Reports of Cases

OPINION OF ADVOCATE GENERAL
COLLINS
delivered on 16 March 2023 [1]

Joined Cases C-508/21 P and C-509/21 P

European Commission
v
Dansk Erhverv (C-508/21 P)
and
Interessengemeinschaft der Grenzhändler (IGG)
v
Dansk Erhverv,

European Commission (C-509/21 P)

(Appeal – State aid – Sale of beverages in non-reusable containers by border shops in Germany to Danish and Swedish residents – Complaint – Exemption from the obligation to collect a deposit on non-reusable containers on condition that the beverages purchased are consumed outside of Germany – Non-charging of value added tax (VAT) on the value of the deposit – Non-imposition of fines – Decision by the Commission not to raise objections – Absence of aid – Directive 94/62/EC – Serious difficulties)

I. Introduction

1. Since time immemorial price differentials have driven trade, and the difference in the price of beverages between the Kingdom of Denmark and the Federal Republic of Germany is no exception. Vigorous competition between traders located in both of these Member States led to Dansk Erhverv, a trade association representing the interests of Danish undertakings, making a State aid complaint to the European Commission. It alleged, inter alia, that its German competitors benefited from State aid due to the German authorities adopting an indulgent stance on the enforcement of German law on the recycling of packaging waste. The Commission concluded that Germany had not granted State aid. Dansk Erhverv challenged that decision and persuaded the General Court of the European Union to annul it. The Commission and the Interessengemeinschaft der Grenzhändler ('IGG'), an association representing the interests of shops on the German border, appealed against the General Court's judgment to this Court. The present Opinion seeks to advise the Court of Justice how to resolve all of the issues that arise in order to rule in both of these appeals. Amongst them is a novel point: whether the Commission

[1] Original language: English.

is under a duty to open a formal investigation procedure under Article 108(2) TFEU in circumstances where the State aid complained of consists in the non-imposition of fines on economic operators for alleged breaches of an imprecise legal obligation.

II. Facts and proceedings

A. Background to the appeals

2. Paragraphs 1 to 27 of the judgment of the General Court in *Dansk Erhverv* v *Commission*[2] set out the background to these appeals in detail. A summary appears below.

3. On 14 March 2016, Dansk Erhverv made a complaint to the Commission to the effect that Germany had granted State aid that was incompatible with the internal market to a group of retail shops located near that Member State's border with Denmark ('the border shops'). According to Dansk Erhverv, the border shops sold beverages in non-reusable containers to consumers, principally residents of Denmark and Sweden, who signed an 'export declaration' to the effect that they would consume the beverages and dispose of the empty containers outside of Germany, without collecting a deposit for those containers as required by German law. The alleged aid consisted of the authorities of two *Länder*, Schleswig-Holstein and Mecklenburg-Vorpommern (Germany) ('the regional authorities'), granting a de facto exemption from the obligation to collect value added tax (VAT) on the value of the deposit and not levying fines on border-shop operators who did not collect the deposit.

4. On 4 October 2018, the Commission adopted Decision C(2018) 6315 final concerning State aid SA.44865 (2016/FC) – Germany – Alleged State aid to German beverage border shops ('the contested decision').

5. Section 3.1 of the contested decision examined the border shops' non-charging of a deposit from the aforesaid group of customers ('the first measure').[3] The retail sector managed the deposit system and the deposits collected were never under State control. State intervention was limited to the obligation in the Verordnung über die Vermeidung und Verwertung von Verpackungsabfällen (Verpackungsverordnung – VerpackV) (Ordinance on the prevention and recycling of packaging waste) of 21 August 1998 ('Packaging Waste Ordinance'),[4] which transposes European Parliament and Council Directive 94/62/EC of 20 December 1994 on packaging and packaging waste,[5] to collect the deposit from retail purchasers in certain defined

[2] Judgment of 9 June 2021, *Dansk Erhverv* v *Commission* (T-47/19, EU:T:2021:331; 'the judgment under appeal').

[3] Recital 32 of the contested decision states that Dansk Erhverv did not argue that the failure to charge the deposit constituted State aid.

[4] BGBl. 1998 I, p. 2379.

[5] OJ 1994 L 365, p. 10.

circumstances and to refund it upon the return of the packaging.[6] Since the deposit system was not financed through State resources, the Commission concluded that the first measure did not constitute State aid.[7]

6. Section 3.2 of the contested decision examined the non-charging of VAT on the value of the deposit ('the second measure'). It concluded that measure did not grant an advantage through State resources because not charging VAT on the value of the deposit was a consequence of the application of the general VAT rules in circumstances where a deposit had not been collected.[8]

7. Section 3.3 of the contested decision assessed whether the non-imposition of fines on the border shops due to their alleged breach of the Packaging Waste Ordinance ('the third measure') constituted State aid. The Commission accepted that a release from the obligation to pay fines could, in principle, constitute an advantage granted through State resources. It nevertheless observed that it is inherent in any legal system that individuals ought not to be exposed to the risk of being penalised for lawful conduct.[9] Difficulties in the interpretation of the law are a feature of all legal systems. It may thus be inappropriate for authorities faced with reasonable doubts as to the interpretation of a law to impose fines for a purported infringement.[10] The Commission observed that the regional authorities did not exempt the border shops from paying fines that they considered were otherwise due. Those authorities instead took the view that the law did not oblige the border shops to charge the deposit and that they had therefore committed no offence.[11]

8. According to the Commission, the Packaging Waste Ordinance aimed at the effective collection of waste packaging in Germany. That objective did not require the collection of a deposit on non-reusable containers not disposed of on the territory of that Member State. The border shops were in the same situation as exporters of canned beverages which were expressly exempt from the requirement to collect a deposit.[12] Since the beverages were purchased for consumption outside Germany, charging the deposit was unlikely to provide any incentive for consumers to put the containers that they had purchased into the German recycling system.[13] In those circumstances, it was not unreasonable that the border shops not charge such consumers a deposit.[14] Nor did Directive 94/62 require a Member State to ensure the collection of deposits on beverages sold in non-reusable containers for consumption outside of its territory.[15] In the

6 Recitals 35 to 37 of the contested decision. By Paragraph 9(1) of the Packaging Waste Ordinance, 'distributors who put drinks into circulation in non-reusable drinks packaging with a volume of between 0.1 and 3 litres shall be obliged to charge the purchaser a deposit of at least [EUR 0.25] including [VAT] per drinks pack. The first sentence above shall not apply to packaging sold to final consumers outside the territorial scope of this Ordinance. The deposit shall be charged by each further distributor at each distribution level until transfer to the final consumer. Distributors shall mark drinks in non-reusable drinks packaging subject to a compulsory deposit pursuant to the first sentence above as being subject to such [a] deposit in a clearly legible way and in a conspicuous place and shall take part in a nation-wide deposit scheme that allows members of the scheme to manage deposit return claims among themselves. The deposit shall be refunded upon return of the packaging. Deposits shall not be refunded without packaging being returned. …'

7 Recital 33 of the contested decision.

8 Recitals 40 to 43 of the contested decision.

9 Recitals 45 and 47 of the contested decision.

10 Recitals 48 and 49 of the contested decision.

11 Recital 50 of the contested decision.

12 Recitals 51 and 53 of the contested decision.

13 Recital 54 of the contested decision. Recital 59 thereof observes that consumers would have to travel up to 500 kilometres if they desired to return the containers.

14 Recital 65 of the contested decision.

15 Recital 63 of the contested decision.

Commission's view, the regional authorities' approach towards the non-collection of the deposit in those circumstances appropriately reconciled the objectives of Directive 94/62, namely environmental protection and the free movement of goods. [16]

9. Although the federal authorities had disputed the regional authorities' interpretation of the law, such case-law as existed appeared to confirm the approach the latter had adopted. [17] The Commission thus considered that the regional authorities were faced, in the normal exercise of their police power, with serious and reasonable doubts as to the scope and meaning of the legal obligation on the border shops to charge a deposit. The non-imposition of fines in that case did not involve an advantage granted through State resources. [18] The contested decision therefore concluded that none of the three measures that it had identified and analysed constituted State aid.

B. The judgment under appeal

10. On 23 January 2019, Dansk Erhverv brought an action before the General Court for the annulment of the contested decision. IGG intervened in support of the Commission. Dansk Erhverv claimed that the Commission, by failing to initiate the formal investigation procedure under Article 108(2) TFEU despite the existence of serious difficulties in the examination of the measures, had infringed its procedural rights as an interested party. [19] The first limb of Dansk Erhverv's single plea in law claimed that the Commission had failed to examine the compatibility of the failure to collect the deposit with Article 4(3) TEU, Directive 94/62, the 'polluter pays principle' and certain provisions of German law. The second limb of that single plea alleged deficiencies in the Commission's examination of the non-imposition of VAT on the value of the deposit. The third limb alleged that the contested decision failed to examine the regional authorities' non-imposition of fines to the requisite standard. [20]

11. Ruling on the first limb, the General Court held that while the failure of a national measure to comply with EU law other than that relating to State aid may be relevant to an assessment of its compatibility with the internal market, it has no bearing on the existence of State aid, which is ascertained by reference to Article 107(1) TFEU exclusively. [21] The same reasoning applies, a fortiori, to a measure's compliance with national law. [22] Even were it shown that the Commission's examination of the non-collection of the deposit had been deficient, that failure could not lead to the annulment of the contested decision. The General Court thus rejected the first limb as ineffective. [23]

16 Recital 68 of the contested decision.

17 Nor had the federal authorities referred the matter for resolution to the *Bundesrat* (Federal Senate, Germany): recitals 61 and 62 of the contested decision.

18 Recital 69 of the contested decision.

19 Paragraph 45 of the judgment under appeal.

20 Paragraph 46 of the judgment under appeal.

21 Paragraphs 59 to 65 of the judgment under appeal.

22 Paragraphs 68 and 69 of the judgment under appeal.

23 Paragraphs 74 and 75 of the judgment under appeal.

12. The General Court rejected the arguments relating to the infringement of various provisions of EU and German law addressed under the second limb for the same reasons as those set out in point 11 of the present Opinion. [24] Not charging VAT on the value of the deposit was the indirect but logical consequence of not collecting it. [25] The condition relating to the existence of State resources had, accordingly, not been met. [26]

13. As for the third limb, the General Court held that the regional authorities had not imposed fines due to their interpretation of German law, according to which border shops were not required to collect the deposit in the circumstances described in point 3 of the present Opinion. The situation thus differed from that the case-law on fines as a form of State aid had examined, which involved authorisations to engage in behaviour that would otherwise have been subject to fines [27] and exemptions from fines due to having engaged in such behaviour. [28] The Commission was therefore correct to rely on a new legal test, whereby difficulties in interpreting national legislation could, in principle, support a finding that the non-imposition of fines did not constitute State aid. The discretion of public authorities to impose fines, which is an instrument of public policy, must be preserved, particularly when those authorities are confronted with difficulties in the interpretation of the applicable law. [29]

14. The General Court then qualified that test by holding that such difficulties may justify the non-imposition of fines for a limited and reasonable period, during which the scope and meaning of applicable legislation must be clarified gradually. [30] Where the aim of that legislation is to transpose a directive, as in the present case, a lack of clarity in its interpretation may be less capable of justifying a finding that no State aid is present. [31] The contested decision did not identify any particular circumstance that justified the state of legal uncertainty that existed between 2005, when the practice of not imposing fines commenced, and 2018, when the contested decision was adopted. [32] The federal authorities had not used the procedure to clarify the law by way of a reference to the *Bundesrat* (Federal Senate, Germany). [33] The national courts' judgments that supported the regional authorities' interpretation had been delivered in the context of applications for interim measures. [34] The national courts could have made preliminary references to the Court in the context of those proceedings, raising questions as to the conformity of the non-imposition of fines with EU law. [35]

15. For those reasons, the General Court concluded that the contested decision erred in law since it had failed to examine whether the difficulties of interpretation that the regional authorities had relied upon were temporary and inherent in the process of the gradual clarification of the law. [36] In any event, the contested decision could not rely on a test based on the existence of difficulties in

24 Paragraph 88 of the judgment under appeal.

25 Paragraph 96 of the judgment under appeal.

26 Paragraphs 89 to 97 of the judgment under appeal. The General Court relied on the judgment of 17 March 1993, *Sloman Neptun* (C-72/91 and C-73/91, EU:C:1993:97, paragraph 21).

27 Judgment of 14 January 2015, *Eventech* (C-518/13, EU:C:2015:9).

28 Judgments of 1 December 1998, *Ecotrade* (C-200/97, EU:C:1998:579), and of 8 September 2011, *Commission* v *Netherlands* (C-279/08 P, EU:C:2011:551).

29 Paragraphs 130 to 136 of the judgment under appeal.

30 Paragraph 143 of the judgment under appeal.

31 Paragraph 144 of the judgment under appeal.

32 Paragraph 149 of the judgment under appeal.

33 Paragraphs 150 to 152 of the judgment under appeal.

34 Paragraphs 153 and 154 of the judgment under appeal.

35 Paragraph 155 of the judgment under appeal.

36 Paragraph 157 of the judgment under appeal.

interpreting the applicable law since the regional authorities had not invoked such difficulties to justify the non-imposition of fines, but had instead taken the view that the border shops were not under a legal requirement to collect the deposit. [37]

16. The General Court thus upheld the third limb of Dansk Erhverv's single plea in law on the ground that the Commission had been confronted by serious difficulties when it assessed the existence of State aid in the regional authorities' non-imposition of fines. [38] Since the failure to charge VAT on the amount of the deposit was inherent in the failure to collect it, which was inseparable from the non-imposition of the fines, the General Court annulled the contested decision in its entirety. [39]

C. The appeals

17. On 18 August 2021, the Commission and IGG appealed against the judgment of the General Court in Cases C-508/21 P and C-509/21 P, respectively. IGG thereafter intervened in support of the Commission's appeal in Case C-508/21 P. Dansk Erhverv appears as the respondent in the appeals and submits they both ought to be dismissed. The Court joined Cases C-508/21 P and C-509/21 P for the purposes of the oral procedure and the judgment. At the hearing on 7 December 2022, the parties presented oral argument and answered the Court's written and oral questions.

III. Assessment

18. I will examine the grounds of appeal in the following order: first, the allegedly insufficient and contradictory reasoning of the judgment under appeal; second, the error in law in annulling the entirety of the contested decision; third, the error of law in the finding that the Commission was faced with serious difficulties when it examined the non-imposition of fines by the regional authorities.

A. Reasoning of the judgment under appeal

1. Arguments of the parties

19. By its second ground of appeal, the Commission, supported by IGG, claims that the judgment under appeal is vitiated by insufficient and contradictory reasoning since it annuls the contested decision in its entirety on the ground that the Commission had been confronted by serious difficulties when it assessed the existence of State aid in the non-imposition of fines by the regional authorities. The General Court did not explain why it took the view that the three measures that made up the contested decision were inseparable and, in particular, how the errors identified in relation to the third measure affected the validity of the Commission's assessment of the first and second measures.

[37] Paragraphs 160 to 163 of the judgment under appeal.

[38] Paragraph 237 of the judgment under appeal.

[39] Paragraph 238 of the judgment under appeal.

20. In its sixth ground of appeal, IGG claims that the judgment under appeal contradicts itself since it annuls the contested decision in its entirety, notwithstanding that it simultaneously concluded that not charging VAT on the value of the deposit did not entail the use of State resources.

21. Dansk Erhverv submits that the Court should dismiss the ground of appeal relating to the reasoning of the judgment under appeal since paragraph 238 thereof makes it clear why the General Court considered the three measures that the contested decision examined to be inseparable.

2. Analysis

22. According to well-established case-law, the obligation to state reasons for the adoption of a measure is an essential procedural requirement to be distinguished from the substantive legality of the reasoning deployed. [40]

23. The Court has consistently held that the statement of reasons in a General Court judgment must be clear and unequivocal in order to enable persons concerned to ascertain them and to allow the Court of Justice to exercise its power of review. [41] The presence of contradictions or inadequacies in the grounds of a General Court judgment is a question of law that is amenable to review on appeal. [42]

24. Whilst paragraph 237 of the judgment under appeal upheld the third limb of the single plea in law owing to the serious difficulties the Commission faced when it examined the issue of the non-imposition of fines, the following paragraph addressed the consequences of that finding for the contested decision. It did so in the following terms: 'since the non-collection of VAT is inherent in the non-charging of the deposit, which is itself inseparable from the non-imposition of a fine on undertakings which do not charge the deposit, the contested decision must be annulled in its entirety'.

25. Paragraph 238 of the judgment under appeal thus suggests that the General Court concluded that the three measures were inseparable, by reason of which the success of the third limb of the single plea in law led to the annulment of the contested decision. That paragraph does not explicitly state the inseparable nature of the three measures that the Commission identified, but that inference can be drawn from the case-law cited therein. [43] That finding is also a prerequisite for the decision to annul the contested decision in its entirety.

26. The Commission, supported by IGG, submits that the judgment gives no reason as to how the General Court arrived at that conclusion.

27. To assess the merits of that criticism one must examine the constituent elements of the contested decision as described in points 5 to 9 of the present Opinion. It is clear from both its content and its structure that the Commission examined and pronounced upon the existence of State aid with regard to three separate and distinct measures. The judgment under appeal

[40] Judgment of 10 March 2022, *Commission* v *Freistaat Bayern and Others* (C-167/19 P and C-171/19 P, EU:C:2022:176, paragraph 77 and the case-law cited).

[41] Judgment of 19 December 2019, *HK* v *Commission* (C-460/18 P, EU:C:2019:1119, paragraph 38 and the case-law cited).

[42] Ibid., paragraph 39 and the case-law cited.

[43] Judgment of 10 December 2002, *Commission* v *Council* (C-29/99, EU:C:2002:734, paragraph 45).

contains no explanation as to how a finding that one of those three measures might constitute State aid had any bearing upon the existence of State aid in either of the other two measures, such as would have justified the annulment of the entire decision. It may be further observed that the nature and scope of the Commission's appeal in Case C-508/21 P convincingly demonstrates that the annulment of the entirety of the contested decision, as distinct from the part that the General Court declared unlawful, has practical consequences for the manner in which that institution might exercise its powers under Article 108(3) TFEU.

28. There are two further demonstrations of significant contradictions in the General Court's approach. First, paragraphs 74 and 75 of the judgment under appeal rejected as ineffective the first limb of the single plea in law alleging the 'insufficient examination by the Commission of the measure consisting of the non-charging of the deposit'. Second, paragraphs 89 to 105 of the judgment under appeal held that 'the Commission was fully entitled to conclude … that the condition relating to State resources was not satisfied as regards the non-charging of the VAT relating to the deposit' and accordingly rejected the second limb of the single plea in law. That judgment does not explain how those findings may be reconciled with the annulment of the first and second measures together with the third. In the absence of a clear explanation to the contrary, these findings appear to contradict the conclusion that the General Court reached in paragraph 238 of its judgment.

29. I therefore advise the Court to uphold both the Commission's second ground of appeal, supported by IGG, and the first limb of IGG's sixth ground of appeal to the effect that the judgment under appeal contains insufficient and contradictory reasoning, and to set it aside on that basis.

B. Errors of law in the annulment of the contested decision in its entirety

1. Arguments of the parties

30. The Commission's first and third grounds of appeal claim that the General Court erred in law when it annulled the contested decision in its entirety, despite finding that only the applicant's plea concerning the non-imposition of fines was well founded. The Commission submits that the three measures that the contested decision analysed are severable. The three measures involve the application of different legal regimes and engage different actors. The contested decision analysed the measures in three separate sections as self-standing and independent of each other. The errors the General Court identified in relation to the third measure thus cannot affect the Commission's assessment that the first and second measures are valid. The annulment of the contested decision must therefore be limited to a finding that the Commission was confronted by serious difficulties when it assessed the non-imposition of fines. The second limb of IGG's sixth ground of appeal also submits that, by annulling the contested decision in its entirety, the judgment under appeal erroneously failed to apply the concept of severability.

31. Dansk Erhverv seeks the dismissal of these grounds of appeal for three reasons. First, the severability of the contested decision depends upon the presence of inextricable links between the three measures it considered, not the structure of the contested decision. Recital 71 of the contested decision demonstrates that the regional authorities' interpretation of the Packaging Waste Ordinance provides a common link between those measures. The three measures did not involve the application of different legal regimes or engage different actors. Only the competent German authorities can enforce the obligation to collect the deposit, to charge VAT on it and to

impose fines for a breach of those obligations. Second, the severability of the contested decision does not require a finding that each one of the elements of an alleged aid measure contain State aid when they are analysed independently from one another. Third, it follows from paragraphs 96 and 132 of the judgment under appeal that the failure to charge VAT on the value of the deposit and the non-imposition of fines are consequences of not collecting the deposit.

2. Analysis

32. The Court has consistently held that upholding a plea in support of an action for annulment does not automatically lead to the annulment of the impugned measure in its entirety, which is not possible where a successful plea directed at a specific part of the contested measure furnishes a basis for its partial annulment only.[44] Such a partial annulment is possible only where the elements subject to annulment can be severed from the remainder of the impugned measure. That requirement is not met where the partial annulment of a measure alters its substance, which is to be ascertained by reference to objective criteria and not the subjective intention of the authority that adopted it.[45]

33. Paragraph 238 of the judgment under appeal implies that the three measures are inseparable. As points 5 to 9 of the present Opinion indicate, the contested decision analysed the three measures in three separate sections and concluded that each of them did not constitute State aid for different reasons. Although the existence of an obligation on the border shops to collect the deposit is relevant to the analysis of the three measures by reference to the State aid rules, it does not follow that each of those measures automatically satisfies the conditions in Article 107(1) TFEU.[46] The first measure involved private arrangements between private undertakings that do not engage State resources, which, moreover, the parties do not dispute. The second is the legal consequence of not charging consumers a deposit on the purchase of reusable beverage containers. The third involves the exercise of police powers by a public authority regarding the imposition of fines on persons for behaviour that, in its view, does not constitute a breach of the law, in circumstances where the interpretation of that law is uncertain. Contrary to what Dansk Erhverv contends, an objective view of the nature and content of the three measures that the contested decision analysed leads to the conclusion that each of them had a distinct character and different consequences. In those circumstances, a partial annulment of the contested decision would not alter the substance of each of the three decisions it contained.

34. The conclusion that the General Court erred in law by annulling the contested decision in its entirety is supported by two additional observations that relate to the first and second measures. First, as the Commission submits, none of the three limbs of Dansk Erhverv's single plea in law was directed against the finding that the first measure did not constitute an advantage granted through State resources. Second, paragraphs 96 and 97 of the judgment under appeal unequivocally rejected the second limb of Dansk Erhverv's single plea in law, holding that the Commission was fully entitled to conclude that the second measure did not seek to confer an advantage on certain undertakings through State resources by reference to the Court's judgment

[44] Judgments of 11 December 2008, *Commission* v *Département du Loiret* (C-295/07 P, EU:C:2008:707, paragraph 104), and of 6 December 2012, *Commission* v *Verhuizingen Coppens* (C-441/11 P, EU:C:2012:778, paragraph 37).

[45] Judgments of 11 December 2008, *Commission* v *Département du Loiret* (C-295-/07 P, EU:C:2008:707, paragraphs 105 and 106), and of 6 December 2012, *Commission* v *Verhuizingen Coppens* (C-441/11 P, EU:C:2012:778, paragraph 38).

[46] First, there must be an intervention by the State or through State resources. Second, it must confer an advantage on the recipient. Third, it must favour certain undertakings or the production of certain goods in comparison with others whom are in a comparable legal and factual situation (selectivity). Fourth, the intervention must be liable to affect trade between Member States. Fifth, it must distort or threaten to distort competition (see, to that effect, judgments of 24 July 2003, *Altmark Trans and Regierungspräsidium Magdeburg*, C-280/00, EU:C:2003:415, paragraphs 74 and 75, and of 3 March 2005, *Heiser*, C-172/03, EU:C:2005:130, paragraph 40).

in *Sloman Neptun*.[47] It is far from clear how the errors of law that the General Court identified in its review of the Commission's assessment of the non-imposition of fines could affect the validity of either of those conclusions.

35. The argument Dansk Erhverv advanced to the effect that, for the purpose of the severability test, it is unnecessary that each of the measures analysed constitute State aid when viewed in isolation rests upon an incorrect reading of the case-law cited to support that proposition.

36. In *Commission* v *Netherlands and ING Groep*,[48] the Netherlands Government notified to the Commission a restructuring plan for a credit institution that consisted of three measures: a capital injection, an impaired assets measure and, thereafter, an amendment of the repayment terms of the capital injection. The Commission declared the measures compatible with the internal market subject to certain commitments being given. Having found that the Commission had erred in its assessment of the amendment of the repayment terms of the capital injection, which it had regarded as 'additional aid', the General Court annulled the entire operative part of its decision. On appeal, the Court ruled that since it was impossible to determine the exact amount of the 'additional aid', a partial annulment of the operative part of the contested decision would alter its substance.[49] The 'additional aid' had been an integral part of the Commission's assessment of the commitments that it had required in order to deem the aid compatible with the internal market.[50] Had the 'additional aid' not constituted State aid, or had it done so in a lower amount, fewer commitments might have been required in order to deem the other measures compatible. That factual situation bears no resemblance to the present case, where the success of Dansk Erhverv's third limb of its single plea in law would require the Commission to open the formal investigation procedure under Article 108(2) TFEU in relation to the third measure only. The judgment in *Trapeza Eurobank Ergasias*[51] provides no support for Dansk Erhverv's submission since that ruling did not involve the partial annulment of a measure.

37. Dansk Erhverv finally submits that there is a link between the three measures since the failure to charge VAT on the value of the deposit and the non-imposition of fines were inseparable from the failure to collect the deposit. I suggest that the Court reject that argument for the reasons given in point 33 of the present Opinion.

38. I therefore propose that the Court uphold both the first and third grounds of the Commission's appeal and the second limb of IGG's sixth ground of appeal. As a consequence, I advise the Court to set aside the judgment under appeal on the basis that, by annulling the contested decision in its entirety, the General Court erred in law in its interpretation and application of the concept of severability.

47 Judgment of 17 March 1993, *Sloman Neptun* (C-72/91 and C-73-/91, EU:C:1993:97). I am of the opinion that the General Court correctly approved the Commission's reliance upon that judgment. I therefore advise the Court to dismiss as unfounded Dansk Erhverv's request to substitute the grounds in paragraphs 96 to 105 of the judgment under appeal.

48 Judgment of 3 April 2014, *Commission* v *Netherlands and ING Groep* (C-224/12 P, EU:C:2014:213).

49 Ibid., paragraph 58.

50 Ibid., paragraph 62.

51 Judgment of 16 April 2015, *Trapeza Eurobank Ergasias* (C-690/13, EU:C:2015:235).

C. Errors of law concerning the existence of serious difficulties in the examination of the non-imposition of fines

39. In its appeal in Case C-509/21 P, IGG advances five grounds to the effect that the General Court committed several errors of law with regard to the existence of serious difficulties confronted by the Commission when it examined the regional authorities' non-imposition of fines.

40. Those five grounds of appeal fall to be assessed in the light of the obligations imposed upon the Commission when it has recourse to the preliminary examination procedure under Article 108(3) TFEU. The procedure under Article 108(2) TFEU applies whenever the Commission has serious difficulties in determining whether aid is compatible with the internal market. The Commission may confine itself to the Article 108(3) TFEU procedure only where it is able to satisfy itself – after a preliminary examination – that there is no aid or that any such aid is compatible with the internal market. If that preliminary examination leads the Commission to the opposite conclusion or does not enable it to overcome all of the difficulties in determining the compatibility of that aid with the internal market, it is under a duty to seek the opinions of interested parties and to initiate the Article 108(2) TFEU procedure for that purpose.[52] The Commission is required to conduct a diligent and impartial examination of the measures before it so that, when it takes its final decision as to the existence of aid and/or its incompatibility or unlawfulness, it has at its disposal the most complete and reliable information possible.[53] In determining the existence and the legality of State aid, the Commission may be obliged to go beyond an examination of the facts and points of law that have come to its attention; it is not required, on its own initiative and in the absence of any evidence to that effect, to seek out all information conceivably connected with the case before it.[54]

41. In an action to annul a decision under Article 108(3) TFEU, the EU Courts must determine whether the Commission's assessment of the information and the evidence it had at its disposal during the preliminary investigation should have raised objective doubts as to the categorisation of a measure since it is the existence of such difficulties that triggers the requirement to initiate the Article 108(2) TFEU procedure.[55] As the criterion of serious difficulties is objective, their existence is to be identified by reference to the circumstances in which the Commission's decision was adopted after it had conducted the preliminary investigation and the assessments that it relied upon in that context.[56]

[52] Judgment of 17 November 2022, *Irish Wind Farmers' Association and Others* v *Commission* (C-578/21 P, not published, EU:C:2022:898, paragraphs 53 and 60 and the case-law cited).

[53] Ibid., paragraph 57.

[54] Ibid., paragraph 58.

[55] Ibid., paragraph 55.

[56] Judgment of 3 September 2020, *Vereniging tot Behoud van Natuurmonumenten in Nederland and Others* v *Commission* (C-817/18 P, EU:C:2020:637, paragraph 79).

1. Errors of law regarding the non-imposition of fines in cases where there are difficulties in interpreting the law

(a) Arguments of the parties

42. By its first, second and third grounds of appeal, which can be examined together, IGG submits that the General Court distorted the contested decision and erred in law in its examination of the regional authorities' non-imposition of fines on the border shops. The General Court's assessment ignored the need for a sufficiently direct link between an advantage and the State budget. The imposition of fines was, moreover, impossible in the circumstances. First, the regional authorities had taken the view that there was no legal obligation on the border shops to collect the deposit. Second, had that obligation existed, any sanctions for its breach could have been imposed only where the persons involved had done so intentionally or negligently, as paragraphs 140 to 142 of the judgment under appeal admit.

43. Although the General Court accepted that, in principle, it was appropriate that the Commission rely on a new legal test to establish whether an advantage is granted through State resources in cases where there are difficulties in interpreting the law, it erred by holding that that test did not apply due to the fact that the regional authorities had not relied upon such difficulties. The General Court also erred in law by ruling that such difficulties may justify the non-imposition of fines for a limited period only, during which the interpretation of the applicable legislation is to be clarified. The General Court committed a further error of law since it required the Commission to investigate exhaustively the existence of an obligation to collect the deposit as a matter of German law, an investigation which would amount to an interference with the powers of national authorities and national courts.

44. Dansk Erhverv submits that IGG's first, second and third grounds of appeal ought to be dismissed. It claims that, in so far as IGG challenges the content of the German legislation, its grounds of appeal are inadmissible. That issue falls outside the Court of Justice's jurisdiction unless IGG can show that the judgment under appeal distorted the applicable German law.

45. According to Dansk Erhverv, the General Court correctly held that it was probable that fines would be imposed where an undertaking persistently declined to collect the deposit. It also correctly rejected the possibility for the Commission to rely on the national authorities' reasonable difficulties in interpreting the law in circumstances in which they had not invoked such difficulties. In any event, those authorities cannot invoke difficulties of that nature indefinitely. In the present case, the German authorities had done nothing to clarify the law. The judgment under appeal did not impose an excessively high investigative burden upon the Commission.

46. Dansk Erhverv also requests the Court to substitute the grounds in paragraphs 135 to 138 of the judgment under appeal to the effect that the introduction of a new test by the Commission was itself evidence of it having encountered serious difficulties in its assessment of the existence of State aid in its preliminary examination under Article 108(3) TFEU.

(b) Analysis

47. It is settled case-law that a release from an obligation to pay fines that are due may constitute an advantage granted through State resources.[57] It is also accepted that in any legal system, persons cannot be exposed to the risk of penalties for conduct permitted as lawful.[58]

48. In the present appeal, the question arises as to whether the border shops were under a legal obligation to collect the deposit and, if so, whether its non-collection ought to have led to the imposition of fines by the authorities with the powers to do so. Had the existence of such a legal obligation been established clearly, the judgment under appeal could not have been faulted for reaching the conclusion that the Commission had failed to comply with its obligations under the Article 108(3) TFEU procedure.

49. I observe at the outset that paragraph 172 of the judgment under appeal held that 'as regards EU law, the Commission stated in the contested decision ([recital] 67) that Directive 94/62 did not lay down any exception justifying not applying the deposit to border shops'. The contested decision had in fact concluded that Article 7(1) of Directive 94/62 does not oblige a Member State to require the collection of a deposit from retail purchasers of non-reusable containers with a view to the consumption of beverages outside of its territory, as the Commission confirmed at the hearing.[59]

50. I agree with the interpretation of Article 7(1) of Directive 94/62 in the contested decision. That article provides that Member States must ensure that systems are set up for the return and/or collection of used packaging and/or packaging waste from the consumer. Such systems must apply to imported products under non-discriminatory conditions in order to avoid barriers to trade or distortions of competition. In response to questions from the Court, the Commission expressed the view that when consumers who reside in one Member State purchase beverage containers in another, with a view to consuming the contents in their Member State of residence, the empty containers become waste in the latter Member State.[60] By that means, Article 7(1) of Directive 94/62 reconciles the requirements of environmental protection with those of the free movement of goods.

51. Under that interpretation of Article 7(1) of Directive 94/62, national authorities are not obliged to require the collection of a deposit in circumstances such as those that furnish the background to this appeal. The Court has observed that a deposit system can achieve the objectives pursued by Directive 94/62 only where consumers who have paid a deposit can easily recover it without having to return to the place of initial purchase.[61] Seen in that light, the sale of canned beverages in border shops to consumers who sign an export declaration is analogous to the sale of goods to traders for export in respect of which the vendor is under no obligation to collect a deposit.

[57] See, to that effect, judgments of 1 December 1998, *Ecotrade* (C-200/97, EU:C:1998:579, paragraphs 42 and 43); of 17 June 1999, *Piaggio* (C-295/97, EU:C:1999:313, paragraphs 41 and 42); and of 8 September 2011, *Commission* v *Netherlands* (C-279/08 P, EU:C:2011:551, paragraph 106).

[58] Judgment of 14 January 2015, *Eventech* (C-518/13, EU:C:2015:9, paragraph 36).

[59] See recitals 54, 63 to 68 and footnote 19 of the contested decision. See also point 8 of the present Opinion.

[60] As regards the concept of 'waste', see, by analogy, judgments of 3 October 2013, *Brady* (C-113/12, EU:C:2013:627), and of 17 November 2022, *Porr Bau* (C-238/21, EU:C:2022:885).

[61] See, to that effect, judgment of 14 December 2004, *Radlberger Getränkegesellschaft and S. Spitz* (C-309/02, EU:C:2004:799, paragraph 46).

52. Recitals 50 to 53 of the contested decision observe that the regional authorities did not exempt the border shops from the imposition of fines since they had taken the view that they were not obliged to collect the deposit by reference to the Packaging Waste Ordonnance and that they therefore had committed no offence. The objective of the Packaging Waste Ordinance in furthering the effective collection of waste packaging in Germany did not require the collection of a deposit on reusable containers the contents of which were purchased with a view to being consumed outside of Germany. As point 51 of the present Opinion observes, the border shops were in circumstances analogous to those of exporters of canned beverages, which were not required to collect a deposit.

53. Whilst the contested decision considered that the regional authorities' interpretation of the applicable rules was reasonable as a matter of both EU law and German law for the reasons set out in point 8 of the present Opinion, it took into account the fact that the federal authorities had disputed that interpretation. It is in that context that the contested decision considered whether the third measure would constitute State aid should the regional authorities' interpretation turn out to be incorrect. Recitals 56 to 60 of the contested decision point to the existence of two conflicting legal opinions on the obligation to collect deposits. According to recital 61 of the contested decision, the existing case-law supported the regional authorities' position. Recital 62 of the contested decision observed that the federal authorities had not had recourse to a procedure whereby the *Bundesrat* (Federal Senate) may rule upon the interpretation of national law in disputes between federal and regional authorities.

54. In view of these considerations, recitals 69 and 70 of the contested decision conclude that even in the case where the border shops were required to collect the deposit as a matter of German law, the non-imposition of fines did not constitute an advantage granted through State resources for four reasons. First, the existence of serious and reasonable doubts as to the interpretation of the Packaging Waste Ordinance. Second, the absence of any elucidation of that interpretation by way of proceedings before the national courts or other procedures for that purpose. Third, the fact that regional authorities had applied their interpretation to all operators that found themselves in similar circumstances. Fourth, the fact that the regional authorities' interpretation of the Packaging Waste Ordinance was not contrary to Directive 94/62.

55. Leaving to one side whether the judgment under appeal correctly characterised the regional authorities' behaviour as the grant of a 'derogation' without any specific legal basis,[62] and whether that interpretation was incorrect,[63] as IGG argues, paragraphs 135 to 138 of that judgment admit that the applicable national law was, at best, uncertain. The General Court thus conceded that the contested decision could take into account the existence of difficulties in interpreting the relevant provisions in order to establish whether the non-imposition of fines on the border shops entailed State aid.

56. Paragraphs 140 and 141 of the judgment under appeal recalled that the principle that criminal offences and penalties must have a proper legal basis is a general legal principle underlying the constitutional traditions common to the Member States and requires a clear definition of offences and the penalties that they attract. Paragraph 147 of the judgment under appeal held

[62] See paragraphs 133, 134, 173 and 181 of the judgment under appeal. I observe that the fact that competent authorities in certain circumstances interpret the law and conclude that no obligation arises therefrom does not equate to a derogation but is rather part of the ordinary process of the interpretation and the application of the law.

[63] Contrary to what appears in paragraphs 170 and 171 of the judgment under appeal, the Commission did not take the view that Paragraph 9(1) of the Packaging Waste Ordinance requires border shops to collect a deposit: see point 52 of the present Opinion.

that, according to the Court's judgment in *AC-Treuhand*,[64] that principle does not preclude reliance upon the gradual, case-by-case clarification of the rules on criminal liability by means of judicial interpretation, provided that the interpretation given to that provision was reasonably foreseeable at the time that the offence was committed. In paragraphs 146 and 148 of the judgment under appeal, however, the General Court added that such difficulties can be relied upon to uphold a finding that State aid does not exist provided two conditions are met: that the difficulties in interpretation are of a temporary nature, and that they are part of a process leading to the gradual clarification of the law. The judgment under appeal concluded in paragraphs 149 to 156 that the contested decision had not satisfied those two conditions.

57. In my view, the findings in paragraphs 146 to 156 of the judgment under appeal misapply the principle that the law must clearly define offences and penalties.[65] That penalties must have a proper legal basis is a corollary of the principle of legal certainty which, inter alia, requires that any legislation, in particular that empowering the imposition of sanctions, must be clear and precise so that the persons concerned may know unambiguously the rights and obligations that flow therefrom and may arrange their affairs accordingly.[66] In its judgment in *AC-Treuhand*,[67] the Court nevertheless held that the principle that offences and penalties must be defined by law does not preclude their gradual clarification by judicial interpretation. A perceived lack of clarity in rules cannot be relied upon where subsequent litigation has clarified their meaning. It is not, however, possible to infer from that, as the judgment under appeal did, that such a process of gradual clarification must always exist. For so long as the meaning of rules has not been clarified by recourse to appropriate mechanisms for that purpose, persons subject to their application may object to the imposition of sanctions by reason of that lack of certainty. To do otherwise would undermine the principle that the law must provide a clear basis for, and a clear definition of, offences and penalties.

58. The case-law the General Court cited does not, moreover, support the proposition that any difficulties of interpretation must be temporary and that persons concerned may only invoke a situation of legal uncertainty during a limited period of time. Paragraph 149 of the judgment under appeal refers to a situation of legal uncertainty between 2005 and 2018. In my view, the implication that certain behaviour was lawful (by not imposing fines with respect thereto) and the uncertainty as to its legality during such a lengthy period strengthens, rather than weakens, the justification for not imposing sanctions.

59. Contrary to the findings in paragraphs 151 and 152 of the judgment under appeal, the federal authorities' reluctance to seek the opinion of the *Bundesrat* (Federal Senate) to clarify the applicable law cannot prevent persons concerned from relying upon any resulting legal uncertainty in order to contest the imposition of sanctions upon them. Since those persons cannot access that procedure, they ought not to suffer any negative consequences from the authorities' reluctance to invoke it.

[64] Judgment of 22 October 2015, *AC-Treuhand* v *Commission* (C-194/14 P, EU:C:2015:717, paragraphs 39 to 41).

[65] See, by analogy, Article 49(1) of the Charter of Fundamental Rights of the European Union as regards criminal offences.

[66] Judgment of 5 April 2006, *Degussa* v *Commission* (T-279/02, EU:T:2006:103, paragraph 66 and the case-law cited). See also, to that effect, judgment of 22 May 2008, *Evonik Degussa* v *Commission and Council* (C-266/06 P, not published, EU:C:2008:295, paragraphs 38 and 39).

[67] Judgment of 22 October 2015, *AC-Treuhand* v *Commission* (C-194/14 P, EU:C:2015:717, paragraph 40).

60. The reasons given in paragraphs 144 and 145 of the judgment under appeal do not support the findings made therein. Whilst it is accepted that it may not be possible to rely upon a lack of clarity in national legislation enacted in order to transpose a directive, Directive 94/62 does not oblige Member States to require the border shops to collect a deposit, as points 49 to 51 of the present Opinion explain.

61. Contrary to the findings in paragraphs 160 to 163 of the judgment under appeal, the Commission was not precluded from taking the existence of reasonable difficulties in the interpretation of the applicable national law into account in its examination as to whether the non-imposition of fines constituted State aid. It is irrelevant whether the regional authorities did not impose fines because they relied on the existence of such difficulties or because they took the view that there had been no infringement of the law. Even had it subsequently turned out that German law required the collection of a deposit, the reasonable difficulties that the regional authorities encountered in establishing the existence of that obligation provide the objective justification for the non-imposition of fines on the border shops. As IGG argued, the aforesaid findings of the judgment under appeal are also vitiated by an error of law.

62. I would further observe that, in line with the principles of sincere cooperation in Article 4(3) TEU and the conferral of powers and of institutional balance in Article 13(2) TEU, it is primarily a matter for the Member States' legal orders to clarify the meaning of their respective domestic laws through the processes of adjudication they provide for. While the Commission may be required to interpret national law in the context, inter alia, of determining the existence of State aid and of its compatibility with the internal market, and to defend that interpretation in proceedings before the EU Courts,[68] it is not under a legal obligation to engage in that exercise in every case where it operates the Article 108(3) TFEU procedure. For the same reasons, I advise the Court to reject Dansk Erhverv's request for a substitution of paragraphs 135 to 138 of the judgment under appeal.

63. Having regard both to the case-law cited in points 40 and 41 of the present Opinion and to the foregoing considerations, I conclude that the General Court erred in law by holding, in paragraph 157 of the judgment under appeal, that the contested decision contained an insufficient and incomplete examination of the non-imposition of fines on the border shops.

64. I therefore propose that the Court declare IGG's first, second and third grounds of appeal well founded and set aside the judgment under appeal on that basis.

65. Should the Court agree with this proposal, it will be unnecessary for it to examine IGG's fourth and fifth grounds of appeal. In the event that the Court chooses not to follow my advice in that regard, I will examine both of those grounds.

[68] See, to that effect, judgment of 15 November 2011, *Commission and Spain* v *Government of Gibraltar and United Kingdom* (C-106/09 P and C-107/09 P, EU:C:2011:732), where the Commission successfully argued that a proposed reform of Gibraltarian corporate tax law constituted State aid incompatible with the internal market.

2. Errors of law regarding additional considerations to support the existence of serious difficulties faced by the Commission

(a) Arguments of the parties

66. IGG's fourth ground of appeal claims that the General Court erred in law in its examination of Dansk Erhverv's additional arguments to support the finding that the Commission faced serious difficulties as regards the existence of an advantage through State resources arising from the non-imposition of fines.

67. The General Court first distorted the contested decision's findings by holding that the regional authorities had exempted the border shops from fines without any legal basis. The contested decision instead found that the border shops were not obliged to collect the deposit and there was therefore no reason for the regional authorities to impose fines.

68. Second, the judgment under appeal distorted the contested decision and misapplied the concept of serious difficulties since the Commission had adequately explained why the divergence of interpretation between the federal and the regional authorities should not lead to the opening of the formal investigation procedure.

69. Third, the judgment under appeal held that it had not been established that the derogation from the obligation to collect the deposit had been applied consistently in all German border areas. In so doing, the General Court distorted the contested decision and misapplied the concept of serious difficulties since all of the border shops in question are located in Schleswig-Holstein and Mecklenburg-Vorpommern.

70. Fourth, the judgment under appeal distorted the evidence by relying selectively on the text of a 2004 draft proposal to amend the Packaging Waste Ordinance, which included a statement that it aimed to promote the objectives of Directive 94/62 and to impose a requirement on the border shops to participate in other Member States' deposit systems.

71. Fifth, the General Court misapplied the concept of serious difficulties by requiring the Commission to investigate exhaustively the national legal framework for the obligation to collect a deposit.

72. Sixth, the General Court distorted the contested decision by rejecting the analogy drawn for the purpose of the collection of the deposit between goods for export and beverages in non-reusable packaging purchased for consumption abroad.

73. Dansk Erhverv asks the Court to dismiss the fourth ground of appeal.

(b) Analysis

74. Points 47 to 64 of the present Opinion address the issues raised in the first, second, fifth and sixth limbs of the present ground of appeal. I will thus limit my examination to the two elements that make up the balance of that ground.

75. IGG claims that paragraphs 178 to 182 of the judgment under appeal distorted the contested decision by holding that the Commission had failed to establish that the interpretation of German law had been applied consistently in the relevant border areas.

76. In accordance with the second subparagraph of Article 256(1) TFEU and the first paragraph of Article 58 of the Statute of the Court of Justice of the European Union, an appeal lies on points of law only. Since the General Court has exclusive jurisdiction to find and appraise the relevant facts and to assess the evidence, the appraisal of such facts and evidence does not, save where they have been distorted, constitute a point of law subject to review by the Court of Justice on appeal.[69] An allegation of distortion of the evidence by the General Court must, pursuant to Article 256 TFEU, the first paragraph of Article 58 of the Statute of the Court of Justice of the European Union and Article 168(1)(d) of its Rules of Procedure, indicate precisely the evidence alleged to have been distorted and the errors of appraisal which led to such distortion. Such distortion must be obvious from the documents in the Court's file, without any need to carry out a new assessment of the facts and evidence.[70]

77. As IGG points out, recital 11 of the contested decision observes that the border-shop trade exists in the two *Länder* in question due to the differential in the price of beer and other beverages between Germany, Denmark and Sweden. The Commission's written submissions confirmed that fact, as it appears from paragraph 179 of the judgment under appeal. There is no indication that similar border shops operated in other *Länder*. The findings in paragraphs 178 to 182 of the judgment under appeal are thus based on a distortion of both the contents of the contested decision and the evidence before the General Court.

78. IGG also claims that paragraphs 183 to 190 of the judgment under appeal distorted the evidence by relying selectively on the text of a draft proposal that the two *Länder* submitted to amend the Packaging Waste Ordinance in 2004.

79. The text of that draft proposal indicates that it was justified by reference to economic, employment and environmental protection considerations and that it included an obligation on the border shops to participate in deposit systems in other Member States. It follows that the General Court distorted the evidence put before it by omitting the fact that the proposal sought to further environmental protection by requiring the border shops to participate in the deposit systems operated in other Member States.

80. I therefore propose that the Court declare IGG's fourth ground of appeal well founded.

3. Errors of law regarding additional considerations to support the absence of serious difficulties faced by the Commission

(a) Arguments of the parties

81. By its fifth ground of appeal, IGG submits that the General Court erred in law by rejecting two arguments it had advanced to support the absence of serious difficulties regarding the existence of State aid when the Commission carried out its assessment.

[69] Judgment of 12 January 2023, *Lietuvos geležinkeliai* v *Commission* (C-42/21 P, EU:C:2023:12, paragraph 60 and the case-law cited).

[70] Judgment of 12 January 2023, *HSBC Holdings and Others* v *Commission* (C-883/19 P, EU:C:2023:11, paragraph 167 and the case-law cited).

82. First, contrary to the General Court's finding, the competent authorities 'may' impose fines in case of non-compliance with the obligation to collect the deposit. It follows that those authorities have a power, not an obligation, to impose fines. The judgment under appeal thus distorted the contents of the contested decision and the evidence before the General Court.

83. Second, the General Court erred in rejecting IGG's argument, based on the Court's judgment in *Radlberger*,[71] to the effect that the collection of the deposit would have constituted an export tax contrary to Article 34 TFEU. In that judgment, which concerned the transition from a collection system to a mandatory deposit and return system for the recycling of non-reusable packaging in Germany, the Court ruled that a Member State must ensure that there are a sufficient number of return points to enable consumers who had paid a deposit to recover it without their having to return to the place where they had purchased the container.[72]

84. Dansk Erhverv requests the Court to dismiss the fifth ground of appeal.

(b) Analysis

85. In the context of the first limb of the fifth ground of appeal, IGG argues that the regional authorities enjoy a margin of discretion in the imposition of sanctions, irrespective of the clarity or otherwise of the rules to be applied.

86. According to recital 22 of the contested decision and paragraph 4 of the judgment under appeal, under Paragraph 15(1)(14) of the Packaging Waste Ordinance, a failure to collect the deposit in breach of Paragraph 9(1) is an administrative offence. Paragraph 69(3) of the Gesetz zur Neuordnung des Kreislaufwirtschafts- und Abfallrechts (Act recasting the law on life-cycle and waste management), of 24 February 2012,[73] provides that that type of offence is punishable by a fine of up to EUR 100 000.

87. Although paragraph 136 of the judgment under appeal recognises that Member States have, as a matter of public policy, a margin of discretion when deciding to impose fines, in particular when they are confronted with difficulties in interpreting the applicable provisions, paragraph 223 thereof correctly states that the contested decision does not rely on that line of argument. I therefore propose that the Court dismiss the first limb of IGG's fifth ground of appeal.

88. As for the second limb of that ground of appeal, the judgment in *Radlberger*[74] does not support the view that the collection of the deposit in the circumstances under consideration would be contrary to Article 34 TFEU, as IGG argues. That article does not apply to pecuniary charges as it does not govern obstacles to trade addressed by other Treaty provisions. Articles 28, 30 and 110 TFEU address obstacles of a pecuniary nature or having an effect equivalent to customs duties and thus fall outside the prohibition in Article 34 TFEU.[75] According to settled case-law, any pecuniary charge, whatever its designation and mode of application, that is imposed unilaterally on goods by reason of the fact that they cross a frontier, and which is not a customs duty in the strict sense, constitutes a charge having equivalent effect

[71] Judgment of 14 December 2004, *Radlberger Getränkegesellschaft and S. Spitz* (C-309/02, EU:C:2004:799).

[72] Ibid., paragraph 46.

[73] BGBl. 2012 I, p. 212.

[74] Judgment of 14 December 2004, *Radlberger Getränkegesellschaft and S. Spitz* (C-309/02, EU:C:2004:799).

[75] Judgment of 17 June 2003, *De Danske Bilimportører* (C-383/01, EU:C:2003:352, paragraphs 32 and 33).

within the meaning of Articles 28 and 30 TFEU.[76] IGG did not develop an argument by reference to those Treaty provisions. I therefore propose that the Court dismiss the second limb of IGG's fifth ground of appeal.

89. I therefore advise the Court to dismiss IGG's fifth ground of appeal in its entirety.

IV. The action before the General Court

90. In accordance with the second sentence of the first paragraph of Article 61 of the Statute of the Court of Justice of the European Union, if the decision of the General Court is set aside, the Court may itself give final judgment in the matter, where the state of the proceedings so permits.

91. In the light of the considerations set out in points 47 to 64 and 75 to 80 of the present Opinion, I propose the Court dismiss the application in the judgment under appeal for the annulment of the contested decision by which the Commission decided not to open the formal investigation procedure under Article 108(2) TFEU.

V. Costs

92. Under Article 184(2) of the Rules of Procedure of the Court, where the appeal is well founded and the Court gives final judgment in the case, the Court is to make a decision as to the costs.

93. Under Article 138(1) of the Rules of Procedure, which applies to appeal proceedings by virtue of Article 184(1) of those rules, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings.

94. Since the Commission and IGG have been successful in their appeals, I propose that Dansk Erhverv be ordered to pay, in addition to its own costs, those of the appellants both at first instance and in connection with the present appeals.

VI. Conclusion

95. In the light of the foregoing considerations, I propose that the Court give the following ruling:

(1) The judgment of the General Court of the European Union of 9 June 2021, *Dansk Erhverv* v *Commission* (T-47/19, EU:T:2021:331), is set aside.

(2) The action brought by Dansk Erhverv before the General Court of the European Union in Case T-47/19 is dismissed.

[76] Judgment of 17 December 2015, *Viamar* (C-402/14, EU:C:2015:830, paragraph 44). In that judgment, the Court examined a registration tax Greece charged an importer of vehicles manufactured in another Member State. The vehicles were neither sold nor registered in Greece but were instead re-exported to another Member State, where they were put into circulation and sold. The Greek authorities refused to reimburse the registration tax paid. The Court held that the charge was collected solely by virtue of crossing the frontier of a Member State, thereby constituting a charge having an equivalent effect to a customs duty within the meaning of Article 30 TFEU (judgment of 17 December 2015, *Viamar*, C-402/14, EU:C:2015:830, paragraph 45).

(3) Dansk Erhverv shall bear its own costs and pay those incurred by the European Commission and by Interessengemeinschaft der Grenzhändler (IGG) in relation to the proceedings before the General Court and to the present appeals.