Reports of Cases

JUDGMENT OF THE GENERAL COURT (Eighth Chamber)

14 April 2021 *

(State aid – Independent welfare services – Grants awarded to the associations in a regional charitable action group – Rejection of a complaint – Decision not to raise objections at the end of the preliminary examination stage – Action for annulment – Status of interested party – Safeguarding of procedural rights – Substantial effect on competitive position – Admissibility – No serious difficulties – No substantial alteration of existing aid)

In Case T-69/18,

Verband Deutscher Alten- und Behindertenhilfe, Landesverband Niedersachsen/Bremen und Hamburg/Schleswig-Holstein eV, established in Hanover (Germany),

CarePool Hannover GmbH, established in Hanover,

represented by T. Unger, lawyer, and S. Korte, professor,

applicants,

v

European Commission, represented by K. Herrmann and F. Tomat, acting as Agents,

defendant,

supported by

Diakonisches Werk evangelischer Kirchen in Niedersachsen eV, established in Hanover, represented by A. Bartosch, lawyer,

by

Arbeiterwohlfahrt Bezirksverband Hannover eV, established in Hanover, represented by C. Jürschik, lawyer,

and by

* Language of the case: German.

Arbeiterwohlfahrt Bezirksverband Braunschweig eV, established in Brunswick (Germany), and the other interveners whose names appear in the Annex hereto,[1] represented by U. Karpenstein, R. Sangi and C. Johann, lawyers,

interveners,

APPLICATION under Article 263 TFEU for annulment of Commission Decision C(2017) 7686 final of 23 November 2017 concerning State aid schemes SA.42268 (2017/E) – Deutschland, Staatliche Beihilfe zur Förderung wohlfahrtspflegerischer Aufgaben, and SA.42877 (2017/E) –Deutschland, CarePool Hannover GmbH, implemented by Germany in support of charitable associations for welfare assistance work (OJ 2018 C 61, p. 1),

THE GENERAL COURT (Eighth Chamber),

composed of J. Svenningsen, President, C. Mac Eochaidh and T. Pynnä (Rapporteur), Judges,

Registrar: E. Coulon,

gives the following

Judgment

1 The first applicant, Verband Deutscher Alten- und Behindertenhilfe, Landesverband Niedersachsen/Bremen und Hamburg/Schleswig-Holstein eV, is an association which operates in the Länder Niedersachsen (*Land* of Lower Saxony, Germany), Freie Hansestadt Bremen (*Land* of Bremen, Germany), Schleswig-Holstein (*Land* of Schleswig-Holstein, Germany) and Freie und Hansestadt Hamburg (*Land* of Hamburg, Germany). According to the application, it represents the interests of 160 undertakings which themselves manage or operate residential facilities providing assistance and outpatient and inpatient care to persons who are reliant on care and support for disabled persons, children and young people.

2 The second applicant, CarePool Hannover GmbH, is a limited liability company, established in Hanover (Germany) and a member of the first applicant. It is a provider of at-home assistance and care services to persons who are reliant on care.

3 By the present action, the applicants seek annulment of Commission Decision C(2017) 7686 final of 23 November 2017 concerning State aid schemes SA.42268 (2017/E) – Deutschland, Staatliche Beihilfe zur Förderung wohlfahrtspflegerischer Aufgaben, and SA.42877 (2017/E) – Deutschland, CarePool Hannover GmbH, implemented by Germany in support of charitable associations for welfare assistance work (OJ 2018 C 61, p. 1; 'the contested decision'), which was notified to them on 11 December 2017. The contested decision concerns various national measures by which the *Land* of Lower Saxony supports entities operating in that *Land* in the field of independent welfare services.

4 In particular, those national measures include financial support which has been granted since 1956, on the basis of legislation and regulations which have evolved over time, to independent umbrella charitable associations ('the financial support'). Those associations provide, through member associations, diverse welfare services to persons who are reliant on care and to vulnerable

[1] The list of the other interveners is annexed only to the version notified to the parties.

persons, such as outpatient, inpatient or mixed care, support for the homeless and refugees and spiritual support. The applicants, private entities which provide certain similar services or represent undertakings which provide such services, believe that they have suffered harm as a result of the financial support.

5 By the contested decision, the European Commission concluded, without initiating the formal investigation procedure provided for in Article 108(2) TFEU, that, in so far as the financial support constituted aid within the meaning of Article 107(1) TFEU, it had to be classified as existing aid within the meaning of Article 1(b)(i) of Council Regulation (EU) 2015/1589 of 13 July 2015 laying down detailed rules for the application of Article 108 [TFEU] (OJ 2015 L 248, p. 9). In doing so, it rejected the complaints made by the applicants.

I. Legal context of the national measures to which the contested decision relates

6 Welfare services (Wohlfahrtspflege) are defined as follows by Paragraph 66(2) of the Abgabenordnung (German Fiscal Code):

'Welfare services shall consist of taking care of persons in need or in danger in a planned manner, in the collective interest and on a not-for-profit basis. That assistance may cover health and moral, educational or economic well-being and may seek to prevent or remedy a given situation.'

7 As is apparent from various texts, the term 'independent welfare services' refers to the voluntary welfare services of bodies which are not part of the State (see, inter alia, Paragraph 1(5) of the statutes of the Bundesarbeitsgemeinschaft der Freien Wohlfahrtspflege eV (Federal Independent Welfare Services Confederation) and Paragraph 4 of the Dritte Verordnung zur Durchführung des Gesetzes über die Ablösung öffentlicher Anleihen (Third Regulation implementing the Law on repayment of government borrowing) of 4 December 1926).

8 The financial support of the actions of charitable associations was provided for by the Gesetz über das Zahlenlotto (Law on lotteries) of 27 February 1956 (Nds. GVB1. 1956 IV, p. 9; 'the 1956 Law on lotteries'), which entered into force on the same date.

9 In accordance with Paragraphs 11(1) and 12(1) of the 1956 Law on lotteries, umbrella charitable associations received, for the purposes of carrying out welfare work, a percentage of the concession fees paid by betting operators in the *Land* of Lower Saxony.

10 In 1956, the Richtlinien für die Verwendung der Konzessionsabgabe zur Erfüllung wohlfahrtspflegerischer Aufgaben (Guidelines on the use of the concession fee for the purposes of carrying out welfare work), published in the *Niedersächsisches Ministerialblatt* (Nds. MBl. 1956, p. 855), regulated the use of the fees.

11 The basis of determination of the financial support was amended on a number of occasions by various successive laws. The 1956 Law on lotteries was amended on 7 June 1968 (Nds. GVBl. 1968, p. 91) and 18 February 1970 (Nds. GVBl. 1970, p. 27). That law was replaced in 1997 by the Niedersächsisches Gesetz über das Lotterie- und Wettwesen (Lower Saxony Law on lotteries and betting) (Nds. GVBl. 1997, p. 289), which was amended in 2003 by the Haushaltsbegleitgesetz (Law accompanying the budget) (Nds. GVBl. 2003, p. 446; 'the 2004 Law accompanying the budget'), which entered into force in 2004. The amount of the financial support was reduced in 2005, increased in 2007 by the Niedersächsisches Glückspielgesetz

(Lower Saxony Law on gambling) (Nds. GVBl. 2007, p. 756; 'the 2007 Law on gambling'), which entered into force in 2008, and further amended by a Law which was adopted in 2012 and entered into force in 2013 (Nds. GVBl. 2012, p. 544).

12 The 2007 Law on gambling was replaced by the Niedersächsisches Gesetz zur Förderung der Freien Wohlfahrtspflege (Lower Saxony Law on the support of independent welfare services) of 16 December 2014 (Nds. GVBl. 2014, p. 429; 'the WohlFödG'), which has applied since 1 January 2015. The guidelines on the use of the concession fee for the purposes of carrying out welfare work were also the subject of amendments.

13 Paragraph 2 of the WohlFödG is headed 'Financial aid for associations in the independent charitable sector and the Landesstelle für Suchtfragen [(Regional Office for Addiction Issues)]'. Paragraph 2(1)(1) of the WohlFödG provides that that financial aid is to be granted to the umbrella associations belonging to the Landesarbeitsgemeinschaft der Freien Wohlfahrtspflege eV (Regional Independent Welfare Services Group; 'the LAG'). Paragraph 2(2) of the WohlFödG provides for the examination, by the Ministry of Social Affairs of the *Land* of Lower Saxony, of the carrying out by the umbrella associations of their work and of the need for an increase in the financial support as referred to in Paragraph 2(1)(1). As to Paragraph 2(3) of the WohlFödG, it provides that, where the receipts which the *Land* derives from the taxes on gambling exceed EUR 146 300 000, the *Land* is to allocate, by way of additional financial support, 18.63% of the excess receipts to the umbrella associations belonging to the LAG and 0.74% of the excess receipts to the Regional Office for Addiction Issues.

14 The LAG, to which the WohlFödG makes reference, is a registered association whose legal basis is constituted by its statutes. That association was already in existence prior to the entry into force of the 1956 Law on lotteries.

15 In the preamble to its statutes, the LAG is defined as follows:

'The [LAG] is a group consisting of the 13 federations in the independent welfare services sector in Lower Saxony.'

16 The 13 umbrella associations which are members of the LAG are territorial subdivisions for the *Land* of Lower Saxony of the 6 confederations or 'families' in the independent welfare services sector in Germany, which are constituted by the Arbeiterwohlfahrt (AWO), Caritas, Das Rote Kreuz (Red Cross), Diakonie, Die Jüdische Wohlfahrt (Jewish welfare) and Der Paritätische Wohlfahrtsverband.

17 The members of the LAG are identified in Paragraph 2 of its statutes as follows:

'1. Arbeiterwohlfahrt Bezirksverband Braunschweig eV,

2. Arbeiterwohlfahrt Bezirksverband Hannover eV,

3. Arbeiterwohlfahrt Bezirksverband Weser-Ems eV,

4. Caritasverband für die Diözese Hildesheim eV,

5. Caritasverband für die Diözese Osnabrück eV,

6. Landes Caritasverband für Oldenburg eV,

7. Paritätischer Wohlfahrtsverband Niedersachsen eV,

8. Deutsches Rotes Kreuz Landesverband Niedersachsen eV,

9. Deutsches Rotes Kreuz Landesverband Oldenburg eV,

10. Diakonisches Werk evangelischer Kirchen in Niedersachsen eV,

11. Diakonisches Werk der Ev.-luth. Kirche in Oldenburg eV,

12. Diakonisches Werk der Ev.-ref. Kirche,

13. Landesverband der Jüdischen Gemeinden von Niedersachsen.'

18 The first sentence of Paragraph 2(2) of the statutes of the LAG provides that other umbrella welfare services associations may be admitted, provided that an umbrella welfare services association fulfils the following conditions:

'— it operates at an inter-regional level in Lower Saxony;

— the actual support which it provides directly covers, in principle, all of the activities included in independent welfare services, and not just certain parts of those services;

— it encourages work on a voluntary and not professional basis;

— it fully federates the organisations and entities which are driven by a common idea;

— there exists, between the umbrella association and the organisations and entities which are part of it, a link based on affiliation or an organisational link;

— the umbrella association guarantees, overall and through the extent of the organisations and entities which it federates, continual, comprehensive and skilled work and reliable management;

— the organisation pursues a public interest, charitable or religious goal within the meaning of the German Fiscal Code.'

19 As is apparent from the fifth indent of the conditions set out in paragraph 18 above, the umbrella associations are linked to organisations and entities which provide independent welfare services. The statutes of the LAG do not impose a particular form regarding the way in which those associations, on the one hand, and those organisations and entities, on the other, are grouped together.

20 Under the second point of Paragraph 2(2) of the statutes of the LAG, the LAG's board is to decide whether new members may join. In the event of a refusal, the general meeting of members may be asked to re-examine the decision.

21 Paragraph 3(1) of the WohlFödG provides as follows:

'The financial aid referred to in Paragraphs 2(1)(1) and (3)(1) must be used to support the work of the independent charitable sector … All measures which aim to offer assistance to persons who are in need of support or who would be in need of support in the absence of assistance, and measures which are

intended to establish or improve the organisational and personal conditions for the provision of assistance, must be regarded as serving the purposes of welfare work …'

22 In accordance with Paragraph 3(2) of the WohlFödG, the payment of the financial support to the LAG is subject to the conclusion of a grant agreement between the Ministry of Social Affairs of the *Land* of Lower Saxony and all the umbrella associations belonging to the LAG ('the grant agreement'), which agreement is then published by the Ministry of Social Affairs in the *Niedersächsisches Ministerialblatt* (Ministerial Gazette of the *Land* of Lower Saxony) and on the internet. That agreement must govern at least the following elements:

'1. the dividing up of the financial aid amongst the various umbrella associations or groups of umbrella associations,

2. the welfare work in support of which the financial aid must be used,

3. regarding at least 67% of the financial aid referred to in Paragraph 2(1)(1), the work which must be supported, specifying for each element of that work the minimum portion of the support which must be allocated to it,

4. the maximum portion of the financial aid which may be used for administrative tasks,

5. the evidence to be provided by the umbrella associations that the financial aid and the resources arising from that aid, given to third parties, are used for the purposes to which that aid was allocated.'

23 Under Paragraph 3(3) of the WohlFödG, if such an agreement is not concluded, the competent ministry may regulate those various aspects by ministerial decree.

24 An agreement on the use of the financial aid granted in accordance with the WohlFödG was concluded on 8 February 2016 between the Ministry of Social Affairs, Health and Equal Opportunities of the *Land* of Lower Saxony and the 13 umbrella associations belonging to the LAG (Nds. MBl. Nr. 8/2016, p. 244) and replaced the earlier agreement concluded in 2007 on the basis of the 2007 Law on gambling.

25 The preamble to that 2016 agreement provides, inter alia, that 'the contracting parties agree that they wish to jointly contribute to the development of a welfare infrastructure in Lower Saxony in a manner which respects the independence of the associations in the independent charitable sector' and that 'that objective is expressed by the designation of the charitable work eligible for aid in accordance with Annex 1'.

26 The first sentence of Paragraph 2(2) of that 2016 agreement provides that 'the associations in the charitable sector may transfer to their members the funds made available to them'.

27 On 12 March 2018, a new grant agreement was concluded between the Ministry of Social Affairs, Health and Equal Opportunities of the *Land* of Lower Saxony and the 13 umbrella associations belonging to the LAG (Nds. MBl. Nr. 12/2018, p. 206). The third recital of that document indicates that compliance will be ensured with Commission Decision 2012/21/EU of 20 December 2011 on the application of Article 106(2) [TFEU] to State aid in the form of public service compensation granted to certain undertakings entrusted with the operation of services of general economic interest (OJ 2012 L 7, p. 3; 'the 2012 SGEI decision') and Commission

Regulation (EU) No 360/2012 of 25 April 2012 on the application of Articles 107 and 108 [TFEU] to *de minimis* aid granted to undertakings providing services of general economic interest (OJ 2012 L 114, p. 8).

II. Background to the dispute

28 On 16 June and 12 August 2015, the Commission received two separate complaints, registered under the reference numbers SA.42268 and SA.42877 ('the complaints'), seeking to have the financial support of welfare support work in Lower Saxony classified as aid which was unlawful and incompatible with the internal market.

29 The beneficiaries of that financial support are the umbrella associations, mentioned in paragraphs 15 to 17 above, which provide, through their regional or local member associations, services which may be of an economic nature, such as outpatient, inpatient or mixed care, or of a non-economic nature, such as the support and accommodation of the homeless, spiritual support or support for refugees.

30 In the complaints, the applicants argued that they were in competition with the charitable associations with regard, inter alia, to care services for persons who are reliant on care. According to the applicants, those charitable associations benefit from financial support, which allows them to better remunerate their staff than private undertakings or to offer their services at lower rates than those of private undertakings. Consequently, private undertakings are at a disadvantage with regard to the recruitment of staff. In addition, in negotiations with care insurance providers and welfare support bodies, the rates offered by private undertakings are rejected because they are regarded as too high in comparison with the rates claimed by the charitable sector. That obliges private undertakings to offer their services at prices which do not properly cover their primary costs.

31 Moreover, the applicants maintained, in the complaints, that the Lower Saxony Law on lotteries and betting adopted in 1997 had substantially amended the 1956 Law on lotteries because the umbrella associations were allocated a flat-rate amount, rather than a percentage of the concession fees. Similarly, the WohlFödG also substantially amended the 1956 Law on lotteries because the financial support of charitable associations now only partly comes from lottery receipts and, in reality, now comes largely from the budget of the *Land*.

32 Besides the question of the WohlFödG's financial support for the umbrella associations, the complaint registered under reference number SA.42877 also concerned two other measures, namely, first, alleged indirect tax advantages regarding income tax in respect of volunteers working for charitable associations and, secondly, the setting of reduced television licence fees for the institutions in those associations.

33 By letters of 30 July 2015 and 8 February 2016, in accordance with Article 10(2) of Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article [108 TFEU] (OJ 1999 L 83, p. 1), and Article 12(2) of Regulation 2015/1589, the Commission sent requests for information to the German authorities, which responded by letters of 9 September 2015 and 6 and 7 April 2016.

34 On 5 July 2016, a meeting was held between the Commission and the German authorities, in the course of which the Commission orally communicated its provisional assessment of the financial support and the proposed classification as existing aid. The Commission's internal minutes relating to that meeting, submitted by the Commission to the Court, state that the measures do not satisfy the conditions laid down in the 2012 SGEI decision, inter alia, with regard to accounting, transparency and the means of avoiding overcompensation.

35 On 30 September and 16 November 2016, the German authorities provided additional information.

36 By letters of 14 February 2017, the Commission gave the applicants its preliminary assessment of the measures contested in the complaints. It indicated that it considered that, in so far as the contested financial support was aid, it was existing aid. As to the other two measures contested by the second applicant, they were not State aid within the meaning of Article 107(1) TFEU. The Commission also informed the applicants that the German authorities had given an assurance that, in future, they would apply the provisions of the 2012 SGEI decision or, where necessary, if the conditions of application were met, those of Regulation No 360/2012. It emphasised, moreover, that that was a provisional conclusion which would apply until receipt of any additional explanations from the applicants.

37 The applicants challenged that preliminary assessment by letters of 17 and 20 February and 6 March 2017. They elaborated on their arguments in letters of 10 March 2017. By letters of 31 August and 5 and 14 September 2017, the German authorities submitted additional information to the Commission.

III. Contested decision

38 By the contested decision, notified to the applicants on 11 December 2017, after examining the legislative changes which had taken place since 1956, the Commission considered that the substance of the measure at issue had not been altered since then and that, in so far as it constituted aid, within the meaning of Article 107(1) TFEU, it had to be classified as existing aid, within the meaning of Article 1(b)(i) of Regulation 2015/1589. In addition, and in any event, the Commission noted, in the contested decision, that the German authorities had committed to ensuring, for the future, that the financial support at issue would be compatible with the 2012 SGEI decision. Thus, the Commission rejected the complaints inasmuch as they related to the financial support at issue.

39 Regarding the other two measures contested by the second applicant, the Commission noted that the second applicant had failed to make known its views on the preliminary assessment of those two measures, as presented by the Commission in its letter of 14 February 2017. Therefore, pursuant to the second subparagraph of Article 24(2) of Regulation 2015/1589, in terms of which, inter alia, 'if the interested party fail[ed] to make known its views within the prescribed period, the complaint [was to] be deemed to have been withdrawn', the Commission considered that the second complaint had to be deemed to have been withdrawn inasmuch as it related to those other two measures.

IV. Procedure and forms of order sought

40 By application lodged at the Registry of the Court on 5 February 2018, the applicants brought the present action.

41 On 21 April 2018, the Commission lodged the defence.

42 On 26 June 2018, the applicants lodged the reply.

43 On 31 August 2018, the Commission lodged the rejoinder.

44 By documents lodged at the Registry of the Court on 30 April and 4 May 2018 respectively, Diakonisches Werk evangelischer Kirchen in Niedersachsen eV ('DWEK') and Arbeiterwohlfahrt Bezirksverband Hannover eV ('ABH') sought leave to intervene in the present case in support of the form of order sought by the Commission.

45 By document lodged at the Registry of the Court on 14 May 2018, Arbeiterwohlfahrt Bezirksverband Braunschweig eV, Arbeiterwohlfahrt Bezirksverband Weser-Ems eV, Caritasverband für die Diözese Hildesheim eV, Caritasverband für die Diözese Osnabrück, Landes-Caritasverband für Oldenburg eV, Paritätischer Wohlfahrtsverband Niedersachsen eV, Deutsches Rotes Kreuz Landesverband Nierdersachsen eV, Deutsches Rotes Kreuz Landesverband Oldenburg eV and Landesverband der Jüdischen Gemeinden von Niedersachsen KdöR (Judische Wohlfahrt) ('the third interveners') sought leave to intervene in support of the form of order sought by the Commission.

46 By order of the President of the Sixth Chamber of 3 October 2018, the requests for leave to intervene were granted.

47 By documents lodged at the Registry on 3 and 4 December 2018, the interveners lodged their statements in intervention, on which the applicants and the Commission submitted their observations on 23 January and 25 January 2019 respectively.

48 Following a change in the composition of the Chambers of the Court, the present case was allocated to a new Judge-Rapporteur, sitting in the Eighth Chamber.

49 Acting on a proposal from the Judge-Rapporteur, the Court, pursuant to Article 106(1) of its Rules of Procedure, decided, of its own motion, to open the oral part of the procedure and, by way of the measures of organisation of procedure provided for in Article 89 of the Rules of Procedure, put written questions to the parties on 27 January 2020. Those questions related to the admissibility of the action, in particular in view of the judgment of 6 November 2018, *Scuola Elementare Maria Montessori* v *Commission*, *Commission* v *Scuola Elementare Maria Montessori and Commission* v *Ferracci* (C-622/16 P to C-624/16 P, EU:C:2018:873). The parties responded to that measure of organisation of procedure within the prescribed period.

50 On account of the health crisis related to COVID-19, the hearing, initially scheduled for 17 March 2020, was postponed until 5 May 2020, then, ultimately, until a later date. By way of a measure of organisation of procedure, the parties were therefore invited, on 15 April 2020, to lodge any observations on the other parties' responses to the written questions put by the Court on 27 January 2020. They complied with that measure within the prescribed periods.

51 In view of the parties' responses to the Court's questions and of their observations on those responses, the Court, considering that it therefore had sufficient information available to it from the material in the file, under Article 106(3) of the Rules of Procedure, found that it was no longer necessary to rule on the action following a hearing and, therefore, on 21 September 2020, decided to close the oral part of the proceedings.

52 The applicants claim that the Court should:

– annul the contested decision;

– order the Commission to pay the costs.

53 The Commission contends that the Court should:

– dismiss the action;

– order the applicants to pay the costs.

54 The interveners contend that the Court should:

– dismiss the action;

– order the applicants to pay the costs.

V. Law

55 In support of their action, the applicants put forward three pleas in law, the first alleging a breach of their procedural rights arising under Article 108(2) TFEU, the second, a breach of the obligation to state reasons laid down in Article 296 TFEU and the third, an infringement of Article 107 et seq. TFEU.

56 It must be recalled that, in the context of the procedure for reviewing State aid provided for in Article 108 TFEU, the preliminary examination of aid under Article 108(3) TFEU, which is intended merely to allow the Commission to form a prima facie opinion on the partial or complete conformity of the aid in question, must be distinguished from the formal investigation procedure under Article 108(2) TFEU. It is only in connection with that investigation, which is designed to enable the Commission to be fully informed of all the facts of the case, that the Treaty imposes an obligation on the Commission to give the parties concerned notice to submit their comments (judgments of 2 April 1998, *Commission* v *Sytraval and Brink's France*, C-367/95 P, EU:C:1998:154, paragraph 38; of 22 December 2008, *British Aggregates* v *Commission*, C-487/06 P, EU:C:2008:757, paragraph 27; and order of 11 April 2018, *ABES* v *Commission*, T-813/16, not published, EU:T:2018:189, paragraph 39).

57 It follows that, where, without initiating the formal investigation procedure under Article 108(2) TFEU, the Commission finds, on the basis of Article 108(3) TFEU, that aid is compatible with the internal market, the persons intended to benefit from those procedural guarantees may secure compliance therewith only if they are able to challenge that decision before the EU Courts. For those reasons, an action for the annulment of such a decision brought by a person who is concerned within the meaning of Article 108(2) TFEU is declared to be admissible where that

person seeks, by instituting proceedings, to safeguard the procedural rights available to him or her under that provision (judgments of 22 December 2008, *British Aggregates* v *Commission*, C-487/06 P, EU:C:2008:757, paragraph 28; of 15 January 2013, *Aiscat* v *Commission*, T-182/10, EU:T:2013:9, paragraph 42; and order of 11 April 2018, *ABES* v *Commission*, T-813/16, not published, EU:T:2018:189, paragraph 40).

58 That is also the case where, without initiating the formal investigation procedure, the Commission maintains that, in so far as the contested measure constitutes aid, within the meaning of Article 107(1) TFEU, it should be classified as existing aid and, in doing so, it refuses by implication to initiate the formal investigation procedure provided for by Article 108(2) TFEU. The adoption by the Commission of such a position, based on the information supplied by the interested parties, constitutes a decision (judgments of 24 March 1993, *CIRFS and Others* v *Commission*, C-313/90, EU:C:1993:111, paragraph 26, and of 18 November 2010, *NDSHT* v *Commission*, C-322/09 P, EU:C:2010:701, paragraph 53).

59 Therefore, an action brought by a party concerned within the meaning of Article 108(2) TFEU, for annulment of a decision not to initiate the formal investigation procedure pursuant to that provision, must be considered to be admissible where that party seeks, by bringing that action, to safeguard the procedural rights available to him or her under that provision (see, to that effect, judgments of 16 May 2002, *ARAP and Others* v *Commission*, C-321/99 P, EU:C:2002:292, paragraphs 61 and 66, and of 18 November 2010, *NDSHT* v *Commission*, C-322/09 P, EU:C:2010:701, paragraph 56).

60 On the other hand, if the applicant challenges the merits of a decision assessing aid as such, the mere fact that the applicant may be regarded as concerned within the meaning of Article 108(2) TFEU cannot provide a sufficient basis on which to accept that the action is admissible. Applicants must therefore demonstrate that they have *locus standi* pursuant to the first and second limbs of the fourth paragraph of Article 263 TFEU, including that they have a particular status within the meaning of the judgment of 15 July 1963, *Plaumann* v *Commission* (25/62, EU:C:1963:17), or that the decision assessing the aid constitutes a regulatory act not entailing implementing measures and which is of direct concern to them, in accordance with the third limb of the fourth paragraph of Article 263 TFEU (see, to that effect, judgment of 19 December 2013, *Telefónica* v *Commission*, C-274/12 P, EU:C:2013:852, paragraph 19).

61 In the present case, by the contested decision, the Commission rejected the complaints, which the applicants had made pursuant to the first subparagraph of Article 24(2) of Regulation 2015/1589, in terms of which 'any interested party may submit a complaint to inform the Commission of any alleged unlawful aid or any alleged misuse of aid'.

62 In the present case it must be held that, by the contested decision, the Commission, while formally rejecting the complaints, refused to initiate the formal investigation procedure provided for in Article 108(2) TFEU.

63 It will be necessary to examine whether the pleas in law put forward by the applicants seek to contest the Commission's decision not to initiate the formal investigation procedure by showing that the assessment of the information and evidence which the Commission had at its disposal or could have had at its disposal, during the preliminary examination, should have raised doubts as regards the classification of the aid at issue as existing aid, in so far as it is State aid, or whether, to the contrary, the pleas in law or some of those pleas in law directly challenge the merits of the assessment of the measure at issue in view of Article 107 TFEU and have the aim or consequence

of changing the subject matter of the application and, consequently, altering the conditions for the assessment of its admissibility (see, to that effect, judgment of 27 October 2011, *Austria* v *Scheucher – Fleisch and Others*, C-47/10 P, EU:C:2011:698, paragraph 50).

A. First plea in law, alleging breach of the procedural rights arising under Article 108(2) TFEU

64 In the first plea in law, the applicants allege a breach of their procedural rights under Article 108(2) TFEU inasmuch as, on conclusion of its handling of the complaints, the Commission wrongly refused to initiate the formal investigation procedure with regard to welfare assistance work.

1. Admissibility

65 The Commission does not call into question the applicants' *locus standi*, as interested parties, within the meaning of Article 1(h) of Regulation 2015/1589, to invoke, by their first plea in law, breach of their procedural rights arising under Article 108(2) TFEU, on the ground that it failed to initiate the formal investigation procedure with regard to welfare assistance work.

66 On the other hand, ABH and the third interveners maintain that the applicants have, essentially, already benefited from all the procedural rights which they are recognised as having in the context of the formal investigation procedure. Those interveners point out, inter alia, that the applicants were made aware of the provisional assessment of the measure at issue and were able to submit comments, which were examined in detail. In addition, the applicants received a copy of the contested decision, which was notified to them.

67 The applicants contest that argument. They argue that, under Article 7 et seq. of Regulation 2015/1589, the Commission has the power to request necessary information from any other Member State, an undertaking or an association of undertakings, where it has initiated the formal investigation procedure, in order to improve the quality of the information received and increase transparency and legal certainty. In addition, the provisions of that regulation relating to the formal investigation procedure allow the periods for the submission of comments by the complainants to be extended and set out more extensive obligations to state reasons.

68 According to Article 1(h) of Regulation 2015/1589, an interested party is 'any Member State and any person, undertaking or association of undertakings whose interests might be affected by the granting of aid, in particular the beneficiary of the aid, competing undertakings and trade associations'.

69 As is clear from the case-law, if an applicant is recognised as having the specific status of 'interested party', within the meaning of Article 1(h) of Regulation 2015/1589, in connection with the specific subject matter of the action, that status is sufficient to distinguish the applicant individually, for the purposes of the fourth paragraph of Article 263 TFEU, where that action seeks to safeguard the applicant's procedural rights under Article 108(2) TFEU (see, to that effect, judgments of 24 May 2011, *Commission* v *Kronoply and Kronotex*, C-83/09 P, EU:C:2011:341, paragraph 48; of 27 October 2011, *Austria* v *Scheucher – Fleisch and Others*, C-47/10 P, EU:C:2011:698, paragraph 44; and of 6 May 2019, *Scor* v *Commission*, T-135/17, not published, EU:T:2019:287, paragraph 41).

70 An interested party is, inter alia, any person, undertaking or association of undertakings whose interests might be affected by the granting of aid, in particular undertakings competing with the beneficiary of that aid and trade associations. In other words, there is an indeterminate group of persons to whom notice must be given (judgments of 14 November 1984, *Intermills* v *Commission*, 323/82, EU:C:1984:345, paragraph 16, and of 6 May 2019, *Scor* v *Commission*, T-135/17, not published, EU:T:2019:287, paragraph 42). That provision does not, however, rule out the possibility that an undertaking which is not a direct competitor of the beneficiary of the aid can be categorised as an 'interested party', provided that that undertaking demonstrates that its interests could be adversely affected by the grant of the aid. Thus, it is necessary for that undertaking to establish, to the requisite legal standard, that the aid is likely to have a specific effect on its situation (see judgment of 24 May 2011, *Commission* v *Kronoply and Kronotex*, C-83/09 P, EU:C:2011:341, paragraphs 63 to 65 and the case-law cited).

71 In the present case, the applicants made the complaints which led to the contested decision. They actively participated in the preliminary examination procedure. In addition, they argued, on a number of occasions, that the first of them was a trade association defending the interests of undertakings competing with the beneficiaries of the alleged aid and the second of them was an undertaking competing with those beneficiaries and that their interests might be affected by the granting of that aid. It must be held, which the Commission does not dispute, that the applicants have established that they are interested parties within the meaning of Article 108(2) TFEU and Article 1(h) of Regulation 2015/1589, in order to defend their procedural rights.

72 As is apparent from paragraph 66 above, ABH and the third interveners maintain that the applicants have already benefited from all their procedural rights under Article 108(2) TFEU.

73 In that regard it must be observed that, while the EU Courts have, on a number of occasions, found that the Commission was not obliged to give the complainants an opportunity to state their views during the preliminary examination provided for by Article 108(3) TFEU, but was required to give notice to the parties concerned to submit their comments only in the context of the formal investigation procedure under Article 108(2) TFEU (judgments of 15 June 1993, *Matra* v *Commission*, C-225/91, EU:C:1993:239, paragraph 52, and of 2 April 1998, *Commission* v *Sytraval and Brink's France*, C-367/95 P, EU:C:1998:154, paragraph 59), it cannot thus be concluded that a party that submitted a complaint, which was rejected by the Commission after hearing that party's views, no longer has an interest in contesting the failure to initiate the formal investigation procedure under Article 108(2) TFEU.

74 According to Article 4(4) of Regulation 2015/1589, where the Commission, after a preliminary examination, finds that doubts are raised as to the compatibility with the internal market of a notified measure, it is to decide to initiate proceedings pursuant to Article 108(2) TFEU.

75 As provided by Article 7 of Regulation 2015/1589, after the initiation of the formal investigation procedure, the Commission may request information from Member States other than the Member State concerned, from undertakings or from associations of undertakings.

76 In addition, as is apparent from the case-law referred to in paragraph 70 above, where Article 108(2) TFEU provides that the Commission is to give notice to the parties concerned to submit their comments, the wording covers not only parties concerned that have submitted a complaint, but an indeterminate group of persons, undertakings or associations whose interests are potentially affected by the granting of the aid, including competing undertakings and trade organisations.

77 It follows from the evidence that, contrary to the submissions of ABH and the third interveners, the concept of 'procedural rights' which interested parties have in the context of the procedure provided for in Article 108(2) TFEU is not to be confused with the right, for a complainant, to secure the initiation of the formal investigation procedure, as part of which, as an 'interested party', it will be able to submit comments on the same basis as any other operator satisfying the definition set down by Article 1(h) of Regulation 2015/1589.

78 It follows that the first plea in law of the action for annulment is admissible inasmuch as it seeks annulment of the contested decision on the ground that the Commission breached the applicants' procedural rights by refusing, in response to their complaints, to initiate the procedure provided for in Article 108(2) TFEU.

2. Substance

79 By their first plea in law, the applicants maintain that a number of factors indicate that the preliminary examination procedure gave rise to serious difficulties, which should have led the Commission to initiate the formal investigation procedure provided for in Article 108(2) TFEU. The existence of such difficulties is demonstrated by three pieces of evidence, relating, first, to the duration of the preliminary examination procedure, which they describe as exceptionally long, secondly, to the poor quality of the statement of reasons provided by the Commission, which is testament to an insufficient or incomplete examination, and, thirdly, to the attitude of the Commission during that procedure.

80 The applicants argue that the total duration of the preliminary examination procedure, of 29 months, is inconsistent with the concise nature of the grounds and of the contested decision, which comprises only 10 pages. They take the view that the Commission breached its obligation to carry out a diligent examination of the case within a reasonable period, especially as it does not appear, in the present case, that it prioritised or delayed its examination of the financial support to the benefit of other cases.

81 They also maintain that the statement of reasons for the contested decision, which fits on a single page, is very brief and is vitiated by 'legal inaccuracies' and 'material shortcomings' which cannot be reconciled with the excessively long duration of the procedure and which demonstrate that the Commission undertook a superficial examination. They criticise the Commission for having failed to examine the objective of increasing the predictability of the level of financial support provided to the umbrella associations, pursued by the *Land* of Lower Saxony as a result of the gradual removal of the link between the support of the charitable sector and lottery resources which took place between 1997 (or 2004) and 2015, even though the first applicant quoted passages from the explanatory memorandum for the various laws at issue. In addition, it did not decide on the question of whether the upward trend in the amounts of the support between 1956 and 2015 respected the 20% threshold laid down by Article 4(1) of Commission Regulation (EC) No 794/2004 of 21 April 2004 implementing Regulation 2015/1589 (OJ 2004 L 140, p. 1), as amended by Commission Regulation (EU) 2015/2282 of 27 November 2015 (OJ 2015 L 325, p. 1), according to which an increase in the original budget of an existing aid scheme by up to 20% is not to be considered an alteration to existing aid. Moreover, it did not decide on the implications of the separation of the support into a fixed part and a variable part, linked to changes in the tax on gambling. Finally, the applicants emphasise that the Commission did not adopt a position on the statements of the Niedersächsischer Landesrechnungshof (Court of Auditors, *Land* of Lower

Saxony, Germany) which it had in its possession and from which, according to the applicants, it is clear that the financial support constitutes new aid. They also criticise the absence of an exposition or definitions of what constitutes a substantial alteration to aid.

82 According to the applicants, the Commission's conduct also suggests that it experienced serious difficulties in classifying the disputed aid from the point of view of Article 107 et seq. TFEU. Those difficulties are apparent from the fact that, during the procedure, a number of Exchanges of Letters and a meeting were necessary for the purposes of adopting the contested decision. Added to that is the fact that, as emerges from the minutes drawn up by the German authorities on 8 July 2016, following their meeting with the Commission of 5 July 2016, the Commission was concerned more with finding a robust legal solution for the future, namely adapting the financial support to the 2012 SGEI decision, than with classifying that measure as existing aid or new aid.

83 The Commission argues that it did not encounter serious difficulties and takes the view that, contrary to the applicants' submissions, the duration of the preliminary examination procedure was not unreasonable in view of the circumstances of the case. It considered at length the legislative changes invoked by the applicants which were regarded as relevant, stating adequate reasons for the contested decision, and the evidence produced by the applicants to denounce the attitude of its services is not capable of demonstrating that there was an infringement of Article 108(2) TFEU.

84 It emphasises that the applicants submitted two separate complaints to its services, on 24 June and 12 August 2015, and that the second applicant's complaint covered two additional national measures, so that the Directorate-General (DG) for Competition was obliged to look at three measures until it gave its provisional assessment. Two requests for information were sent to the German authorities on 30 July 2015 and 8 February 2016, to which responses were given by lengthy letters of 9 September 2015 and 6 and 7 April 2016, respectively. After examining that information, the Commission reached the conclusion that the financial support constituted existing aid. At a meeting which took place on 5 July 2016, the Commission informed the German authorities of its assessment and checked whether they were willing to adjust the financial support in future in accordance with the rules on the control of State aid. By letter of 16 November 2016, the German authorities committed to bringing that financial support into line with the 2012 SGEI decision for the future. The other two measures called into question by the second applicant were also addressed at that meeting and further information was given to the Commission by letter of 30 September 2016. Finally, the Commission emphasises that, on conclusion of the examination of all the measures covered by the complaints, on 14 February 2017, it gave its provisional assessment relating to all the measures denounced in the complaints.

85 The Commission is also of the opinion that the length of time between the communication of that provisional assessment to the applicants and the adoption of the contested decision was not unreasonable, especially as that decision takes into account the applicants' comments submitted by letters of 17 and 20 February and 6 and 10 March 2017, and the additional information given by the German authorities on 31 August and 5 and 14 September 2017.

86 The third interveners point out that, for the examination of aid which entered into force before the EEC Treaty, it is necessary to go back several decades in time and, sometimes, to undertake historical investigations on the basis of archives.

87 According to the Commission, the statement of reasons for the contested decision does not attest to the existence of serious difficulties. It maintains that it adequately examined the applicants' explanations, including those submitted by the first of them on 10 March 2017 to refute the classification of the financial support as existing aid. It observes, in that regard, that the first applicant's explanations were no more than two pages long and merely described the legislative changes of 1997 and 2014 without indicating how those changes had brought about an increase in the amount of the financial support. Neither did the first applicant provide information on the amount of the financial support actually granted since 1956.

88 In that regard, the Commission, supported by DWEK, argues that Article 4(1) of Regulation No 794/2004 does not provide that an increase of more than 20% in the amount of aid is sufficient by itself for it to be considered that an existing aid scheme has become new aid. In any event, the data submitted by the German authorities, taking account of inflation, do not indicate that the increased amounts of financial support exceed the original budget by 20%.

89 Regarding the criticism of the attitude of its services, the Commission maintains that the applicants' claims are based on pure supposition. In any event, the Exchange of Letters with the authorities of a Member State is part of the procedure for the examination of a complaint. As to the meeting with the German authorities, it allowed the Commission to inform them of its assessment of the measure and to ask the *Land* of Lower Saxony to bring the financial support into line, for the future, with the 2012 SGEI decision.

90 According to the case-law, the formal investigation procedure under Article 108(2) TFEU is essential whenever the Commission has serious difficulties in determining whether aid is compatible with the internal market. Thus, the Commission may confine itself to the preliminary examination under Article 108(3) TFEU when taking a decision in favour of aid only if it is able to satisfy itself, after an initial examination, that that aid is compatible with the internal market. If, by contrast, the initial examination leads the Commission to the opposite conclusion or even if it does not enable it to resolve all the difficulties involved in determining whether the aid is compatible with the internal market, the Commission is under a duty to carry out all the requisite consultations and for that purpose to initiate the procedure under Article 108(2) TFEU (see judgment of 27 October 2011, *Austria* v *Scheucher – Fleisch and Others*, C-47/10 P, EU:C:2011:698, paragraph 70 and the case-law cited; judgment of 21 December 2016, *Club Hotel Loutraki and Others* v *Commission*, C-131/15 P, EU:C:2016:989, paragraph 30; see also, to that effect, judgment of 18 November 2010, *NDSHT* v *Commission*, C-322/09 P, EU:C:2010:701, paragraphs 52 to 54).

91 In the present case, the purpose of the review of lawfulness carried out by the Court in dealing with the first plea in law is to examine whether the preliminary examination procedure gave rise to serious difficulties in the analysis of the contested measure and the assessment of whether it could be classified as existing aid. Consequently, in the context of that plea in law, by which the applicants contest the breach of their procedural rights arising under Article 108(2) TFEU, it is not for the Court to review, as such, the Commission's assessment of whether the contested measure could be classified as existing aid or the compatibility of that measure with the internal market, but only to assess whether, in that assessment, it encountered serious difficulties.

92 As the criterion of serious difficulties is objective in nature, the existence of such difficulties must be looked for not only in the circumstances in which the Commission's decision was adopted after the preliminary examination but also in the assessments upon which the Commission relied (see

judgment of 27 October 2011, *Austria* v *Scheucher – Fleisch and Others*, C-47/10 P, EU:C:2011:698, paragraph 71 and the case-law cited; judgment of 21 December 2016, *Club Hotel Loutraki and Others* v *Commission*, C-131/15 P, EU:C:2016:989, paragraph 31).

93 It follows that the lawfulness of a decision not to raise objections, based on Article 4(3) of Regulation 2015/1589, depends on the question whether the assessment of the information and evidence which the Commission had at its disposal or could have had at its disposal (see, to that effect, judgment of 20 September 2017, *Commission* v *Frucona Košice*, C-300/16 P, EU:C:2017:706, paragraph 71) during the preliminary examination of the measure notified should objectively have raised doubts as to the compatibility of that measure with the internal market, given that such doubts must lead to the initiation of a formal investigation procedure in which the interested parties referred to in Article 1(h) of that regulation may participate (judgments of 27 October 2011, *Austria* v *Scheucher – Fleisch and Others*, C-47/10 P, EU:C:2011:698, paragraph 72, and of 21 December 2016, *Club Hotel Loutraki and Others* v *Commission*, C-131/15 P, EU:C:2016:989, paragraph 32).

94 It is also apparent from the case-law that if the examination carried out by the Commission during the preliminary examination is insufficient or incomplete, this constitutes evidence of the existence of serious difficulties (see judgment of 10 February 2009, *Deutsche Post and DHL International* v *Commission*, T-388/03, EU:T:2009:30, paragraph 95 and the case-law cited, judgment of 19 September 2018, *HH Ferries and Others* v *Commission*, T-68/15, EU:T:2018:563, paragraph 62).

95 The onus is on the applicants to prove the existence of serious difficulties, proof that can take the form of a consistent body of evidence (judgment of 19 September 2018, *HH Ferries and Others* v *Commission*, T-68/15, EU:T:2018:563, paragraph 63, see also, to that effect, judgment of 17 March 2015, *Pollmeier Massivholz* v *Commission*, T-89/09, EU:T:2015:153, paragraph 51 and the case-law cited).

96 In the present case, the applicants take the view that, in the preliminary examination procedure, the Commission encountered serious difficulties in the analysis of the contested measure and the assessment of whether it could be classified as existing aid. They invoked three pieces of evidence, namely the duration of the preliminary examination procedure, the statement of reasons for the contested decision and the attitude of the Commission. Those three aspects must be examined in turn.

(a) Duration of the preliminary examination procedure

97 It must be observed that 29 months passed between the submission of the complaints, on 16 June and 12 August 2015, and the adoption of the contested decision, on 23 November 2017.

98 The Commission argues that the duration of the preliminary examination procedure, of 29 months, is justified, inter alia, by the requests to the German authorities for information, the submission of that information, the meeting with those authorities and their commitments. It also emphasises the time necessary to examine the legislative changes contested by the applicants and take account of their comments relating to the provisional assessment which it gave to them on 14 February 2017.

99 In that regard, while such length can constitute an indication of the existence of doubt regarding the classification of the contested measure as existing aid or the compatibility of that measure with the internal market, it cannot, however, of itself, lead to the conclusion that the preliminary examination procedure gave rise to serious difficulties, which compelled the Commission to initiate the formal investigation procedure provided for in Article 108(2) TFEU (see judgment of 24 January 2013, *3F* v *Commission*, C-646/11 P, not published, EU:C:2013:36, paragraph 32 and the case-law cited, judgment of 12 December 2006, *Asociación de Estaciones de Servicio de Madrid and Federación Catalana de Estaciones de Servicio* v *Commission*, T-95/03, EU:T:2006:385, paragraph 135).

100 In addition, it should be noted that, according to the case-law, whether or not the duration of the preliminary examination procedure is reasonable must be determined in relation to the particular circumstances of each case and, especially, its context, the various procedural stages to be followed by the Commission and the complexity of the case (see judgment of 14 September 2016, *Trajektna luka Split* v *Commission*, T-57/15, not published, EU:T:2016:470, paragraph 65 and the case-law cited).

101 Moreover, while paragraph 47 of the Code of Best Practice for the conduct of State aid control procedures (OJ 2009 C 136, p. 13) provides that 'the Commission will use its best endeavours to investigate a complaint within an indicative time frame of twelve months from its receipt', it adds, however, that 'that time limit does not constitute a binding commitment[and that,] depending on the circumstances of the individual case, the possible need to request complementary information from the complainant, the Member State or interested parties may extend the investigation of a complaint'.

102 In the present case, despite the particularly succinct nature of the complaints, their examination necessitated the analysis of a significant volume of documents, including on account of the adoption of various successive laws between 1956 and 2015, of numerous pieces of legislation of some complexity, and the identification of the amounts granted to the umbrella associations during that period.

103 Thus, on numerous occasions, the Commission had to request explanations and information from the German authorities, which had to carry out the searches necessary in order to provide the data required. On a number of occasions, the Commission asked the applicants to submit comments.

104 Therefore, even though the duration of the preliminary examination procedure was rather long, and clearly longer than the indicative time frame of 12 months mentioned by the Commission in its Code of Best Practice, it is not apparent from the case file that that duration was due to serious difficulties encountered in the analysis of the contested measure and the assessment of whether it could be classified as existing aid.

105 Moreover, as is apparent from the case-law and from paragraph 48 of the Code of Best Practice, the Commission is entitled to give differing degrees of priority to the complaints brought before it (judgments of 4 March 1999, *Ufex and Others* v *Commission*, C-119/97 P, EU:C:1999:116, paragraph 88, and of 4 July 2007, *Bouygues and Bouygues Télécom* v *Commission*, T-475/04, EU:T:2007:196, paragraph 158).

106 In the light of all those considerations, it must be concluded that the duration of the preliminary procedure does not demonstrate that the Commission faced serious difficulties in its assessment of that measure as constituting existing aid.

(b) Statement of reasons for the contested decision

107 Regarding the statement of reasons for the contested decision, it is apparent from the case-law that if the examination carried out by the Commission during the preliminary examination is insufficient or incomplete, this constitutes evidence of the existence of serious difficulties (see judgment of 12 September 2017, *Bayerische Motoren Werke* v *Commission*, T-671/14, EU:T:2017:599, paragraph 39 and the case-law cited). By the statement of reasons set out in a decision not to initiate the formal investigation procedure, the Commission provides an account of the examination of the financial support which it undertook and, therefore, the statement of reasons for such a decision may constitute an indication as to whether that examination was sufficiently complete or adequate.

108 In that regard, in the decision which it adopts on conclusion of the examination of the complaint, such as the contested decision, the Commission is required to adequately set out for the complainant the reasons why the matters of fact and of law invoked in the complaint were not sufficient to demonstrate that the disputed measure ought to raise doubts as to its compatibility with the internal market. Thus, there must be a correlation between the arguments contained in the complaint and the explanations which the Commission gives in the decision not to raise objections or, as in the present case, not to initiate the formal investigation procedure (see, to that effect, judgment of 1 July 2008, *Chronopost and La Poste* v *UFEX and Others*, C-341/06 P and C-342/06 P, EU:C:2008:375, paragraph 96).

109 However, the Commission is not obliged to adopt a position on all the arguments relied on by the parties concerned, but it is sufficient if it sets out the facts and the legal considerations having decisive importance in the context of the decision (see judgment of 3 March 2010, *Bundesverband deutscher Banken* v *Commission*, T-36/06, EU:T:2010:61, paragraph 45 and the case-law cited). In addition, it is not required to define its position on matters invoked in a complaint where they are manifestly irrelevant or insignificant or plainly of secondary importance (see, to that effect, judgments of 2 April 1998, *Commission* v *Sytraval and Brink's France*, C-367/95 P, EU:C:1998:154, paragraphs 63 and 64, and of 28 March 2012, *Ryanair* v *Commission*, T-123/09, EU:T:2012:164, paragraph 180).

110 In the present case, it must be observed that, in paragraphs 32 and 33 of the contested decision, the Commission recalled the wording of the applicable EU legislation and, more specifically, the definition of the concept of existing aid. In paragraphs 34 to 43 of that decision, it described the legislative developments, from 1956 to 2014, relating to the measures at issue, specifying in each case the amount of the financial support granted to the umbrella associations and the origin of that financial aid. It is apparent from that description that that financial support came either from lottery and sports-betting concession fees or from the taxes on gambling or from both the budget of the *Land* of Lower Saxony and the taxes on gambling where the receipts from those taxes exceeded a certain amount.

111 In paragraph 47 of the contested decision, the Commission noted that no changes had been made to the purpose of the public financial support and its beneficiaries since 1956. In paragraphs 48 and 49 of that decision, the Commission set out its position on the criticisms, relating to the legislation of 1997 and 2014, mentioned by the applicants in their complaints. According to the applicants, that legislation contains significant changes and constitutes new aid favouring the umbrella associations through the grant of flat-rate amounts which provide those organisations with certainty for planning purposes.

112 Regarding, first of all, the change from a percentage amount to a flat-rate amount which allegedly took place in 1997, the Commission pointed out that that change did not happen in 1997, as was incorrectly indicated in the complaint, but in 2004, in the 2004 Law accompanying the budget. Referring to the statement of reasons for Paragraph 11 of the draft of that law, it found that there was no substantial change, because that change did not affect the basic right of the umbrella associations to be allocated public financial support for the welfare assistance services which they provided. It pointed out, moreover, that the change concerned only the amount of the support and that it had led to a decrease in the financial support for the charitable associations.

113 Furthermore, as regards the alleged removal, by the WohlFödG, of the link between the financial support for the charitable sector and the licence fees from gambling, the Commission, referring to the legal provisions since 1956, took the view that neither the nature nor the source of the financial support had changed, since the concession fees paid by gambling operators had always been paid into the budget of the *Land* of Lower Saxony.

114 While the Commission did not expressly adopt a position on the objective of allegedly increasing predictability, through the grant of a flat-rate amount, allowing better planning of the welfare activities of the charitable associations, it nevertheless examined the question of whether the grant of flat-rate amounts entailed a substantial alteration to the aid scheme and concluded that it did not.

115 As to the objectives allegedly pursued by the draft laws cited by the applicants, it should be recalled that, according to settled case-law, Article 107 TFEU does not distinguish between State interventions on the basis of their causes or their objectives, but defines them on the basis of their effects (judgments of 22 December 2008, *British Aggregates* v *Commission*, C-487/06 P, EU:C:2008:757, paragraphs 87 and 89, and 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, paragraph 87). Thus, the Commission's analysis of the disputed measures did not necessarily have to take account of the objectives alleged by the applicants, even assuming that they were the actual objectives pursued by the German authorities in changing the disputed measures.

116 Regarding the alleged failure by the Commission to decide on the question of whether the upward trend in the financial support between 1956 and 2015 respected the 20% threshold laid down by Article 4(1) of Regulation No 794/2004, it must be observed that, as is apparent, inter alia, from recitals 33 and 50 of the contested decision, the Commission concluded that the changes made since 1956 to the measures of support for the charitable sector were of a purely formal or administrative nature, regardless of the precise changes in the amounts at issue. Therefore, a specific statement of reasons as regards possible compliance with that threshold was not necessary.

117 In any event, it is apparent from the financial data which were submitted to it by the German authorities during the administrative procedure that the increases in the amount of the financial support did not, overall, give rise to a level of aid which exceeded the initial amount of that support by more than 20%.

118 Finally, it must be observed that the Commission was in no way bound by the statements of the Niedersächsischer Landesrechnungshof (Court of Auditors, *Land* of Lower Saxony) and, therefore, that the fact that it did not express a view on those statements cannot affect the question of whether serious difficulties existed.

119 It follows from that evidence that the statement of reasons for the contested decision does not demonstrate that the Commission undertook a superficial, insufficient or incomplete examination of the disputed measure or that it encountered serious difficulties in its assessment of that measure as constituting existing aid. Similarly, the applicants have failed to demonstrate that, in the contested decision, the Commission did not effectively deal with any of the arguments appearing in their complaints, other than those which were of secondary importance, insignificant or irrelevant.

(c) Attitude of the Commission

120 Regarding the attitude of the Commission and, more specifically, its interactions with the German authorities, it is apparent from the case-law that the mere fact that discussions took place between the Commission and the Member State concerned during the preliminary examination, and that, in that context, the Commission asked for additional information about the measures submitted for its review, cannot, in itself, be regarded as evidence that it was faced with serious difficulties of assessment (judgment of 10 July 2012, *TF1 and Others* v *Commission*, T-520/09, not published, EU:T:2012:352, paragraph 76).

121 In accordance with the objective of Article 108(3) TFEU and its duty of sound administration, the Commission may, amongst other things, engage in dialogue with the State concerned or with third parties in an endeavour to overcome, during the preliminary examination, any difficulties encountered. However, that power presupposes that the Commission may adjust its position according to the results of the dialogue engaged in, without that adjustment having to be interpreted, a priori, as establishing the existence of serious difficulties (judgments of 13 June 2013, *Ryanair* v *Commission*, C-287/12 P, not published, EU:C:2013:395, paragraph 71, and of 21 December 2016, *Club Hotel Loutraki and Others* v *Commission*, C-131/15 P, EU:C:2016:989, paragraph 35). Accordingly, the Commission may lawfully adopt, on the basis of Article 4(2) of Regulation 2015/1589, a decision whereby, while finding that there is no State aid, it takes note of commitments entered into by the Member State (judgment of 21 December 2016, *Club Hotel Loutraki and Others* v *Commission*, C-131/15 P, EU:C:2016:989, paragraph 36, see also, to that effect, judgment of 13 June 2013, *Ryanair* v *Commission*, C-287/12 P, not published, EU:C:2013:395, paragraph 72).

122 In the present case, in the light of the need to analyse the legislation at issue and the records relating to the financial support of the charitable associations since 1957, the number of requests for information and the amount of correspondence, as well as the organisation of a meeting, may attest to the existence of material difficulties in correctly understanding the operation of the regulatory measures at issue, but cannot, a priori, be interpreted as establishing the existence of serious difficulties relating to the classification of the measure contested by the applicants.

123 As to the recommendation made to the German authorities to adapt the financial support to the 2012 SGEI decision, it must be held that the Commission cannot be criticised for that action, any more than that action can constitute evidence of the existence of serious difficulties necessitating the initiation of the procedure provided for in Article 108(2) TFEU.

124 The Commission had informed the German authorities, at the same time, of the fact that, in its view, the financial support could be classified as existing aid and of the fact that that measure did not comply with the conditions laid down in the 2012 SGEI decision. It is not apparent from the case file that the first assessment, relating to the existing nature of the aid, was dependent on the German authorities' bringing the financial support into line with that decision.

125 In reality, the German authorities' spontaneously taking the measures necessary to make the existing aid compliant with the 2012 SGEI decision allowed the Commission to avoid having to propose appropriate measures pursuant to Article 22 of Regulation 2015/1589.

126 It follows from those factors that the attitude of the Commission, contested by the applicants, cannot be interpreted as constituting evidence of the existence of serious difficulties necessitating the initiation of the procedure provided for in Article 108(2) TFEU.

127 In the light of the foregoing, it must be held that all the evidence examined, assessed as a whole, does not establish the existence of such serious difficulties.

128 Therefore, the first plea in law must be dismissed as unfounded.

B. Second plea in law, alleging breach of the obligation to state reasons

129 By their second plea in law, the applicants argue that the statement of reasons for the contested decision is relatively thin and inadequate, that it ignores concepts of EU law, that it describes the relevant legal situation in an abbreviated manner and that it does not contain any references to case-law. In their reply, they add that the Commission failed to respond to the claim that predictability of resources was increased in order to improve the planning of welfare activities by the charitable associations.

130 It must be held that the applicants' arguments, formally presented as part of the second plea in law, in reality correspond to the arguments presented as part of the first plea in law, in order to demonstrate that the failure to state adequate reasons for the contested decision is evidence of the existence of serious difficulties necessitating the initiation of the procedure provided for in Article 108(2) TFEU.

131 Thus, for the same reasons as those set out in paragraphs 107 to 119 above, it must be held that the statement of reasons for the contested decision was sufficient to allow the applicants to understand the reasons why the Commission, in view, inter alia, of the factors invoked in the complaints, considered that the disputed measure had not been the subject of a substantial alteration.

132 Consequently, the second plea in law is dismissed.

C. Third plea in law, alleging an infringement of Article 107 et seq. TFEU

1. Admissibility

133 It should be recalled that the admissibility of an action brought by a natural or legal person against an act which is not addressed to them, in accordance with the fourth paragraph of Article 263 TFEU, is subject to the condition that they are accorded standing to bring proceedings, which arises in two situations. First, such proceedings may be instituted if the act is of direct and individual concern to them. Secondly, such persons may bring proceedings against a regulatory act not entailing implementing measures if that act is of direct concern to them (see judgment of 4 December 2019, *PGNiG Supply & Trading* v *Commission*, C-117/18 P, not published, EU:C:2019:1042, paragraph 26 and the case-law cited).

134 It is necessary to examine the second situation, relating to the third limb of the fourth paragraph of Article 263 TFEU.

135 The Commission and the interveners maintain that the contested decision cannot be regarded as constituting a regulatory act of direct concern to the applicants, within the meaning of the third limb of the fourth paragraph of Article 263 TFEU.

136 In the first place, the Commission and the interveners maintain that the contested decision is not a regulatory act, as it is not of general application, since the financial support established by the WohlFödG, which is under consideration in the contested decision, does not constitute an aid scheme within the meaning of the first limb of Article 1(d) of Regulation 2015/1589. Consequently, the principles identified in the judgment of 6 November 2018, *Scuola Elementare Maria Montessori* v *Commission*, *Commission* v *Scuola Elementare Maria Montessori* and *Commission* v *Ferracci* (C-622/16 P to C-624/16 P, EU:C:2018:873), cannot be applied to this case.

137 First, the Commission and the interveners argue that the beneficiaries are not defined in a general and abstract manner, but are identifiable, since the financial support is granted to the umbrella associations that are members of the LAG, that is to say, to the 13 federations in the independent welfare services sector in Lower Saxony. Secondly, those parties argue that the provisions which form the basis of that support require further implementing measures, namely the conclusion of a grant agreement or, failing which, the adoption of a ministerial decree governing, inter alia, the dividing up of that support. Thirdly, in so far as the financial support can be classified as State aid, it constitutes an aid scheme within the meaning of the second limb of Article 1(d) of Regulation 2015/1589, which type of scheme concerns 'one or several undertakings', and not undertakings defined in a general and abstract manner.

138 In the second place, the Commission and the interveners argue that the contested decision does not directly affect the applicants. In that regard, they argue that the applicants have not shown why the contested decision places them in an unfavourable competitive position and, therefore, affects their legal situation. In addition, the purpose of the disputed measure was exclusively to grant financial support to the umbrella associations belonging to the LAG, and not subsequently to distribute financial resources to the establishments which are members of those organisations, which is a matter for which those organisations are responsible. Only that distribution is liable to affect the applicants' legal situation.

139 The applicants contest that line of argument.

140 In that regard, it must be recalled that, by the Treaty of Lisbon, a third limb was added to the fourth paragraph of Article 263 TFEU, relaxing the conditions of admissibility of actions for annulment brought by natural and legal persons. That limb, without subjecting the admissibility of actions for annulment brought by natural and legal persons to the condition of individual concern, allows such actions to be brought against 'regulatory acts', that is to say, all non-legislative acts of general application, which do not entail implementing measures and are of direct concern to the applicant (see, to that effect, judgments of 3 October 2013, *Inuit Tapiriit Kanatami and Others* v *Parliament and Council*, C-583/11 P, EU:C:2013:625, paragraph 57, and of 6 November 2018, *Scuola Elementare Maria Montessori* v *Commission*, *Commission* v *Scuola Elementare Maria Montessori and Commission* v *Ferracci*, C-622/16 P to C-624/16 P, EU:C:2018:873, paragraphs 22 and 28).

141 The conditions laid down by the third limb of the fourth paragraph of Article 263 TFEU are cumulative, so that, if any of them is not met, the action for annulment brought against that act must be regarded as inadmissible.

(a) Classification of the contested decision as a regulatory act

142 It must be recalled that, according to settled case-law of the Court of Justice, an act is of general application if it applies to objectively determined situations and produces legal effects with respect to categories of persons envisaged in a general and abstract manner (see judgment of 6 November 2018, *Scuola Elementare Maria Montessori* v *Commission*, *Commission* v *Scuola Elementare Maria Montessori and Commission* v *Ferracci*, C-622/16 P to C-624/16 P, EU:C:2018:873, paragraph 29 and the case-law cited).

143 In addition, the Court of Justice has held that, in the field of State aid, decisions of the Commission authorising or prohibiting a national aid scheme are of general application. That general application derives from the fact that such decisions apply to objectively determined situations and produce legal effects with respect to a category of persons envisaged in a general and abstract manner (see judgment of 6 November 2018, *Scuola Elementare Maria Montessori* v *Commission*, *Commission* v *Scuola Elementare Maria Montessori and Commission* v *Ferracci*, C-622/16 P to C-624/16 P, EU:C:2018:873, paragraph 31 and the case-law cited).

144 Article 1(d) of Regulation 2015/1589 defines the concept of an aid scheme as covering, in the first scenario, defined in the first limb, 'any act on the basis of which, without further implementing measures being required, individual aid awards may be made to undertakings defined within the act in a general and abstract manner', and, in the second scenario, defined in the second limb, 'any act on the basis of which aid which is not linked to a specific project may be awarded to one or several undertakings for an indefinite period of time and/or for an indefinite amount'. It is not apparent either from that definition or from the judgment of 6 November 2018, *Scuola Elementare Maria Montessori* v *Commission*, *Commission* v *Scuola Elementare Maria Montessori and Commission* v *Ferracci* (C-622/16 P to C-624/16 P, EU:C:2018:873), that an aid scheme capable of falling within the second scenario of the concept of 'aid scheme' laid down in Article 1(d) of Regulation 2015/1589 is not of general application.

145 In the present case, first, it must be observed that Paragraph 1 of the WohlFödG provides that 'the independent charitable sector shall be supported by means of financial aid from the *Land* [of Lower Saxony]', so that that legislative measure concerns the independent charitable sector as a whole and throughout that *Land*.

146 Similarly, the heading of Paragraph 2 of the WohlFödG indicates that the *Land* is to grant financial aid, inter alia, to the associations in the independent charitable sector, thus showing that the beneficiaries of the aid are all the associations in the independent charitable sector in the *Land* of Lower Saxony, defined in a general and abstract manner. In addition, Paragraph 2(1)(1) of the WohlFödG provides that the financial support for which that law makes provision is to be granted to the umbrella associations which are members of the LAG. That law therefore covers a category of persons envisaged in a general and abstract manner, namely umbrella associations operating in the independent charitable sector in the *Land* of Lower Saxony which are members of the LAG.

147 Admittedly, as is apparent from the preamble to the statutes of the LAG and from Paragraph 2 thereof, the LAG is a group consisting of the 13 umbrella federations in the independent welfare services sector in Lower Saxony, which have been members of the LAG since before the entry into force of the 1956 Law on lotteries. Moreover, Paragraph 3(2) of the WohlFödG provides that the payment of the financial support is subject to the conclusion of a grant agreement between the Ministry of Social Affairs of the *Land* of Lower Saxony and the umbrella associations belonging to the LAG, so that the admission of a further umbrella association as a member of the LAG would necessitate the conclusion of a new grant agreement.

148 However, first, those circumstances do not rule out the possibility that other umbrella associations may become members of the LAG. According to Paragraph 2(2) of the statutes of the LAG, it may accept new members, provided that a candidate umbrella association fulfils the conditions laid down in Paragraph 2(2) of those statutes, which require, inter alia, that the activities of such a candidate association are independent welfare services with a public-interest, charitable or religious goal within the meaning of the Fiscal Code and that the admission of that association is allowed by the board of the LAG. In addition, it is not apparent from the wording of the WohlFödG or from the case file before the Court that, if an umbrella association were admitted as a member of the LAG, it would not be possible, where necessary, for the Ministry of Social Affairs of the *Land* of Lower Saxony and the umbrella associations belonging to the LAG to conclude a new grant agreement.

149 Secondly, a measure does not lose its character as a regulation simply because it may be possible to ascertain with a greater or lesser degree of accuracy the number or even the identity of the persons to which it applies at any given time, as long as there is no doubt that the measure is applicable as a result of an objective situation of law or of fact which it specifies and which is in harmony with its ultimate objective (judgment of 11 July 1968, *Zuckerfabrik Watenstedt* v *Council*, 6/68, EU:C:1968:43, p. 415). Similarly, the Court has already held that the fact that a given undertaking was actually the only beneficiary of an aid scheme corresponding to an excise duty exemption did not mean that the beneficiaries of that exemption were defined in a general and abstract manner (see, to that effect, order of 7 December 2017, *Ireland* v *Commission*, C-369/16 P, not published, EU:C:2017:955, paragraph 39).

150 Next, it must be observed that, under Paragraph 2(2) of the 2016 grant agreement (see paragraph 24 above), the umbrella associations, which are the direct beneficiaries of the financial support, may transfer to their own members the funds made available to them, which members are the indirect beneficiaries of that financial support. Moreover, the umbrella associations could accept new charitable organisations as local or regional members established in the *Land* of Lower Saxony. Those local or regional members constitute a category of persons envisaged in a general and abstract manner.

151 Thirdly, in the contested decision, the Commission concluded that, in so far as the financial support at issue constituted aid, it constituted existing aid within the meaning of Article 1(b)(i) of Regulation 2015/1589. In that context, even assuming that the beneficiaries of the measure at issue constitute a restricted class, that decision preserves the effects of the general and abstract measure which that support constitutes with respect to an indefinite number of competitors of the beneficiaries, direct or indirect, of that support, so that the decision applies to objectively determined situations and produces legal effects for categories of persons envisaged in a general and abstract manner (see, to that effect, judgment of 6 November 2018, *Scuola Elementare Maria Montessori* v *Commission*, *Commission* v *Scuola Elementare Maria Montessori and Commission* v *Ferracci*, C-622/16 P to C-624/16 P, EU:C:2018:873, paragraphs 31, 36 and 38).

152 In the light of the foregoing, it must be held that the contested decision is of general application and, therefore, constitutes a regulatory act within the meaning of the third limb of the fourth paragraph of Article 263 TFEU.

(b) Direct concern to the applicants

153 According to settled case-law of the Court, the condition that a natural or legal person must be directly concerned by the decision against which the action is brought, laid down in the fourth paragraph of Article 263 TFEU, requires two cumulative criteria to be met, namely, first, the contested measure must directly affect the legal situation of the individual and, secondly, it must leave no discretion to its addressees who are entrusted with the task of implementing it, such implementation being purely automatic and resulting from the EU rules alone, without the application of other, intermediate rules (see judgment of 6 November 2018, *Scuola Elementare Maria Montessori* v *Commission*, *Commission* v *Scuola Elementare Maria Montessori* and *Commission* v *Ferracci*, C-622/16 P to C-624/16 P, EU:C:2018:873, paragraph 42 and the case-law cited).

154 As regards specifically the rules on State aid, it must be observed that their objective is to preserve competition. So, in that field, the fact that a Commission decision leaves intact all the effects of national measures which the applicant, in a complaint addressed to that institution, claimed were not compatible with that objective and placed it in an unfavourable competitive position makes it possible to conclude that the decision directly affects its legal situation, in particular its right under the provisions on State aid of the FEU Treaty not to be subject to competition distorted by the national measures concerned (see judgment of 6 November 2018, *Scuola Elementare Maria Montessori* v *Commission*, *Commission* v *Scuola Elementare Maria Montessori and Commission* v *Ferracci*, C-622/16 P to C-624/16 P, EU:C:2018:873, paragraph 43 and the case-law cited).

155 With regard to the first of the two criteria mentioned in paragraph 153 above, the Court has observed that, while it is not for the EU judicature, at the stage of the examination of admissibility, to rule definitively on the competitive relationships between an applicant and the beneficiaries of the national measures assessed in a decision of the Commission on State aid, such as the contested decision, a direct effect on the applicant cannot be deduced from the mere potential existence of a competitive relationship (see judgment of 6 November 2018, *Scuola Elementare Maria Montessori* v *Commission*, *Commission* v *Scuola Elementare Maria Montessori and Commission* v *Ferracci*, C-622/16 P to C-624/16 P, EU:C:2018:873, paragraph 46 and the case-law cited).

156 Given that the condition of direct concern requires the contested measure to produce effects directly on the applicant's legal situation, the EU judicature must ascertain whether the applicant has adequately explained the reasons why the Commission's decision was liable to place him or her in an unfavourable competitive position and thus to produce effects on his or her legal situation (judgment of 6 November 2018, *Scuola Elementare Maria Montessori* v *Commission*, *Commission* v *Scuola Elementare Maria Montessori and Commission* v *Ferracci*, C-622/16 P to C-624/16 P, EU:C:2018:873, paragraph 47).

157 In the present case, the second applicant is an undertaking providing assistance and non-residential care services in the urban area of Hanover (Germany), the capital of the *Land* of Lower Saxony, and, in the context of its activities, it competes with at least some of the organisations which are members of the umbrella associations in the LAG and which are located in the vicinity of its place of business, which is not disputed by the Commission. A priori, those

organisations, through their umbrella associations, are eligible for a portion of the funds paid by the *Land* of Lower Saxony as part of the financial support at issue. In addition, to the extent that that support covers the operating costs of the umbrella associations, it also benefits those organisations inasmuch as they are members of those associations.

158 Inasmuch as it is not for the EU judicature, at the stage of the examination of admissibility, to rule definitively on the competitive relationships between an applicant and the beneficiaries of the financial support at issue, it must be held that the second applicant has adequately explained the reasons why the contested decision, which leaves intact all the effects of the financial support at issue, is liable to place it in an unfavourable competitive position and, consequently, that that decision directly affects its legal situation, in particular its right not to be subject in that market to competition distorted by that financial support (see, to that effect, judgment of 6 November 2018, *Scuola Elementare Maria Montessori* v *Commission*, *Commission* v *Scuola Elementare Maria Montessori and Commission* v *Ferracci*, C-622/16 P to C-624/16 P, EU:C:2018:873, paragraph 50).

159 Since one and the same application is involved, there is no need to consider whether the first applicant is entitled to bring proceedings (see, to that effect, judgment of 24 March 1993, *CIRFS and Others* v *Commission*, C-313/90, EU:C:1993:111, paragraph 31).

160 With regard to the second of the criteria mentioned in paragraph 153 above, it is sufficient to observe that, inasmuch as the Commission concluded, in the contested decision, that, in so far as it constitutes aid, the contested measure constitutes existing aid within the meaning of Article 1(b)(i) of Regulation 2015/1589, that decision leaves intact all the effects of the measure at issue and produces legal effects purely automatically on the basis of the EU rules alone, without the application of other, intermediate rules (see, to that effect, judgment of 6 November 2018, *Scuola Elementare Maria Montessori* v *Commission*, *Commission* v *Scuola Elementare Maria Montessori and Commission* v *Ferracci*, C-622/16 P to C-624/16 P, EU:C:2018:873, paragraph 54).

161 In the light of the foregoing, it must be concluded that the contested decision is of direct concern to the applicants.

(c) Existence of implementing measures

162 The Court has consistently held that the expression ‘does not entail implementing measures’ within the meaning of the third limb of the fourth paragraph of Article 263 TFEU must be interpreted in the light of the objective of that provision, which, as is apparent from its drafting history, is to ensure that individuals do not have to break the law in order to have access to a court. Where a regulatory act directly affects the legal situation of a natural or legal person without requiring implementing measures, that person may be denied effective judicial protection if he or she does not have a legal remedy before the EU judicature for the purpose of challenging the lawfulness of the regulatory act. In the absence of implementing measures, a natural or legal person, although directly concerned by the act in question, would be able to obtain judicial review of the act only after having infringed its provisions, by pleading that those provisions were unlawful in proceedings initiated against them before the national courts (see judgment of 6 November 2018, *Scuola Elementare Maria Montessori* v *Commission*, *Commission* v *Scuola Elementare Maria Montessori and Commission* v *Ferracci*, C-622/16 P to C-624/16 P, EU:C:2018:873, paragraph 58 and the case-law cited).

163 By contrast, where a regulatory act entails implementing measures, judicial review of compliance with the EU legal order is ensured irrespective of whether those measures were adopted by the European Union or the Member States. Natural or legal persons that are unable, because of the conditions of admissibility in the fourth paragraph of Article 263 TFEU, to challenge an EU regulatory act directly before the EU judicature are protected against the application to them of such an act by the ability to challenge the implementing measures which the act entails (see judgment of 6 November 2018, *Scuola Elementare Maria Montessori* v *Commission*, *Commission* v *Scuola Elementare Maria Montessori and Commission* v *Ferracci*, C-622/16 P to C-624/16 P, EU:C:2018:873, paragraph 59 and the case-law cited).

164 Where responsibility for the implementation of such acts lies with the institutions, bodies, offices or agencies of the European Union, natural or legal persons are entitled to bring a direct action before the EU judicature against the implementing acts under the conditions stated in the fourth paragraph of Article 263 TFEU and to plead in support of that action, pursuant to Article 277 TFEU, the unlawfulness of the basic act concerned. Where that implementation is a matter for the Member States, those persons may plead the invalidity of the basic act concerned before the national courts and cause them to refer questions to the Court for a preliminary ruling under Article 267 TFEU (see judgment of 6 November 2018, *Scuola Elementare Maria Montessori* v *Commission*, *Commission* v *Scuola Elementare Maria Montessori and Commission* v *Ferracci*, C-622/16 P to C-624/16 P, EU:C:2018:873, paragraph 60 and the case-law cited).

165 Moreover, the Court has held that the question whether a regulatory act entails implementing measures should be assessed by reference to the position of the person pleading the right to bring proceedings under the third limb of the fourth paragraph of Article 263 TFEU. It is therefore irrelevant whether the act in question entails implementing measures with regard to other persons. Furthermore, in that assessment, reference should be made exclusively to the subject matter of the action (see judgment of 6 November 2018, *Scuola Elementare Maria Montessori* v *Commission*, *Commission* v *Scuola Elementare Maria Montessori and Commission* v *Ferracci*, C-622/16 P to C-624/16 P, EU:C:2018:873, paragraph 61 and the case-law cited).

166 In the present case, as the Commission furthermore acknowledges, the contested decision does not entail implementing measures with regard to the applicants.

167 First, there are no implementing measures adopted by the Commission or other institutions of the European Union in respect of the contested decision.

168 Secondly, the national implementation measures which are potentially relevant in the present case, specifically the conclusion of a grant agreement or the adoption of a ministerial decree concerning, inter alia, the dividing up of the financial support between the umbrella associations which are members of the LAG, do not concern the applicants. The situation of the applicants differs from that of the beneficiaries, direct or indirect, of the financial support, in that there is no possibility of their becoming members of such an association, or of the LAG, given that they do not satisfy the conditions laid down for that purpose, in particular the condition related to the charitable nature of their activities. In those circumstances, it would be artificial to expect the applicants to contest, before a national court, a grant agreement, a ministerial decree or any other national measure concerning the dividing up of the financial support, in order to cause that court to make a reference to the Court on the validity of the contested decision concerning the financial support at issue (see, by analogy, judgments of 6 November 2018, *Scuola Elementare Maria Montessori* v *Commission*, *Commission* v *Scuola Elementare Maria Montessori and*

Commission v *Ferracci*, C-622/16 P to C-624/16 P, EU:C:2018:873, paragraphs 65 to 67, and of 28 October 2020, *Associazione GranoSalus* v *Commission*, C-313/19 P, not published, EU:C:2020:869, paragraphs 38 to 42).

169 In the light of the foregoing, it must be held that the action must also be declared admissible inasmuch as it is based on the third plea in law.

2. Substance

170 The third plea in law consists of two parts. By the first part, the applicants argue that the Commission infringed Article 107 et seq. TFEU in considering that the financial support constituted existing aid, within the meaning of Article 1(b)(i) of Regulation 2015/1589. By the second part, the applicants claim that the contested measure fulfils all the conditions of State aid, within the meaning of Article 107 TFEU.

(a) First part, relating to the errors as regards the classification of the financial support as existing aid within the meaning of Article 1(b)(i) of Regulation 2015/1589

171 By the first part of the third plea in law, the applicants maintain that the financial support was not existing aid within the meaning of Article 1(b)(i) of Regulation 2015/1589 and, in the alternative, assuming that the disputed measure may have constituted existing aid, that it was substantially altered and became new aid, within the meaning of the first sentence of Article 108(3) TFEU or Article 1(c) of Regulation 2015/1589, as a result of the entry into force of the WohlFödG.

(1) Error as regards the classification of the financial support as existing aid within the meaning of Article 1(b)(i) of Regulation 2015/1589

172 First, the applicants claim that, although Paragraph 12 of the 1956 Law on lotteries made provision for the financial support, it was probably only after 1 January 1958, the date on which the EEC Treaty entered into force in the Federal Republic of Germany, that that support was implemented and actually paid for the first time to the umbrella associations.

173 The Commission argues that the applicants are merely hypothesising, without proof, and that they did not advance that argument prior to the adoption of the contested decision. In addition, supported by the third interveners, the Commission points out that the applicants do not dispute that the transfer of licence fees to the eligible umbrella associations took place in 1957, prior to the entry into force of the EEC Treaty. Referring to archival documents, DWEK also argues that the first actual payments of resources very probably took place prior to the entry into force of the EEC Treaty.

174 In that regard, it must be recalled that the time of implementation of an aid scheme or individual aid is that of the adoption or conclusion of the legally binding act by which the competent national authority undertakes, unconditionally, to grant aid to recipients (see, to that effect, judgment of 25 January 2018, *BSCA* v *Commission*, T-818/14, EU:T:2018:33, paragraph 72 and the case-law cited).

175 In the present case, it is common ground that the act which provided for the payment of the financial support to the umbrella charitable associations was the 1956 Law on lotteries, which was adopted on 27 February 1956 and entered into force on the same date. Moreover, as

indicated in paragraph 10 above, guidelines regulating the use of concession fees for the purposes of carrying out welfare work were published in the *Niedersächsisches Ministerialblatt* in 1956. That law and those guidelines were therefore adopted prior to the date on which the EEC Treaty entered into force.

176 In addition, it is apparent from the Court's case file that amounts were granted to the associations in the charitable sector in 1956 and 1957. Thus, the applicants themselves mention the payment of an amount of DEM 6.8 million in 1956, making reference to Section 13 of the budgetary accounts of the *Land* of Lower Saxony for 1956 and 1957. In addition, besides the archival documents submitted by DWEK, it should be noted that the amounts paid in 1956 and 1957 are specified in Annex 16 to the German Government's communication of 6 April 2016 containing the amounts of the aid allocated to independent charitable services since 1957. Consequently, actual payments of the financial support at issue also took place prior to the entry into force of the EEC Treaty (see, to that effect, judgment of 22 April 2016, *Ireland and Aughinish Alumina* v *Commission*, T-50/06 RENV II and T-69/06 RENV II, EU:T:2016:227, paragraph 201).

177 It follows that the financial support at issue was implemented prior to the entry into force of the EEC Treaty and that the Commission was entitled to consider that that measure, in so far as it constituted aid, constituted existing aid within the meaning of Article 1(b)(i) of Regulation 2015/1589.

178 Secondly, the applicants argue that a market for outpatient and inpatient care services was not yet in existence in 1956, because the population looked after the older generation or the sick themselves. They take the view that the financial support became new aid on account of a subsequent change in the independent charitable sector's field of activity. On that point, the applicants add that that change is distinguishable from an 'evolution of the internal market' within the meaning of Article 1(b)(v) of Regulation 2015/1589, so that that support cannot constitute existing aid within the meaning of that provision.

179 Supported by the third interveners, the Commission argues that the applicants' observations are ineffective.

180 In that regard, and as is apparent from the contested decision, in so far as it constitutes aid, the financial support has been existing aid since the entry into force of the EEC Treaty, falling within the scope of Article 1(b)(i) of Regulation 2015/1589. Consequently, the arguments relating to the absence, in 1956, of a market for private outpatient and inpatient care services and the inapplicability of Article 1(b)(v), of Regulation 2015/1589 are irrelevant.

(2) Substantial alteration of the measure at issue

181 In the alternative, the applicants argue that, assuming that the support financed by the tax on gambling, introduced in 1956, may have constituted existing aid, that aid, as a result of the entry into force of the WohlFödG, was substantially altered and became new aid, within the meaning of the first sentence of Article 108(3) TFEU or Article 1(c) of Regulation 2015/1589, according to which new aid is constituted, inter alia, by 'alterations to existing aid'. The applicants present five arguments. First, they maintain that the umbrella associations have greater influence, since Paragraph 3(3) of the WohlFödG provides for the possibility, for the Ministry of Social Affairs of the *Land* of Lower Saxony, to adopt a ministerial decree instead of a grant agreement only where

the negotiations with the charitable associations on the detailed rules for the use of the support are unsuccessful, whereas Paragraph 16(2) of the 2007 Law on gambling gave it the option to adopt a unilateral regulation instead of concluding an agreement with the umbrella associations.

182 Secondly, the applicants argue that the support for the charitable sector no longer depends on the gambling market, but depends on the budget of the *Land* of Lower Saxony, which increases predictability as far as planning is concerned.

183 Thirdly, they take the view that 'the legal and factual framework' relating to gambling receipts and the range of the charitable associations' activities have been substantially altered as the receipts from gambling are no longer judged useful, since they no longer result from a socially undesirable activity. In their response to the statements in intervention, the applicants maintain, in essence, that the weakening of the link between the receipts from gambling and the support of welfare projects undermines the basis for the legitimacy of the disputed grants.

184 Fourthly, the applicants argue that the substantial nature of the alterations is apparent from an overall analysis of the legislative changes which have taken place since 1956, consisting of, (i) the change, in 2004, from the financing of the support by means of a percentage of the tax on gambling to financing by means of a flat-rate amount, funded by that tax until 2014, then directly from the budget of the *Land*, (ii) the alteration of the conditions of use of the financial support, which were initially determined using government guidelines established unilaterally by the *Land*, and subsequently through negotiations between the *Land* and the umbrella associations, and(iii) the considerable change in the amount of the aid. It follows that both the legislative changes and the main support which has existed since 1956 must, as of 2015 at the latest, be classified as new aid.

185 Fifthly, the applicants argue that Paragraph 2(3) of the WohlFödG results in a substantial alteration since it provides that the umbrella associations may now freely divide up additional support amongst the areas of activity laid down by the grant agreement. According to the applicants' estimates, the effect of this is that, on average, 22% of resources for 2015 were able to be used freely, so that it results in a substantial alteration to the existing aid within the meaning of Article 4(1) of Regulation No 794/2004.

186 The Commission argues, inter alia, that the majority of those claims were not made during the administrative procedure, so that it was not possible to adopt a position on them in the contested decision. Moreover, the Commission and the interveners contest those claims and consider that the alterations invoked by the applicants are not substantial.

187 In that regard, it is apparent from Article 1(c) of Regulation 2015/1589 that the classification of new aid applies to all aid, that is to say, aid schemes and individual aid, which is not existing aid and to alterations to existing aid.

188 In addition, it must be observed that Article 4 of Regulation No 794/2004, headed 'Simplified notification procedure for certain alterations to existing aid', provides:

'1. For the purposes of Article 1(c) of [Regulation No 659/1999], an alteration to existing aid shall mean any change, other than modifications of a purely formal or administrative nature which cannot affect the evaluation of the compatibility of the aid measure with the common market. However[,] an increase in the original budget of an existing aid scheme by up to 20% shall not be considered an alteration to existing aid.'

189 As is clear from that provision, alterations of a purely formal or administrative nature which cannot affect the evaluation of the compatibility of the aid measure are not to be regarded as alterations to existing aid. In order to qualify as new aid, an alteration to existing aid must be substantial (judgment of 11 July 2014, *Telefónica de España and Telefónica Móviles España* v *Commission*, T-151/11, EU:T:2014:631, paragraph 62).

190 In addition, it is only the alteration as such that constitutes new aid. It is only where the alteration affects the actual substance of the original scheme that it is transformed into a new aid scheme. On the other hand, an alteration does not affect the actual substance of the original scheme where the new element is clearly severable from the original scheme (judgments of 30 April 2002, *Government of Gibraltar* v *Commission*, T-195/01 and T-207/01, EU:T:2002:111, paragraphs 109 to 111; of 20 March 2013, *Rousse Industry* v *Commission*, T-489/11, not published, EU:T:2013:144, paragraph 55; and of 11 July 2014, *Telefónica de España and Telefónica Móviles España* v *Commission*, T-151/11, EU:T:2014:631, paragraph 63).

191 In the present case, it is necessary to verify whether the successive legislative developments gave rise to a substantial alteration to the financial support established by the 1956 Law on lotteries. In doing so, it is necessary to examine whether those changes affected the constituent elements of that system of financing, such as the class of beneficiaries, the objective of the financial support, the public service task assigned to the beneficiaries and the source and amount of that support (see, to that effect, judgments of 9 August 1994, *Namur-Les assurances du crédit*, C-44/93, EU:C:1994:311, paragraph 29; of 20 September 2018, *Carrefour Hypermarchés and Others*, C-510/16, EU:C:2018:751, paragraph 41; and of 13 December 2018, *Rittinger and Others*, C-492/17, EU:C:2018:1019, paragraphs 60 to 63).

192 The applicants do not dispute that the beneficiaries of the current financial support are the same umbrella associations as those which benefited from the financial support pursuant to the 1956 Law on lotteries. In addition, it must be observed that the objective of the financial support, namely to assist the charitable associations with the provision of welfare services, has not been altered since the introduction of the 1956 Law on lotteries.

193 With regard to the arguments advanced by the applicants which are set out in paragraphs 181 to 185 above, first, it must be observed that Paragraph 3(3) of the WohlFödG did not confer greater influence on the umbrella associations by providing for the possibility, for the Ministry of Social Affairs of the *Land* of Lower Saxony, to adopt a ministerial decree instead of a grant agreement only where the negotiations with the umbrella associations on the detailed rules for the use of the support were unsuccessful. The wording and interpretation of that provision make no difference when compared to Paragraph 16(2) of the 2007 Law on gambling, which also gave that ministry the option to adopt a unilateral regulation instead of concluding an agreement with the umbrella associations. As DWEK pointed out, Paragraph 16(2) of that 2007 law provided for the same powers as those provided for by the WohlFödG.

194 In any event, the argument relating to the increased influence of the umbrella associations is not relevant, since it is not capable of calling into question the findings that the purpose of the grant of the financial support, the nature of the activities and the class of beneficiaries have not, in essence, changed since the adoption of the 1956 Law on lotteries.

195 Secondly, regarding the argument relating to the source of the resources, it is sufficient to find that the funds granted as part of the financial support always came from the budget of the *Land* of Lower Saxony, which was funded by the receipts from the lottery and gambling. Furthermore,

the applicants did not contest paragraph 49 of the contested decision, in which the Commission stated that the nature and source of the remuneration were not changed by the entry into force of the WohlFödG, since lottery operators have always had to pay the concession and gambling fees to the *Land*.

196 As to the greater predictability of the amount granted, which facilitates planning, it must be held that, in paragraph 48 of the contested decision, the Commission correctly concluded that the change from a percentage amount to a flat-rate amount, which occurred through an amendment contained in the 2004 Law accompanying the budget, did not constitute a substantial alteration, since it did not affect the basic right of the umbrella associations to public financial support for the welfare assistance services which they provide. Regarding the effect of the WohlFödG on the financial support, the same must be true, so that, as in 2004, there was no substantial alteration, especially given that neither the 2004 Law accompanying the budget nor the WohlFödG gave rise to an increase in the grant in comparison with the amounts granted prior to that change.

197 Thirdly, inasmuch as the applicants rely on the disappearance of the link between the receipts from gambling and the support of welfare projects, it must be observed that those constituent elements of the measure have not been substantially altered, since the receipts from gambling in 1957 were part of the budget of the *Land* and the welfare projects of the umbrella associations have always remained essentially the same as in 1957.

198 Fourthly, it must be held that the overall analysis presented by the applicants does not support the conclusion that there has been an alteration affecting the substance of the aid scheme. It is apparent from an examination of the relevant legislative provisions and the development of those provisions between 1956 and 2016 that the alterations to the legal bases were of a purely formal or administrative nature, inasmuch as they did not substantially alter the constituent elements of the measure, such as, inter alia, the amount of the support granted to the beneficiaries. That is the case, inter alia, of the WohlFödG, which did not alter the beneficiaries of the measure, the objective of the support, the source of the aid or, substantially, the amount of the support.

199 As to the alterations to the conditions of use of that support, it must be held that, under Paragraph 3(3) of the WohlFödG, those conditions are determined by the Ministry of Social Affairs of the *Land* of Lower Saxony if the 'negotiations' between that ministry and the LAG are unsuccessful, so that the situation has not significantly changed since the period when, as is apparent from paragraph 10 above, the *Land* of Lower Saxony established those conditions unilaterally in guidelines. Furthermore, Paragraph 3(2) of the WohlFödG is intended to regulate those negotiations. Therefore, it is not apparent from the change in the method of determining the conditions of use of that support that that change necessarily altered the substance of those conditions or that it gave rise to a substantial alteration to the measure at issue.

200 Regarding the amounts of the support, as set out in paragraph 117 above, it is apparent from the financial data which were submitted to the Commission by the German authorities during the administrative procedure that the increases in the amount of the financial support did not, overall, give rise to a level of aid which exceeded the initial amount of that support by more than 20%. Therefore, the adjustments to the amounts of that support did not exceed the threshold specified in Article 4(1) of Regulation No 794/2004.

201 Fifthly, the applicants contest Paragraph 2(3) of the WohlFödG, according to which, in the event of there being significant receipts from the taxes on gambling, additional financial support will be awarded, partly to the umbrella associations in the LAG and partly to the Regional Office for

Addiction Issues (see paragraph 13 above). In that regard, it must be held that that claim relating to the alleged flexibility in the use of the additional support was not invoked during the administrative procedure. In any event, the applicants have not demonstrated that that additional support alters the substance of the financial support or constitutes an element which is separable from the main support provided for by Paragraph 2(1)(1) of that law.

202 Similarly, it must be recalled that Paragraph 3 of the WohlFödG describes the work of the independent charitable sector and the conditions imposed on the umbrella associations belonging to the LAG. The first sentence of Paragraph 3(1) of the WohlFödG specifies that 'the financial aid referred to in Paragraphs 2(1)(1) and 2(3)(1) must be used to support the work of the independent charitable sector'. It follows that the additional financial support contested by the applicants does not constitute a substantial alteration to the measure, turning it into new aid, on the ground that that additional support could be freely used by the umbrella associations. Both the main support and the additional support are intended solely to support eligible charitable work. In addition, the payment of the additional support is not systematic, since it depends on there being excess receipts from gambling, of more than EUR 147 300 000.

203 It follows from the foregoing that the measure at issue has not been the subject of a substantial alteration since it was instituted in 1956. Therefore, without its being necessary to examine the Commission's argument that the issue of such a substantial alteration was not raised during the administrative procedure, the first part of the third plea in law must be dismissed as unfounded.

(b) Second part, relating to the error as regards the failure to classify the financial support as aid within the meaning of Article 107 TFEU

204 By the second part of the third plea in law, the applicants claim that the disputed measure fulfils all the conditions for classification as State aid within the meaning of Article 107 TFEU.

205 The Commission contends that that part should be dismissed.

206 In that regard, it must be held that, by the second part, the applicants seek to demonstrate that the financial support at issue constitutes State aid. However, it is important to point out that the Commission, in the contested decision, did not carry out any assessment relating to the classification of that measure as State aid and did not express a view on whether the conditions laid down in Article 107 TFEU were met or whether that measure was compatible with the internal market. Therefore, the line of argument advanced by the applicants is ineffective. Consequently, the second part of the third plea in law and, thus, the third plea in law in its entirety, must be dismissed.

207 It follows from all of the foregoing that the action must be dismissed in its entirety.

VI. Costs

208 Under Article 134(1) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. As the applicants have been unsuccessful, they must be ordered to bear their own costs and to pay those of the Commission and the interveners, in accordance with the forms of order sought by them.

On those grounds,

THE GENERAL COURT (Eighth Chamber)

hereby:

1. **Dismisses the action;**

2. **Orders Verband Deutscher Alten- und Behindertenhilfe, Landesverband Niedersachsen/Bremen und Hamburg/Schleswig-Holstein eV and CarePool Hannover GmbH to bear their own costs and to pay those incurred by the European Commission, by Diakonisches Werk evangelischer Kirchen in Niedersachsen eV, by Arbeiterwohlfahrt Bezirksverband Hannover eV and by Arbeiterwohlfahrt Bezirksverband Braunschweig eV and the other interveners whose names appear in the Annex hereto.**

Svenningsen Mac Eochaidh Pynnä

Delivered in open court in Luxembourg on 14 April 2021.

[Signatures]

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