



Reports of Cases

JUDGMENT OF THE GENERAL COURT (Fourth Chamber)

12 December 2018*

(State aid – Aid in favour of the Bavarian dairy sector – Funding of milk quality tests – Decision declaring the aid to be incompatible with the internal market – Procedural rights of the Land of Bavaria – Article 108(2) TFEU – Article 6(1) of Regulation (EC) No 659/1999)

In Case T-683/15,

Freistaat Bayern (Germany), represented by U. Soltész and H. Weiß, lawyers,

applicant,

v

European Commission, represented by T. Maxian Rusche, K. Herrmann and P. Němečková, acting as Agents,

defendant,

APPLICATION under Article 263 TFEU seeking partial annulment of Commission Decision (EU) 2015/2432 of 18 September 2015 concerning State aid SA.35484 (2013/C) (ex SA.35484 (2012/NN)) granted by Germany in respect of milk quality tests pursuant to the Milk and Fat Law (OJ 2015 L 334, p. 23),

THE GENERAL COURT (Fourth Chamber),

composed of H. Kanninen, President, L. Calvo-Sotelo Ibáñez-Martín and I. Reine (Rapporteur), Judges,

Registrar: N. Schall, Administrator,

having regard to the written part of the procedure and further to the hearing on 27 February 2018,

gives the following

* Language of the case: German.

Judgment

Background to the dispute

- 1 In Germany, the quality of milk has traditionally been guaranteed by independent quality tests. Those quality tests are funded, in Bavaria (Germany), first, by resources from the milk levy imposed on milk buyers and, secondly, from the general budget of the applicant, Freistaat Bayern (Land of Bavaria, Germany).

National legal framework

- 2 Paragraph 22(1) of the 1952 Gesetz über den Verkehr mit Milch, Milcherzeugnissen und Fetten (German Federal Law on Milk and Fats) (BGBl. 1952 I, p. 811, ‘the MFG’), as last amended by Paragraph 397 of the regulation of 31 August 2015 (BGBl. 2015 I, p. 1474), provides that the governments of the *Länder*, acting in consultation with the *Land* association concerned, that association having been created in accordance with the MFG and comprising businesses in the dairy sector and consumers who are jointly defending their economic interests, or with the relevant professional organisations, may apply jointly to dairies, milk collection centres and creameries levies in order to support the dairy sector. Paragraph 22(2) and (2a) of the MFG provides that the resources obtained under subparagraph 1 may be used solely to fund nine objectives, including promoting and maintaining milk quality, the financing of which forms the subject matter of the present proceedings.
- 3 In accordance with Paragraph 1(1) of the Milch-Güteverordnung (Milk Quality Regulation) of 9 July 1980 (BGBl. 1980 I, p. 878, ‘the MGV’), as last amended by the regulation of 17 December 2010 (BGBl. 2010 I, p. 2132), the buyers of the delivered milk are obliged to test that milk or to have it tested.
- 4 Under Paragraph 4 of the Bayerische Ausführungsverordnung zur Milch-Güteverordnung (Regulation implementing the MGV in Bavaria) of 15 December 1980 (GVBl. 1981, p. 3), replaced by Paragraph 2(1) of the Bayerische Ausführungsverordnung zum MGV (Regulation implementing the MGV in Bavaria) of 7 December 1988 (GVBl. 1988, p. 387), the milk testing body, Milchprüfring Bayern e.V. (‘the Milchprüfring’), was entrusted with performing those tests.
- 5 Paragraph 1 of the Milchumlageverordnung (Regulation on a levy for milk) of 17 October 2007 (BayGVBl. 2007, p. 727) of the Bavarian Ministry of Food, Agriculture and Forestry, taken on the basis of Paragraph 22(1) of the MFG, provides that a levy is to be imposed on dairy operators in respect of the quantities of raw milk delivered to them.
- 6 In accordance with Article 23 of the Haushaltsordnung des Freistaates Bayern (Financial Regulation of the Free State of Bavaria) of 8 December 1971 (BayRS 630-1-F, ‘the BayHO’), which is in Part II of that regulation, entitled ‘Determination of the budget and financial plan’, expenditure and commitment appropriations for services outside the *Land* administration to meet specific purposes may be estimated in the budget only if the State has an overriding interest in those services being implemented that cannot be satisfied without the corresponding subsidies or, at least, not to the extent necessary.
- 7 Article 44 of the BayHO, which is in Part III of that regulation, entitled ‘Implementation of the budget’, provides that those subsidies may be paid only in accordance with the conditions laid down in Article 23 of that regulation.

The administrative procedure

- 8 By letters dated 28 November 2011 and 27 February 2012, the European Commission asked the Federal Republic of Germany for additional information concerning the 2010 Annual Report on State aid in the agricultural sector which Germany had submitted in accordance with Article 21(1) 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). The Federal Republic of Germany answered the Commission's questions by letters dated 16 January 2012 and 27 April 2012. In the light of the Federal Republic of Germany's answers, it became apparent to the Commission that Germany had granted State aid to its dairy sector pursuant to the MFG.
- 9 By letter dated 2 October 2012, the Commission informed the Federal Republic of Germany that the measures implemented by various German *Länder*, including Bavaria and Baden-Württemberg, pursuant to the power given to them by Paragraph 22 of the MFG, had been registered as non-notified aid under the number SA.35484 (2012/NN). By letters dated 16 November 2012, and 7, 8, 11, 13, 14, 15 and 19 February, 21 March, 8 April, 28 May, 10 and 25 June and 2 July 2013, the Federal Republic of Germany submitted further information to the Commission.
- 10 By letter of 17 July 2013 (C(2013) 4457 final) (OJ 2014 C 7, p. 8), the Commission informed the Federal Republic of Germany that it had decided to initiate the procedure laid down in Article 108(2) TFEU ('the initiating decision'). That decision concerns various measures implemented in several German *Länder* under the MFG in order to support the dairy sector, including the aid referred to in Commission Decision (EU) 2015/2432 of 18 September 2015 concerning State aid SA.35484 (2013/C) (ex SA.35484 (2012/NN)) granted by Germany in respect of milk quality tests pursuant to the Milk and Fat Law (OJ 2015 L 334, p. 23, 'the contested decision'). The aid covered by the present action was one of the measures examined in that decision. With regard to that aid, the Commission, on the one hand, in paragraph 2.5 of the initiating decision, regarding the financing of the measures being assessed, cited Paragraph 22 of the MFG, which concerns the milk levy. On the other hand, in recital 264 of that decision, the Commission stated that the measures being assessed were financed by means of a parafiscal levy, referring to the same provision of the MFG.
- 11 At the end of its analysis, the Commission found that the aid at issue was compatible with the internal market during the period from 28 November 2001 to 31 December 2006, while expressing doubts as to its compatibility with the internal market as from 1 January 2007.
- 12 By letter dated 20 September 2013, the Federal Republic of Germany submitted comments concerning the initiating decision.
- 13 The Commission received seven comments from interested parties which referred to the measures concerning milk quality tests covered by the contested decision.
- 14 The comments received were sent to the Federal Republic of Germany by letters of 27 February, 3 March and 3 October 2014.
- 15 By letter dated 3 December 2014, the Federal Republic of Germany responded to additional observations submitted on 8 July 2014.

The contested decision

- 16 On 18 September 2015, the Commission adopted the contested decision. The decision concerns exclusively the funding of milk quality tests carried out from 1 January 2007 in Baden-Württemberg (Germany) and Bavaria. The present action is confined to measures relating to Bavaria.

- 17 In the first place, the Commission examined whether the resources obtained from the milk levy constituted State aid within the meaning of Article 107(1) TFEU. The Commission found that the final decision as to how the resources were to be used lay with the respective Land authorities, thus with the State, whereas, under the third sentence of Paragraph 22(3) of the MFG, the *Land* association or professional associations merely had to be consulted before the resources were used. In addition, Paragraph 22(2), points 1 to 6, of the MFG stipulated the purposes for which milk levy resources could be used. Consequently, the Commission considered that the resources from the milk levy should be regarded as being under State control and the measures funded by the resources from the milk levy were granted through State resources and were attributable to the State. Lastly, it transposed that finding to the funding from the general budget of the *Land* of Bavaria.
- 18 In the second place, the Commission found that the dairies in Bavaria obtained a selective advantage as a result of being refunded the costs of milk quality tests from resources from the levy and the general budget of the *Land* of Bavaria. The Commission found that those milk quality tests were, ultimately, of benefit to dairies because they were required by law to test the milk delivered to them. The dairies were undertakings within the meaning of Article 107(1) TFEU and the costs relating to the payment made to a testing body for the purposes of milk quality tests had to be regarded as typical operating costs which the undertakings in question, namely the dairies, normally had to bear themselves. Moreover, according to the Commission, any possible advantage was granted only to ‘certain undertakings’ because, other than the dairy sector, many other economic sectors in Germany did not benefit from the measures in question. The possible advantage being conferred was therefore selective. Furthermore, in *Länder* other than Baden-Württemberg and Bavaria, dairies were not refunded those costs from milk levy resources. Finally, in recital 145 of the contested decision, the Commission took account of the fact that the measure was also funded from the general budget of the *Land* of Bavaria. Consequently, in its view, the benefit which the dairies derived from the costs of the milk quality tests being borne did not necessarily correspond to the amount they had paid in respect of the milk levy.
- 19 In the third place, in the contested decision, it was found that, as regards the presence of existing aid, the competent Federal Ministry and the German *Länder* had adopted implementing measures which constituted the legal bases for the measures being assessed in that decision. The Commission found that, with the exception of the MFG, which did not establish the aid scheme in question, the German authorities had not submitted any information demonstrating that a legal basis adopted before 1958 was still applicable in its original version during the period of investigation.
- 20 In the fourth and last place, the Commission found that the aid towards routine controls of milk did not meet the conditions of paragraph 109 of the Community guidelines for State aid in the agriculture and forestry sector 2007 to 2013 (OJ 2006 C 319, p. 1), read in conjunction with Article 16(1) of Commission Regulation (EC) No 1857/2006 of 15 December 2006 on the application of Articles [107 and 108 TFEU] to State aid to small and medium-sized enterprises active in the production of agricultural products and amending Regulation (EC) No 70/2001 (OJ 2006 L 358, p. 3), to which paragraph 109 refers.
- 21 In those circumstances, the Commission decided, in Article 1 of the contested decision, that the aid granted since 1 January 2007 in Bavaria was unlawful and incompatible with the internal market. In Articles 2 to 4 of that decision, the Commission ordered the recovery of the aid and set out the detailed rules for that recovery.

Procedure and forms of order sought

- 22 By application lodged at the Registry of the General Court on 26 November 2015, the applicant brought the present action.
- 23 The Commission lodged its defence at the Registry of the General Court on 2 March 2016.

- 24 The applicant lodged its rejoinder at the Registry of the General Court on 23 May 2016.
- 25 By decision 14 June 2016 of the President of the General Court, as a result of the partial renewal of the General Court, the present case was allocated to a new Judge-Rapporteur.
- 26 The Commission lodged its rejoinder at the Registry of the General Court on 5 September 2016.
- 27 Following a change in the composition of the Chambers of the General Court, pursuant to Article 27(5) of the Rules of Procedure of the General Court, the Judge-Rapporteur was assigned to the Fourth Chamber, to which this case was consequently allocated.
- 28 By way of measures of organisation of procedure, on 9 January 2018, the General Court put written questions to the parties, to which they replied within the period prescribed.
- 29 On 9 February 2018, by way of measures of organisation of procedure, the General Court raised new written questions to be answered at the hearing.
- 30 At the hearing on 27 February 2018, the parties presented oral argument and answered the questions put to them by the General Court.
- 31 The applicant claims that the Court should:
- annul Article 1 of the contested decision in so far as it declares that the Federal Republic of Germany granted, in favour of the dairy sector undertakings concerned in Bavaria, State aid, in breach of Article 108(3) TFEU, in respect of the milk quality tests carried out in Bavaria, aid which has been incompatible with the internal market since 1 January 2007;
 - annul Articles 2 to 4 of the contested decision in so far as they order recovery of the aid with interest from the dairy sector undertakings concerned in Bavaria;
 - order the Commission to pay the costs.
- 32 The Commission contends that the Court should:
- dismiss the action as unfounded;
 - order the applicant to pay the costs.

Law

- 33 The applicant puts forward five pleas in support of its action:
- the first plea alleges an infringement of Article 108(2) TFEU and of Article 6(1) and Article 24(1) 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);
 - the second plea alleges, in the first part, that milk buyers were not given an advantage and, in the second part, that the advantage granted to Bavarian dairies was not selective;
 - the third plea, raised in the alternative, infers that there was no infringement of the notification obligation, nor was the subsequent recovery unlawful in accordance with Article 108(1) and (3) TFEU and Article 14 of Regulation 2015/1589;

- the fourth plea, raised in the alternative, alleges that the Commission wrongly dismissed that the aid was compatible with the internal market;
- the fifth plea, raised in the alternative, alleges infringement of the principle of the protection of legitimate expectations.

The first plea in law, alleging infringement of Article 108(2) TFEU and of Article 6(1) and Article 20(1) of Regulation No 659/1999

- 34 As a preliminary point, it should be observed that, in its action, the applicant refers to Regulation 2015/1589. In response to a question raised by the Court, the applicant has clarified, in writing and then at the hearing, that it intended to refer to the regulation that was applicable to the facts of the case, namely Regulation No 659/1999, which was not repealed and replaced by Regulation 2015/1589 until after the date of adoption of the contested decision. It must be added that the provisions of Article 6(1) and Article 24(1) of Regulation 2015/1589 relied on reproduce identically Article 6(1) and Article 20(1) of Regulation No 659/1999.
- 35 In the light of the foregoing, the present judgment will refer only to Regulation No 659/1999.

Arguments of the parties

- 36 First, the applicant claims that the contested decision is vitiated by a serious procedural error which has not only infringed the Federal Republic of Germany's rights of defence and its right to participate in the proceedings, but also distorted the examination procedure as a whole. The contested decision goes beyond the subject matter of the initiating decision on which it is based in so far as the funding of milk quality tests from resources from its general budget is not covered by the initiating decision. Moreover, by not giving the Federal Republic of Germany or the interested parties the opportunity to submit their comments on that subject, the Commission has, in the applicant's view, adopted a decision which has a lack of reasoning and investigation. In any event, even if the two funding mechanisms must be perceived as a single aid measure, they are too different and should therefore have been clearly identified in the initiating decision. Furthermore, the applicant submits that, even though the funding from resources from its general budget was invoked at the stage of the examination prior to the initiating decision, this does not prevent the contested decision from being unlawful in so far as that funding should have been precisely defined in the subject matter of the initiating decision.
- 37 Secondly, the applicant submits that the formal investigation procedure must be legitimate for the contested decision to be valid. According to the applicant, a lawful initiating decision must have a clearly defined subject matter as the Commission is always able to adopt an extension decision, if necessary. According to the applicant, where the Commission goes beyond the subject matter of the initiating decision, the interested parties' rights of defence and right to be heard are infringed. Such an error must be examined by the Court of its own motion and result, unconditionally, in the contested decision being annulled. It adds that, even though, from a formal point of view, only the Member State is the addressee of the Commission's decisions, the third parties concerned, which are directly interested, must also be granted the right to be heard and the right to participate in the proceedings. Moreover, the applicant's right to be involved in the administrative procedure to an appropriate extent has been infringed. Furthermore, the applicant submits that it is entitled to invoke in proceedings an infringement of the rights of defence of the Federal State as an entity pursuing the case on its behalf. Lastly, the applicant confirmed, at the hearing, that the infringement of the rights of defence and that of the right to be involved in the administrative procedure were two separate complaints which had been grouped under the same plea.

- 38 Thirdly, the applicant claims that the procedure could have resulted in a different outcome if the interested parties had been given the opportunity to put forward their views on the aspect relating to the resources from its general budget. On the one hand, the applicant submits that making the resources from its general budget available to the Milchprüfing does not entail any relevant (indirect) advantage from the perspective of the law on aid. Those resources are used to finance additional tests which go beyond the testing that is legally required and do not constitute additional tests initiated by dairies, in accordance with Paragraphs 3 and 4 of the Regulation implementing the MGV in Bavaria, the full cost of which is borne by the dairies. Those tests are carried out not in the interests of the dairies but in the interests of consumers and in the public interest. The applicant also claims that those resources are not aid, but compensation for taking charge of a public authority activity which the Milchprüfing performs for the *Land* of Bavaria. On the other hand, the applicant submits that the recovery of that alleged aid is excluded since the resources made available from its general budget are ‘existing aid’ and similar funding has been in place since the 1930s.
- 39 The Commission replies, in the first place, that it is settled case-law that the applicant cannot invoke the Federal Republic of Germany’s rights of defence since those rights are subjective and may be invoked only by the Federal Republic of Germany. It adds that the infringement of the right to be involved in the administrative procedure to the extent appropriate, invoked by the applicant for the first time in the reply, is a new, and therefore inadmissible, plea.
- 40 In the second place, the Commission submits that the funding of milk quality tests using resources from the general budget of the *Land* of Bavaria does not constitute an independent aid measure. According to the Commission, the aid covered by the investigation procedure consists in the exemption, enjoyed by milk buyers, from the costs which must be borne in respect of tests as to its quality. The budget resources used for that purpose are merely another form of ‘State resources’, one of the four constituent elements of State aid. Those resources are used for the same tests as those funded by the milk levy and the same buyers receive the advantage. According to the Commission, the applicant does not dispute the fact that the measure at issue is funded using State resources, it simply deplores the fact that the amount and the origin of the aid were not sufficiently detailed in the initiating decision even though the applicant had such information. Moreover, the Commission refutes the fact that the funding from the *Land* of Bavaria’s budgetary resources concerned solely the ‘additional tests which go beyond what is compulsory’. It adds that neither the interested parties nor the Member State indicated during the formal procedure that the funding from the milk levy concerned only the minimum number of tests provided for in Paragraph 2(1) to (8) of the MGV.
- 41 In the third place, the Commission claim that the applicant is mistaken in claiming that the contested decision concerns an aid measure which was not mentioned in the initiating decision. It relies in that regard on settled case-law in accordance with which it is permissible for the initiating decision merely to summarise the relevant issues of fact and law and it must solely give interested parties the opportunity effectively to participate in the formal investigation procedure. For that purpose, it is sufficient for the interested parties to be aware of the Commission’s reasoning and the Commission is not required, at that stage, to present a complete analysis of the aid in question. Even if the initiating decision was limited to the levy, the reasoning put forward therein applies a fortiori to measures which are funded directly using State resources.
- 42 In the fourth place, the Commission disputes the argument that the funding of milk quality tests using resources from the general budget of the *Land* of Bavaria is excluded from the initiating decision and is not covered by the formal investigation procedure. The Commission does not dispute that that funding was not expressly mentioned in the initiating decision, but submits that it has not been expressly excluded from the examination of the aid measure. It adds that paragraph 3.3.1 of the initiating decision cannot be interpreted as limiting the formal investigation to funding using milk levy resources since the Commission had explained that such funding was equivalent to funding using State resources and that there was no need to address that matter. Moreover, the Commission submits that it is clear from the scheme of the initiating decision that budget resources are also taken into account

and that the ‘financial assistance’ encompasses both aspects: the levy and budget resources. The wording of the initiating decision does not support the proposition that the contested decision infringes Article 108(2) TFEU in so far as it explicitly names the constituent element of the aid measure, which has not been disputed and had to be expressly mentioned in order to determine the scale of the recovery.

- 43 In the fifth and last place, the Commission states that the applicant’s claim that the initiating decision prevented it from expressing its views on a number of aspects of the aid measure funded using budget resources is irrelevant. The Commission notes, first, that the *Land* of Bavaria was able to participate in the investigation procedure through the participation of the German Federal Government. Moreover, it submits that the Member States and the interested parties were able to put forward their arguments regarding the alleged absence of any advantage for milk buyers as a result of the costs of tests carried out by the Milchprüfing being met or the presence of existing aid. Furthermore, the Commission states that the subsidies from State budgets occurred for the first time in 1970, well after the entry into force of the Treaty establishing the European Economic Community, signed in Rome on 25 March 1957. In the alternative, the Commission submits that, if there has been an infringement of the applicant’s right to put forward its comments, this cannot lead to the contested decision being annulled since the procedure would not have resulted in a different outcome, irrespective of the comments submitted.

Findings of the Court

– The complaint alleging infringement of the rights of the defence

- 44 As regards the rights of infra-State bodies which have granted State aid, it must be noted that the administrative procedure in State aid matters is initiated only in respect of the Member State concerned. Only that State, as the addressee of the contested decision, may therefore rely on true rights of defence. Infra-State bodies which grant aid, such as the applicant, like the undertakings receiving the aid and their competitors, are considered only to be interested parties in this procedure, for the purposes of Article 108(2) TFEU (see, to that effect, judgments of 6 March 2003, *Westdeutsche Landesbank Girozentrale and Land Nordrhein-Westfalen v Commission*, T-228/99 and T-233/99, EU:T:2003:57, paragraph 122, and of 12 May 2011, *Région Nord-Pas-de-Calais and Communauté d’agglomération du Douaisis v Commission*, T-267/08 and T-279/08, EU:T:2011:209, paragraph 71 and the case-law cited). Breach of the rights of the defence is an irregularity which by its nature is subjective and which must therefore be raised by the Member State concerned itself (see judgments of 9 September 2009, *Diputación Foral de Álava and Others v Commission*, T-30/01 to T-32/01 and T-86/02 to T-88/02, EU:T:2009:314, paragraph 238 and the case-law cited, and of 1 July 2010, *ThyssenKrupp Acciai Speciali Terni v Commission*, T-62/08, EU:T:2010:268, paragraph 186 and the case-law cited).
- 45 It follows that the *Land* of Bavaria may not rely on the rights of defence in respect of the Federal Republic of Germany or in respect of itself. It has only the right to be involved in the administrative procedure to the extent appropriate in the light of the circumstances of the case (see, to that effect, judgments of 31 May 2006, *Kuwait Petroleum (Nederland) v Commission*, T-354/99, EU:T:2006:137, paragraph 80 and the case-law cited, and of 15 December 2009, *EDF v Commission*, T-156/04, EU:T:2009:505, paragraph 107). Consequently, this complaint must be rejected.

– The complaint alleging infringement of the right to be involved in the administrative procedure

- 46 It should be recalled that, under Article 108(2) TFEU, the Commission has a duty to put the interested parties on formal notice to put forward their comments during the formal investigation phase (see, to that effect, judgments of 22 February 2006, *Le Levant 001 and Others v Commission*, T-34/02,

EU:T:2006:59, paragraph 78; of 31 May 2006, *Kuwait Petroleum (Nederland) v Commission*, T-354/99, EU:T:2006:137, paragraph 83 and the case-law cited; and of 15 December 2009, *EDF v Commission*, T-156/04, EU:T:2009:505, paragraph 106). This rule is in the nature of an essential procedural requirement (judgment of 11 December 2008, *Commission v Freistaat Sachsen*, C-334/07, EU:C:2008:709, paragraph 55). With regard to that duty, it is settled case-law that the publication of a notice in the *Official Journal* is an appropriate means of informing all interested parties that a procedure has been initiated (judgments of 14 November 1984, *Intermills v Commission*, 323/82, EU:C:1984:345, paragraph 17, and of 31 May 2006, *Kuwait Petroleum (Nederland) v Commission*, T-354/99, EU:T:2006:137, paragraph 81). The sole aim of this communication is to obtain from persons concerned all information required for the guidance of the Commission with regard to its future action (judgments of 12 July 1973, *Commission v Germany*, 70/72, EU:C:1973:87, paragraph 19; of 22 October 1996, *Skibsværftsforeningen and Others v Commission*, T-266/94, EU:T:1996:153, paragraph 256; and of 20 September 2011, *Regione autonoma della Sardegna and Others v Commission*, T-394/08, T-408/08, T-453/08 and T-454/08, EU:T:2011:493, paragraph 73).

- 47 In accordance with Article 6(1) of Regulation No 659/1999, the initiating decision must summarise the relevant issues of fact and law, include a preliminary assessment of the Commission and set out the doubts as to its compatibility with the internal market. The formal investigation procedure permits a more in-depth examination and clarification of the questions raised in the initiating decision (judgment of 4 March 2009, *Italy v Commission*, T-424/05, not published, EU:T:2009:49, paragraph 69). The Commission must, however, without being required to present a complete analysis of the aid in question, define sufficiently the framework of its investigation so as not to render meaningless the right of interested parties to submit their comments (see, to that effect, judgments of 1 July 2009, *ISD Polska and Others v Commission*, T-273/06 and T-297/06, EU:T:2009:233, paragraph 126 and the case-law cited, and of 15 December 2009, *EDF v Commission*, T-156/04, EU:T:2009:505, paragraph 108). For that purpose, it is sufficient for the parties concerned to be aware of the reasoning which has led the Commission to conclude provisionally that the measure in issue might constitute new aid incompatible with internal market (judgments of 11 May 2005, *Saxonia Edelmetalle and ZEMAG v Commission*, T-111/01 and T-133/01, EU:T:2005:166, paragraph 50, and of 15 December 2009, *EDF v Commission*, T-156/04, EU:T:2009:505, paragraph 110).
- 48 It follows from Article 7 of Regulation No 659/1999 that, at the end of that procedure, the Commission's analysis may have changed, as it may ultimately decide that the measure does not constitute aid or that the doubts as to the compatibility of the measure have been removed. It follows that the final decision may contain certain differences with respect to the initiating decision, without their necessarily vitiating the final decision (judgments of 4 March 2009, *Italy v Commission*, T-424/05, not published, EU:T:2009:49, paragraph 69, and of 16 December 2010, *Netherlands and NOS v Commission*, T-231/06 and T-237/06, EU:T:2010:525, paragraph 50).
- 49 The present complaint must be examined in the light of those principles.
- 50 As a preliminary point, it should be noted that, as is apparent from paragraph 37 above, and in the light of the content of the application, the reliance on rights to participate in the procedure and the right to be heard are, in fact, inseparable from the reliance, by the applicant, on its right to be involved in the administrative procedure.
- 51 Moreover, the fact remains that, contrary to what the Commission submits, the applicant raised in paragraphs 56 and 59 of the application, and not at the stage of the reply, the infringement of the right to be involved in the administrative procedure, in accordance with Article 108(2) TFEU, and Article 6(1) and Article 20 of Regulation No 659/1999. It follows that the complaint is admissible.

- 52 Therefore, in order to assess whether that right has been infringed, the contested decision must be examined in the light of the initiating decision in order to determine whether the funding using resources from the general budget of the *Land* of Bavaria was already covered by the initiating decision.
- 53 In the first place, as stated in paragraph 10 above, paragraph 2.5 of the initiating decision concerns the context of the financing of the aid forming the subject matter of the formal investigation procedure. That paragraph contains a reference to Paragraph 22 of the MFG. That provision, entitled ‘Levies’, concerns milk levies, as is also stated in recital 8 of that decision. Consequently, that provision has been identified, in the initiating decision, as the basis for collecting the milk levy. However, that provision does not in any way concern the resources taken from the general budget of the *Land* of Bavaria.
- 54 Moreover, the BayHO, and in particular Articles 23 and 44 thereof, cited in paragraphs 6 and 7 above, which the Commission found, in the contested decision, to be the legal basis for the aid, was not mentioned in the initiating decision.
- 55 In the second place, paragraph 3.1 of the initiating decision, which contains a general commentary on the assessment made by the Commission, and in particular paragraph 3.3.1 entitled ‘Aid granted by a State or through State resources’, also concerns the milk levy, under the MFG. In particular, recitals 130 and 132 state that, under that law, the levy is collected from private operators in order to support the variable sub-measures inspected. In recital 133, the Commission drew the conclusion that ‘the measures funded by revenue from the levy have been granted through State resources and are attributable to the State’.
- 56 In the third place, as stated in paragraph 10 above, recital 264 of the initiating decision also states that the measure at issue is funded using the milk levy.
- 57 However, as is apparent from paragraph 10 above and as has been confirmed by the Commission itself, the funding of milk quality tests using the *Land* of Bavaria’s budgetary resources was not mentioned in the initiating decision.
- 58 Therefore, the interested parties could legitimately presume that the Commission’s examination in the initiating decision exclusively concerned the resources from the milk levy.
- 59 That finding is not refuted by the Commission’s arguments.
- 60 In the first place, it cannot be accepted, as the Commission submits, that it is sufficient that the initiating decision did not exclude the funding using resources from the general budget of the *Land* of Bavaria. In that regard, it must be found that, in accordance with Article 6(1) of Regulation No 659/1999, ‘the decision to initiate the formal investigation procedure shall summarise the relevant issues of fact and law’. Consequently, that provision establishes a positive obligation on the Commission, in accordance with which it was unable to rely on such an argument which would render that obligation meaningless.
- 61 In accordance with the case-law cited in paragraph 47 above, even though the Commission is not required to present a complete analysis of the aid in question, it must define sufficiently the framework of its investigation so as not to render meaningless the right of interested parties to submit their comments.
- 62 In the second place, the Commission’s argument that all of the interested parties were informed of the fact that the aid was financed from several funding sources and that an express reference to that effect was not necessary must be rejected. Specifically, the fact that the financing of the aid from resources from the general budget of the *Land* of Bavaria was mentioned prior to the adoption of the initiating

decision does not necessarily mean that the Commission had considered that factor in the formal investigation procedure. Thus, in the present case, the question is not whether the interested parties were aware of the fact that the aid was funded from several sources, but whether they were able to infer from the initiating decision that the Commission's examination also concerned the funding from the general budget of the *Land* of Bavaria. However, as stated in paragraph 58 above, that was not the case here.

- 63 In the third place, the Commission is also not justified in maintaining that the origin of State resources is irrelevant in so far as, in any event, they are used to fund the same aid measure.
- 64 On the one hand, if such an argument were accepted, this would render meaningless the obligation on the Commission to identify the 'relevant issues of fact and law' within the meaning of Article 6(1) of Regulation No 659/1999.
- 65 In that context, it must be pointed out that Article 107(1) TFEU uses the term 'State resources' in a very broad sense since it provides that any aid granted through such resources 'in any form whatsoever' is incompatible with the internal market. Consequently, those resources may take various forms and, therefore, the Commission must identify them and analyse them carefully. In addition, State resources are one of the constituent elements of the classification as aid. In that regard, even though the expression 'financial support', used by the Commission in the initiating decision, might be interpreted as referring to both sources of funding, it must be considered to be insufficiently precise.
- 66 Admittedly, in accordance with the case-law cited in paragraph 48 above, the final decision may contain certain differences with respect to the initiating decision, in particular after the parties have submitted their arguments in response to the initiating decision without, however, those differences vitiating the final decision (see, to that effect, judgment of 16 December 2010, *Netherlands and NOS v Commission*, T-231/06 and T-237/06, EU:T:2010:525, paragraphs 48 and 49). However, such a difference is not justified in the present case. As the Commission acknowledges, it was informed by the Member State of the funding using resources from the general budget of the *Land* of Bavaria long before the initiating decision was adopted. Therefore, when the initiating decision was adopted, the Commission already had the information to enable it to identify the general budget of the *Land* of Bavaria as a source of funding of the aid at issue. Moreover, the Commission does not allege that the reference to the general budget of the *Land* of Bavaria in the contested decision is a result of account being taken of the information provided in response to the initiating decision.
- 67 On the other hand, as stated in paragraph 18 above, in recital 145 of the contested decision, the Commission relied on the funding of the aid from resources from the general budget of the *Land* of Bavaria in order to support its reasoning. Moreover, in recitals 170 and 173 of the contested decision, the Commission expressly stated that, in contrast to the aid granted in Baden-Württemberg, the aid in Bavaria had been granted not only through funding from the milk levy but also from Bavaria's general budget. Therefore, the Commission has acknowledged that the funding using resources from the general budget of the *Land* of Bavaria was not an irrelevant factor in its analysis.
- 68 In the light of the foregoing, the fact remains that the contested decision was adopted without giving the interested parties the opportunity to comment on the funding using resources from the general budget of the *Land* of Bavaria.
- 69 Consequently, it must be concluded that the contested decision was adopted in breach of the applicant's right to be involved in the administrative procedure and, therefore, of Article 108(2) TFEU and of Article 6(1) of Regulation No 659/1999.
- 70 In that context, it must be noted that the obligation on the Commission to place the interested parties in a position, at the stage of the initiating decision, to put forward their comments is in the nature of an essential procedural requirement (judgment of 11 December 2008, *Commission v Freistaat Sachsen*,

C-334/07, EU:C:2008:709, paragraph 55), the infringement of which has consequences, such as the annulment of the defective act, irrespective of whether that infringement caused harm to the person pleading it or whether the administrative procedure might have led to a different result (see, to that effect, judgment of 8 September 2016, *Goldfish and Others v Commission*, T-54/14, EU:T:2016:455, paragraph 47).

- 71 It follows that the infringement, by the Commission, of the applicant's right to be involved in the administrative procedure is sufficient for the present plea to be upheld.
- 72 For the sake of completeness, it cannot be ruled out that, in the absence of the procedural failure found, that is, if the applicant had actually had an opportunity during the formal investigation procedure to submit its comments on the funding from its general budget, the procedure might have led to a different result (see, to that effect, judgment of 22 February 2006, *Le Levant 001 and Others v Commission*, T-34/02, EU:T:2006:59, paragraph 95).
- 73 First of all, by criticising the applicant for not having invoked at the stage of the formal investigation procedure the argument that the funding from its budgetary resources concerned solely the additional tests which went beyond what was compulsory, the Commission confirms the specific impact of the failure in the initiating decision to mention the funding from its budgetary resources.
- 74 Moreover, the Commission disputes the applicant's argument that the funding of milk quality tests using resources from its general budget is existing aid in so far as it has existed since the 1930s, thus before the MFG was adopted in 1952. The Commission submits that that funding was not implemented until 1970. It is clear from that debate between the parties that the origin of the funding from the general budget of the *Land* of Bavaria is of some significance with respect to the analysis of the presence of existing aid at least.
- 75 Lastly, it is clear from paragraphs 17 to 20 above that the contested decision does not put forward a separate analysis in respect of each of the two funding methods. In that decision, the Commission either carried out an analysis without referring to the funding method concerned, or transposed its reasoning on the funding using the milk levy to its reasoning on the funding from the general budget of the *Land* of Bavaria. It is therefore possible that, if the arguments relating to the funding from the general budget of the *Land* of Bavaria, such as those set out in paragraphs 73 and 74 above, had been put forward during the formal investigation procedure, they might have led to a different outcome.
- 76 Consequently, the first plea must be upheld.
- 77 However, it is necessary to examine to what extent the contested decision must be annulled in view of the fact that the first plea concerns the breach of the applicant's right to be involved in the administrative procedure with regard, in particular, to the funding of the aid from its general budget.
- 78 It should be noted that, according to settled case-law, partial annulment of an EU act is possible only if the elements which it is sought to have annulled can be severed from the remainder of the measure. That requirement of severability is not satisfied in the case where the partial annulment of an act would have the effect of altering its substance (judgment of 3 April 2014, *Commission v Netherlands and ING Groep*, C-224/12 P, EU:C:2014:213, paragraph 57, and order of 11 December 2014, *Carbuni3n v Council*, C-99/14 P, not published, EU:C:2014:2446, paragraph 26).
- 79 In that regard the Court of Justice has held that the issue of whether the present-day value of the initial amount of the aid had to be calculated by applying a simple interest rate or a compound interest rate was separable from the initial amount of the aid and did not affect the finding that the aid was incompatible with the internal market. Moreover, the Court observed that the operative part of the

decision at issue itself drew a distinction, in Article 1, between the initial amount of the aid in question and the present-day value (judgment of 11 December 2008, *Commission v Département du Loiret*, C-295/07 P, EU:C:2008:707, paragraphs 107 and 108).

80 However, the General Court has taken the view that the criteria which governed temporary authorisation to pay aid were inseparable from the remainder of the contested measure (see, to that effect, order of 10 December 2013, *Carbunión v Council*, T-176/11, not published, EU:T:2013:686, paragraphs 33 to 36).

81 Furthermore, the Court of Justice has considered that an amendment to the repayment terms of a capital injection representing an additional advantage could not be detached from the contested measure since that element formed an integral part of the Commission's assessment when it had ruled on the compatibility of the aid (see, to that effect, judgment of 3 April 2014, *Commission v Netherlands and ING Groep*, C-224/12 P, EU:C:2014:213, paragraphs 59 to 63).

82 It follows that a partial annulment is not assumed and is possible only on the condition that there is no doubt that that annulment will not have the effect of altering the substance of the contested measure.

83 In the present case, the fact remains, as is stated in paragraph 75 above, that the contested decision does not contain a separate analysis depending on the funding method, particularly since the Commission submits, as is stated in paragraph 63 above, that, even though the aid at issue is financed from two funding sources, it is a single measure. That finding is confirmed by the fact that, unlike the facts at issue in the case which gave rise to the judgment cited in paragraph 79 above, Article 1 of the contested decision, which finds that the aid at issue is incompatible with the internal market, does not specify the exact means of funding of that aid. Moreover, in Articles 2 to 4 of the contested decision, which concern the recovery of the aid, no distinction is drawn between the two types of funding.

84 Consequently, in the present case, in view of the content and the structure of the contested decision, it is impossible, from reading the decision, to separate the considerations regarding the funding from the general budget of the *Land* of Bavaria from the remainder of that decision. Therefore, since the condition set out in paragraph 82 is not satisfied, the partial annulment of the contested decision, which is limited to the funding from the general budget of the *Land* of Bavaria, cannot be imposed.

85 In addition, it must be observed that, in the context of a review by the EU Courts of complex economic assessments made by the Commission in the field of State aid, it is not for those Courts to substitute their own economic assessment for that of the Commission (judgment of 20 September 2017, *Commission v Frucona Košice*, C-300/16 P, EU:C:2017:706, paragraph 63; see, also, to that effect, judgment of 9 March 2017, *Ellinikos Chrysos v Commission*, C-100/16 P, EU:C:2017:194, paragraph 20).

86 Therefore, in the present case, it is not for the Court to trace back the Commission's reasoning in order to identify the impact of the funding from the general budget of the *Land* of Bavaria on the examination of the aid at issue in the contested decision.

87 In the light of the foregoing, the action must be upheld on the basis of the first plea.

88 Accordingly, Article 1 of the contested decision must be annulled in so far as it concerns the aid granted in Bavaria.

89 The same applies with regard to Articles 2 to 4 of that decision, the annulment of which is also sought by the applicant, in so far as the recovery of the aid provided for therein is a direct consequence of Article 1. This also follows from the wording of Article 14(1) of Regulation No 659/1999, which provides that, where 'negative decisions are taken in cases of unlawful aid, the Commission shall decide that the Member State concerned shall take all necessary measures to recover the aid from the beneficiary'.

90 Consequently, Articles 1 to 4 of the contested decision must be annulled in so far as they concern the aid granted in Bavaria, without there being any need to rule on the other pleas put forward by the applicant.

Costs

91 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. Since the Commission has been unsuccessful, it must be ordered to bear its own costs as well as those incurred by the applicant, in accordance with the form of order sought by the latter.

On those grounds,

THE GENERAL COURT (Fourth Chamber)

hereby:

- 1. Annuls Articles 1 to 4 of Commission Decision (EU) 2015/2432 of 18 September 2015 concerning State aid SA.35484 (2013/C) (ex SA.35484 (2012/NN)) granted by the Federal Republic of Germany in respect of milk quality tests pursuant to the Milk and Fat Law in so far as they declare that the grant by the Federal Republic of Germany of State aid is incompatible with the internal market in respect of the milk quality tests carried out in Bavaria and order recovery of that aid;**
- 2. Orders the European Commission to bear its own costs and pay those incurred by Freistaat Bayern.**

Kanninen

Calvo-Sotelo Ibáñez-Martín

Reine

Delivered in open court in Luxembourg on 12 December 2018.

[Signatures]