



Reports of Cases

OPINION OF ADVOCATE GENERAL
TANCHEV
delivered on 4 July 2019¹

Case C-56/18 P

European Commission

v

Gmina Miasto Gdynia and Port Lotniczy Gdynia Kosakowo

(Appeal — State aid — Article 108(2) TFEU — Investment aid — Operating aid — Airport infrastructure — Decision declaring the aid incompatible with the internal market and ordering its recovery — Annulment by the General Court — Essential procedural requirement — Procedural rights of the interested parties)

1. By the present appeal, the European Commission seeks to have the judgment of the General Court in Case T-263/15² set aside, in so far as it annulled Articles 2 to 5 of Commission Decision (EU) 2015/1586.³ In that decision, the Commission found that the Polish municipalities Gdynia and Kosakowo granted State aid incompatible with the internal market to the company Port Lotniczy Gdynia-Kosakowo sp. z o.o. ('PLGK') with a view to covering the investment costs of the conversion of the military airfield of Gdynia-Oksywie in the north of Poland to a civil airport ('investment aid') and the operating costs of the future airport ('operating aid'). The Commission examined the provision of funds of a total value of some 207.48 million Polish zlotys (PLN) (some EUR 48.7 million). The contested decision replaced the previous decision in the same case, Commission Decision 2014/883/EU,⁴ which it withdrew.

2. The present case requires the Court to consider, in particular, whether the requirement to ask interested parties to express their views in the course of the State aid procedure, following a substantial amendment of the legal framework, is an essential procedural requirement (the violation of which would cause the decision to be annulled independently of the impact such an amendment might have on the decision) or whether, as I shall conclude, such a requirement exists only if that substantial amendment could have an impact on the decision.

I. Background to the dispute and the contested decision

3. The relatively complex background to the dispute is described in detail in paragraphs 1 to 25 of the judgment under appeal. For the purposes of the present appeal, I shall limit myself to the following summary.

¹ Original language: English.

² Judgment of 17 November 2017, *Gmina Miasto Gdynia and Port Lotniczy Gdynia-Kosakowo v Commission*, EU:T:2017:820 ('the judgment under appeal').

³ Decision of 26 February 2015 on measure SA.35388 (13/C) (ex 13/NN and ex 12/N) — Poland — Setting up the Gdynia-Kosakowo airport (notified under document C(2015) 1281) (OJ 2015 L 250, p. 165; 'the contested decision').

⁴ Decision of 11 February 2014 on the measure SA.35388 (13/C) (ex 13/NN and ex 12/N) — Poland — Setting up the Gdynia-Kosakowo Airport (notified under document C(2014) 759) (OJ 2014 L 357, p. 51; 'Decision 2014/883').

4. On 7 September 2012, Poland notified the Commission, for reasons of legal certainty, of plans to finance the abovementioned project. Later, Poland confirmed that the notified financing had in fact already been irrevocably granted.

5. Following correspondence between the Commission and Poland, by decision of 2 July 2013, the Commission opened a formal investigation procedure, under Article 108(2) TFEU, and invited interested parties to submit their comments (Decision C(2013) 4045 final of 2 July 2013 on measure SA.35388 (2013/C) (ex 2013/NN and ex 2012/N) — Poland — Setting up the Gdynia-Kosakowo airport (OJ 2013 C 243, p. 25) ('the opening decision'). Having received no comments from Poland or from interested parties, on 11 February 2014, the Commission adopted Decision 2014/883 finding the State aid (both the investment and the operating aid) to be incompatible with the internal market. The Commission examined that aid under the derogation in Article 107(3)(a) TFEU and the Guidelines on national regional aid for 2007-2013 (OJ 2006 C 54, p. 13; 'the Regional aid Guidelines').

6. The municipalities Kosakowo and Gdynia as well as PLGK challenged Decision 2014/883 before the General Court (Cases T-215/14 and T-217/14). Poland intervened in both cases. Meanwhile, on 7 May 2014, the Gdańsk-Północ District Court issued a decision declaring PLGK bankrupt and ordering its liquidation. In the course of the proceedings before the General Court, on 26 February 2015, the Commission withdrew Decision 2014/883 and replaced it with the contested decision. This was because the opening decision concluded that investment in buildings and equipment for firefighters, customs, airport security guards, police and border guards did not constitute State aid, and the Commission considered that it should not call into question that conclusion in the final decision on the measure.

7. In the period between Decision 2014/883 and the contested decision, the Communication from the Commission — Guidelines on State aid to airports and airlines of 31 March 2014 (OJ 2014 C 99, p. 3; 'the 2014 Guidelines') entered into force on 4 April 2014 — replacing the 2005 Aviation Guidelines for investment aid to airports ('the 2005 Guidelines').⁵ In the contested decision, the Commission found that, in view of point 172 of the 2014 Guidelines, the principles of those guidelines were not applicable to investment aid granted before 4 April 2014, but were immediately applicable to operating aid.

8. In recital 244 of the contested decision, the Commission noted that it had based its assessment of the operating aid in recital 227 of Decision 2014/883 on the finding that 'granting operating aid in order to ensure the operation of an investment project that benefits of incompatible investment aid is inherently incompatible with the internal market'. Without the incompatible investment aid Gdynia airport would not exist, as it is entirely financed by that aid, and operating aid cannot be granted for non-existent airport infrastructure. In recital 245 of the contested decision, the Commission considered that that conclusion under the 2005 Guidelines is equally valid under the 2014 Guidelines and sufficient to find that the operating aid granted to the airport operator is incompatible with the internal market. In recitals 246 and 247 of the contested decision, the Commission refers to the first compatibility condition established by the 2014 Guidelines (in point 113 thereof) and to Decision 2014/883, explaining that if that aid was not compatible with the 2005 Guidelines, it would not be compatible with the 2014 Guidelines either. Finally, in recitals 248 and 249 of the contested decision, the Commission analyses, for the sake of completeness, the compatibility of the operating aid with the Regional aid Guidelines.

⁵ Communication from the Commission — Community guidelines on financing of airports and start-up aid to airlines departing from regional airports (OJ 2005 C 312, p. 1).

II. Procedure before the General Court and the judgment under appeal

9. By application lodged at the General Court Registry on 15 May 2015, Gdynia and PLGK (in this appeal, jointly, ‘the respondents’) brought an action against the contested decision. Poland intervened in support of that action. By the judgment under appeal, the General Court upheld the third complaint of Gdynia and PLGK’s sixth plea in law, with which they reproached the Commission for having infringed their procedural rights as interested parties (that is, by depriving them of the possibility to submit observations on the application of the new 2014 Guidelines).

III. The appeal

A. *The first and second grounds of appeal*

1. *The first branch of the first ground of appeal (incorrect legal qualification of the right of interested parties to submit observations)*

(a) *Brief summary of the arguments of the parties*

10. The Commission argues that, in the contested decision, its finding that the *operating aid* was incompatible with the internal market was based on two independent grounds. The main ground was that the *investment aid* itself was incompatible with the internal market, whereas the failure to fulfil the first condition of the 2014 Guidelines (operating aid contributing to a well-defined objective of common interest) was merely a second, complementary ground. Yet, the General Court’s reasoning was based on the assumption that the incompatibility of the operating aid with the internal market is based exclusively on the application of the 2014 Guidelines.

11. According to the first branch of the first ground, the General Court erred in its legal classification of ‘the right of the parties concerned to submit their comments’, pursuant to Article 108(2) TFEU, in a manner contrary to the judgment of 8 May 2008, *Ferriere Nord v Commission* (C-49/05 P, not published, EU:C:2008:259; hereafter ‘*Ferriere Nord*’, paragraphs 78 to 84).

12. The Commission states that, since Poland did not bring an action against the contested decision based on an infringement of its rights of defence or its right to an adversarial procedure, it is now inadmissible for it to raise a plea in that respect.

13. Next, the Commission claims that given the fact that the breach of interested parties’ right to submit observations does not constitute an essential procedural requirement, the General Court should have declared the third complaint of the sixth plea in law to be inadmissible and this plea should not have been examined *ex officio*.

14. The respondents contend that the Commission’s approach minimises the importance of the right of interested parties to be heard before the adoption of a decision. The respondents consider that the judgment of 11 December 2008, *Commission v Freistaat Sachsen* (C-334/07 P, EU:C:2008:709; hereafter ‘*Freistaat Sachsen*’, paragraph 56), clearly indicates that, when a change in the legal framework occurs before a decision is adopted, the Commission must ask interested parties to comment on the compatibility of that aid. The respondents consider that there are important differences of fact and law between *Ferriere Nord* and the present case. In *Ferriere Nord*, the opening decision and the final decision were identical. Moreover, in that case, the legal frameworks that came one after another were essentially identical, which allowed the Court to consider that the Commission was not obliged to invite the parties to submit observations.

15. In the present case, ultimately, it was the substantial differences between the legal frameworks and the Commission's obligation sufficiently to define the parameters of its assessment which led the General Court to qualify the obligation incumbent on the Commission to allow the interested parties to submit observations as an essential procedural requirement. Contrary to the Commission's arguments, it is not the impact of possible observations on the final decision which determines the obligation to invite parties to comment on changes to legal framework, but rather the substantial nature of that change.

16. The Polish Government considers that the right of interested parties to submit observations in a formal investigation must be examined in a more general manner as an essential element of good administration of justice under Article 41 of the Charter of Fundamental Rights of the European Union. In its procedures the Commission is required to respect the Charter, which imposes obligations on the Commission that are stricter in this respect than they were before the Charter's entry into force. The Polish Government considers that, in *Freistaat Sachsen* (paragraph 55), the Court held that the Commission's duty to allow interested parties to present observations is an essential procedural requirement. Next, in paragraph 56 of that judgment, the Court formulated an exception to that principle in the case of a non-substantial modification of the legal framework before the decision's adoption. This exception should be interpreted strictly and should be rejected in the present case, given that the 2014 Guidelines brought about a substantial modification of the legal framework. Finally, the Commission's behaviour infringed its rights of defence as a Member State, addressee of the contested decision.

(b) Assessment

17. The Court first dealt with the question of the right of interested parties to submit comments in *Ferriere Nord*, paragraph 83, when it held that 'the Commission did not draw from the new framework the principles and criteria of assessment which would have modified its analysis and that, in these specific circumstances, a new consultation of the parties concerned was not required, in so far as it is not liable to change the contested decision'. I note that the Court made an explicit reference to the potential impact of the modification of the legal framework on the decision.

18. The Court next took a position on this question in *Freistaat Sachsen*, paragraphs 55 and 56. In that judgment, the Court made no explicit reference to the potential impact of the modification of the legal framework on the decision, but held that 'where the Commission *decides to initiate the formal investigation procedure* in respect of proposed aid, it must give interested parties, including the undertaking(s) concerned, an opportunity to submit their comments. This rule is in the nature of an essential procedural requirement. ... It follows that, where the legal rules under which a Member State notified proposed aid change before the Commission takes its decision, the Commission must, with a view to giving its decision, as it is obliged to do, on the basis of the new rules, ask the interested parties to express their views on the compatibility of that aid with those rules. The situation is different only if the new legal rules do not contain any substantial amendments in relation to those previously in force' (emphasis added; in that judgment the Court cites *Ferriere Nord*, paragraphs 68 to 71).

19. I would point out that *Freistaat Sachsen*, particularly paragraph 56 thereof, dealt with a different legal question to the one at issue in *Ferriere Nord*. The former case concerned the question whether the Commission breached the principle of non-retroactivity when, in ruling on that case, it applied Regulation No 70/2001. That regulation was new at the time and it defined categories of State aid in favour of small and medium enterprises as compatible with the internal market and not subject to the notification requirement on the basis of Article 108(3) TFEU. It entered into force after the aid measure was notified to the Commission. The Commission invited interested parties to comment on the application of that regulation and so paragraph 56 of *Freistaat Sachsen* should be seen from this angle.

20. As I see it, the present case is similar to *Ferriere Nord*, in which the Commission had not consulted interested parties on the compatibility conditions set out in guidelines that had entered into force before the contested decision was adopted. It is precisely in that factual context that the Court did not consider that such a consultation had the character of an essential procedural requirement.

21. Despite *Ferriere Nord*, in the judgment under appeal, the General Court asserted that the fact of not having consulted interested parties on the new 2014 Guidelines constituted an infringement of an essential procedural requirement, infringement of which results in the annulment of the vitiated measure without it being necessary to examine whether the result of the procedure would have been different in the absence of that procedural irregularity (paragraphs 81 and 83).

22. As mentioned in point 2 of the present Opinion, I have come to the conclusion, in the present case, that the requirement to consult interested parties in the course of the procedure exists only if the substantial amendment of the legal framework could have an impact on the final decision.

23. Indeed, I consider that a position which would completely disregard such an impact would not be consistent with the Court's case-law. The Court seeks to preserve the fundamental, and therefore exceptional, character of requirements which constitute an essential procedural requirement. As pointed out by Advocate General Sharpston in her Opinion in *Spain v Commission*, C-114/17 P, EU:C:2018:309, point 95, 'the Court has held that failure to comply with an essential procedural requirement entails the annulment of the act vitiated by it. ... In that context, ... only the procedural requirements intrinsically linked to the formation and expression of the intention of the adopting authority are essential. Their observance is in the general interest. ... *Those requirements are so fundamental that any breach entails an annulment of the subsequent act, regardless of whether the outcome of the procedure might have been any different, had they been respected*'.⁶

24. Moreover, first, it is relevant to point out that the General Court seems to ignore the fact that, in State aid cases, interested parties do not have rights of defence or a right to an adversarial debate with the Commission, their role is merely to provide all information required for the guidance of the Commission.⁷

25. The State aid administrative procedure is only opened against the Member State responsible for the award of the aid. It is also the Member State that is the addressee of the Commission's final decision and so this justifies the Member State's privileged status in terms of communication with the Commission⁸ and, in particular, its right to a fair defence.⁹

⁶ Emphasis added. The Court rejected that ground of appeal as inadmissible and so did not rule on the substance. The Opinion cites the judgment of 20 October 1987, *Spain v Commission*, 128/86, EU:C:1987:447, paragraph 25; the Opinion of Advocate General Fennelly in *Commission v ICI*, C-286/95 P and C-287/95 P, EU:C:1999:578, points 22 to 26; and the judgment of 6 April 2000, *Commission v ICI*, C-286/95 P, EU:C:2000:188, paragraphs 42 and 52.

⁷ See judgments of 12 July 1973, *Commission v Germany*, 70/72, EU:C:1973:87, paragraph 19; of 2 April 1998, *Commission v Sytraval and Brink's France*, C-367/95 P, EU:C:1998:154, paragraph 59; and of 24 September 2002, *Falck and Acciaierie di Bolzano v Commission*, C-74/00 P and C-75/00 P, EU:C:2002:524 paragraphs 80 to 83.

⁸ See, inter alia, judgment of 8 July 2004, *Technische Glaswerke Ilmenau v Commission*, T-198/01, EU:T:2004:222, paragraph 61 (appeal of this judgment was dismissed by the Court).

⁹ Judgment of 18 November 2004, *Ferriere Nord v Commission*, T-176/01, EU:T:2004:336, paragraph 74.

26. This contrasts with the interested parties' limited procedural rights in State aid cases: consultations with those parties have the sole aim of obtaining from them all the information needed so that the Commission can base its future action on all the relevant facts.¹⁰ The essential role of interested parties is therefore to be 'sources of information' for the Commission.¹¹ In fact, even the Polish Government admits in its observations that the right of interested parties to submit observations is 'not identical' to the rights of defence granted to the Member State concerned.

27. Thus, interested parties do not have a special role in the procedure and clearly cannot rely on rights as extensive as the rights of the defendant Member State¹² — the right to be heard in the procedure is an entitlement recognised for persons against whom the procedure has been initiated.¹³ In particular, they cannot claim a right to debate the issues with the Commission in the same way as the Member State can.¹⁴ Their only right is to be associated with the administrative procedure as far as is necessary for the particular circumstances of the case in hand.¹⁵

28. Therefore, as the General Court correctly ruled, the EU Courts cannot, on the basis of general legal principles such as those of the right to due process, the right to be heard, the right to sound administration or the right to equal treatment, extend the procedural rights conferred on interested parties in State aid review procedures by the Treaty and secondary legislation.¹⁶ The Article 108(2) TFEU procedure is therefore an *inter partes* procedure only in relation to the Member State concerned and not in relation to interested parties.¹⁷

29. Secondly, it should be pointed out that, in the judgment under appeal, the General Court did not rule that the Commission should have opened a new formal procedure under Article 108(2) TFEU as such. Instead, it merely reproaches the Commission for infringing an essential procedural requirement by failing to allow interested parties to submit observations on the 2014 Guidelines.

30. I agree with the Commission that it follows from paragraphs 55 and 56 of *Freistaat Sachsen* that, as regards interested parties in State aid procedures, it is necessary to distinguish between an 'essential procedural requirement' flowing from Article 108(2) TFEU, on the one hand, and other procedural rights (which are not intrinsically linked to the expression of the Commission's intention in a decision based on Article 108(2) TFEU), on the other.¹⁸ Such rights include rights of interested parties to

¹⁰ See, inter alia, judgments of 12 July 1973, *Commission v Germany*, 70/72, EU:C:1973:87, paragraph 19, and of 14 January 2004, *Fleuren Compost v Commission*, T-109/01, EU:T:2004:4, paragraph 41. See also, in this respect, Ortiz Blanco, L. (ed.), *EC Competition Procedure*, Second Edition, 2006, Oxford, p. 840 and the case-law cited.

¹¹ Judgments of 24 September 2002, *Falck and Acciaierie di Bolzano v Commission*, C-74/00 P and C-75/00 P, EU:C:2002:524, paragraphs 81 and 82, 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, paragraphs 180 and 181. See also judgments of 22 October 1996, *Skibsværftsforeningen and Others v Commission*, T-266/94, EU:T:1996:153, paragraph 256 (not appealed); of 8 July 2004, *Technische Glaswerke Ilmenau v Commission*, T-198/01, EU:T:2004:222, paragraph 192 (appeal of this judgment was dismissed by the Court); and of 2 July 2015, *France and Orange v Commission*, T-425/04 RENV and T-444/04 RENV, EU:T:2015:450, paragraph 161 (appeal dismissed).

¹² Judgment of 24 September 2002, *Falck and Acciaierie di Bolzano v Commission*, C-74/00 P and C-75/00 P, EU:C:2002:524, paragraph 83.

¹³ See, inter alia, judgment of 18 November 2004, *Ferriere Nord v Commission*, T-176/01, EU:T:2004:336, paragraph 74.

¹⁴ Judgments of 24 September 2002, *Falck and Acciaierie di Bolzano v Commission*, C-74/00 P and C-75/00 P, EU:C:2002:524, paragraph 82, 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 181. See also judgment of 8 July 2004, *Technische Glaswerke Ilmenau v Commission*, T-198/01, EU:T:2004:222, paragraphs 61 and 192 (appeal of this judgment was dismissed by the Court), and order of 6 November 2012, *Castelnuovo Energia v Commission*, T-57/11, not published, EU:T:2012:580, paragraph 115 (not appealed).

¹⁵ See, inter alia, judgment 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 125 (not appealed).

¹⁶ See judgment of 8 July 2004, *Technische Glaswerke Ilmenau v Commission*, T-198/01, EU:T:2004:222, paragraph 194 (appeal of this judgment was dismissed by the Court).

¹⁷ See, inter alia, 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 168 (not appealed); of 14 January 2004, *Fleuren Compost v Commission*, T-109/01, EU:T:2004:4, paragraph 43; and of 8 July 2004, *Technische Glaswerke Ilmenau v Commission*, T-198/01, EU:T:2004:222, paragraph 61 (appeal of this judgment was dismissed by the Court).

¹⁸ Cf. also the distinction made by Advocate General Sharpston in her Opinion in *Spain v Commission*, C-114/17 P, EU:C:2018:309, points 95 and 96.

submit observations *on the provisions which the Commission intends to apply in order to assess the measure concerned*. It is this right which was at issue in *Ferriere Nord* and, in that judgment, the Court did not qualify it as an ‘essential procedural requirement’ (as even the Polish Government recognises in paragraph 13 of its response).

31. Indeed, the Commission’s obligation to allow interested parties to submit observations *following the opening of a formal investigation* does constitute an essential procedural requirement (*Freistaat Sachsen*, paragraphs 55 and 56). In the present case, it satisfied this obligation by publishing the opening decision. Given that the Commission had not relied on new facts, it was not obliged to re-open the formal investigation and re-invite interested parties to submit observations. The Court held that if the amendment of the legal framework arises in the course of the procedure, to the extent that that amendment was substantially identical and was not liable to modify the initial analysis proposed by the Commission, a new consultation of interested parties was not necessary (*Ferriere Nord*, paragraphs 79 to 83) — and, as I shall explain below, we are faced with the same scenario here.

32. If the consultation of interested parties could be considered to constitute an essential procedural requirement in a situation where the legal framework changes in the course of the procedure (such as was the case here), then the Court would not have proceeded to analyse in *Ferriere Nord* the *impact* of the new legal provisions on the Commission’s findings. Furthermore, such a conclusion would amount to recognising the rights of defence of interested parties, which would be contrary to the case-law I cited above. However, even in such a hypothesis, it follows from settled case-law that the breach of a right of defence, which is a right stronger than the right to present observations, results in the annulment of the contested decision only if it is established that, in the absence of that breach, the outcome of that procedure might have been different.¹⁹

33. Indeed, if an obligation such as the one at issue here were considered to constitute an essential procedural requirement implying the automatic annulment of a decision infringing that obligation, we could find ourselves in a situation where the rights of interested parties are better protected than the same rights of the parties to the procedure themselves (indeed, in order to cause the annulment of a decision, the infringement of rights of defence must, in principle, adversely affect the addressee of the decision).

34. This is so *a fortiori* as this would run counter to the case-law on the rights of defence *of Member States* (which constitutes a stronger right than the right to submit observations): for instance, the Court has ruled that it was not justified to annul a decision adopted after the previous decision concerning the compatibility of State aid was annulled, even though the new decision took account of a condition on which the Member State had not been consulted.²⁰ Similarly, the Court ruled that a decision should not be annulled despite the fact that it took into account observations presented by interested parties that had not been submitted to the Member State concerned for comments.²¹ In these cases, the Court expressly assessed whether, had the Commission abstained from applying conditions, which had not been submitted to the Member State in violation of its rights of defence, the contested decision might have been different.

¹⁹ Judgment of 5 October 2000, *Germany v Commission*, C-288/96, EU:C:2000:537, paragraph 101 and the case-law cited.

²⁰ Judgment of 12 November 1998, *Spain v Commission*, C-415/96, EU:C:1998:533, paragraphs 40 and 41.

²¹ Judgment of 5 October 2000, *Germany v Commission*, C-288/96, EU:C:2000:537, paragraphs 101 to 104 and the case-law cited. See also the General Court’s case-law: judgment of 30 April 2014, *Tisza Erőmű v Commission*, T-468/08, not published, EU:T:2014:235, paragraph 217 and the case-law cited (not appealed).

35. It may be added that if the Court were to disregard an analysis of the impact of the adoption of new guidelines on the decision, then it could lead to situations such as the one at issue here not being taken into account, where – whilst it is true that the legal framework had changed – the aid in question was operating aid and its incompatibility was based not on the legal framework applicable to that type of aid but on the incompatibility of the principal aid supporting the airport project (the investment aid).

36. The provision of capital at issue was supposed to cover both the investment costs (that is, the conversion of the airport: the investment aid) as well as the operating costs related to the functioning of the converted airport at the beginning of its operation (the operating aid).

37. The procedural defect identified by the General Court concerned only the operating aid.

38. I refer here to the actual wording of recital 244 of the contested decision (see point 8 of the present Opinion). The conclusion in that recital is clearly autonomous and does not depend in any way on the Commission guidelines. It is valid both under the 2014 Guidelines and under the 2005 Guidelines or, for that matter, under the Regional aid Guidelines.

39. In fact, in paragraph 85 of the judgment under appeal, the General Court did see the clear link between the investment aid and the operating aid.

40. However, it then found that there was certain imprecision, concerning the legal framework, on which that link was based.

41. According to the General Court, that imprecision followed from the difference between the legal framework mentioned in recital 245 of the contested decision and that mentioned in recitals 227 and 228 of Decision 2014/883, as well as from the way the latter decision was drafted.

42. Whilst the present appeal does not deny that difference, I agree with the Commission that that difference between the legal frameworks is ultimately not relevant in the present case, given that the decision to consider the operating aid as incompatible with the internal market is based (primarily) on a principle of general logic based on Article 107 TFEU, which is applicable in any event.

43. Indeed, in recital 244 of the contested decision, the Commission made reference to recital 227 of Decision 2014/883, repeating the conclusion reached in that decision that ‘granting operating aid in order to ensure the operation of an investment project that benefits of incompatible investment aid is *inherently incompatible with the internal market*’ (emphasis added). In the next sentence of recital 244 the Commission justified that conclusion as follows: ‘Without the incompatible investment aid Gdynia airport would not exist, as it is entirely financed by that aid, and operating aid cannot be granted for non-existent airport infrastructure.’

44. The excessively formalistic approach of the General Court in the judgment under appeal has already been criticised in academic legal writing:²² ‘[The] differences [between the various guidelines] notwithstanding, the General Court missed an important point. The Commission found that the aid for Gdynia airport was incompatible with the internal market because it financed duplicate and, therefore, unnecessary infrastructure. The nearby airport of Gdansk was not operating at full capacity and there was no need to build another airport. The General Court did not consider whether the phrasing differences in the regional aid guidelines and aviation guidelines would have made any difference to the finding of the Commission that the infrastructure did not serve a legitimate objective of public policy. Poland, wisely, did not argue that it was within its rights to waste its money. What will happen now? The Commission will probably re-open the formal investigation procedure, fix the

²² Nicolaidis, P., *The Legal Basis of the (In)compatibility of Aid Must be Clear*, on the authoritative blog ‘State Aid Hub.eu’ by lexion, <http://stateaidhub.eu/blogs/stateaiduncovered/post/9086>.

problem with the legal base of the assessment, address a number of other issues raised by the Court, such as the different analysis of operating and investment aid, and re-adopt the negative decision. It is rather inconceivable that the Commission will concede that aid for redundant infrastructure is compatible with the internal market.’

45. It should be added that it was clearly only ‘in the alternative’ that the Commission observed in the contested decision that the operating aid was also incompatible pursuant to the 2014 Guidelines.

46. I would go as far as to say that it is unfortunate that the Commission made that complementary argument, which the General Court then focussed on and interpreted (wrongly) as requiring the annulment of the contested decision.

47. I consider that, in the contested decision, the Commission should have based the incompatibility of the operating aid with the internal market only on the reasoning provided in recitals 244 and 245 of that decision (see point 8 of the present Opinion).

48. It is true that this begs the question why the Commission did not simply proceed to rectify the previous decision, rather than adopting a new decision (which implied a new procedure). However, as the Commission explained at the hearing, this was not an option in the present case, in so far as a reduction in the provision of funds required the private investor test to be carried out anew (so as to establish whether there was an economic advantage).

49. The above also raises the question: at what stage in the administrative procedure does the essential procedural requirement actually arise? As the Commission argued at the hearing, this happens in a situation where the Commission has a doubt as to the compatibility of the aid measure with the internal market. From that moment on, the Commission is obliged to publish a decision opening the formal investigation in the Official Journal. Thus, the essential procedural requirement is that all the interested parties (competitors, recipients of aid, etc.) and all Member States, by way of that publication, have a possibility to submit observations in relation to the measure investigated by the Commission.

50. Therefore, if in the course of the procedure before the Commission there is an amendment of the legal framework and the amendment is substantial and liable to affect the result of the assessment of the measure’s compatibility with the internal market, then the Commission may invite the Member State to submit observations. However, it is only the Member State that can do so (and not interested parties) and, importantly, that situation does not constitute an essential procedural requirement.

51. Having said that, the respondents argue, in essence, that the position defended by the Commission is contrary to the Charter and to the fact that the Union is a community governed by the rule of law, and it impairs the right of interested parties (PLGK as the beneficiary of the aid) and of Poland to submit observations. Moreover, they submit that the Charter obliges the Commission to take into account the right of interested parties to be heard before a State aid decision.

52. However, suffice it to point out that the entry into force of the Charter did not change the nature of the rights conferred pursuant to Article 108(2) and (3) TFEU. Moreover, State aid control is not an administrative procedure initiated against the beneficiary of the aid, and the Charter is not intended to alter the nature of the review of State aid established by the FEU Treaty or to confer on third parties a right of scrutiny which Article 108 TFEU does not provide.²³

²³ See judgments of 9 December 2014, *Netherlands Maritime Technology Association v Commission*, T-140/13, not published, EU:T:2014:1029, paragraph 60, and of 6 July 2017, *SNCM v Commission*, T-1/15, not published, EU:T:2017:470, paragraphs 85 and 86.

53. Finally, the respondents argue that the Commission's administrative practice in the present case contradicts the line followed in other cases: they refer to the Commission publishing an invitation to present observations on the 2014 Guidelines in application of Article 108(2) TFEU. That invitation was addressed to the Member States and to airports that received aid by way of the formal investigation initiated by the Commission (OJ 2014 C 113, p. 30). This consultation took place after Decision 2014/883 was adopted, but before the contested decision. The respondents consider that the fact that neither the Polish Government nor they were able to present such observations amounts to discrimination.

54. I do not consider that this calls into question my assessment above. The above invitation is normal procedure in similar situations and amounts to good administration on the part of the Commission. In any case, it is not comparable to the present situation and it does not constitute a decision opening a new formal investigation, nor does it constitute a supplement to such a decision.

55. For the foregoing reasons, the first branch of the first ground of appeal should be upheld.

2. *The second branch of the first ground of appeal and the second ground of appeal (incorrect interpretation and application of Ferriere Nord and of the Commission decision)*

(a) *Brief summary of the arguments of the parties*

56. According to the second branch of the first ground of appeal, even assuming — as the General Court did — that the incompatibility of the operating aid with the internal market was based only on the 2014 Guidelines (*quod non*), the General Court incorrectly interpreted and applied *Ferriere Nord*, in so far as the provisions applied in assessing the operating aid were, in essence, the same as the provisions applied in Decision 2014/883, adopted on the basis of the 2005 Guidelines, and so any comments on the 2014 Guidelines could not have had an effect on the operative part of the decision in that regard.

57. First, the Commission contends that in any case that plea was ineffective, given that the contested decision is based on the two independent grounds already mentioned. Secondly, even on the assumption that the contested decision relied only on the 2014 Guidelines, the Commission considers that the General Court should — in accordance with *Ferriere Nord* — have taken into account the fact that the provisions of the 2014 Guidelines at issue here were essentially identical to those of the 2005 Guidelines. Thirdly, the first condition of compatibility with the internal market of operating aid granted to airports, set out in point 113 of the 2014 Guidelines, is essentially identical to that of the 2005 Guidelines. Finally, in their application at first instance, the applicants did no more than contest the applicability of the 2014 Guidelines, without commenting on how the conditions contained therein should have been applied.

58. The respondents submit that their plea in law was admissible before the General Court regardless of the possibility for the latter to raise it *ex officio*, in so far as it constituted a simple amplification of an argument included in the application at first instance. Furthermore, the respondents argue that the fundamentally different character of the guidelines applied by the Commission is due to (a) the fact that the first guidelines concern regional aid and the second concern sectoral aid and (b) the numerous elements already set out above. Finally, the General Court was not obliged to analyse whether the modification of the legal framework had substantial impact on the result of the contested decision.

59. The Polish Government submits that the judgment under appeal correctly identified the substantial modifications of the 2014 Guidelines vis-à-vis those of 2005. Secondly, the Polish Government submits that the modification of the legal basis of the guidelines has an important impact. Indeed, in view of the wording of Article 107(3)(a) TFEU vis-à-vis that of Article 107(3)(c) TFEU, the latter provision

has added a new condition. Therefore, in view of the 2014 Guidelines (adopted under Article 107(3)(c) TFEU), the Commission should take into account possible distortions of competition resulting from the provision of aid, a condition which did not exist in the 2005 Guidelines (adopted under Article 107(3)(a) TFEU).

60. By its second ground of appeal, the Commission claims that the General Court's finding, in paragraph 89 of the judgment under appeal, that the contested decision is unlawful is based on an incorrect interpretation of the justification of incompatibility of the operating aid with the internal market set out in recital 244 of the contested decision, according to which that justification was based on the 2014 Guidelines and Decision 2014/883. The incorrect interpretation of recital 244 of the contested decision was the result of an incorrect interpretation of recital 245 of that decision.

61. The expression 'valid under the [2014 Guidelines]' used in recital 245 of the contested decision does not mean that it results from those guidelines. The idea is that it cannot be affected by the application of the provisions of the 2014 Guidelines. It is apparent from recital 245 of the contested decision as cited above that the incompatibility of the operating aid with the internal market resulting from the incompatibility of the investment aid is independent of the 2014 Guidelines. The slight 'imprecision' regarding Decision 2014/883, which was pointed out by the General Court in paragraph 85 of the judgment under appeal, is not capable of calling into question the legal propriety of the abovementioned conclusion of the contested decision.

62. The Commission considers that, when concluding in paragraph 86 of the judgment under appeal that interested parties should have been given the opportunity to comment on the compatibility of the operating aid in the course of the formal administrative procedure, the General Court went beyond the action brought before it. This is because, as the General Court itself recognises in that same paragraph, the justification of the incompatibility of the operating aid does not stem from the 2014 Guidelines. Indeed, such a conclusion follows only from Article 107(1) TFEU, and the finding that that conclusion would have been reached in the context of the first or the second Guidelines, as the General Court ruled in paragraph 87 of the judgment under appeal, results from an error of assessment.

63. The respondents submit, first, that the Commission's second ground of appeal refers to paragraphs 84 to 87 of the judgment under appeal, whereas these are points made by the General Court merely in the alternative and so this ground is ineffective. Secondly, the respondents submit that the second ground of appeal is inadmissible, as it relates to a question of fact. Thirdly, the respondents consider that the contested decision's unlawfulness is based on the absence of consultation of interested parties and not on the grounds which justified the incompatibility.

64. In relation to the second ground of appeal, the Polish Government reproaches the Commission for presuming the content and the scope of the observations that that government and interested parties would have made, had they been put in a position to do so. Moreover, in recital 245 of the contested decision, the Commission explicitly makes reference to principles set out in point 113 of the 2014 Guidelines and, in recital 246, applied the first condition set out in that point of the guidelines.

(b) Assessment

65. Given that the first branch of the first ground of appeal was upheld in so far as the obligation to consult the parties in the event that there is a substantial amendment of the legal framework in the course of the procedure does not constitute an essential procedural requirement, by the second branch of the first ground of appeal and by the second ground of appeal the Commission seeks an assessment by the Court of whether it was actually obliged to respect the obligation of consulting interested parties in the present case.

66. The respondents raise the question of the admissibility of the second ground of appeal (see point 63 et seq. of the present Opinion). However, those arguments shall not succeed given that the Commission is entitled to contest paragraphs 81 to 88 of the judgment under appeal. This is so because therein the General Court responds to the Commission's arguments relating to *Ferriere Nord* and the General Court bases its reasoning inter alia on that case-law. Thus, I consider that, in the present case, the General Court's interpretation of the contested decision (and Decision 2014/883) is not an element falling outside the control of the Court.

67. By the General Court's reasoning, a right to submit new observations arises as soon as new guidelines become applicable in the course of an ongoing procedure. However, I agree with the Commission that, under *Ferriere Nord*, in order to find that the Commission has infringed its obligation to allow interested parties to submit observations under Article 108(2) TFEU, the General Court would have to establish that the decision finding the operating aid incompatible with the internal market was *based only on the 2014 Guidelines and that they substantially modified* the 2005 Guidelines (that is, it would have to analyse whether the applicability of the new guidelines could have had consequences *in concreto* on the reasoning of the contested decision).

68. The General Court did no such thing. Instead, in order to reject the Commission's arguments, the General Court compared simply *in abstracto* the provisions and the legal basis of the 2014 and 2005 Guidelines (see paragraphs 73 to 77 of the judgment under appeal). Neither did the General Court establish that the first condition relating to the common interest (examined in recital 246 of the contested decision) was substantially different from the conditions set out in the 2005 Guidelines. In paragraphs 76 and 84 of the judgment under appeal, the General Court relied only on the legal basis of those two regimes when it found that there was convergence between the conditions foreseen by them.

69. However, in *Ferriere Nord* the Court did not stop its analysis at an abstract comparison of the provisions of the 1994 framework and the new 2001 framework, as one could be led to believe upon reading paragraph 56 of *Freistaat Sachsen*. Instead, the Court referred to the new 2001 framework, which was applied in the decision at issue, and then examined whether it contained substantial changes vis-à-vis the 1994 framework. Thus, the Court's analysis related to the new provisions of the 2001 framework, which the Commission had applied in that particular case (see paragraphs 78, 82 and 83 of *Ferriere Nord*). It follows that the General Court made an error of law relating to the abovementioned case-law of the Court.

70. Moreover, it is necessary to take into account the particularity of the present case which differentiates it from *Freistaat Sachsen* and *Ferriere Nord*, namely the fact that *Decision 2014/883 was replaced* by the contested decision. Therefore, the General Court should have centred its comparison not merely on the provisions of the two guidelines that were applied (as was the case in *Ferriere Nord*), but should also have done so on the basis of the content of the two Commission decisions as regards the operating aid granted to PLGK.

71. It follows from the contested decision (recitals 244 and 245) that the potential observations of the respondents *could not have had an impact* on the outcome of the procedure, nor could they have had an impact on the contested decision or, in particular, on the assessment of the compatibility of the operating aid with the internal market. This is because its incompatibility resulted from the investment aid granted with a view to the conversion and start of the operation of the Gdynia-Kosakowo airport (see also recital 246 of the contested decision).

72. I agree with the Commission that, as follows from *Ferriere Nord*, in order to analyse the impact of the breach of interested parties' right to comment on new guidelines, *the element which needs to be taken into account is the content of the adopted decision (objective criterion)* and not merely, as asserted by the Polish Government and by the General Court (paragraph 83 of the judgment under appeal), the conclusion which the Commission could have come to on the basis of new guidelines (*subjective criterion*).

73. In addition, even if one were to base the analysis on such comments (*quod non*), it follows from the written observations submitted by the respondents that their comments on the 2014 Guidelines could have no impact on the result of the procedure relating to the compatibility of the operating aid with the internal market.

74. As we have seen above in relation to the General Court's misinterpretation of the justification of incompatibility of the operating aid, it follows clearly from recital 244 of the contested decision that the primary reason for that incompatibility was the fact that the investment aid itself was declared incompatible.

75. However, as the General Court itself notes in paragraph 86 of the judgment under appeal, the incompatibility of the operating aid based on the incompatibility of the investment aid does not result from a condition expressly provided in the Regional aid Guidelines or the 2014 Guidelines. Moreover, given that the 2014 Guidelines were not applicable to the investment aid, whose incompatibility is not contested, the application of the 2014 Guidelines to the operating aid simply could not have altered the result of the contested decision.

76. It follows from the foregoing considerations that both the second branch of the first ground and the second ground should also be upheld. Thus, the judgment under appeal must be annulled and the third claim of the sixth plea in law at first instance must be dismissed as unfounded and, in any event, ineffective. The case must therefore be sent back to the General Court to examine the five other pleas in law.

B. The third ground of appeal (point 1 of the operative part of the judgment under appeal is disproportionate)

77. The Commission argues — in the alternative, should the Court reject the preceding grounds of appeal — that point 1 of the operative part of the judgment under appeal, annulling Articles 2 to 5 of the contested decision in their entirety, is disproportionate and the General Court incorrectly found that the contested decision was not severable. The respondents as well as the Polish Government argue, in essence, that the third ground of appeal should be dismissed as unfounded.

78. Given that the first and second grounds of appeal should be upheld and the third ground of appeal is only presented in the alternative, I consider that it is not necessary for the Court to deal with it.

IV. Conclusion

79. For these reasons, I propose that the Court should:

- (i) annul the judgment of 17 November 2017 in Case T-263/15, *Gmina Miasto Gdynia and Port Lotniczy Gdynia-Kosakowo v Commission*;
- (ii) dismiss the third claim of the sixth plea in law at first instance as unfounded and, in any event, ineffective;

- (iii) refer the case back to the General Court to examine the five other pleas in law; and
- (iv) reserve the costs.