



Reports of Cases

JUDGMENT OF THE COURT (Fifth Chamber)

11 March 2020*

(Appeal — State aid — Article 108(2) TFEU — Investment aid — Operating aid — Airport infrastructure — Public funding by the municipalities of Gdynia and Kosakowo for setting up the Gdynia-Kosakowo Airport — Decision of the European Commission — Aid incompatible with the internal market — Order for recovery of the aid — Annulment by the General Court of the European Union — Essential procedural requirement — Procedural rights of the interested parties)

In Case C-56/18 P,

APPEAL under Article 56 of the Statute of the Court of Justice of the European Union, brought on 29 January 2018,

European Commission, represented by K. Herrmann, D. Recchia and S. Noë, acting as Agents,

appellant,

the other parties to the proceedings being:

Gmina Miasto Gdynia,

Port Lotniczy Gdynia Kosakowo sp. z o.o.,

established in Gdynia (Poland), represented by T. Koncewicz, adwokat, M. Le Berre, avocat, and K. Gruszecka-Spychała and P. Rosiak, radcowie prawni,

applicants at first instance,

Republic of Poland, represented by B. Majczyna and M. Rzutkiewicz, acting as Agents,

intervener at first instance,

THE COURT (Fifth Chamber),

composed of E. Regan (Rapporteur), President of the Chamber, I. Jarukaitis, E. Juhász, M. Ilešič and C. Lycourgos, Judges,

Advocate General: E. Tanchev,

Registrar: M. Aleksejev, Head of Unit,

having regard to the written procedure and further to the hearing on 4 April 2019,

* Language of the case: Polish.

after hearing the Opinion of the Advocate General at the sitting on 4 July 2019,
gives the following

Judgment

- 1 By its appeal, the European Commission asks the Court of Justice to set aside the judgment of the General Court of the European Union of 17 November 2017, *Gmina Miasto Gdynia and Port Lotniczy Gdynia Kosakowo v Commission* (T-263/15, ‘the judgment under appeal’, EU:T:2017:820), by which the General Court annulled Articles 2 to 5 of Commission Decision (EU) 2015/1586 of 26 February 2015 on measure SA.35388 (13/C) (ex 13/NN and ex 12/N) — Poland — Setting up the Gdynia-Kosakowo airport (OJ 2015 L 250, p. 165, ‘the decision at issue’).

Legal context

- 2 Article 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), which was in force at the material time, provided:

‘For the purposes of this Regulation:

...

- (h) “interested party” shall mean any Member State and any person, undertaking or association of undertakings whose interests might be affected by the granting of aid, in particular the beneficiary of the aid, competing undertakings and trade associations.’

- 3 Article 6(1) of that regulation, entitled ‘Formal investigation procedure’, provided:

‘The decision to initiate the formal investigation procedure shall summarise the relevant issues of fact and law, shall include a preliminary assessment of the Commission as to the aid character of the proposed measure and shall set out the doubts as to its compatibility with the common market. The decision shall call upon the Member State concerned and upon other interested parties to submit comments within a prescribed period which shall normally not exceed one month. In duly justified cases, the Commission may extend the prescribed period.’

- 4 Article 9 of that regulation, entitled ‘Revocation of a decision’, read as follows:

‘The Commission may revoke a decision taken pursuant to Article 4(2) or (3), or Article 7(2), (3), (4), after having given the Member State concerned the opportunity to submit its comments, where the decision was based on incorrect information provided during the procedure which was a determining factor for the decision. Before revoking a decision and taking a new decision, the Commission shall open the formal investigation procedure pursuant to Article 4(4). Articles 6, 7 and 10, Article 11(1), Articles 13, 14 and 15 shall apply *mutatis mutandis*.’

Background to the dispute and the decision at issue

- 5 The background to the dispute, as is apparent from paragraphs 1 to 25 of the judgment under appeal, may be summarised as follows.

- 6 In July 2007, the Gmina Miasto Gdynia (municipality of Gdynia, Poland) and the Gmina Kosakowo (municipality of Kosakowo, Poland), through capital injections of 100%, created the company Port Lotniczy Gdynia Kosakowo sp. z o.o. ('PLGK'), with the aim of converting the military airfield of Gdynia-Oksywie (Poland) into a civil airport. Those injections were to cover both the investment costs ('the investment aid') and the operating costs of the airport during the initial phase of its operation ('the operating aid'). That airfield is located in the territory of the municipality of Kosakowo in Pomerania, in the north of Poland. That new civil airport, the management of which was entrusted to PLGK, was to become the second largest airport in Pomerania and was to be used predominantly for general air traffic, low cost airlines and charter airlines.
- 7 On 7 September 2012, the Republic of Poland notified the Commission of the funding measure for the proposed conversion of Gdynia-Oksywie military airport ('the aid measure at issue').
- 8 On 7 November 2012 and 6 February 2013, the Commission asked the Polish authorities for additional information on the aid measure at issue. That information was sent to the Commission on 7 December 2012 and 15 March 2013.
- 9 On 15 May 2013, the Commission informed the Polish authorities that it intended to transfer the file on the aid measure at issue to the register of non-notified aid, since most of the notified funding had already been irrevocably granted.
- 10 By Decision C(2013) 4045 final of 2 July 2013 on measure SA.35388 (13/C) (ex 2013/NN and ex 2012/N) — Poland — Setting up the Gdynia-Kosakowo airport (OJ 2013 C 243, p. 25, 'the opening decision'), the Commission initiated the formal investigation procedure in respect of the aid measure at issue, pursuant to Article 108(2) TFEU, and invited interested parties in the case to submit their comments. The Commission did not receive any comments from those parties.
- 11 On 30 October 2013, the Commission requested additional information from the Polish authorities. That information was provided on 4 and 15 November 2013. The Polish authorities submitted further information on 3 December 2013 and on 2 January 2014.
- 12 On 11 February 2014, the Commission adopted Decision 2014/883/EU on the measure SA.35388 (13/C) (ex 13/NN and ex 12/N) — Poland — Setting up the Gdynia-Kosakowo Airport (OJ 2014 L 357, p. 51), in which it found that the proposed funding constituted State aid within the meaning of Article 107(1) TFEU, in particular because, as a result of the aid measure at issue, granted to PLGK by the municipality of Gdynia and the municipality of Kosakowo, PLGK had obtained an economic advantage from which it would not have benefited under normal market conditions. Taking the view that the aid measure at issue constituted State aid within the meaning of Article 107 TFEU, the Commission therefore ordered the Polish authorities to recover the aid paid to PLGK.
- 13 On 8 and 9 April 2014 respectively, the municipality of Gdynia, together with PLGK and the municipality of Kosakowo, brought actions before the General Court seeking annulment of Decision 2014/883 (Cases T-215/14 and T-217/14). By separate documents lodged on the same day, they also applied for the suspension of the operation of that decision (Cases T-215/14 R and T-217/14 R).
- 14 On 20 August 2014, the President of the General Court dismissed the applications for interim measures (orders of 20 August 2014, *Gmina Miasto Gdynia and Port Lotniczy Gdynia Kosakowo v Commission*, T-215/14 R, not published, EU:T:2014:733, and of 20 August 2014, *Gmina Kosakowo v Commission*, T-217/14 R, not published, EU:T:2014:734).
- 15 On 26 February 2015, the Commission, by the same measure, withdrew Decision 2014/883 and replaced it with the decision at issue.

16 The operative part of the decision at issue is worded as follows:

‘Article 1

Decision [2014/883] is withdrawn.

Article 2

1. The capital injections in favour of [PLGK] between 28 August 2007 and 17 June 2013 constitute State aid which has been unlawfully put into effect by [the Republic of] Poland in breach of Article 108(3) [TFEU] and which is incompatible with the internal market, except in so far as these capital injections were spent on investments necessary to carry out the activities that according to [the opening] decision must be considered as falling within the public policy remit.

2. The capital injections which [the Republic of] Poland is planning to implement in favour of [PLGK] after 17 June 2013 for the conversion of the Gdynia-Kosakowo military airfield into a civil aviation airport constitute State aid which is incompatible with the internal market. The State aid may accordingly not be implemented.

Article 3

1. [The Republic of] Poland shall recover the aid referred to in Article 2(1) from the beneficiary.

Article 4

1. Recovery of the aid referred to in Article 2(1) and the interest referred to in Article 3(2) shall be immediate and effective.

2. [The Republic of] Poland shall ensure that this Decision is implemented within four months following the date of notification of this Decision.

Article 5

1. Within two months following notification of this Decision, [the Republic of] Poland shall submit the following information to the Commission:

- (a) the total amount (principal and recovery interest) to be recovered from the beneficiary;
- (b) a detailed description of the measures already taken and planned to comply with this Decision;
- (c) documents demonstrating that the beneficiary has been ordered to repay the aid.

2. [The Republic of] Poland shall keep the Commission informed of the progress of the national measures taken to implement this Decision until recovery of the aid referred to in Article 2(1) and the interest referred to in Article 3(2) has been completed. It shall immediately submit, on simple request by the Commission, information on the measures already taken and planned to comply with this Decision. It shall also provide detailed information concerning the amounts of aid and recovery interest already recovered from the beneficiary.

...’

The procedure before the General Court and the judgment under appeal

- 17 On 23 April 2015, the municipality of Kosakowo, the applicant in Case T-217/14, brought an action for annulment of the decision at issue (Case T-209/15).
- 18 On 15 May 2015, the municipality of Gdynia and PLGK, the applicants in Case T-215/14, brought an action for annulment of the decision at issue.
- 19 On 30 November 2015, the General Court found, by order, that there was no longer any need to adjudicate on the actions brought in Cases T-215/14 and T-217/14 (orders of 30 November 2015, *Gmina Miasto Gdynia and Port Lotniczy Gdynia Kosakowo v Commission*, T-215/14, not published, EU:T:2015:965, and of 30 November 2015, *Gmina Kosakowo v Commission*, T-217/14, not published, EU:T:2015:968).
- 20 By decision of 1 December 2015, the President of the Sixth Chamber of the General Court granted the Republic of Poland leave to intervene in support of the forms of order sought by the municipality of Gdynia and PLGK in their actions seeking annulment of Articles 2 to 5 of the decision at issue.
- 21 By the judgment under appeal, the General Court examined, first of all, the sixth plea in law in that action, alleging, inter alia, infringement of the procedural rights of the interested parties in the present case. In that context, the General Court noted, in paragraph 71 of the judgment under appeal, that, in the decision at issue, the Commission no longer relied, as it had done in the opening decision and in Decision 2014/883, on the Guidelines on national regional aid for 2007-2013 (OJ 2006 C 54, p. 13, 'the Regional aid Guidelines') to analyse whether the operating aid was compatible with the internal market, but on the principles set out in the Commission Communication entitled 'Guidelines on State aid to airports and airlines' (OJ 2014 C 99, p. 3, 'the 2014 Guidelines').
- 22 In paragraph 73 of the judgment under appeal, the General Court pointed out that, in addition to the change between the Regional aid Guidelines and the 2014 Guidelines, the Commission also made a change in the derogation analysed in the light of Article 107(3) TFEU. In particular, the General Court pointed out, in that regard, that, in the opening decision and Decision 2014/883, the Commission had framed its position in the context of the derogation provided for in Article 107(3)(a) TFEU, whereas, in the decision at issue, the compatibility of the operating aid is analysed in accordance with Article 107(3)(c) TFEU.
- 23 The General Court found, in paragraph 78 of the judgment under appeal, that the new legal regime applied by the Commission in the decision at issue contained substantive amendments in relation to the legal regime which was previously in force and which was taken into account in the opening decision and in Decision 2014/883.
- 24 The General Court noted, in paragraph 79 of that judgment, that, between the date of publication of the 2014 Guidelines and the adoption of the decision at issue, the interested parties in the present case were not given an opportunity to submit effectively comments on the applicability and possible effect of those guidelines.
- 25 In paragraph 81 of the judgment under appeal, the General Court rejected the Commission's argument that PLGK had not demonstrated to what extent the failure to request it to express its views on the application of the 2014 Guidelines could have affected its legal position, or to what extent the possibility of expressing its views on those guidelines could have led to the decision at issue being different in content. In that regard, the General Court relied, in particular, on the fact that the interested parties' right to be able to submit their comments is an essential procedural requirement within the meaning of Article 263 TFEU, the infringement of which — established by the General

Court — results in the annulment of the vitiated measure, without it being necessary to establish an effect on the party alleging such an infringement or that the administrative procedure could have led to a different outcome.

- 26 Lastly, in paragraph 87 of that judgment, the General Court found that the Commission's argument — that the view that the operating aid was incompatible with the internal market in that the investment aid itself was incompatible with that market had an independent legal basis stemming from the FEU Treaty — had been put forward for the first time by the Commission at the hearing before the General Court and finds no support in the wording of Decision 2014/883 or the decision at issue.
- 27 Accordingly, the General Court upheld the sixth plea in law in the action and therefore annulled Articles 2 to 5 of the decision at issue, without examining the other pleas in law put forward in support of that action.

Forms of order sought by the parties

- 28 By its appeal, the appellant claims that the Court of Justice should:

- set aside the judgment under appeal;
- reject the third complaint in the sixth plea in law as unfounded;
- refer the case back to the General Court in order that it may examine the remaining five pleas in law;

in the alternative:

- set aside the judgment under appeal in so far as point 1 of the operative part relates to the findings in the decision at issue concerning the investment aid;
- refer the case back to the General Court in order that it may examine the remaining five pleas in law, and

in any event:

- reserve the costs of the proceedings at first instance and on appeal.

- 29 The municipality of Gdynia and PLGK contend that the appeal should be dismissed and the Commission ordered to pay the costs.

- 30 The Republic of Poland contends that the appeal should be dismissed.

The appeal

Admissibility of the appeal

- 31 Without formally invoking the inadmissibility of the appeal, the municipality of Gdynia and PLGK submit that the scope and content of the various grounds raised in support of the appeal are not sufficiently clear. They contend that those grounds of appeal are worded differently in paragraph 32 of the appeal, in the subheadings preceding the various complaints and in the actual content of those grounds of appeal.

- 32 In that regard, it should be noted that, according to settled case-law, it follows from the second subparagraph of Article 256(1) TFEU, the first paragraph of Article 58 of the Statute of the Court of Justice of the European Union and Article 168(1)(d) of the Rules of Procedure of the Court of Justice that an appeal must indicate precisely the contested elements of the judgment which the appellant seeks to have set aside and also the legal arguments specifically advanced in support of the appeal. In that regard, Article 169(2) of the Rules of Procedure of the Court of Justice specifies that the pleas in law and legal arguments relied on must identify precisely those points in the grounds of the decision of the General Court which are contested (order of 15 January 2019, *CeramTec v EUIPO*, C-463/18 P, not published, EU:C:2019:18, paragraph 28 and the case-law cited).
- 33 In the present case, it must be noted that the municipality of Gdynia and PLGK merely submit, in a very general manner, that the grounds of appeal are unclear in that different wording is used to describe them. However, they do not explain how such differences prevent the Commission's arguments, as put forward in the appeal, from being understood. Furthermore, the Commission identifies precisely, in each of the grounds of its appeal, the disputed parts of the judgment under appeal and sets out in detail the legal arguments which specifically support its request that that judgment be set aside, thus enabling any normally diligent party to understand its content and the Court to carry out its review of legality (see, by analogy, judgment of 28 January 2016, *Heli-Flight v AESA*, C-61/15 P, not published, EU:C:2016:59, paragraph 77). The arguments developed by the municipality of Gdynia and PLGK in their written pleadings demonstrate that they were able to understand the grounds of appeal.
- 34 The appeal cannot, therefore, be regarded as inadmissible in its entirety.
- 35 It must be added that, in so far as the municipality of Gdynia and PLGK put forward separate arguments specifically challenging the admissibility of the second ground of appeal, those arguments will be addressed when that ground of appeal is examined.

Substance

- 36 In support of its appeal, the appellant relies on three grounds, the first of which alleges errors of law relating to the scope of the rights which the interested parties in the present case derive from Article 108(2) TFEU, the second alleges misinterpretation of the decision at issue and the third, submitted in the alternative, alleges that point 1 of the operative part of the judgment under appeal is disproportionate.

First part of the first ground of appeal

Arguments of the parties

- 37 By the first part of the first ground of appeal, the Commission complains that, in paragraphs 69 to 89 of the judgment under appeal, the General Court misapplied the right conferred on interested parties by Article 108(2) TFEU to submit comments, 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): it wrongly classified that right, in the circumstances of the present case, as an 'essential procedural requirement', failure to comply with which automatically results in the annulment of the decision at issue, without it being necessary to show the effect of that infringement on the situation of the party concerned or on the conclusions reached in that decision.

- 38 The Commission submits that all the legal consequences arising from the incorrect classification of the right at issue as an ‘essential procedural requirement’ are also vitiated by an error of law. In particular, the General Court was wrong to find, in paragraph 70 of the judgment under appeal, that it was entitled to examine of its own motion the infringement of that essential procedural requirement as a plea involving a matter of public policy.
- 39 Furthermore, the argument put forward before the General Court, alleging such an infringement, was inadmissible, in so far as it related to the legal regime used in the decision at issue, since that argument was raised by PLGK only at the stage of the reply submitted by it at first instance.
- 40 By classifying that argument, in paragraph 70 of the judgment under appeal, as ‘amplifying a plea made previously, directly or by implication’ in the application initiating the proceedings, and declaring it admissible, the General Court infringed the rule which prohibits the production of new pleas in law in the course of proceedings.
- 41 In so far as, in that application, the municipality of Gdynia and PLGK put forward a plea in law alleging infringement of their procedural guarantees when the decision at issue was adopted in that they had not had the opportunity to submit comments, they were referring to the failure to open a new formal investigation procedure before the adoption of that decision, which, if opened, would have made it possible to examine the legal effects of the exclusion of expenditure associated with the performance of public interest tasks from the State aid at issue. That plea in law was, therefore, based on a justification that was completely different to that relating to the failure to consult the municipality of Gdynia and PLGK on the 2014 Guidelines.
- 42 The Commission adds that, while only the Member State responsible for granting the aid has rights of defence, in the present case, the Republic of Poland nevertheless did not bring an action for annulment of the decision at issue based on infringement of its rights of defence or of its right to an adversarial procedure and, as an intervener, it cannot rely on such a plea in law.
- 43 The municipality of Gdynia and PLGK contend that the first part of the first ground of appeal is unfounded.
- 44 In their view, the Commission is trying to minimise the importance of the right of the interested parties in the present case to submit comments, by relying on settled case-law according to which the role of interested parties in a formal investigation procedure is only to serve as a source of information for the Commission. Such arguments are contrary to EU law as it currently stands, since the judgments cited by the Commission in that regard were delivered before the entry into force of the Charter of Fundamental Rights of the European Union (‘the Charter’).
- 45 The interested parties’ right to be heard before the adoption of a Commission decision should now be taken into account. Contrary to what the Commission argues in that regard, the municipality of Gdynia and PLGK do not contend that the fact that the Charter is fully applicable to the procedures conducted by the Commission and that Article 41(2)(a) of the Charter — which provides that every person has the right to be heard before any individual measure which would affect him or her adversely is taken — applies to the beneficiary of aid such as PLGK means that the municipality of Gdynia and PLGK enjoy, under the provisions of the Charter, a right to an adversarial debate with the Commission.
- 46 Moreover, contrary to what the Commission suggests, the General Court was fully entitled right to reject, in paragraph 70 of the judgment under appeal, the Commission’s argument that the line of argument put forward by PLGK in its reply, concerning the change in the legal regime used in the decision at issue, constitutes a new plea in law. Furthermore, the fact that the General Court stated that it could raise of its own motion the infringement of an essential procedural requirement does not mean that, in the present case, it examined that infringement of its own motion.

- 47 The municipality of Gdynia and PLGK contend that by the first part of the first ground of appeal, the Commission focuses on the judgment of 8 May 2008, *Ferriere Nord v Commission* (C-49/05 P, not published, EU:C:2008:259), proposing a restrictive reading thereof, whereas the General Court also referred to other judgments of the Court of Justice and the General Court and, in particular, to the judgment of 11 December 2008, *Commission v Freistaat Sachsen* (C-334/07 P, EU:C:2008:709). It is apparent from paragraph 56 of that judgment that where the legal regime, under which a Member State has notified planned aid, changes before the Commission takes its decision, the Commission must request interested parties to express their views on whether that aid is compatible with the new rules. The obligation to request interested parties to express their views remains the rule, unless the new legal regime does not entail any substantive amendments in relation to the regime which was previously in force.
- 48 The municipality of Gdynia and PLGK further contend that the judgment of 8 May 2008, *Ferriere Nord v Commission* (C-49/05 P, not published, EU:C:2008:259) does not allow the Commission to draw up universal rules applicable to every situation, since the facts and law relevant in the case which gave rise to that judgment differ from those analysed in the judgment under appeal. In particular, first, in the case which gave rise to the judgment of 8 May 2008, *Ferriere Nord v Commission* (C-49/05 P, not published, EU:C:2008:259), neither the parties nor the General Court noted any significant differences between the decision to initiate the procedure and the decision which was being challenged, such as those found by the General Court in paragraphs 67 to 71 of the judgment under appeal.
- 49 Secondly, in the present case, Decision 2014/883 closing the Commission's procedure had already been adopted and was the subject of an action before the General Court, and its subsequent withdrawal was immediately followed by a further closure of the procedure which had been resumed, which was not so in the case which gave rise to the judgment of 8 May 2008, *Ferriere Nord v Commission* (C-49/05 P, not published, EU:C:2008:259).
- 50 Thirdly, the General Court clearly stated, in the latter case, that the principles laid down by the two legal regimes of the State aid at issue were essentially the same. The Court of Justice also noted that similarity in its judgment in that case. By contrast, in paragraphs 67 to 78 of the judgment under appeal, the General Court demonstrated precisely that the new provisions of the 2014 Guidelines, applied by the Commission in the decision at issue, had brought about substantial amendments in relation to the legal regime previously in force which was taken into account in the opening decision and in Decision 2014/883.
- 51 The municipality of Gdynia and PLGK contend that those amendments and the Commission's obligation to define sufficiently the framework of its examination led the General Court, in the present case, to classify the Commission's obligation to give the interested parties the opportunity to submit their comments as an 'essential procedural requirement', in accordance with paragraph 55 of the judgment of 11 December 2008, *Commission v Freistaat Sachsen* (C-334/07 P, EU:C:2008:709). Amendments of such a magnitude would most likely have required a new formal investigation procedure under Article 6 of Regulation No 659/1999, which those parties certainly would have pointed out in their comments if they had had the opportunity to do so.
- 52 The approach advocated by the Commission is also contrary to the position expressed in the Opinion of Advocate General Sharpston in *Spain v Commission* (C-114/17 P, EU:C:2018:309), according to which a Member State's right to be heard by the Commission in a situation such as that at issue in this case is an essential procedural requirement. The municipality of Gdynia and PLGK also agree with the view expressed in that Opinion that it is irrelevant whether the Member State concerned succeeds in specifically demonstrating that, if the Commission had not infringed that right, its decision on the State aid at issue would have been different. Such a condition would necessarily be speculative and it would be difficult to identify the level of proof and degree of accuracy required to demonstrate that the decision concerned would actually have been different.

- 53 The municipality of Gdynia and PLGK note that when the Commission adopted the 2014 Guidelines on 31 March 2014, it invited both the Member States and airports receiving aid to submit their comments on the measures in respect of which the Commission had opened formal investigation procedures. In that invitation, 23 procedures which concern State aid to airports or airlines are referred to, but the case of Gdynia-Kosakowo airport is not mentioned, as it was closed by Decision 2014/883. That manner of proceeding could be described as ‘discriminatory’. It is irrelevant in that regard whether that decision had been adopted, since it was subsequently withdrawn and the Commission resumed the administrative procedure in that case until the decision at issue was adopted.
- 54 The Republic of Poland also contends that the first part of the first ground of appeal is unfounded.
- 55 In particular, it contends that it is in no way apparent from the judgment under appeal that the General Court granted rights of defence to the interested parties in the present case. By contrast, the General Court held that the Commission was required to invite those parties to put forward their arguments before the adoption of the decision at issue, in view of the scope of the amendments made by the 2014 Guidelines. The right to formulate comments is not limited to the rights of defence alone, but has a wider scope. It is, in particular, an essential element of the right to good administration, provided for in Article 41 of the Charter, which the municipality of Gdynia and PLGK can rely on, as well as the right to the protection of legitimate expectations.
- 56 The position defended by the Commission would, moreover, be liable to infringe those fundamental rights because, in the present case, on account of the fundamental differences between the Regional aid Guidelines and the 2014 Guidelines, it would be impossible to prove that depriving the parties to the State aid procedure of the opportunity to submit comments had affected the outcome of that procedure. The Commission could not, therefore, disregard the obligation to hear the parties without fear of negative consequences.
- 57 The Commission did not deny that there are fundamental differences between the Regional aid Guidelines and the 2014 Guidelines, nor does it call into question the fact that it did not give the interested parties in this case the opportunity to submit comments before the decision at issue was adopted.
- 58 The Republic of Poland contends that, although the Court of Justice did not explicitly state in its judgment of 8 May 2008, *Ferriere Nord v Commission* (C-49/05 P, not published, EU:C:2008:259) that the right to submit comments constituted an essential procedural requirement, it did not exclude it either. As regards the judgment of 11 December 2008, *Commission v Freistaat Sachsen* (C-334/07 P, EU:C:2008:709), the Commission did not take account of paragraph 55 of that judgment, in which the Court of Justice clearly stated that the Commission’s obligation to give the interested parties an opportunity to submit their comments is an essential procedural requirement. The Commission merely referred to paragraph 56 of that judgment, whereas paragraphs 55 and 56 of that judgment should be interpreted together.
- 59 The Commission also disregards the fact that, in the Opinion of Advocate General Sharpston in *Spain v Commission* (C-114/17 P, EU:C:2018:309), it was proposed that, inasmuch as the Commission based its amending decision on information on which a party had not been able to comment, it had infringed that party’s right to be heard and, therefore, the principle of good administration.
- 60 Furthermore, irrespective of the infringement of the applicants’ right to submit comments, the Commission infringed the rights of defence of the Republic of Poland as the Member State to which the decision at issue was addressed, preventing it from putting forward its arguments before that decision was adopted. The Republic of Poland, as an intervener, is entitled to plead, in the present proceedings, the infringement of its rights of defence.

- 61 The arguments put forward by the Commission, by which it denies that the Republic of Poland can argue that there has been such an infringement, are inadmissible because they were submitted late, since the Commission challenged that possibility for the first time only at the stage of the reply submitted to the Court of Justice, whereas the Republic of Poland has relied on that infringement from the outset of the proceedings at first instance.

Findings of the Court

- 62 As a preliminary point, it should be noted, in the first place, that the General Court examined the third complaint in the sixth plea in law in the action before it, not from the point of view of the rights of defence, which only Member States have as parties to the State aid investigation procedures (see, to that effect, 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, paragraphs 80 to 83), but by considering the right which the interested parties have, under Article 108(2) TFEU, to submit comments.
- 63 As is apparent from paragraph 89 of the judgment under appeal, the General Court, having found that that right to submit comments had been infringed in the present case, held that there was no need to rule, in particular, on whether the municipality of Gdynia and PLGK could plead before the General Court that the Republic of Poland's rights of defence had been infringed, which was also raised in that Member State's statement in intervention.
- 64 Consequently, there is no need to examine, at this stage of the proceedings, the arguments before the Court of Justice concerning, first, whether, as an intervener at first instance, the Republic of Poland is entitled to rely on a plea alleging infringement of its rights of defence or of its right to an exchange of arguments, even though it did not bring an action for annulment of the decision at issue based on an infringement of those rights, and, secondly, whether such an infringement leads to the annulment of the decision at issue. It follows that there is also no need to assess, for the purposes of examining the present appeal, the Republic of Poland's argument before the Court of Justice concerning the inadmissibility of the Commission's arguments before that court by which the Commission claims that the Republic of Poland cannot plead such an infringement.
- 65 In the second place, it is apparent from the judgment under appeal and, in particular, from paragraph 89 thereof, that the General Court also did not rule on the Commission's obligation to invite the interested parties in the present case to submit their comments on the factual changes made in the decision at issue, and therefore focused on the obligation to invite comments in so far as it concerns the new legal regime applied in that decision. Consequently, it is not for the Court of Justice to examine the arguments put forward by the municipality of Gdynia and PLGK by which they complain that the Commission did not invite the interested parties in the present case to submit their views in the light of the new factual information contained in the decision at issue.
- 66 In the third place, as regards the Commission's arguments set out in paragraphs 39 to 41 above, it should be borne in mind that, under Article 84(1) of the Rules of Procedure of the General Court, no new plea in law may be introduced in the course of proceedings unless it is based on matters of law or of fact which come to light in the course of the procedure. However, a plea or an argument which may be regarded as amplifying a plea put forward previously, whether directly or by implication, in the original application and which is closely connected therewith must be declared admissible (judgment of 11 July 2013, *Ziegler v Commission*, C-439/11 P, EU:C:2013:513, paragraph 46 and the case-law cited).
- 67 In the present case, it is not in dispute that, as the General Court noted in paragraph 70 of the judgment under appeal, in their application initiating proceedings, the municipality of Gdynia and PLGK stated that they should have been given an opportunity to comment on the Commission's new arguments and analysis and that the failure to fulfil obligations alleged on that point constitutes, as such, in their view, an infringement of essential procedural requirements. Nor does the Commission

deny that — as the General Court also noted in paragraph 70 — point II.14 of the application, which summarises the pleas in law put forward in support of the action before the General Court, is entitled, in particular, ‘breach of the procedural rules in the form of the applicants’ right to submit their comments and to express a view’.

- 68 In those circumstances, the General Court did not err in law when it held, in paragraph 70 of the judgment under appeal, that the argument raised in PLGK’s reply, alleging infringement of the interested parties’ right to submit comments on the relevance of the new legal regime, by which that company was referring specifically to the Commission’s new analysis in the decision at issue, constitutes an amplification of a plea raised in the application, alleging infringement of essential procedural requirements relating to the right of the municipality of Gdynia and PLGK to submit comments.
- 69 Since the General Court rightly found that that argument was admissible, it was fully entitled to examine its substance, irrespective of whether, as the General Court also pointed out in paragraph 70 of the judgment under appeal, it could raise of its own motion the infringement, which is the subject matter of that argument, as a plea involving a matter of public policy.
- 70 Those preliminary findings having been made, it must be borne in mind, as regards the right the infringement of which was held by the General Court to result in the annulment of Articles 2 to 5 of the decision at issue, that, according to the case-law of the Court of Justice, undertakings which may be beneficiaries of State aid are regarded as being interested parties and that the Commission has the duty, at the examination phase referred to in Article 108(2) TFEU, to invite those parties to submit their comments (judgments of 15 June 1993, *Matra v Commission*, C-225/91, EU:C:1993:239, paragraph 16; of 2 April 1998, *Commission v Sytraval and Brink’s France*, C-367/95 P, EU:C:1998:154, paragraph 59; and of 11 September 2008, *Germany and Others v Kronofrance*, C-75/05 P and C-80/05 P, EU:C:2008:482, paragraph 37 and the case-law cited).
- 71 Although those interested parties cannot rely on the rights of defence, they have, by contrast, the right to be involved in the administrative procedure followed by the Commission, to an extent appropriate to the circumstances of the case (judgment of 8 May 2008, *Ferriere Nord v Commission*, C-49/05 P, not published, EU:C:2008:259, paragraph 69).
- 72 The Court has ruled, in proceedings concerning the application of Article 108(2) TFEU, that publication of a notice in the *Official Journal of the European Union* is an appropriate means of informing all the parties concerned that a procedure has been initiated. That communication is intended to obtain from persons concerned all information required for the guidance of the Commission with regard to its future action. Such a procedure also guarantees to the other Member States and the sectors concerned an opportunity to make their views known (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 80 and the case-law cited).
- 73 The procedure for reviewing State aid is, however, in view of its general scheme, a procedure initiated in respect of the Member State responsible, in the light of its obligations under EU law, for granting the aid. Thus, in order to observe the rights of the defence, where the Member State concerned was not afforded an opportunity to comment on certain information, the Commission may not use it in its decision with regard to that Member State (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 81 and the case-law cited).

- 74 In the procedure for reviewing State aid, interested parties other than the Member State concerned have only the role mentioned in paragraph 72 above and, in that regard, they cannot themselves seek to engage in an adversarial debate with the Commission in the same way as is offered to the abovementioned Member State (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 82 and the case-law cited).
- 75 No special role is reserved to the recipient of aid, among all the interested parties, by any provision of the procedure for reviewing State aid. In that regard, it must be made clear that the procedure for reviewing State aid is not a procedure initiated against the recipient or recipients of aid entailing rights on which it or they could rely which are as extensive as the rights of the defence as such (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).
- 76 As regards the specific circumstances of the present case, it should be noted that, on 2 July 2013, the Commission adopted the opening decision by which it initiated the formal investigation procedure in respect of the aid measure at issue, pursuant to Article 108(2) TFEU, and invited the interested parties in this case to submit their comments. By Decision 2014/883, the Commission found that the proposed funding in question constituted State aid within the meaning of Article 107(1) TFEU and that it had to be recovered by the Polish authorities to the extent that it had been paid out. That decision was subsequently withdrawn and replaced by the decision at issue.
- 77 Furthermore, it is apparent from paragraph 79 of the judgment under appeal, and it is not disputed in the present appeal, that the interested parties in the present case were not invited to submit comments effectively on the applicability and possible effect of the 2014 Guidelines, before the decision at issue was adopted, even though those guidelines were published on 4 April 2014, that is, after Decision 2014/883 was adopted and therefore after the initial closure of the investigation procedure.
- 78 It must, therefore, be examined whether the General Court was entitled to find, in paragraph 81 of the judgment under appeal, that the interested parties' right in the present case to submit comments on that new legal regime and, in particular, on the 2014 Guidelines, before the decision at issue was adopted, constitutes an essential procedural requirement within the meaning of Article 263 TFEU, the infringement of which leads to the annulment of that decision, without it being necessary to establish that the administrative procedure could have led to a different result.
- 79 As the Court of Justice has held, the Commission cannot, without infringing the procedural rights of the interested parties, base its decision on new principles introduced by a new legal regime, without inviting those interested parties to submit their comments in that regard (see, to that effect, judgment of 8 May 2008, *Ferriere Nord v Commission*, C-49/05 P, not published, EU:C:2008:259, paragraphs 70 and 71).
- 80 However, in principle, a procedural irregularity will entail the annulment of a decision in whole or in part only if it is shown that in the absence of such irregularity the decision being challenged might have been substantively different (judgment of 23 April 1986, *Bernardi v Parliament*, 150/84, EU:C:1986:167, paragraph 28, and the case-law cited).
- 81 More specifically, as regards the interested parties' procedural rights, where there is a change in the legal regime after the Commission has given the interested parties the opportunity to submit their comments and before the Commission has adopted a decision on proposed aid, and where the Commission bases that decision on the new legal regime without inviting those parties to submit their comments on it, the mere existence of differences between the legal regime on which those parties were given the opportunity to submit their comments and that on which that decision is based is not, as such, capable of leading to the annulment of that decision. Even though the legal regimes at issue have changed, the question arises as to whether, in the light of the provisions of those regimes which

are relevant to the case, that change was capable of altering the meaning of the decision in question (see, to that effect, judgment of 8 May 2008, *Ferriere Nord v Commission*, C-49/05 P, not published, EU:C:2008:259, paragraphs 78 to 83).

- 82 The General Court therefore erred in law, in paragraph 81 of the judgment under appeal, when it held that the interested parties' right to submit comments in circumstances such as those at issue in the present case is an essential procedural requirement within the meaning of Article 263 TFEU the infringement of which leads to the annulment of the decision at issue, without it being necessary to establish that the infringement of that right could have affected the meaning of that decision.
- 83 It follows that the General Court also erred in law, in paragraph 83 of that judgment, when it rejected the Commission's argument by which it sought to demonstrate that the decision at issue would have been the same if the interested parties in the present case had been given the opportunity to submit comments on the 2014 Guidelines, since the operating aid was in any event incompatible with the internal market on account of the investment aid's being incompatible with that market. In particular, the General Court rejected that line of argument, first, by wrongly relying, as is apparent from paragraph 82 of the present judgment, on the fact that it is not necessary to establish that the infringement found could have affected the meaning of the decision at issue.
- 84 Secondly, the General Court relied on the substantive amendments which it had identified when comparing the Regional aid Guidelines and the 2014 Guidelines, whereas, by the line of argument in question, the Commission was specifically seeking to demonstrate that, whatever the amendments introduced by the 2014 Guidelines, the finding that the operating aid was incompatible with the internal market had another legal basis independent of the 2014 Guidelines, so that that finding of incompatibility could not have been affected if the interested parties had been given the opportunity to comment on those guidelines.
- 85 Although, in principle, substantive amendments to a legal basis on which a Commission decision is based are capable of affecting that decision, that is not the case if that decision also has an autonomous legal basis which has not undergone any change and which, on its own, forms a valid basis for that decision.
- 86 It must, therefore, be held that the General Court could not, without disregarding the case-law relating to the procedural rights of interested parties as set out in paragraphs 70 to 75 and 79 to 81 above, find that there is no need to examine the effect on the decision at issue of the failure to invite the interested parties to express their views on the 2014 Guidelines before that decision was adopted, or find that there was such an effect without examining the Commission's arguments that there was an autonomous and independent legal basis for that decision.
- 87 The finding set out in the previous paragraph is not called into question by the other arguments put forward before the Court of Justice and, in particular, in the first place, by those relating to the judgment of 11 December 2008, *Commission v Freistaat Sachsen* (C-334/07 P, EU:C:2008:709). It is true that, in paragraph 55 of that judgment, the Court noted, in essence, that it follows from Article 108(2) TFEU and Article 1(h) of Regulation No 659/1999 that, where the Commission decides to initiate the formal investigation procedure in respect of proposed aid, it must give interested parties, including the undertaking or undertakings concerned, the opportunity to submit their comments and that that rule is an essential procedural requirement.
- 88 However, first, that judgment concerns the Commission's obligations at the time of the opening of the formal investigation procedure. Secondly, it raises the question of the application of new legal rules adopted after the notification of proposed aid. That judgment therefore deals with issues separate to those raised in the present appeal, since the right to be given an opportunity to submit comments, on

which the municipality of Gdynia and PLGK rely, relates to a change in the legal regime which took place after those parties were invited to submit their comments and before the decision at issue was adopted.

- 89 In the second place, the finding set out in paragraph 86 of the present judgment is not called into question either by the arguments put forward both by the municipality of Gdynia and PLGK and by the Republic of Poland to the effect that the interested parties' right to be given the opportunity to submit comments in a situation such as that at issue must be assessed in the light of the fundamental rights protected by the Charter and, in particular, in the light of the right to good administration provided for in Article 41 of the Charter, which is one of the components thereof.
- 90 In that regard, it must be noted that, as the Commission submits, and as the Advocate General also observed in point 52 of his Opinion, the entry into force of the Charter has not altered the nature of the rights conferred by Article 108(2) TFEU, nor is it intended to alter the nature of the control of State aid established by the Treaty.
- 91 Moreover, contrary to what the Republic of Poland suggests in its general assertion, set out in paragraph 56 above, concerning a possible infringement of fundamental rights, it cannot be found, from the outset, that the existence of differences between the two legal regimes at issue in the present case makes it impossible to demonstrate that depriving interested parties of the opportunity to submit comments on the 2014 Guidelines is likely to have had an effect on the outcome of the procedure. On the contrary, it is precisely because of such differences that, if necessary, such an effect could be demonstrated. However, the question of whether the failure to consult the interested parties in the present case on the 2014 Guidelines may actually have had an effect on the conclusion reached by the Commission in the decision at issue falls within the substance of the second part of the first ground of appeal and the second ground of appeal.
- 92 In the third place, as regards the arguments set out in paragraphs 52 and 59 above and based on the Opinion of Advocate General Sharpston in *Spain v Commission* (C-114/17 P, EU:C:2018:309), it is sufficient to note that, in the judgment of 20 September 2018 in *Spain v Commission* (C-114/17 P, EU:C:2018:753), the Court did not follow the same reasoning as that advocated in that Opinion.
- 93 In the fourth and last place, with regard to the argument set out in paragraph 53 above, relating to the invitation made in other procedures to Member States and airports receiving aid to submit their comments, it should be noted that — as observed by the Advocate General, in essence, in paragraph 54 of his Opinion in the present case — the fact, if established, that the Commission respected the procedural rights of interested parties, as described in paragraph 79 above, in the 23 procedures referred to by the municipality of Gdynia and PLGK, does not detract from the considerations set out in paragraph 82 above, from which it is clear that the right claimed by the municipality of Gdynia and PLGK in the present case is not an essential procedural requirement the mere infringement of which results in the annulment of the decision at issue.
- 94 The first part of the first ground of appeal must, therefore, be upheld.
- 95 However, as follows from paragraph 82 above, the errors found in paragraphs 82 to 86 above can lead to the judgment under appeal being set aside, in so far as the General Court annulled the decision at issue, only if the provisions of the 2014 Guidelines on which the Commission relied in that decision were not actually capable of changing the meaning of that decision. As is apparent from paragraph 91 above, the question of whether that is the case falls within the substance of the second part of the first ground of appeal and the second ground of appeal.
- 96 The second part of the first ground of appeal and the second ground of appeal must, therefore, be examined together.

Second part of the first ground of appeal and the second ground of appeal

Arguments of the parties

– Arguments of the parties on the second part of the first ground of appeal

- 97 By the second part of the first ground of appeal, the Commission submits that, in paragraphs 71 to 89 of the judgment under appeal, the General Court misinterpreted and misapplied the case-law resulting from the judgment of 8 May 2008, *Ferriere Nord v Commission* (C-49/05 P, not published, EU:C:2008:259), when it held that the Commission had infringed an essential procedural requirement in the present case by not giving the municipality of Gdynia and PLGK the opportunity to submit their comments on the 2014 Guidelines.
- 98 The municipality of Gdynia and PLGK contend that the Commission was wrong to argue that its decision on whether the aid measure was compatible with the internal market was not based on the 2014 Guidelines. As the General Court showed in paragraph 84 of the judgment under appeal, the Commission expressly referred to the 2014 Guidelines, in recitals 245 and 246 of the decision at issue, in its assessment of whether the operating aid was compatible with the internal market.
- 99 Furthermore, contrary to the judgment of 8 May 2008, *Ferriere Nord v Commission* (C-49/05 P, not published, EU:C:2008:259), the Commission cannot claim in the present case that the principles and assessment criteria in the 2014 Guidelines were essentially the same as those in the previous legal regime.
- 100 The municipality of Gdynia and PLGK dispute the Commission's argument that, by pointing out in paragraph 73 of the judgment under appeal that, in the opening decision and in Decision 2014/883, on the one hand, and in the decision at issue, on the other, the Commission relied on different provisions of the Treaty for the purposes of analysing whether the operating aid was compatible with the internal market, the General Court took a purely formalistic approach. The fundamentally different nature of the Regional aid Guidelines and the 2014 Guidelines arises, first, from the fact that the former concern regional aid and the latter sectoral aid and, secondly, from the numerous arguments set out by the General Court in paragraphs 67 to 78 of the judgment under appeal.
- 101 According to the municipality of Gdynia and PLGK, there is, therefore, no justification for the claim that the judgment of 8 May 2008, *Ferriere Nord v Commission* (C-49/05 P, not published, EU:C:2008:259), relieves the Commission of the obligation to consult interested parties where it considers that such a consultation is unlikely to alter its decision. The right of the interested parties to be able to submit comments is, in the present case, an essential procedural requirement, the infringement of which — established in this case — results in the annulment of the contested measure, without it being necessary to prove that the administrative procedure could have led to a different result.
- 102 The Republic of Poland contends that the Commission disregards the detailed statement of the General Court concerning the substantive amendments introduced by the 2014 Guidelines. The fact that those guidelines differ in substance from the previous legal regime is apparent from the Commission's argument that it applied only the first criterion of paragraph 113 of the 2014 Guidelines. Furthermore, the criterion of facilitating regional development in the 2014 Guidelines is interpreted in a different way from the criterion of contribution to regional development set out in the Regional aid Guidelines.
- 103 Nor can the Republic of Poland accept the Commission's position that it is immaterial that the 2014 Guidelines were adopted pursuant to a provision of the Treaty, namely Article 107(3)(c) TFEU, different from that underlying its Communication entitled 'Community guidelines on financing of

airports and start-up aid to airlines departing from regional airports' (OJ 2005 C 312, p. 1, 'the 2005 Guidelines'), namely Article 107(3)(a) TFEU. Although those two provisions of the Treaty have in common that they enable the approval of aid intended for the development of certain regions, they lay down different additional conditions for the compatibility of the aid, by requiring, in particular in Article 107(3)(c) TFEU, that the aid granted does not adversely affect trading conditions to an extent contrary to the common interest. According to paragraphs 131 and 132 of the 2014 Guidelines, in assessing the compatibility of operating aid, the Commission takes into account the distortion of competition and the effect on trade.

- 104 That means that, before the decision at issue was adopted, the Commission ought to have given the Republic of Poland the opportunity to submit its comments on the question of limiting undue distortions of competition, the obligation to limit distortion being introduced by the 2014 Guidelines. That shows both the substantive nature of the amendments made by those guidelines and the fact that the assessment in the decision at issue could have been different if the Commission had given the Republic of Poland the opportunity to submit comments.

– Arguments of the parties on the second ground of appeal

- 105 By its second ground of appeal, the Commission submits that the General Court, in paragraph 89 of the judgment under appeal, was wrong to find that the decision at issue was unlawful, by relying on the misinterpretation of that decision and of Decision 2014/883, set out in paragraphs 84 to 87 of that judgment, thereby distorting those two decisions. The Commission also challenges the arguments put forward by the municipality of Gdynia and PLGK seeking to show that the second ground of appeal is ineffective and inadmissible.
- 106 The municipality of Gdynia and PLGK contend that the second ground of appeal is inadmissible, since it relates to the assessment of the facts and the Commission has not provided evidence, as is apparent from the arguments submitted by the municipality of Gdynia and PLGK on the substance of the second ground of appeal, that the General Court, by its assessment of those facts, distorted the decision at issue. In particular, the Commission does not call into question the fact that, in so far as they concern the decision at issue and Decision 2014/883, paragraphs 84 to 87 of the judgment under appeal — which the Commission disputes in its second ground of appeal — explain several sets of paragraphs in those decisions, namely paragraphs 196, 197, 198 to 202, 245 and 246 of the decision at issue and paragraphs 227 and 228 of Decision 2014/883, which relate to findings of fact, not to questions of interpretation of law.
- 107 The municipality of Gdynia and PLGK add that the argument in the reply, by which the Commission seeks to demonstrate that the second ground of appeal is admissible, is itself inadmissible because the Commission does not clearly indicate the passage from the response to which it refers in that regard.
- 108 The municipality of Gdynia and PLGK argue that the second ground of appeal is also ineffective. In particular, the grounds relied on by the General Court in support of the annulment of the decision at issue are set out in paragraphs 62 to 79 of the judgment under appeal. The Commission's complaint concerns paragraphs 84 to 87 of that judgment, namely considerations expressed by the General Court only in the alternative, in response to the Commission's other arguments. This follows from paragraph 80 of the judgment under appeal, which states that '[those] findings cannot be brought into question by any of the Commission's other arguments'. In that regard, the Commission merely states that it disagrees with the interpretation of that wording by the municipality of Gdynia and PLGK.
- 109 The municipality of Gdynia and PLGK contend that the first sentence of paragraph 89 of the judgment under appeal can be interpreted only as confirmation that the Commission's arguments, referred to by the General Court in paragraphs 81 to 88 of the judgment under appeal, in no way affect the finding

that the Commission's decision must be annulled on the basis of the arguments set out in paragraphs 62 to 79 of that judgment. Furthermore, the first sentence of paragraph 89 of the judgment under appeal perfectly reflects the distinction drawn in paragraph 80 of that judgment.

- 110 The municipality of Gdynia and PLGK maintain that the second ground of appeal is, in any event, unfounded. The Commission appears to argue that the conclusion in recital 244 of the decision at issue constitutes an independent legal basis for a finding that the operating aid was incompatible with the internal market, because of the expression 'inherently' in that recital. The use of such a formula could, at most, be regarded as a way of presenting the reasoning in that decision and not as a ground for determining compatibility of the State aid with the internal market. The provisions of the Treaty constitute such a legal basis, which the General Court summarised in the last sentence of paragraph 87 of the judgment under appeal.
- 111 Furthermore, the wording of that recital does not support the Commission's argument in that regard. It is also apparent from paragraph 87 of the judgment under appeal that the Commission's assessment was carried out, as regards Decision 2014/883, in the context of Article 107(3)(a) TFEU and the Regional aid Guidelines and, as regards the decision at issue, in the context of Article 107(3)(c) TFEU and the 2014 Guidelines. Thus, contrary to what the Commission argues, the finding that the operating aid is incompatible with the internal market was not based on the general prohibition of State aid in Article 107(1) TFEU.
- 112 The Commission criticises the General Court for having held, in paragraph 84 of the judgment under appeal, that the conclusion that operating aid cannot be granted for non-existent airport infrastructure follows from the application of the 2014 Guidelines. That interpretation of paragraph 84 is incorrect in the light of the wording of that paragraph.
- 113 The Commission also seems to claim, although it is not apparent from recitals 244 and 245 of the decision at issue, that the autonomous nature of the conclusion that the operating aid was incompatible with the internal market, since the investment aid itself was incompatible with that market, was due to the fact that the conditions of Article 107(3) TFEU were not met. However, non-compliance with those conditions should be interpreted in the present case as being due to the lack of compliance with the 2014 Guidelines.
- 114 The Commission therefore contradicts itself and acknowledges that the assessment of the operating aid was essentially based on the 2014 Guidelines. Accordingly, the basic argument that allowing the interested parties in the present case to express their views on the 2014 Guidelines with regard to operating aid would not have affected the content of the decision at issue is unfounded.
- 115 The Republic of Poland contends that the second ground of appeal is unfounded. In so far as the Commission maintains that the decision at issue would have been the same if the interested parties in the present case had been given the opportunity to submit comments, the Commission cannot prejudice the scope of the comments which those interested parties might have submitted if they had had the opportunity to do so.
- 116 In recitals 196 and 197 of the decision at issue, the Commission stated that in the present case, it would apply the principles laid down in the 2014 Guidelines as regards operating aid. In recital 245 of the decision at issue, the Commission also expressly referred to the 2014 Guidelines, stating that the fact that the operating aid was incompatible with the internal market, because the investment aid itself was incompatible with the internal market, was equally relevant in the context of the 2014 Guidelines. As the General Court observed in paragraph 84 of the judgment under appeal, the Commission also applied the first criterion of the 2014 Guidelines in recital 246 of the decision at issue, whereas in its appeal, the Commission submits that it applied only the criterion in paragraph 113(a) of the 2014 Guidelines.

117 The Republic of Poland therefore contends that the second ground of appeal, inasmuch as it is founded on an alleged twofold legal basis for the assessment carried out by the Commission, is unfounded and contradicts the Commission's earlier arguments, contained both in the decision at issue and its appeal.

Findings of the Court

– Admissibility of the second ground of appeal

118 As regards the inadmissibility raised by the municipality of Gdynia and PLGK concerning the Commission's arguments in its reply seeking to demonstrate that the second ground of appeal is admissible, it is sufficient to note that, even if, in those arguments, the Commission incorrectly referred to paragraphs 35 and 36 of the response of the municipality of Gdynia and PLGK rather than to paragraphs 34 and 35 of that response, such an inaccuracy prevents neither the other parties to the appeal from identifying the matters in that response to which the Commission wishes to respond, nor the Court from ruling on that point. The Commission's arguments cannot, therefore, be regarded as being so unclear that they must be declared inadmissible.

119 The argument set out in paragraph 107 above must, therefore, be rejected as unfounded.

120 As regards the arguments outlined in paragraph 106 above, contrary to what the municipality of Gdynia and PLGK suggest, the Commission does not, in the second ground of appeal, merely call into question the General Court's assessment of the findings of fact in Decision 2014/883 and in the decision at issue; it submits that the General Court misinterpreted those decisions by failing to recognise that the finding in each of those decisions that the operating aid was incompatible with the internal market had an autonomous and independent legal basis from the Regional aid Guidelines, as regards Decision 2014/883, and, from the 2014 Guidelines, as regards the decision at issue.

121 The question of whether the General Court misinterpreted those decisions in the manner set out in the previous paragraph is a question of law which is admissible at the appeal stage, whereas, as is apparent from the very arguments of the municipality of Gdynia and PLGK, the question of whether the Commission has succeeded in demonstrating that those interpretations were incorrect in the present case falls within the substance of the second ground of appeal.

122 Consequently, the second ground of appeal must be regarded as admissible.

– Substance

123 As a preliminary point, as regards the arguments put forward by the municipality of Gdynia and PLGK that the second ground of appeal is ineffective, it is sufficient to note that, in the judgment under appeal, after holding that the interested parties' right to submit comments in circumstances such as those at issue in the present case is an essential procedural requirement, the mere infringement of which results in the annulment of the decision at issue and that the scope of those comments cannot be prejudged, in view of the changes introduced by the new legal regime, the General Court, in any event, rejected the Commission's argument that the provisions of the 2014 Guidelines on which it had relied in the decision at issue were not capable of influencing that decision. In view of those latter grounds developed by the General Court, the second ground of appeal cannot be declared ineffective in its entirety.

124 As regards the merits of the second part of the first ground of appeal and of the second ground of appeal, first of all, the Commission submits that the General Court unduly broadened the subject matter of the action, in the last part of paragraph 86 of the judgment under appeal, when it noted that

‘Decision 2014/883 was withdrawn and the issue is not so much whether the interested parties had been able to submit comments in relation to that decision, but whether they were able to do so within the context of the formal investigation procedure. In the opening decision, the Commission merely indicated that, in principle, operating aid is incompatible with the internal market, except where it meets the conditions set out in the [Regional aid guidelines]’.

- 125 In that regard, the Commission submits that, by such findings, it was the General Court’s intention to consider that the question raised by the action was whether the interested parties were invited to submit comments in the formal investigation procedure on the finding that the operating aid was incompatible with the internal market, in so far as the investment aid itself is incompatible with that market.
- 126 However, even if the General Court had intended to define in that way the issue raised in the dispute before it, the fact remains that the question which the General Court actually examined, in paragraphs 63 to 85, 87 and 88 of the judgment under appeal, concerned the failure to consult the interested parties on the 2014 Guidelines before the decision at issue was adopted, regardless of the formal investigation procedure.
- 127 As regards the argument submitted at first instance that the Commission ought to have opened the formal investigation procedure before adopting the decision at issue, the General Court noted, in paragraph 62 of the judgment under appeal, that, according to case-law, the procedure for replacing an illegal measure may be resumed at the very point at which the illegality occurred, and the Commission is not required to recommence the procedure by going back further than that precise point; the General Court also noted that that case-law relating to the replacement of a measure annulled by the EU judicature also applies, in the absence of any annulment of the measure in question by the court, when an illegal measure is withdrawn and replaced by its author. In paragraph 63 of that judgment, the General Court stated that the fact that the Commission is not required to recommence the procedure by going back further than the precise point at which the illegality occurred does not, however, mean that it is not, as a matter of principle, required to give the interested parties the opportunity to submit comments before a new decision is adopted.
- 128 Furthermore, it is apparent from the paragraphs of the judgment under appeal referred to in the previous paragraph of the present judgment, and from paragraphs 89 and 91 of the judgment under appeal that, contrary to what the municipality of Gdynia and PLGK argued at the hearing before the Court of Justice, for the purposes of annulling the decision at issue in that judgment the General Court relied on the Commission’s infringement of its obligation to give the interested parties the opportunity to express their views on the 2014 Guidelines before the decision at issue was adopted.
- 129 Since the conclusion reached by the General Court in the judgment under appeal was, therefore, based on that infringement and not on whether the interested parties were given the opportunity to express their views in the formal investigation procedure, the Commission’s argument in that regard is ineffective.
- 130 Next, it should be noted that the Commission does not deny that, in the decision at issue, it applied the 2014 Guidelines for the purposes of its analysis of whether the operating aid was compatible with the internal market.
- 131 By contrast, the Commission submits that, by rejecting its argument that the provisions of the 2014 Guidelines, which it actually applied in the decision at issue, did not change the conclusion it reached in that decision that the operating aid is incompatible with the internal market, the General Court disregarded the case-law set out in paragraph 81 above and distorted that decision.

- 132 In that regard, it must be noted that, as is apparent from paragraph 81 above, in a situation such as that at issue in the present case, the EU judicature cannot simply identify amendments introduced by a new legal regime, in order to justify annulling a Commission decision applying that regime, but must also ascertain whether the change in legal regime was capable of influencing that decision.
- 133 Consequently, irrespective of the extent to which the 2014 Guidelines contain amendments in relation to the legal regime previously in force and, in particular, whether the considerations set out in that regard by the General Court in paragraphs 72 to 77 of the judgment under appeal rightly support the conclusion reached by the General Court in paragraph 78 of that judgment that such amendments were substantive, it must be examined whether the General Court was entitled to reject the Commission's argument at first instance, referred to in paragraph 131 above, on grounds other than those which, as is apparent from paragraphs 82 to 86 above, were wrongly chosen by the General Court.
- 134 In that regard, it must be noted that, as the Commission rightly submits, the General Court essentially limited itself, first, to setting out, in particular in paragraphs 69, 71 to 78 and 88 of the judgment under appeal, the extent to which the legal regime applied in the decision at issue differed from that applied in the opening decision and in Decision 2014/883 and, secondly, in particular in paragraphs 69, 71, 78 and 84 of that judgment, to pointing out that the Commission did indeed apply the 2014 Guidelines in the decision at issue and therefore applied new provisions compared to those on which the interested parties had had the opportunity to express their views.
- 135 However, as the Commission argues, it is apparent from recitals 244 and 245 of the decision at issue that the finding that the operating aid was incompatible with the internal market was also based on the fact that the investment aid itself was incompatible with the internal market. In particular, by referring to recital 227 of Decision 2014/883, it is noted in recital 244 of the decision at issue that 'granting operating aid in order to ensure the operation of an investment project that benefits [from] incompatible investment aid is inherently incompatible with the internal market'. The Commission also stated in recital 244 that, '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'.
- 136 In recital 245 of the decision at issue, the Commission added that 'that conclusion under the 2005 Aviation Guidelines is equally valid under the 2014 Aviation Guidelines and sufficient to find that the operating aid granted to the airport operator is incompatible with the internal market'.
- 137 It thus follows from recitals 244 and 245 of the decision at issue and, in particular, from the wording 'inherently' in that first recital and the word 'sufficient' in that second recital, that the incompatibility of the investment aid with the internal market was in itself the basis for finding that the operating aid was incompatible with the internal market. It is also not in dispute that the Commission did not rely on the 2014 Guidelines when concluding in the decision at issue that the investment aid was incompatible with the internal market, nor is that conclusion called in question in this appeal.
- 138 It is true that, as the General Court points out in paragraph 84 of the judgment under appeal, the Commission stated in recital 245 of the decision at issue that the conclusion it had reached in recital 244 of that decision is equally valid under the 2014 Guidelines. However, as the Commission argues, such a reference to those guidelines can in no way be interpreted as meaning that the Commission applied those guidelines in order to reach that conclusion, but merely that that conclusion is imperative irrespective of those guidelines and cannot, therefore, be called into question by them.
- 139 In addition, it is true that, as the General Court also points out in paragraph 84 of the judgment under appeal — immediately after setting out the considerations relating to the interdependence between the finding that the investment aid was incompatible with the internal market and the finding that

operating aid was incompatible with that market — the Commission continued its assessment of the compatibility of the operating aid with that market, in recitals 246 and 247 of the decision at issue, noting that the first condition for compatibility of aid with that market, defined in the 2014 Guidelines, is not met as regards the operating aid and that, consequently, the operating aid is also incompatible with the internal market for that reason.

140 Furthermore, it is apparent from recital 254 of the decision at issue that the Commission relied on two legal bases in order to find that the operating aid was incompatible with the internal market, namely, first, the incompatibility of the investment aid with the internal market and, secondly, the fact that the operating aid merely leads to a duplication of infrastructure, thus failing to meet a clearly defined legitimate objective of general interest as required by the first condition of compatibility in the 2014 Guidelines.

141 However, as the Commission submits, in essence, it follows from an overall reading of recitals 244 to 254 of the decision at issue that recitals 244 and 245 of that decision on their own formed the basis for the finding that the operating aid was incompatible with the internal market, irrespective of any application of the 2014 Guidelines to that aid, with the finding in the decision at issue that that aid was incompatible with the internal market having two autonomous legal bases. It should be noted in that regard that the General Court itself acknowledged, in paragraph 86 of the judgment under appeal, that the conclusion that the operating aid was incompatible with the internal market in so far as the investment aid itself was incompatible with the internal market does not stem from a condition expressly laid down in the Regional aid Guidelines or in the 2014 Guidelines.

142 It is inherent in the logic of the Treaty's provisions relating to State aid that Member States cannot fund projects that would exist only as a result of aid incompatible with the internal market. It necessarily follows that, as the Commission submits, in essence, the conclusion which it reached in the decision at issue cannot be called into question by any application of the 2014 Guidelines to the operating aid, since the assessment of the compatibility of that aid with the internal market cannot disregard the project for which the aid is intended.

143 Furthermore, it is true that the General Court noted, in paragraph 85 of the judgment under appeal, that the decision at issue contains at least one inaccuracy concerning the legal framework underlying the Commission's finding that the operating aid was incompatible with the internal market in so far as the investment aid itself was incompatible with that market. In particular, the General Court noted that the Commission had stated, in recital 245 of the decision at issue, that in Decision 2014/883, that finding was made in accordance with the 2005 Guidelines, whereas it follows from recitals 227 and 228 of Decision 2014/883 that the Commission's assessment in that regard was made in the context of the Regional aid Guidelines and on the basis of Article 107(3)(a) TFEU.

144 The General Court also pointed out, in paragraph 85, that the Commission's finding that the operating aid was incompatible with the internal market in so far as the investment aid itself was incompatible with the internal market was for the sake of completeness in Decision 2014/883 and was placed before the conclusion in recital 228 of that decision that the operating aid did not satisfy the criteria laid down in the Regional aid Guidelines.

145 However, as the Commission submits, it is not apparent from the judgment under appeal, nor has it been demonstrated in this appeal, how such an inaccuracy could affect the interpretation which must be made of the decision at issue, in particular in that the finding set out in paragraph 143 above must be regarded as having a legal basis which is autonomous and independent of the 2014 Guidelines.

146 As regards that finding, set out in Decision 2014/883, being for the sake of completeness, the fact that it was put forward by the Commission in the alternative does not alter its autonomous nature for the purposes of forming the basis, in that decision, of the Commission's conclusion that the operating aid is incompatible with the internal market. The autonomous nature of the finding in that regard is

apparent, first, from the wording ‘inherently’ used in recital 227 of that decision and, secondly, from the fact that such a finding is inherent in the very logic of the Treaty provisions on State aid, as noted in paragraph 142 of the present judgment with regard to the similar finding in the decision at issue.

- 147 Likewise, as the Commission in essence argues, the fact that it included that finding in recital 227 of Decision 2014/883, and therefore before its conclusion in recital 228 of that decision that the operating aid does not meet the criteria laid down in the Regional aid Guidelines, is the result of a choice of wording which cannot call into question the interpretation of that decision as set out in the previous paragraph.
- 148 Moreover, in so far as the General Court points out in paragraphs 81, 87 and 88 of the judgment under appeal that the Commission, for the purposes of its assessment of whether the operating aid is compatible with the internal market, applied, in Decision 2014/883, the Regional aid Guidelines, which implement Article 107(3)(a) TFEU, whereas, in the decision at issue, it applied the 2014 Guidelines, which implement a different provision of the Treaty, namely Article 107(3)(c) TFEU, it is sufficient to note that, as the Commission submits, that fact affects neither the interpretation of the decision at issue, according to which the finding that the operating aid was incompatible with the internal market in that decision had a legal basis which is autonomous and independent of the 2014 Guidelines, nor the fact that, as is apparent from paragraph 142 above, that legal basis remains valid irrespective of any application of the 2014 Guidelines.
- 149 The General Court also stated, in paragraph 87 of the judgment under appeal, that the argument put forward by the Commission at first instance, that the finding that the operating aid was incompatible with the internal market in so far as the investment aid itself was incompatible with that market had an autonomous legal basis deriving from the Treaty, is not supported by the wording of Decision 2014/883 or by the decision at issue.
- 150 In that regard, it must be found that, although the reasoning provided in recitals 244 and 245 of the decision at issue is succinct, it nevertheless makes it clear that operating aid cannot be regarded as being compatible with the Union rules on State aid if its sole purpose is to finance a project which would exist only as a result of aid which is itself incompatible with those rules.
- 151 Moreover, although it is true that the Commission did not specifically refer in that context to the FEU Treaty, it is necessarily apparent from the recitals referred to in the previous paragraph of the present judgment that its reasoning in that respect is based on the provisions of that treaty. As follows from the very wording of Article 107 TFEU and the assessment carried out by the Commission in the decision at issue, the existence of aid such as that at issue is assessed in the light of that article.
- 152 Since, as noted in paragraphs 142 and 146 above, it is inherent in the logic of the Treaty’s provisions on State aid that Member States cannot finance projects which would exist only as a result of aid that is incompatible with the internal market, the Commission cannot be criticised for not having stated that the assessment set out in recitals 244 and 245 of the decision at issue is based on those provisions, and even less so for not having cited a specific provision of the Treaty in that context. The General Court therefore erred in law, in paragraph 87 of the judgment under appeal, in that it held that the finding that the operating aid was incompatible with the internal market, since the investment aid itself was incompatible with that market, was not based on the wording of Decision 2014/883 or on the decision at issue.
- 153 In the light of the foregoing, it must be noted that, even if the interested parties in the present case had been given the opportunity to submit comments on the 2014 Guidelines before the decision at issue was adopted and had succeeded in showing that the operating aid met the relevant criteria laid down in those guidelines, the Commission would, in any event, for the reasons set out in recitals 244 and 245 of that decision, having been fully entitled to conclude that that aid is incompatible with the internal market. By rejecting the Commission’s arguments that the decision at issue would have been

identical if the interested parties in the present case had been invited to express their views on the relevance of the 2014 Guidelines, the General Court therefore disregarded the case-law set out in paragraph 81 above and misinterpreted the decision at issue.

- 154 Consequently, it must be concluded that the General Court was wrong to hold that the fact that the Commission did not give the interested parties in the present case the opportunity to submit comments on the relevance of the 2014 Guidelines before the decision at issue was adopted leads to the annulment of that decision and that the General Court was therefore wrong, in paragraph 91 of the judgment under appeal, to uphold the sixth plea in law put forward at first instance and to annul Articles 2 to 5 of that decision.
- 155 Lastly, that conclusion cannot be called into question by the other arguments put forward before the Court of Justice in this case and, in particular, in the first place, by the fact emphasised by the municipality of Gdynia and PLGK and also pointed out by the General Court, in paragraph 87 of the judgment under appeal, that the Commission put forward the finding set out in paragraph 143 above for the first time at the hearing before the General Court.
- 156 In that regard, it must be held that, even if the Commission had raised that finding only at that stage of the proceedings at first instance, in any event, that would not in itself affect the assessment that must be made of the pleas in law raised by the applicants at first instance in support of their action and, in particular, the assessment of whether the infringement of the right of the interested parties in the present case to submit comments on the 2014 Guidelines leads to the annulment of that decision.
- 157 In the second place, as regards the arguments set out in paragraph 104 above, it is sufficient to note that, as is apparent from paragraphs 62 to 64 above, the arguments submitted before the General Court concerning the Republic of Poland's rights of defence were not examined by the General Court in the judgment under appeal and are, therefore, not to be assessed by the Court of Justice at this stage of the proceedings.
- 158 Consequently, the second part of the first ground of appeal and the second ground of appeal must be upheld.
- 159 It follows that there is no need to examine the Commission's arguments, by which it seeks to demonstrate that, even if the incompatibility of the operating aid with the internal market did not have a legal basis which was independent of the 2014 Guidelines, the provisions of those guidelines applied in the decision at issue in order to assess whether that aid was compatible with the internal market were essentially the same as those of the Regional aid Guidelines applied in Decision 2014/883, so that the comments of the interested parties in the present case on the 2014 Guidelines would not, in any event, have been capable, in that regard, of affecting the outcome of that first decision.
- 160 In the light of all of the foregoing considerations, the judgment under appeal must be set aside. There is, therefore, no need to examine the third ground of appeal.

Referral of the case back to the General Court

- 161 In accordance with the first paragraph of Article 61 of the Statute of the Court of Justice of the European Union, the Court of Justice may, where the decision of the General Court has been set aside, either itself give final judgment in the matter, where the state of the proceedings so permits, or refer the case back to the General Court for judgment.

- 162 In the present case, the Court of Justice has the necessary information to enable it to give final judgment on the arguments raised in the third complaint in the sixth plea in law, alleging infringement of the procedural rights of the interested parties in the present case based on the fact that they were not given the opportunity to express their views on the relevance of the new legal regime, before the decision at issue was adopted. In that regard, it is sufficient to note that that line of argument must be rejected as ineffective since, for the reasons set out in paragraphs 70 to 95 and paragraphs 132 to 156 above, the fact that the Commission did not invite those parties to submit comments on the relevance of the 2014 Guidelines for the assessment of whether the operating aid was compatible with the internal market cannot, in any event, result in the annulment of that decision.
- 163 For the remainder, the Court considers that the state of the proceedings is not such as to permit final judgment to be given.
- 164 In particular, first, as regards the possibility for the municipality of Gdynia and PLGK to plead before the General Court that the Republic of Poland's rights of defence were infringed and that it is possible for the Republic of Poland, as an intervener at first instance, to plead such an infringement, it must be noted that, as is apparent from paragraphs 62 and 63 above, the General Court did not rule on those two possibilities. Moreover, before the Court of Justice, although the Republic of Poland put forward the reasons why it should be regarded as having such an option, the Commission merely submitted, in essence, in that regard, that the Republic of Poland did not bring an action for annulment of the decision at issue based on an infringement of its rights of defence or of its right to an adversarial procedure and that, as an intervener, it cannot rely on such a plea in law.
- 165 Secondly, the first to fifth pleas in law in the action were neither examined by the General Court nor argued before the Court of Justice.
- 166 The case must, therefore, be referred back to the General Court for it to rule on the aspects of the action referred to in paragraphs 164 and 165 above.

Costs

- 167 Since the case is to be referred back to the General Court, the costs relating to the present appeal proceedings must be reserved.

On those grounds, the Court (Fifth Chamber) hereby:

1. **Sets aside the judgment of the General Court of the European Union of 17 November 2017, *Gmina Miasto Gdynia and Port Lotniczy Gdynia Kosakowo v Commission* (T-263/15);**
2. **Rejects the third complaint in the sixth plea in law in the action for annulment in so far as that complaint alleges infringement of the procedural rights of the interested parties in the present case based on the fact that they were not given the opportunity to express their views on the relevance of the Commission Communication entitled 'Guidelines on State aid to airports and airlines', before Commission Decision (EU) 2015/1586 of 26 February 2015 on measure SA.35388 (13/C) (ex 13/NN and ex 12/N) — Poland — Setting up the Gdynia-Kosakowo airport was adopted;**
3. **Refers the case back to the General Court of the European Union for a ruling, first, on the aspects of third complaint in the sixth plea in law in the action for annulment on which it did not rule in the judgment of the General Court of the European Union of 17 November 2017, *Gmina Miasto Gdynia and Port Lotniczy Gdynia Kosakowo v Commission* (T-263/15), and, secondly, for a ruling on the first to fifth pleas in law of that action;**

4. Reserves the costs.

[Signatures]