Reports of Cases

JUDGMENT OF THE COURT (Fourth Chamber)

10 March 2022 *

(Appeal – State aid – Aid in favour of the German dairy sector – Financing of milk quality tests – Article 108(2) TFUE – Decision to initiate the formal investigation procedure – Regulation (EC) No 659/1999 – Article 6(1) – Obligation for the European Commission to summarise the relevant issues of fact and law in that decision – Scope – Rights of interested parties to be involved in the administrative procedure – Breach of an essential procedural requirement – Consequences for the lawfulness of the final decision)

In Joined Cases C-167/19 P and C-171/19 P,

TWO APPEALS under Article 56 of the Statute of the Court of Justice of the European Union, brought on 22 February 2019,

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

appellant in Cases C-167/19 P and C-171/19 P,

the other parties to the proceedings being:

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

applicant at first instance in Case C-167/19 P,

Interessengemeinschaft privater Milchverarbeiter Bayerns eV, established in Mertingen (Germany),

Genossenschaftsverband Bayern eV, established in Munich (Germany),

Verband der Bayerischen Privaten Milchwirtschaft eV, established in Munich,

represented by C. Bittner and N. Langhans, Rechtsanwälte,

applicants at first instance in Case C-171/19 P,

THE GENERAL COURT (Fourth Chamber),

composed of K. Jürimäe, President of the Third Chamber, acting as President of the Fourth Chamber, S. Rodin and N. Piçarra (Rapporteur), Judges,

* Language of the case: German.

Advocate General: E. Tanchev,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after hearing the Opinion of the Advocate General at the sitting on 15 July 2021,

gives the following

Judgment

1 By its appeals, the European Commission seeks to have set aside the judgments of the General Court of the European Union of 12 December 2018, *Freistaat Bayern* v *Commission* (T-683/15, EU:T:2018:916; 'the first judgment under appeal') and of 12 December 2018, *Interessengemeinschaft privater Milchverarbeiter Bayerns and Others* v *Commission* (T-722/15 to T-724/15, not published, EU:T:2018:920; 'the second judgment under appeal'), by which the Court allowed the actions, respectively, of the Freistaat Bayern (*Land* of Bavaria, Germany) (Case C-167/19 P) and of Interessengemeinschaft privater Milchverarbeiter Bayerns eV, Genossenschaftsverband Bayern eV and Verband der Bayerischen Privaten Milchwirtschaft eV (Case C-171/19 P) ('the interest grouping'), seeking the annulment in part of Commission Decision (EU) 2015/2432 of 18 September 2015 concerning State aid SA.35484 (2013/C) (ex SA.35484 (2012/NN), granted by Germany in respect of milk quality tests pursuant to the Milk and Fat Law (OJ 2015 L 334, p. 23; 'the decision at issue').

Legal context

European Union law

2 Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 93 of the EC Treaty (OJ 1999 L 83, p. 1), applicable *ratione temporis* to the present dispute, stated in recitals 8 and 16:

'(8) … in all cases where, as a result of the preliminary examination, the Commission cannot find that the aid is compatible with the common market, the formal investigation procedure should be opened in order to enable the Commission to gather all the information it needs to assess the compatibility of the aid and to allow the interested parties to submit their comments; … the rights of the interested parties can best be safeguarded within the framework of the formal investigation procedure provided for under Article 93(2) of the Treaty;

…

(16) … it is appropriate to define all the possibilities in which third parties have to defend their interests in State aid procedures.'

3 Article 1 of that regulation provided:

'For the purpose 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.'

4 Article 6 of that regulation, entitled 'Formal investigation procedure', provided in paragraph 1:

'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.'

5 Article 13 of that regulation, entitled 'Decisions of the Commission', provided in paragraph 1:

'… In the case of decisions to initiate the formal investigation procedure, proceedings shall be closed by means of a decision pursuant to Article 7. …'

German law

6 Paragraph 22(1) of the Gesetz über den Verkehr mit Milch, Milcherzeugnissen und Fetten 1952 (the Law on Milk and Fats of 1952) (BGBl. 1952 I, p. 811), as amended by Paragraph 397 of the Regulation of 31 August 2015 (BGB1. 2015 I, p. 1474) ('the MFG'), empowers the governments of the *Länder*, in consultation with the association concerned, comprising dairy sector businesses and consumers which jointly defend their economic interests, or with the professional organisations concerned, to apply levies jointly on dairies, milk collection centres and creameries to support the dairy sector.

7 Paragraph 22(2) and (2a) of the MFG provides that the resources obtained under paragraph 1 may be used only to finance the objectives laid down by that law, which include promoting and preserving milk quality.

8 Under Paragraph 1(1) of the Milch-Güteverordnung (Milk Quality Regulation) of 9 July 1980 (BGB1. 1980 I, p. 878), as amended by the Regulation of 17 December 2010 (BGB1. 2010 I, p. 2132), the buyers of delivered milk are obliged to test that milk or to have it tested.

9 Paragraph 1 of the Bayerische Milchumlageverordnung (Regulation of the *Land* of Bavaria on a levy for milk) of 17 October 2007 (BayGVBl. 2007, p. 727), adopted on the basis of Paragraph 22(1) of the MFG, provides that a levy is to be imposed on dairy operators in respect of the quantities of raw milk delivered to them.

10 According to Paragraph 23 of the Haushaltsordnung des Freistaates Bayern (Financial Regulation of the *Land* of Bavaria) of 8 December 1971 (BayRS 630-1-F), expenditure and commitment appropriations for services intended for entities outside the *Land* administration, to meet specific

purposes, may be included in the *Land* budget only if it has an overriding interest in those services being implemented that cannot be satisfied without the corresponding subsidies or at least not to the extent necessary.

11 Paragraph 44 of that financial regulation, which appears in Part III thereof, entitled 'Implementation of the budget', provides that those subsidies may be paid only under the conditions laid down in Paragraph 23 of that regulation.

Background to the dispute and the decision at issue

12 By letter of 17 July 2013, the Commission informed the Federal Republic of Germany that it had decided to initiate the procedure laid down in Article 108(2) TFEU ('the opening decision') in relation to various measures implemented in several German *Länder* under the Milk Quality Regulation in order to support the dairy sector. In recital 264 of that decision, the Commission, relying on the judgment of the Court of 21 October 2003 in *van Calster and Others* (C-261/01 and C-262/01, EU:C:2003:571) noted that when State aid is financed by means of a parafiscal levy, as in the present case, it must assess both that aid and the method of financing it.

13 The Commission found that the aid measure at issue was compatible with the internal market during the period from 28 November 2001 to 31 December 2006, while expressing doubts as to the compatibility of that aid with the internal market as from 1 January 2007.

14 By letter dated 20 September 2013, the Federal Republic of Germany submitted comments concerning the opening decision. The Commission also received seven comments with observations from interested parties. Those observations were sent to the Federal Republic of Germany, which responded to them by letters of 27 February, 3 March and 3 October 2014. By letter of 3 December 2014, that Member State responded to further observations submitted on 8 July 2014.

15 The decision at issue, dated 18 September 2015, concerns exclusively the financing of milk quality tests carried out from 1 January 2007 in the *Länder* of Baden-Württemberg and Bavaria.

16 In the first place, the Commission examined whether the resources obtained from the milk levy constitute State aid, within the meaning of Article 107(1) TFEU. In its view, that revenue, in respect of which points 1 to 6 of Paragraph 22(2) of the MFG defines the purposes for which it may be used, had to be regarded as being under State control, and the measures financed by those resources as being granted through State resources and as attributable to the State.

17 In the second place, the Commission found that the dairies in the *Land* of Bavaria, which constitute 'undertakings' within the meaning of Article 107(1) TFEU, obtained a selective advantage as a result of being refunded for the costs of milk quality tests which are their responsibility. In recital 145 of the decision at issue, the Commission stated that the measure at issue is financed not only by resources derived from the milk levy, but also by additional resources from the general budget of that *Land*, thus inferring that the benefit which the Bavarian dairies have derived from the fact that the costs of the quality tests which they are required to carry out are taken charge of for them is not necessarily offset by the amounts which they had paid by way of the milk levy.

18 In the third place, as regards the presence of existing aid, the Commission stated that, apart from the MFG, which, in its view, does not establish the aid scheme concerned, the German authorities had not provided any information demonstrating the existence of a legal basis, adopted before 1958, which was still applicable during the period under investigation.

19 In the fourth place, the Commission found that aid towards routine controls of milk does not meet the conditions of paragraph 109 of the Community Guidelines for State aid in the agriculture and forestry sector 2007 to 2013 (OJ 2006 C 319, p. 1), read in conjunction with Article 16(1) of Commission Regulation (EC) No 1857/2006 of 15 December 2006 on the application of Articles [107] and [108 TFEU] to State aid to small and medium-sized enterprises active in the production of agricultural products and amending Regulation (EC) No 70/2001 (OJ 2006 L 358, p. 3), to which paragraph 109 refers.

20 Consequently, the Commission decided in Article 1 of the decision at issue that the aid granted by the Federal Republic of Germany, in breach of Article 108(3) TFEU, in respect of the milk quality tests carried out in particular in the *Länder* of Baden-Württemberg and Bavaria for the dairy undertakings concerned in those *Länder* was incompatible with the internal market from 1 January 2007. In Articles 2 to 4 of that decision, the Commission ordered the recovery of the aid and set out the detailed rules for that recovery.

Proceedings before the General Court and the judgments under appeal

21 By application lodged at the Registry of the General Court on 26 November 2015 and 4 December 2015 respectively, the *Land* of Bavaria and the interest grouping brought two actions under Article 263 TFEU for the annulment in part of the decision at issue.

22 By decision of the President of the Second Chamber of the General Court of 16 February 2016, Cases T-722/15 to T-724/15 were joined for the purposes of the written and oral procedure. At the hearing on 26 February 2018, the President of the Fourth Chamber of the General Court decided that the cases should be joined for the purposes of the decision closing the proceedings.

23 The first plea in law of both the *Land* of Bavaria and of the interest grouping alleged an infringement of Article 108(2) TFEU and also of Article 6(1) and Article 20(1) of Regulation No 659/1999.

24 The second plea of the interest grouping claimed an infringement of Article 107(1) TFEU in that the resources from the levy amounts were classified as ‘State resources’.

25 The first part of the *Land* of Bavaria’s second plea and the first part of the third plea of the interest grouping alleged that there was no advantage for the buyers of milk. The second part of the second plea relied on by the *Land* of Bavaria claimed that the advantage granted to the Bavarian dairies was not selective. The second part of the third plea raised by the interest grouping concerned the benefits obtained by the Bavarian dairy undertakings being offset by the milk levy which they were required to pay.

26 In the alternative, the *Land* of Bavaria, by its third plea, and the interest grouping, by its fifth plea, alleged infringement by the Commission of the notification obligation and inferred from this that the recovery of the aid ordered in the decision at issue was unlawful.

27 By their fourth plea, also raised in the alternative, the *Land* of Bavaria and the interest grouping complained about the Commission's finding that the aid at issue was incompatible with the internal market.

28 In the further alternative, the *Land* of Bavaria, by its fifth plea, and the grouping of interests, by its sixth plea, alleged infringement of the principle of the protection of legitimate expectations.

29 As regards the plea alleging infringement of Article 108(2) TFEU and also of Article 6(1) and Article 20(1) of Regulation No 659/1999, the Court, in the first place, noted in paragraph 46 of the first judgment under appeal and in paragraphs 41 to 43 of the second judgment under appeal, that interested parties, within the meaning of Article 1(h) of Regulation No 659/1999, have the right to be involved in the procedure for investigating the aid measure at issue. In paragraph 47 of the first judgment under appeal and in paragraph 44 of the second judgment under appeal, it stated that to that end, under Article 6(1) of that regulation, the initiating decision must summarise the relevant issues of fact and law in such a way as to define sufficiently the framework of its investigation of that measure so as not to render meaningless the right of interested parties to submit their comments.

30 In the second place, the Court, in paragraphs 52 to 58 of the first judgment under appeal and in paragraphs 47 to 54 of the second judgment under appeal, examined the decision at issue in the light of the opening decision, in order to determine whether that latter decision referred to the partial financing of the measure at issue from the additional resources from the general budget of the *Land* of Bavaria. It found that the Commission had not made any reference in the opening decision to those resources as a means of financing the aid. It inferred from this that the interested parties could legitimately presume that the Commission's examination would exclusively concern the resources arising from the milk levy.

31 In the third place, the Court noted in paragraphs 65 and 66 of the first judgment under appeal and in paragraphs 62 and 63 of the second judgment under appeal, that the expression 'State resources', referred to in Article 107(1) TFEU, has a very broad meaning and that, therefore, the Commission is required to identify and analyse the various State resources, which are a constituent element of the classification as 'aid'. In that regard, it stated that the expression 'financial support', used in the opening decision, even assuming that it might be interpreted as referring to both sources of financing of the measure at issue, had to be considered as insufficiently precise. It added that although the Commission's final decision may contain certain differences with regard to the initiating decision, the difference between the two decisions in the present case was not justified, in so far as the Commission acknowledged that it had been informed, before the adoption of the opening decision, of the financing for that measure that derived also from the resources of the general budget of the *Land* of Bavaria.

32 The Court also stated, in paragraphs 67 and 68 of the first judgment under appeal and in paragraphs 64 and 65 of the second judgment under appeal, that the Commission refers expressly in the decision at issue to the aid being financed from resources from that budget. According to the Court, that showed that that method of financing was not an irrelevant factor in the Commission's analysis of the aid measure at issue. It thus concluded that the decision at issue had been adopted without giving the interested parties the opportunity to submit comments on the financing using resources from the general budget of that *Land*.

33 The Court found on that basis, in paragraphs 69 to 71 of the first judgment under appeal and in paragraphs 66 to 68 of the second judgment under appeal, that the decision at issue had been adopted in breach of the applicants' right to be involved in the administrative procedure and, therefore, in breach of Article 108(2) TFEU and Article 6(1) of Regulation No 659/1999. It also ruled, on the basis of the judgment of 11 December 2008, *Commission* v *Freistaat Sachsen* (C-334/07 P, EU:C:2008:709), that the obligation on the Commission to place the interested parties in a position, at the stage of the initiating decision, to put forward their comments is in the nature of an essential procedural requirement, the infringement of which results in the annulment of the act, irrespective of whether that infringement caused harm to the person pleading it or whether the administrative procedure might have led to a different result. On that basis, it upheld the first plea in law.

34 For the sake of completeness, the Court held, in paragraphs 72 to 75 of the first judgment under appeal and in paragraphs 69 to 72 of the second judgment under appeal, that it could not be ruled out that, in the absence of the infringement found, the procedure might have led to a different result. It observed that the decision at issue did not put forward a separate analysis in respect of each of the two methods of financing the aid measure at issue, with the result that it was possible that if the arguments relating to the financing by means of the additional resources from the general budget of the *Land* of Bavaria had been able to be put forward by the applicants during the formal investigation procedure, they might have led to a different outcome.

35 Without ruling on the other pleas raised by the applicants, the Court annulled Articles 1 to 4 of the decision at issue in so far as they declare that the grant by the Federal Republic of Germany of the State aid at issue is incompatible with the internal market in respect of the milk quality tests carried out in Bavaria and order recovery of that aid.

Forms of order sought by the parties to the appeals

36 In its appeals, the Commission claims that the Court of Justice should:

– set aside the judgments under appeal;

– declare the first plea raised in the actions before the General Court to be unfounded;

– refer the case back to the General Court as regards the other pleas in the actions, and

– order the applicants at first instance to pay the costs of the proceedings at first instance and those of the appeals or, in the alternative, if the case is referred back to the General Court, reserve the decisions as to the costs at first instance and on appeal.

37 The *Land* of Bavaria and the interest grouping contend that the Court should:

– dismiss the appeals and

– order the Commission to bear its own costs and to pay those of the respondents relating to the proceedings before the General Court and before the Court of Justice.

The appeals

38 The Commission puts forward four grounds of appeal in support of each of its appeals.

39 By decision of 1 April 2019, the President of the Court of Justice ordered that the two appeals be joined for the purposes of the written and oral part of the procedure and the judgment.

40 By decision of the President of the Court of 4 July 2019, the parties were allowed to reply as regards, first, the admissibility of the grounds relied on by the Commission in support of its appeals and, second, the arguments put forward for the first time by the respondents in their responses.

41 On 1 October 2020, on the basis of Article 61(1) of the Rules of Procedure of the Court of Justice, the Court sent the parties to the proceedings in the present cases a written question, asking them to state their views, in a written reply, on the possible effect on these cases of the judgment of 11 March 2020, *Commission* v *Gmina Miasto Gdynia and Port Lotniczy Gdynia Kosakowo* (C-56/18 P, EU:C:2020:192). Those parties replied to that question within the period prescribed by the Court.

First ground of appeal, alleging an error of law in the interpretation and application of Article 108(2) TFEU and Article 6(1) of Regulation No 659/1999

Arguments of the parties

42 The Commission submits that the Court, by criticising it for failing to present in its opening decision, taken pursuant to Article 108(2) TFEU and Article 6(1) of Regulation No 659/1999, the 'revenue' part of the budget item, namely the sources of financing of the aid, whereas it had presented the budget item for that aid in the 'expenditure' part of the budget of the *Land* of Bavaria, established a new formal requirement which has no basis in law. In support of its position, it relies on the judgment of 21 July 2011, *Alcoa Trasformazioni* v *Commission* (C-194/09 P, EU:C:2011:497).

43 According to the Commission, it is apparent from the judgment of 21 October 2003, *van Calster and Others* (C-261/01 and C-262/01, EU:C:2003:571), that it is only exceptionally, when there is an indissoluble link between the revenue and the expenditure and there are indicia implying that the mode of collecting the revenue infringes a provision of EU law, that the notification of the aid scheme, by the Member State, must also specify the method or the source of financing of that scheme.

44 In the present case, the Commission argues that that financing is mixed and only the financing by means of the milk levy is problematic. Consequently, it submits that it was not required to indicate expressly, in its opening decision, the method of financing the aid measure at issue by additional resources from the general budget of the *Land* of Bavaria. It is evident that that method of financing is made up of State resources. Under Article 107(1) TFEU, the existence of aid is determined solely by its financing through State resources, the precise origin of those resources being irrelevant for that purpose.

45 In its reply, the Commission maintains that in both the opening decision and the decision at issue it defined the aid measure at issue in the same way. It follows clearly from the general budget described in those decisions that that single aid measure encompasses two sources of financing. It refers, in that regard, to the judgment of 13 June 2019, *Copebi* (C-505/18, EU:C:2019:500), in which the Court confirmed that it is not obligatory for the sources of the financing of an aid measure to be set out exactly and down to the last detail in the opening decision.

46 The *Land* of Bavaria and the interest grouping contend that the first ground of appeal is inadmissible in that, first, it seeks to challenge a factual assessment made by the Court, without alleging distortion in that regard and, second, it merely repeats the pleas and arguments put forward before the Court. In the alternative, they contend that this ground of appeal is unfounded.

Findings of the Court

– *Admissibility*

47 In the context of the present ground of appeal, the Court of Justice must review whether the General Court, in the judgments under appeal, correctly interpreted Article 108(2) TFEU and Article 6(1) of Regulation No 659/1999 when it assessed the lawfulness of the decision at issue in the light of those provisions and whether, to that end, it interpreted that decision correctly in its entirety, including the preparatory decision, namely the opening decision. Such an interpretation constitutes an admissible question of law at the appeal stage (see, by analogy, judgment of 11 March 2020, *Commission* v *Gmina Miasto Gdynia and Port Lotniczy Gdynia Kosakowo*, C-56/18 P, EU:C:2020:192, paragraph 121).

48 Moreover, in so far as the respondents submit that the first ground of appeal raised by the Commission consists of a repetition of the arguments put forward before the Court, it is sufficient to recall that, where the appellant challenges the interpretation or application of EU law by the Court, the points of law examined at first instance may be discussed again in the course of an appeal. If an appellant could not base its appeal on pleas in law and arguments already relied on before the Court, an appeal would be deprived of part of its purpose (judgment of 21 September 2010, *Sweden and Others* v *API and Commission*, C-514/07 P, C-528/07 P and C-532/07 P, EU:C:2010:541, paragraph 116).

49 The first ground of appeal is therefore admissible.

– *Substance*

50 The error of law alleged against the Court in the interpretation and application of Article 108(2) TFEU and Article 6(1) of Regulation No 659/1999 relates, in essence, to the requirements arising from those provisions as regards the content of an opening decision.

51 In that regard, it must be noted, as did the Court in paragraphs 46 and 61 of the first judgment under appeal and in paragraphs 41 and 44 of the second judgment under appeal, that, under Article 108(2) TFEU, the Commission has a duty to put the interested parties on formal notice to put forward their comments during the formal investigation phase of the aid measure at issue, in order to obtain from those parties all the information required for the guidance of its future action in the framework of that investigation.

52 Although those interested parties cannot rely on the rights of defence, they have, by contrast, the right to be involved in the administrative procedure conducted by the Commission, to an extent appropriate to the circumstances of the case. In that regard, the publication of a notice in the *Official Journal of the European Union* is an appropriate means of informing all the interested parties of an opening decision, which gives the other Member States and the sectors concerned the opportunity to make their views known in that capacity (see, to that effect, judgment of 11 March 2020, *Commission* v *Gmina Miasto Gdynia and Port Lotniczy Gdynia Kosakowo*, C-56/18 P, EU:C:2020:192, paragraphs 71 and 72).

53 To that end, the first sentence of Article 6(1) of Regulation No 659/1999 requires the Commission to 'summarise' in the opening decision the relevant issues of fact and law, to include in it a preliminary assessment as to the aid character of that measure, and to set out the doubts as to the compatibility of that measure with the internal market.

54 The method of financing such a measure constitutes a 'relevant issue' for determining whether it may be classified as 'State aid' within the meaning of Article 107(1) TFEU. In order for that measure to be classified as such, the advantages it provides must, on the one hand, be granted directly or indirectly through State resources and, on the other hand, be attributable to the State (see, to that effect, judgment of 19 December 2013, *Association Vent De Colère! and Others*, C-262/12, EU:C:2013:851, paragraphs 15 and 16 and the case-law cited). In that regard, contrary to what the Commission maintains, in order to determine whether such is the case, the payment of an amount to the beneficiaries of an aid measure and the method of financing that measure cannot be dissociated (see, to that effect, judgments of 21 October 2003, *van Calster and Others*, C-261/01 and C-262/01, EU:C:2003:571, paragraph 49, and of 22 December 2008, *Régie Networks*, C-333/07, EU:C:2008:764, paragraph 89).

55 Consequently, the method of financing, in so far as it falls within the conditions governing the classification of 'State aid', for the purposes of Article 107(1) TFEU, is a relevant issue, within the meaning of the first sentence of Article 6(1) of Regulation No 659/1999 and, as the Court rightly pointed out in paragraph 62 of the first judgment under appeal and in paragraphs 56 and 57 of the second judgment under appeal, must, as such, be identified in the opening decision.

56 In addition, despite the broad discretion available to the Commission when adopting such a decision (see, to that effect, judgments of 21 July 2011, *Alcoa Trasformazioni* v *Commission*, C-194/09 P, EU:C:2011:497, paragraph 61, and of 21 December 2016, *Commission* v *Hansestadt Lübeck*, C-524/14 P, EU:C:2016:971, paragraph 78), the summary of the relevant issues of fact and law, within the meaning of the first sentence of Article 6(1) of Regulation No 659/1999, cannot depend on subjective criteria, such as it being evident, in the Commission's opinion, that financing by means of the general budget of the Member State constitutes State resources.

57 An incomplete summary of the relevant issues of fact and law does not in fact enable the interested parties to submit their comments on the grounds which led the Commission to initiate the formal investigation procedure and, consequently, ensure the effectiveness of Article 108(2) TFEU.

58 Such a finding is not called into question by the case-law resulting from the judgment of 13 June 2019, *Copebi* (C-505/18, EU:C:2019:500), from which the Commission infers that there is no obligation to identify exactly, down to the smallest detail, the sources of financing of an aid measure in the opening decision. In fact, as the Advocate General observed in point 68 of his Opinion, in that judgment the two sources of financing of the measure at issue had been

identified. In the present cases, what is complained of is that the Commission, in the opening decision, failed to identify a source of financing, from the general budget of the *Land* of Bavaria, of which it was already aware at that stage of the procedure, even though that factor is taken into account in the decision at issue and serves as the basis for assessments, including in particular that set out in recital 145 of that decision, cited in paragraph 17 above.

59 The Court therefore did not err in law in the interpretation and application of Article 108(2) TFEU and Article 6(1) of Regulation No 659/1999 when it held, in paragraphs 68 and 69 of the first judgment under appeal and in paragraphs 65 and 66 of the second judgment under appeal, that, in the absence in the opening decision of a summary, as a relevant issue of fact and law, within the meaning of that latter provision, of the financing of the measure at issue by means of resources from the general budget of the *Land* of Bavaria, the decision at issue was adopted in a manner in which the Commission did not comply with its obligation to put the interested parties in a position to put forward their comments on that issue and, consequently, in breach of the right of those parties to be involved in the administrative procedure, as guaranteed by those provisions.

60 It follows that the first ground of appeal must be rejected as unfounded.

Second ground of appeal, alleging a failure to state reasons resulting from an incorrect interpretation of the opening decision

Arguments of the parties

61 By this ground, which is divided into two parts, the Commission complains, in the alternative, that the Court misinterpreted the opening decision and that it vitiated the judgments under appeal by a failure to state reasons.

62 By the first part of this ground, the Commission begins by observing that the opening decision, in point 2.3 and recital 5, mentions 'amounts of budgetary origin' and 'amounts destined for the assistance' respectively. Although that latter expression relates to financing by means of resources arising from the milk levy, measures which are the subject of the formal investigation procedure, it argues that it is obvious that that expression also relates to the financing from the general budget of the *Land* of Bavaria. It is also apparent from recital 18 of the opening decision that the financing at issue is secured through budgetary resources and resources from the milk levy, that latter financing being the subject of a specific assessment in that decision, having regard to the objections raised by the Federal Republic of Germany during the preliminary examination stage.

63 However, the Commission asserts that, in paragraph 53 of the first judgment under appeal and in paragraph 48 of the second judgment under appeal, the Court confined itself to examining, in a selective manner, a single subsection of the opening decision, instead of taking into account all the recitals of that decision in order to respond to the arguments put forward by the Commission. Consequently, by failing to analyse all the grounds of defence submitted, the Court infringed its obligation to state reasons and committed its first error of law.

64 The second error of law raised by the Commission relates to paragraphs 54 to 57 of the first judgment under appeal and to paragraphs 49 to 53 of the second judgment under appeal, by which the Court held that the failure, in the opening decision, to mention Articles 23 and 44 of the Financial Regulation of the *Land* of Bavaria and, therefore, the financing of the measure at

issue by means of resources from the general budget of that *Land*, was an error of law. The Commission argues, first, that the reference, by way of example, in recital 17 of the opening decision to the provisions of the Financial Regulation of the *Land* of Baden-Württemberg made it possible for the *Land* of Bavaria to infer that the identical provisions of the Financial Regulation of the *Land* of Bavaria were also covered by the opening decision. It adds that it is in any event established that a Member State has knowledge of its own budgetary laws, such that an express reference to that law is not necessary in the present case.

65 The third and fourth errors of law complained of by the Commission in relation to the Court concern paragraphs 55 and 56 of the first judgment under appeal and paragraphs 50 and 51 of the second judgment under appeal. According to the Commission, the Court interpreted section 3.1, in particular subsection 3.3.1, as well as recital 264 of its opening decision, as limiting the preliminary examination stage solely to the method of financing the measures at issue by means of the milk levy, whereas that decision contains only a provisional assessment of the character of those measures as aid. The Commission explained before the Court that the analysis in the opening decision relates solely to the financing of those measures by means of the milk levy because only that method of financing could give rise to doubts as to the use of State resources. By failing to respond to that argument, the Court failed to examine a ground of defence put forward by the Commission and thus failed to fulfil its obligation to state reasons.

66 By the second part of its second ground of appeal, the Commission complains that the Court stated, in paragraph 62 of the first judgment under appeal and in paragraph 56 of the second judgment under appeal, that the content of the file relating to the administrative procedure prior to the opening decision is irrelevant to the interpretation of that decision. It submits that, on reading the correspondence exchanged during the preliminary investigation phase, neither the *Land* of Bavaria nor the Court could doubt that the formal investigation procedure also concerned the financing of the aid measures at issue by means of general tax revenue.

67 The Commission further maintains that the Court, in paragraphs 53 to 58 and 62 of the first judgment under appeal, and in paragraphs 47 to 53 of the second judgment under appeal, disregarded the case-law arising from the judgments of 21 July 2011, *Alcoa Trasformazioni* v *Commission* (C-194/09 P, EU:C:2011:497) and of 2 April 1998, *Commission* v *Sytraval and Brink's France* (C-367/95 P, EU:C:1998:154), according to which, first, the statement of reasons must be appropriate to the measure at issue and must disclose in a clear and unequivocal fashion the reasoning followed by the institution which adopted the measure in question in such a way as to enable the persons concerned to ascertain the reasons for the measure and to enable the court having jurisdiction to exercise its power of review, and second, that institution is not required to define its position on matters which are manifestly irrelevant or insignificant or plainly of secondary importance.

68 The *Land* of Bavaria and the interest grouping contend, first, that the first and second parts of the second ground of appeal raised by the Commission are inadmissible, since they seek, first, a fresh assessment of the facts by the Court of Justice and, second, they merely repeat pleas in law and arguments raised before the General Court.

69 In the second place, and in the alternative, they submit that both parts of that ground of appeal are unfounded.

Findings of the Court

70 Whereas the arguments of the *Land* of Bavaria and the interest grouping as to inadmissibility must be rejected for the same reasons as those set out in paragraphs 47 and 48 above, it is important to note, on the substance that, in the first place, the arguments put forward by the Commission in both parts of this ground of appeal – according to which the opening decision implicitly refers to the second method of financing the measure at issue, namely the budgetary resources of the Land of Bavaria – is based on the premiss that the obligation imposed on the Commission under the first sentence of Article 6(1) of Regulation No 659/1999, to summarise, in that decision, the issues of relevant fact and law, is satisfied where those issues are referred to implicitly or may be inferred from that decision, in particular by the Member State concerned.

71 However, as is apparent from the very wording of that provision and, in particular, from the usual meaning of the word 'summarise' used in it, any relevant issue of fact and law, within the meaning of that provision, must be referred to explicitly and clearly in the opening decision.

72 That finding is supported by Article 108(2) TFEU, which, as the Advocate General noted in point 42 of his Opinion, requires the Commission to put the interested parties on formal notice for them to be in a position to put forward their comments during the formal investigation phase.

73 That formal notice takes the form in fact of an opening decision which, as stated in recitals 8 and 16 of Regulation No 659/1999, is intended to enable the Commission to gather all the information it needs in order to decide on the classification of that measure as aid and on the compatibility of that measure with the internal market, by offering the best means of guaranteeing the rights of interested parties to be involved in the administrative procedure conducted by the Commission and by giving them all the possibilities to defend their interests.

74 Therefore, in view of the nature and the purpose of the opening decision, the summary of a relevant issue of fact and law following the preliminary examination conducted by the Commission, for determining the existence of State aid and deciding on the compatibility of such aid with the internal market, while it may be brief, must necessarily be explicit in order to disclose in a clear and unequivocal manner the subject matter of the examination carried out by the Commission and thus to enable the interested parties to submit their observations in that regard in a useful manner.

75 Moreover, only an explicit summary of the issues which are objectively relevant for the investigation of the aid measure at issue, for the purposes of the first sentence of Article 6(1) of Regulation No 659/1999, complies with the requirements of clarity, precision and predictability of EU legal acts dictated by the principle of legal certainty (see, to that effect, judgments of 15 February 1996, *Duff and Others*, C-63/93, EU:C:1996:51, paragraph 20; of 18 November 2008, *Förster*, C-158/07, EU:C:2008:630, paragraph 67; and of 8 December 2011, *France Télécom* v *Commission*, C-81/10 P, EU:C:2011:811, paragraph 100).

76 Consequently, in so far as the premiss relied on by the Commission, based on the possibility of referring implicitly, in an opening decision, to an issue of relevant fact or law, for the purposes of the first sentence of Article 6(1) of Regulation No 659/1999, is wrong in law, all the arguments relating to the Court's allegedly erroneous interpretation of the opening decision must also be rejected as unfounded.

77 In the second place, in so far as the Commission complains that the Court infringed its obligation to state reasons, it must be stated at the outset that that obligation is an essential procedural requirement that must be distinguished from the question whether the reasoning is well founded, which goes to the substantive legality of the measure at issue (judgments of 2 April 1998, *Commission* v *Sytraval and Brink's France*, C-367/95 P, EU:C:1998:154, paragraph 62; of 30 November 2016, *Commission* v *France and Orange*, C-486/15 P, EU:C:2016:912, paragraph 79; and of 29 April 2021, *Achemos Grupė and Achema* v *Commission*, C-847/19 P, not published, EU:C:2021:343, paragraph 62).

78 It should also be recalled that while the statement of the reasons on which the judgment is based must clearly and unequivocally disclose the General Court's thinking, so that the persons concerned can be apprised of the justification for the decision taken and the Court of Justice can exercise its power of review, the obligation to state reasons does not require the General Court to provide an account which follows exhaustively and one by one all the arguments put forward by the parties to the case, on condition that it enables the persons concerned to know the grounds of the General Court's decision and provides the Court of Justice with sufficient material for it to exercise its power of review (judgments of 11 July 2013, *Ziegler* v *Commission*, C-439/11 P, EU:C:2013:513, paragraphs 81 and 82, and of 29 April 2021, *Achemos Grupė and Achema* v *Commission*, C-847/19 P, not published, EU:C:2021:343, paragraphs 60 and 61).

79 After observing, in paragraphs 53 and 55 to 57 of the first judgment under appeal and in paragraphs 48 and 50 to 52 of the second judgment under appeal, that only the financing by means of the milk levy was expressly mentioned in the opening decision, the Court found in paragraph 57 of the first judgment under appeal and in paragraph 53 of the second judgment that the financing by means of the general budget of the *Land* of Bavaria had not been expressly mentioned in that decision.

80 It then inferred from that, in paragraph 58 of the first judgment under appeal and in paragraph 54 of the second judgment under appeal, that the interested parties could legitimately presume that the Commission's examination exclusively concerned the resources from the milk levy. In addition, in paragraphs 60 and 61 of the first judgment under appeal and in paragraphs 58 and 59 of the second judgment under appeal, the Court stated that, in the light of the requirements laid down in Article 6(1) of Regulation No 659/1999, even though the Commission is not required to present a complete analysis of the measure at issue, it could not argue that the opening decision could make no mention of the financing by means of resources from the general budget of the *Land* of Bavaria, since it is required to define sufficiently the framework of its investigation so as not to render meaningless the right of interested parties to submit their comments. It is thus apparent from the two judgments under appeal that the financing by means of resources from the general budget of the *Land* of Bavaria should have been expressly mentioned in the opening decision.

81 Therefore, even if it might be possible to consider that the General Court did not respond exhaustively to all of the Commission's arguments seeking to demonstrate that that method of financing figured implicitly in the opening decision or could be inferred from that decision, it must be held that the judgments under appeal clearly and unequivocally disclose the General Court's reasoning, and enable the persons concerned to know the grounds of the General Court's decision and the Court of Justice to exercise its power of review, so that those judgments are not vitiated by any failure to state reasons.

82 The second ground of appeal must therefore be dismissed as unfounded.

Third ground of appeal, alleging an error of law in the interpretation of the second paragraph of Article 263 TFEU

Arguments of the parties

83 By the third ground of appeal, the Commission argues, in essence, that only the obligation to open the formal investigation procedure in respect of an aid measure, within the meaning of Article 107 TFEU, constitutes an essential procedural requirement. Any failure to summarise a relevant issue of fact or law in the opening decision does not constitute an infringement of such a procedural requirement. Moreover, the rights of third parties to be involved in the formal investigation procedure would be infringed only if that omission prevented them from submitting their comments on the issue in question. In addition, that infringement would lead to the annulment of the final decision only if the interested parties were able to establish that the information which they could have communicated in relation to that issue was capable of altering the content of the final decision.

84 The *Land* of Bavaria and the interest grouping contend, first, that this ground of appeal is inadmissible since it cannot, by itself, lead to the judgments under appeal being set aside. Such an annulment would be possible only if this and the fourth ground of appeal were upheld, the latter relating to the lack of effect of the infringement of the right of the interested parties to be involved in the formal investigation procedure on the decision at issue.

85 Second, and in the alternative, the Land of Bavaria and the interest grouping contend that the third ground of appeal raised by the Commission is unfounded.

Findings of the Court

– *Admissibility*

86 It is important to note that, contrary to the submissions of the *Land* of Bavaria and the interest grouping, the third and fourth grounds of appeal, while being linked, are independent of each other. By its third ground of appeal, the Commission complains that the Court erred in law by finding, in paragraphs 70 and 71 of the first judgment under appeal and in paragraphs 67 and 68 of the second judgment under appeal, that the obligation imposed on the Commission to place the interested parties in a position, at the stage of the opening decision, to put forward their comments is in the nature of an essential procedural requirement, the infringement of which entails the annulment of the decision at issue, while by its fourth ground of appeal the Commission complains that the Court erred in law by holding, for the sake of completeness, that it could not be ruled that, in the absence of the infringement found, the procedure for investigating the State aid measure might have led to a different result.

87 As the Advocate General pointed out in point 102 of his Opinion, the fact that the third and fourth grounds of appeal are linked is not sufficient, in and of itself, to declare either of them inadmissible.

88 Consequently, the third ground of appeal is admissible.

– *Substance*

89 As regards the question whether, as the Commission maintains, the Court erred in law by holding that the obligation laid down by the first sentence of Article 6(1) of Regulation No 659/1999 to summarise, in an opening decision, the issues of fact and law that are relevant for the formal procedure of the investigation of the compatibility of an aid measure with the internal market is in the nature of an essential procedural requirement, within the meaning of the second paragraph of Article 263 TFEU, like the obligation to initiate such a procedure under Article 108(2) TFEU, it should first be borne in mind that the Court has already ruled that it follows from Article 108(2) TFEU and Article 1(h) of Regulation No 659/1999 that where the Commission decides to initiate a formal investigation procedure in respect of proposed aid, it must give the interested parties, including the undertaking or undertakings concerned, an opportunity to submit their comments and that that obligation is in the nature of an 'essential procedural requirement' (see judgment of 11 December 2008, *Commission* v *Freistaat Sachsen*, C-334/07 P, EU:C:2008:709, pargraph 55). That characteristic follows from the fact that such an obligation is an essential procedural requirement that is intrinsically linked to the correct formation or expression of the intention of the author of the act.

90 The obligation that the Court has classified as an 'essential procedural requirement' is given concrete expression, specifically, in Article 6(1) of Regulation No 659/1999, which requires the Commission, in particular, to summarise in the opening decision the issues of fact and law that are relevant to the investigation of the aid or proposed aid at issue and, consequently, to ensure the effectiveness of Article 108(2) TFEU.

91 It is true that publication of a notice in the *Official Journal of the European Union* is an appropriate means of informing all interested parties that the formal investigation procedure has been initiated and of obtaining, from those parties, all the information required for the guidance of the Commission with regard to its future action, while guaranteeing to the other Member States and the sectors concerned an opportunity to make their views known as such parties (see, to that effect, judgment of 11 March 2020, *Commission* v *Gmina Miasto Gdynia and Port Lotniczy Gdynia Kosakowo*, C-56/18 P, EU:C:2020:192, paragraphs 71 and 72). However, interested parties will be able to submit their comments effectively only if the published decision expressly and clearly mentions the relevant issues of fact and law, as provided for in the first sentence of Article 6(1) of Regulation No 659/1999.

92 It follows that simply publishing a decision to initiate the formal investigation procedure, without the content of such a decision being in accordance with the requirements of that provision, does not mean that the obligation imposed on the Commission at the time of the formal investigation procedure, one that is classified as an 'essential procedural requirement' within the meaning of the second paragraph of Article 263 TFEU, has been satisfied.

93 In the present case, it follows from paragraphs 54 and 55 above that the method of financing an aid measure is a relevant issue, for the purposes of the first sentence of Article 6(1) of Regulation No 659/1999. As such, that issue, from which the Commission, in the decision at issue, draws consequences for the purpose of classifying the measure as 'State aid', within the meaning of Article 107 TFEU, should therefore have been expressly summarised in the decision to initiate the formal investigation procedure at issue.

94 Consequently, the omission of such an issue from the decision to initiate the formal investigation procedure, in so far as it plays a role in the reasoning of the decision at issue, must be regarded as constituting a breach of an 'essential procedural requirement' in terms of paragraph 55 of the judgment of 11 December 2008, *Commission* v *Freistaat Sachsen* (C-334/07 P, EU:C:2008:709), which entails the annulment of that decision by force of law (see, to that effect, judgments of 29 October 1980, *Roquette Frères* v *Council*, 138/79, EU:C:1980:249, paragraph 33, and of 6 September 2017, *Slovakia and Hungary* v *Council*, C-643/15 and C-647/15, EU:C:2017:631, paragraph 160).

95 In that regard, the Commission's argument that only the obligation to initiate the formal investigation procedure is an essential procedural requirement must be rejected in express manner. Such an argument, apart from the fact that it is manifestly contrary to the first sentence of Article 6(1) of Regulation No 659/1999, which imposes clear obligations on the Commission with regard to the content of an opening decision, amounts to depriving that decision, the purpose of which is to allow the interested parties to submit their comments to the Commission in a useful manner, of any practical effect. Those parties must be able to ascertain the relevant issues of fact and law on which the formal investigation of the aid measure at issue is based, in particular those concerning the method of financing that measure, which constitutes a decisive issue in the classification of that measure as 'State aid', within the meaning of Article 107(1) TFEU.

96 By contrast, there is no infringement of an essential procedural requirement, in terms of paragraph 55 of the judgment of 11 December 2008, *Commission* v *Freistaat Sachsen* (C-334/07 P, EU:C:2008:709), where the issue which the Commission is alleged to have omitted from an opening decision does not constitute an issue of fact or law relevant to the investigation of the aid measure at issue, within the meaning of the first sentence of Article 6(1) of Regulation No 659/1999.

97 The Commission also cannot rely on the case-law stemming from the judgments of 8 May 2008, *Ferriere Nord* v *Commission* (C-49/05 P, not published, EU:C:2008:259), and of 11 December 2008, *Commission* v *Freistaat Sachsen* (C-334/07 P, EU:C:2008:709) to argue that the omission of a relevant issue from an opening decision does not constitute an infringement of an essential procedural requirement. The cases which gave rise to those two judgments concerned a change in the legal framework during the formal investigation procedure in respect of the aid measure and not, as in the present case, the requirements concerning the definition of the framework of the investigation imposed on the Commission by the first sentence of Article 6(1) of Regulation No 659/1999 at the time of the adoption of the opening decision.

98 Accordingly, in the judgment of 8 May 2008, *Ferriere Nord* v *Commission* (C-49/05 P, not published, EU:C:2008:259), the Court of Justice confirmed the General Court's analysis that, in so far as the principles and criteria established by the new guidelines on State aid for environmental protection were identical, in essence, to those established by the guidelines applicable at the time of the decision to initiate the investigation procedure, the Commission had not infringed the right of the interested parties to be involved in the procedure by not placing them in a position to submit their comments on those new guidelines. In those specific circumstances, a new consultation of the interested parties, under Article 108(2) TFEU in conjunction with the second sentence of Article 6(2) of Regulation No 659/1999, was not required.

99 As regards the judgment of 11 December 2008, *Commission* v *Freistaat Sachsen* (C-334/07 P, EU:C:2008:709), the Court, after noting that the obligation on the Commission to ask interested parties to submit comments in the context of a formal investigation procedure is an essential

procedural requirement, stated, referring to the judgment of 8 May 2008, *Ferriere Nord* v *Commission* (C-49/05 P, not published, EU:C:2008:259), that if the new legal rules which entered into force after notification by the Member State of proposed aid do not contain any substantial amendments in relation to those previously in force, the omission by the Commission to consult the interested parties on the amended legal rules does not constitute an infringement of an essential procedural requirement.

100 Nor does the judgment of 11 March 2020, *Commission* v *Gmina Miasto Gdynia and Port Lotniczy Gdynia Kosakowo* (C-56/18 P, EU:C:2020:192), given subsequent to the delivery of the judgments under appeal, call into question the categorisation of the obligation laid down by the first sentence of Article 6(1) of Regulation No 659/1999, read in the light of Article 108(2) TFEU, as an 'essential procedural requirement'.

101 As the Court itself stated in paragraph 88 of that judgment, it does not concern the Commission's obligations at the time of opening the formal investigation procedure and, consequently, it does not concern the obligations falling within the scope of Article 6(1) of Regulation No 659/1999, the interpretation of which is the subject of the present case.

102 It follows from the foregoing that the Court was right, on the basis of paragraph 55 of the judgment of 11 December 2008, *Commission* v *Freistaat Sachsen* (C-334/07 P, EU:C:2008:709), to hold, in paragraph 70 of the first judgment under appeal and in paragraph 67 of the second judgment under appeal, that the obligation on the Commission to place the interested parties in a position, at the stage of the opening decision, to put forward their comments is in the nature of an essential procedural requirement, the infringement of which leads to the annulment of the defective act, irrespective of whether that infringement caused harm to the person pleading it or whether the administrative procedure might have led to a different result.

103 The third ground of appeal must therefore be rejected as unfounded.

The fourth ground of appeal, alleging an error of law in the interpretation of the right of the interested parties to be involved in the procedure, provided for in Article 108(2) and (3) TFEU and Article 6(1) of Regulation No 659/1999, of the concept of 'State resources', referred to in Article 107(1) TFEU, of the concept of 'existing aid', referred to in Article 108(1) TFEU, and also a distortion of the facts and failure to respond to arguments submitted in defence

Arguments of the parties

104 The Commission complains that the Court wrongly held, in paragraphs 72 to 75 of the first judgment under appeal and in paragraphs 70 to 72 of the second judgment under appeal, that if the *Land* of Bavaria had been able to submit comments on whether budgetary resources constitute State resources, the procedure might have led to a different result. It submits that the Court infringed not only Article 108(2) and (3) TFEU and Article 6(1) of Regulation No 659/1999, but also Article 107(1) TFEU, in that it misinterpreted the concept of 'State resources', and Article 108(1) TFEU in so far as it misinterpreted the concept of 'existing aid'. It also complains that the Court distorted the facts found in the decision at issue and failed to examine the arguments put forward in the Commission's defence.

105 The *Land* of Bavaria and the interest grouping contend that this ground of appeal is inadmissible since the General Court's conclusion in paragraphs 72 and 75 of the first judgment under appeal, that the infringement of the interested parties' right to submit comments had affected the outcome of the procedure, was made on the basis of a purely factual finding, which the Court of Justice cannot review. Moreover, the main points of that ground of appeal merely repeat the pleas and arguments already put forward before the General Court.

106 In the alternative, the *Land* of Bavaria and the interest grouping contend that the fourth ground of appeal is unfounded since it is based on a misreading of the judgments under appeal.

Findings of the Court

107 Since the arguments of the *Land* of Bavaria in support of inadmissibility with respect to this ground of appeal must be rejected for the same reasons as those set out in paragraphs 47 and 48 above, it is sufficient, as to the substance, to note that it was only for the sake of completeness that the Court held that if the interested parties had been able to submit observations on the method of financing from the general budget of the *Land* of Bavaria, the procedure might have led to a different result.

108 However, it is settled case-law that pleas directed against grounds of the judgment included for the sake of completeness cannot as such lead to the annulment of that judgment and are therefore ineffective (see, inter alia, judgments of 28 June 2005, *Dansk Rørindustri and Others* v *Commission*, C-189/02 P, C-202/02 P, C-205/02 P to C-208/02 P and C-213/02 P, EU:C:2005:408, paragraph 148, and of 26 March 2019, *Commission* v *Italy*, C-621/16 P, EU:C:2019:251, paragraph 61).

109 In so far as the Court of Justice has held that the General Court was right to find, in paragraph 70 of the first judgment under appeal and in paragraph 67 of the second judgment under appeal, that the decision at issue, by failing to place the interested parties in a position to put forward their comments, infringed an essential procedural requirement which leads to the annulment by force of law of the defective act, the fourth ground of appeal must therefore be rejected as ineffective.

110 Since none of the four grounds of appeal raised by the Commission in support of each of its appeals has been upheld, the appeals must be dismissed in their entirety.

Costs

111 Under Article 138(1) of the Rules of Procedure, which applies to appeal proceedings by virtue of Article 184(1) thereof, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the Commission has been unsuccessful and the *Land* of Bavaria and the interest grouping have applied for costs to be awarded against it, the Commission must be ordered to pay the costs.

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

1. Dismisses the appeals;

2. Orders the European Commission to pay the costs.

[Signatures]