Reports of Cases

JUDGMENT OF THE COURT (Fifth Chamber)

29 July 2019 *

(Appeal – State aid – Regional investment aid – Aid for a large investment project – Aid partly incompatible with the internal market – Article 107(3) TFEU – Whether the aid is necessary – Article 108(3) TFEU – Regulation (EC) No 800/2008 – Aid exceeding the individual notification threshold – Notification – Scope of the block exemption – Cross-appeal – Whether an intervention before the General Court of the European Union may proceed – Admissibility)

In Case C-654/17 P,

APPEAL under Article 56 of the Statute of the Court of Justice of the European Union, brought on 22 November 2017,

Bayerische Motoren Werke AG, established in Munich (Germany), represented by M. Rosenthal, G. Drauz and M. Schütte, Rechtsanwälte,

appellant,

the other parties to the proceedings being:

European Commission, represented by F. Erlbacher, A. Bouchagiar and T. Maxian Rusche, acting as Agents,

defendant at first instance,

Freistaat Sachsen, represented by T. Lübbig, Rechtsanwalt,

intervener at first instance,

THE COURT (Fifth Chamber),

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

Advocate General: E. Tanchev,

Registrar: D. Dittert, head of unit,

having regard to the written procedure and further to the hearing on 23 January 2019,

* Language of the case: German.

after hearing the Opinion of the Advocate General at the sitting on 3 April 2019,

gives the following

Judgment

1 By its appeal, Bayerische Motoren Werke AG ('BMW') seeks to have set aside the judgment of the General Court of the European Union of 12 September 2017, *Bayerische Motoren Werke* v *Commission* (T-671/14, , EU:T:2017:599; 'the judgment under appeal'), by which the General Court dismissed its action seeking partial annulment of Commission Decision (EU) 2016/632 of 9 July 2014 on the State aid No SA. 32009 (2011/C) (ex 2010/N) which the Federal Republic of Germany plans to grant to BMW for a large investment project in Leipzig (OJ 2016 L 113, p. 1) ('the decision at issue').

2 The European Commission has brought a cross-appeal seeking to have set aside the order of the President of the Fifth Chamber of the General Court of 11 May 2015, *Bayerische Motoren Werke* v *Commission*, (T-671/14, not published, EU:T:2015:322; 'the order of 11 May 2015'), whereby the President granted Freistaat Sachsen leave to intervene, and to have set aside the decision concerning the admissibility of that intervention and the consideration given to the arguments set out by Freistaat Sachsen, in addition to those raised by the appellant in the judgment under appeal.

The legal context

Regulation No 659/1999

3 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), as amended by Council Regulation (EU) No 734/2013 of 22 July 2013 (OJ 2013 L 204, p. 15), ('Regulation No 659/1999') states:

'For the purpose of this Regulation:

…

(b) "existing aid" shall mean:

…

(ii) authorised aid, that is to say, aid schemes and individual aid which have been authorised by the Commission or by the Council [of the European Union];

…

(c) "new aid" shall mean all aid, that is to say, aid schemes and individual aid, which is not existing aid, including alterations to existing aid;

…'

4 Paragraph 1 of Article 2 of Regulation No 659/1999, entitled 'Notification of new aid', provides:

'Save as otherwise provided in regulations made pursuant to Article [109 TFEU] or to other relevant provisions thereof, any plans to grant new aid shall be notified to the Commission in sufficient time by the Member State concerned. …'

5 Article 7 of Regulation No 659/1999, entitled 'Decisions of the Commission to close the formal investigation procedure', provides:

'…

2. Where the Commission finds that, where appropriate following modification by the Member State concerned, the notified measure does not constitute aid, it shall record that finding by way of a decision.

3. Where the Commission finds that, where appropriate following modification by the Member State concerned, the doubts as to the compatibility of the notified measure with the [internal] market have been removed, it shall decide that the aid is compatible with the [internal] market (hereinafter referred to as a "positive decision"). That decision shall specify which exception under the Treaty has been applied.

…'

6 Article 10 of Regulation No 659/1999, entitled 'Examination, request for information and information injunction', states in paragraph 1:

'Without prejudice to Article 20, the Commission may on its own initiative examine information regarding alleged unlawful aid from whatever source.

The Commission shall examine without undue delay any complaint submitted by any interested party in accordance with Article 20(2) and shall ensure that the Member State concerned is kept fully and regularly informed of the progress and outcome of the examination.'

Regulation (EC) No 800/2008

7 Recitals 2 to 4 and 7 of Commission Regulation (EC) No 800/2008 of 6 August 2008 declaring certain categories of aid compatible with the [internal] market in application of Articles [107 and 108 TFEU] (General block exemption Regulation) (OJ 2008 L 214, p. 3), replaced by Commission Regulation (EU) No 651/2014 of 17 June 2014 declaring certain categories of aid compatible with the internal market in application of Articles [107 and 108 TFEU] (OJ 2014 L 187, p. 1), are worded as follows:

'(2) The Commission has applied Articles [107] and [108] [TFEU] in numerous decisions and gained sufficient experience to define general compatibility criteria as regards aid in favour of [small and medium-sized enterprises (SMEs)] …

(3) The Commission has also gained sufficient experience in the application of Articles [107] and [108] [TFEU] in the fields of training aid, employment aid, environmental aid, research and development and innovation aid and regional aid with respect to both SMEs and large enterprises …

(4) In the light of this experience, it is necessary to adapt some of the conditions laid down in Regulations … For reasons of simplification and to ensure more efficient monitoring of aid by the Commission, those Regulations should be replaced by a single Regulation. Simplification should result from, amongst other things, a set of common harmonised definitions and common horizontal provisions laid down in Chapter I of this Regulation. …

…

(7) State aid within the meaning of Article [107(1) TFEU] not covered by this Regulation should remain subject to the notification requirement of Article [108(3) TFEU]. This regulation should be without prejudice to the possibility for Member States to notify aid the objectives of which correspond to objectives covered by this Regulation. Such aid will be assessed by the Commission in particular on the basis of the conditions set out in this Regulation and in accordance with the criteria laid down in specific guidelines or frameworks adopted by the Commission wherever the aid measure at stake falls within the scope of application of such a specific instrument.'

8 Article 3 of Regulation No 800/2008, entitled 'Conditions for exemption', featuring in Chapter I of that regulation, itself entitled 'Common Provisions', provides:

'1. Aid schemes fulfilling all the conditions of Chapter I of this Regulation, as well as the relevant provisions of Chapter II of this Regulation, shall be compatible with the [internal] market within the meaning of Article [107(3) TFEU] and shall be exempt from the notification requirement of Article [108(3) TFEU] provided that any individual aid awarded under such a scheme fulfils all the conditions of this Regulation, and the scheme contains an express reference to this Regulation, by citing its title and publication reference in the *Official Journal of the European Union*.

2. Individual aid granted under a scheme referred to in paragraph 1 shall be compatible with the [internal] market within the meaning of Article [107(3) TFEU] and shall be exempt from the notification requirement of Article [108(3) TFEU] provided that the aid fulfils all the conditions of Chapter I of this Regulation, as well as the relevant provisions of Chapter II of this Regulation, and that the individual aid measure contains an express reference to the relevant provisions of this Regulation, by citing the relevant provisions, the title of this Regulation and its publication reference in the *Official Journal of the European Union*.

3. Ad hoc aid fulfilling all the conditions of Chapter I of this Regulation, as well as the relevant provisions of Chapter II of this Regulation, shall be compatible with the [internal] market within the meaning of Article [107(3) TFEU] and shall be exempt from the notification requirement of Article [108(3) TFEU] provided that the aid contains an express reference to the relevant provisions of this Regulation, by citing the relevant provisions, the title of this Regulation and its publication reference in the *Official Journal of the European Union*.'

9 Also featuring in Chapter I, Article 6 of Regulation No 800/2008, entitled 'Individual notification thresholds', provides in paragraph 2:

'Regional investment aid awarded in favour of large investment projects shall be notified to the Commission if the total amount of aid from all sources exceeds 75% of the maximum amount of aid an investment with eligible costs of EUR 100 million could receive, applying the standard aid threshold in force for large enterprises in the approved regional aid map on the date the aid is to be granted.'

10 Article 8 of Regulation No 800/2008, entitled 'Incentive effect', provides:

'1. This Regulation shall exempt only aid which has an incentive effect.

…

3. Aid granted to large enterprises, covered by this Regulation, shall be considered to have an incentive effect if, in addition to fulfilling the condition laid down in paragraph 2, the Member State has verified, before granting the individual aid concerned, that documentation prepared by the beneficiary establishes one or more of the following criteria:

…

(e) as regards regional investment aid referred to in Article 13, that the project would not have been carried out as such in the assisted region concerned in the absence of the aid.

4. The conditions laid down in paragraphs 2 and 3 shall not apply in relation to fiscal measures if the following conditions are fulfilled:

(a) the fiscal measure establishes a legal right to aid in accordance with objective criteria and without further exercise of discretion by the Member State; and

…'

11 Featuring in Chapter II of Regulation No 800/2008, entitled 'Specific provisions for the different categories of aid', Article 13 of that regulation, headed 'Regional aid and employment aid', provides as follows in paragraph 1:

'Regional investment and employment aid schemes shall be compatible with the [internal] market within the meaning of Article [107(3) TFEU] and shall be exempt from the notification requirement of Article [108(3) TFEU], provided that the conditions laid down in this Article are fulfilled.

…'

The 2009 Communication

12 The Communication from the Commission concerning the criteria for an in-depth assessment of regional aid to large investment projects (OJ 2009 C 223, p. 3) ('the 2009 communication'), provides inter alia as follows:

'21. In the case of regional aid to large investment projects covered by this communication, the Commission will verify in detail "that the aid is necessary to provide an incentive effect for the investment" … The objective of this detailed assessment is to determine whether the aid actually contributes to changing the behaviour of the beneficiary, so that it undertakes (additional) investment in the assisted region concerned. There are many valid reasons for a company to locate in a certain region, even without any aid being granted.

22. Having regard to the equity objective deriving from cohesion policy and as far as the aid contributes to achieving this objective, an incentive effect can be proven in two possible scenarios:

…

2. The aid gives an incentive to opt to locate a planned investment in the relevant region rather than elsewhere because it compensates for the net handicaps and costs linked to a location in the assisted region.

…

25. In scenario 2, the Member State could provide proof of the incentive effect of the aid by providing company documents that show a comparison has been made between the costs and benefits of locating in the assisted region concerned with an alternative region. Such comparative scenarios will have to be considered to be realistic by the Commission.

…

33. In scenario 2, for a location incentive, the aid will generally be considered proportionate if it equals the difference between the net costs for the beneficiary company to invest in the assisted region and the net costs to invest in the alternative region(s). …

…

52. Having established that the aid is necessary as an incentive to carry out the investment in the region concerned, the Commission will balance the positive effects of the regional investment aid to a large investment project with its negative effects. …

…

56. The Commission may decide either to approve, condition or prohibit the aid …'

13 The footnote to paragraph 56 of the 2009 Communication reads: '[w]hen the aid is granted on the basis of an existing regional aid scheme, it is however to be noted that the Member State retains the possibility to grant such aid up to the level which corresponds to the maximum allowable amount that an investment with eligible expenditure of EUR 100 million can receive under the applicable rules.'

Background to the dispute and the decision at issue

14 The background to the dispute, as set out in paragraphs 1 to 5 of the judgment under appeal, is as follows:

'1 The applicant … is the parent company of the Bayerische Motoren Werke Group …, whose principal activity is the manufacture of BMW, MINI and Rolls-Royce automobiles and motorcycles.

2 On 30 November 2010, pursuant to Article 6(2) of [Regulation No 800/2008], the Federal Republic of Germany notified aid in the nominal amount of EUR 49 million that it intended to grant pursuant to the Investitionszulagengesetz 2010 (Law on investment subsidies) of 7 December 2008, as amended (BGBl. 2008 I, p. 2350) ("the IZG"), with a view to the construction in Leipzig (Germany) of a production site for the manufacture of the BMW i3 electric car and the i8 hybrid rechargeable car, in accordance with the Guidelines on National

Regional Aid 2007-2013 (OJ 2006 C 54, p. 13) … The notification indicated investment costs of EUR 392 million … and aid intensity of 12.5%. The actual payment of the aid was made subject to the grant of authorisation by the European Commission.

3 After having obtained certain additional information, on 13 July 2011 the Commission decided to open the formal investigation procedure pursuant to Article 108(2) TFEU and subsequently obtained the observations of the Federal Republic of Germany in that regard. On 13 December 2011, the decision entitled "State aid – Germany – State aid SA.32009 (11/C) (ex 10/N) – LIP – Aid to BMW Leipzig – Invitation to submit comments in accordance with Article 108(2) of the TFEU" was published in the *Official Journal of the European Union* (OJ 2011 C 363, p. 20). …

…

5 On 9 July 2014, the Commission adopted [the decision at issue], Article 1 of which is worded as follows:

"The State aid which [the Federal Republic of] Germany is planning to implement in favour of [the appellant's] investment in Leipzig, amounting to EUR 45 257 273, is compatible with the internal market only if it is limited to an amount of EUR 17 million (in prices of 2009); the exceeding amount (EUR 28 257 273) is incompatible with the internal market.

The aid may accordingly only be implemented up to the amount of EUR 17 million.'

Procedure before the General Court and the judgment under appeal

15 By application lodged at the Registry of the General Court on 19 September 2014, the present appellant brought an action seeking to have the decision at issue annulled.

16 On 16 January 2015, Freistaat Sachsen lodged an application to intervene in support of the appellant.

17 By order of 11 May 2015, the President of the Fifth Chamber of the Court granted that application to intervene.

18 By the judgment under appeal, the General Court dismissed the action in its entirety.

Forms of order sought by the parties

19 By its appeal, the appellant claims that the Court should:

– set aside the judgment under appeal;

– annul the decision at issue in so far as it declares the aid amount of EUR 28 257 273 to be incompatible with the internal market, which amount corresponds to the part of the aid in question exceeding EUR 17 million, or in the alternative, to the extent to which the Court considers that the state of the proceedings does not permit final judgment in the case, refer the case back to the General Court;

– in the alternative, annul the decision at issue in so far as it prohibits and declares incompatible with the internal market all aid exempted from the notification requirement under Article 6(2) of Regulation No 800/2008 and granted as part of the investment project in question, to the extent to which it exceeds EUR 17 million; and

– order the Commission to pay the costs of the proceedings both at first instance and on appeal.

20 The Commission contends that the Court should dismiss the appeal and order the appellant to pay the costs.

21 Freistaat Sachsen puts forward the same claims as the appellant regarding setting aside and annulment and requests the Court to order the Commission to pay the costs of the proceedings both at first instance and on appeal.

22 By its cross-appeal, the Commission claims that the Court should:

– set aside the order of 11 May 2015;

– set aside the decision concerning the admissibility of the intervention and the consideration given to the arguments put forward by Freistaat Sachsen in addition to those raised by BMW in the judgment under appeal;

– adjudicate, acting as a court of first instance, on the application to intervene and reject that application as unfounded; and

– order the appellant to pay the costs.

23 The appellant and Freistaat Sachsen contend that the cross-appeal should be dismissed and the Commission ordered to pay the costs.

The cross-appeal

24 By its cross-appeal, the Commission criticises the General Court for having committed a breach of procedure, for the purposes of the first paragraph of Article 58 of the Statute of the Court of Justice of the European Union, which adversely affected its interests by permitting the intervention by Freistaat Sachsen in support of the form of order sought by the appellant, pursuant to the second paragraph of Article 40 of that Statute. In support of this appeal, it relies on three grounds, derived in substance from the breach of that provision and an incorrect characterisation of the facts.

25 The appellant and Freistaat Sachsen consider that the cross-appeal is inadmissible. In any event, they submit, that cross-appeal is unfounded.

26 The second subparagraph of Article 256(1) TFEU provides that decisions given by the General Court may be subject to a right of appeal to the Court of Justice on points of law only, 'under the conditions and within the limits laid down by the Statute [of the Court of Justice of the European Union].'

27 In this regard, under the first paragraph of Article 56 of the Statute of the Court of Justice of the European Union, an appeal may be brought before the Court of Justice, within two months of the notification of the decision appealed against, against final decisions of the General Court and decisions of that Court disposing of the substantive issues in part only or disposing of a procedural issue concerning a plea of lack of competence or inadmissibility.

28 Furthermore, the first paragraph of Article 57 of the Statute of the Court of Justice of the European Union provides that any person whose application to intervene, lodged in accordance with the second paragraph of Article 40 of that Statute, has been dismissed by the General Court may appeal to the Court of Justice within two weeks from the notification of the decision dismissing the application.

29 It should be noted that the decision by which the General Court grants an application to intervene, lodged in accordance with the second paragraph of Article 40, does not come under either of those provisions.

30 Firstly, such a decision is not a decision on substantive issues, nor does it dispose of a procedural issue deriving from a plea of lack of competence or inadmissibility, within the meaning of the first paragraph of Article 56 of the Statute of the Court of Justice of the European Union. The Commission, moreover, does not dispute this in its cross-appeal.

31 Secondly, the General Court's decision to grant an application to intervene does not correspond to that covered by the first paragraph of Article 57 of that Statute, according to which, quite to the contrary, only the rejection of an application to intervene can be the subject of an appeal by the party requesting the intervention.

32 It follows from these provisions that the Statute of the Court of Justice of the European Union does not permit a party to the proceedings at first instance to bring an appeal before the Court of Justice against a decision of the General Court granting leave to intervene.

33 It follows that, as the Commission, moreover, accepts, the order of 11 May 2015 by which the General Court granted Freistaat Sachsen leave to intervene pursuant to the second paragraph of Article 40 of the Statute of the Court of Justice of the European Union cannot be the subject of a main appeal.

34 However, the Commission maintains that the decision of the General Court to grant that leave to intervene can be the subject of a cross-appeal under Article 178(1) and (2) of the Rules of Procedure of the Court of Justice, in respect of the judgment under appeal which brings to a close the proceedings at first instance, since the granting of leave to intervene constitutes a breach of procedure within the meaning of the first paragraph of Article 58 of the Statute of the Court of Justice of the European Union which adversely affects its interests.

35 That argument cannot succeed.

36 First, Article 178(1) of the Rules of Procedure of the Court of Justice requires that a cross-appeal should seek to have set aside, in whole or in part, a 'decision of the General Court'.

37 While it is true that this provision, in contrast to Article 169(1) of those Rules of Procedure, does not specify that the annulment referred to in the appeal must relate to the decision of the General Court 'as set out in the operative part of the decision', the fact remains that, in any event, as has

already been noted in paragraph 31 of the present judgment, the decision of the General Court granting leave to intervene does not constitute a decision which is amenable to appeal, within the meaning of the first paragraph of Article 56 or the first paragraph of Article 57 of the Statute of the Court of Justice of the European Union.

38 Second, Article 178(2) of the Rules of Procedure of the Court of Justice states that a cross-appeal may equally seek to have set aside an express or implied decision relating to the 'admissibility of the action before the General Court'.

39 The decision of the General Court granting leave to intervene does not, however, affect the admissibility of the main action, such an intervention being ancillary to the main action (see, to that effect, judgment of 10 November 2016, *DTS Distribuidora de Televisión Digital* v *Commission*, C-449/14 P, EU:C:2016:848, paragraph 121, and order of 19 July 2017, *Lysoform Dr. Hans Rosemann and Ecolab Deutschland* v *ECHA* C-663/16 P, not published, EU:C:2017:568, paragraph 47).

40 It follows that there is no provision in EU law capable of constituting a legal basis for a party to bring an appeal before the Court of Justice against a decision of the General Court to grant leave to intervene.

41 None of the arguments submitted by the Commission is capable of challenging that finding.

42 First, in so far as the Commission submits that the granting of leave to intervene in breach of the second paragraph of Article 40 of the Statute of the Court of Justice of the European Union constitutes a 'breach of procedure', within the meaning of the first paragraph of Article 58 of that Statute, which adversely affects its interests, suffice it to state that the sole intention of that latter provision is to set out the legal questions capable of being raised in support of an appeal, and not to establish a category of decisions capable of such appeal, which are set out in the first paragraph of Article 56 and in the first paragraph of Article 57 of the Statute. The first paragraph of Article 58 of the Statute of the Court of Justice of the European Union therefore cannot broaden this category of decisions beyond those set out in Articles 56 and 57.

43 Secondly, in so far as the Commission alleges that it is apparent from the case-law resulting from the judgment of 29 November 2007, *Stadtwerke Schwäbisch Hall and Others* v *Commission* (C-176/06 P, not published, EU:C:2007:730), that the Court is required to examine, of its own motion, the admissibility of a request for leave to intervene brought before the General Court if the intervener brings a cross-appeal or, as in the present case, lodges a response to the main appeal, its argument is unfounded.

44 It is true, as the Court stated in paragraph 18 of that judgment, that, when the Court is hearing an appeal under Article 56 of the Statute of the Court of Justice of the European Union, it is required, if need be of its own motion, to adjudicate on the admissibility of an action for annulment and therefore on the public-policy plea based on non-compliance with the condition set out in the fourth paragraph of Article 263 TFEU, according to which an applicant may seek annulment of a decision not addressed to him only if he is directly and individually concerned by it.

45 Thus, it is a pre-condition for admissibility of an action for annulment brought before the General Court that the applicant has a legal interest in bringing proceedings which grants standing to bring proceedings within the meaning of the above provision. By contrast, the granting of an application to intervene made pursuant to the second paragraph of Article 40 of the Statute of

the Court of Justice of the European Union does not affect the admissibility of such an action, as noted in paragraph 39 of the present judgment. Therefore, no analogy can be drawn with the case-law resulting from the judgment of 29 November 2007, *Stadtwerke Schwäbisch Hall and Others* v *Commission* (C-176/06 P, not published, EU:C:2007:730).

46 Third, in so far as the Commission sought to rely during the hearing on the judgment of 14 April 2005, *Gaki-Kakouri* v *Court of Justice* (C-243/04 P, not published, EU:C:2005:238), in which the Court examined, in paragraphs 33 and 34, a ground of appeal alleging an infringement by the General Court of Article 48(1) of its Rules of Procedure concerning late submission of evidence, it need only be stated that, in that case, that ground of appeal sought to have set aside a decision of the General Court within the meaning of the first paragraph of Article 56 of the Statute of the Court of Justice of the European Union, namely, in that case, a decision disposing of the substantive issues.

47 That is precisely not the subject of the cross-appeal lodged by the Commission in the present case. The Commission itself explicitly stated in its appeal that it is not seeking to have set aside the judgment under appeal, which disposes of the substantive issues, but that it is seeking only to have set aside the decision of the General Court granting leave to intervene, which is not a 'decision' within the meaning of the first paragraph of Article 56.

48 Fourthly, the Commission argues that the granting of leave to intervene at first instance produces autonomous legal effects which adversely affect its procedural status in the context of an appeal. By its arguments, the intervener could expand the subject matter of the dispute before the General Court, with the effect that both the Court, in an appeal, and the General Court, in a referral back following the setting-aside of the judgment under appeal, would be required to examine additional arguments. Further, the General Court would be in a position to develop, with no judicial oversight by the Court of Justice, a line of case-law which would not comply with the requirements set out at Article 40 of the Statute of the Court of Justice of the European Union. Additionally, a party granted leave to intervene in breach of that provision could bring an appeal against a decision of the General Court.

49 In this regard, it should first be noted that, contrary to what the Commission contends, the granting of leave to intervene cannot in any event lead to an expansion of the subject matter of the proceedings before the General Court.

50 In accordance with the fourth paragraph of Article 40 of the Statute of the Court of Justice of the European Union, a party which is granted leave to intervene in a case submitted to the General Court may not alter the subject matter of the dispute as defined by the forms of order sought by the main parties and the pleas in law raised by those parties. It follows that arguments submitted by an intervener are admissible only if they come within the framework provided by those forms of order and pleas in law (see, inter alia, judgments of 10 November 2016, *DTS Distribuidora de Televisión Digital* v *Commission*, C-449/14 P, EU:C:2016:848, paragraph 114, and of 25 October 2017, *Commission* v *Council* (CMR-15), C-687/15, EU:C:2017:803, paragraph 23). An intervener has no right to rely on new pleas in law, distinct from those relied on by the applicant (judgment of 10 November 2016, *DTS Distribuidora de Televisión Digital* v *Commission*, C-449/14 P, EU:C:2016:848, paragraph 121).

51 Next, for all that the Commission argues that the granting of leave to intervene would be capable of affecting its right to effective judicial protection, it should be emphasised that EU law, in particular Article 47 of the Charter of Fundamental Rights of the European Union, read in the

light of the safeguards set out in Articles 18 and 19(2) of that Charter, does not require there to be two levels of jurisdiction. The only requirement is that there must be a remedy before a judicial body. The principle of effective judicial protection therefore affords an individual a right of access to a court or tribunal but not to multiple levels of jurisdiction (see, inter alia, judgments of 28 July 2011, *Samba Diouf*, C-69/10, EU:C:2011:524, paragraph 69; of 30 May 2013, *F*, C-168/13 PPU, EU:C:2013:358, paragraph 44, and of 19 June 2018, *Gnandi*, C-181/16, EU:C:2018:465, paragraph 57).

52 It is not, however, contested in the present case that the Commission was in a position to submit to the General Court its observations on the admissibility of the request for leave to intervene, in view of the requirements set out in the second paragraph of Article 40 of the Statute of the Court of Justice of the European Union.

53 It must also be emphasised that, if the General Court had granted the request for annulment brought by the present appellant, the Commission would be entitled to challenge, in an appeal, the arguments put forward by the intervener in support of the appellant's arguments, which the General Court would, as might be the case, have considered to be well founded.

54 Finally, it is true that a party granted leave to intervene before the General Court, other than a Member State or an institution of the European Union, is granted the status of a 'party' by the second paragraph of Article 56 of the Statute of the Court of Justice of the European Union, in order that it may bring an appeal before the Court and may, in that regard, raise any plea in order to challenge the legality of the contested decision. It also follows from this provision that an intervener before the General Court, being regarded as a 'party' before the General Court and no longer as an 'intervener', is entitled to lodge a response when another party lodges an appeal, pursuant to Article 172 of the Rules of Procedure of the Court of Justice (judgment of 11 February 1999, *Antillean Rice Mills and Others* v *Commission*, C-390/95 P, EU:C:1999:66, paragraphs 20 to 22).

55 However, it should be pointed out that, under the second paragraph of Article 40 of the Statute of the Court of Justice of the European Union, any person may intervene in appeal proceedings if it can establish an interest in the result of the case before the Court. In addition, in accordance with the second paragraph of Article 56 of the Statute of the Court of Justice of the European Union, an intervener before the General Court may bring an appeal only where it can demonstrate that it is directly affected by the decision of the General Court. Finally, and in any event, any party to the proceedings is entitled, as already noted in paragraph 53 of the present judgment, to challenge the pleas and arguments put forward by an intervener before the General Court who is participating in those proceedings.

56 Consequently, the cross-appeal brought by the Commission must be dismissed as inadmissible.

The main appeal

57 In its appeal, the appellant, supported by Freistaat Sachsen, relies on two grounds. The first ground alleges infringement of Article 107(3) TFEU. The second ground alleges infringement of Article 288 TFEU, of Articles 3 and 13(1) of Regulation No 800/2008 and of the principle of non-discrimination.

The first ground of appeal

58 In its first ground of appeal, which is divided into four parts, the appellant contends that the General Court infringed Article 107(3) TFEU in finding, in paragraphs 145 to 149 of the judgment under appeal, that the aid in question was not necessary, on the sole ground that its amount exceeded the difference between the net costs of investment in the assisted region and those of an investment in another region, in breach of paragraph 33 of the 2009 communication, without the General Court having verified whether this aid gave rise to a distortion of competition.

The first, second and third parts of the first ground of appeal

– *Arguments of the parties*

59 By the first part of the first ground of appeal, the appellant submits that the General Court erred in law in relying on the presumption that all aid which is not necessary to compensate for the difference between the costs of an investment in the assisted region and an investment in another region gives rise to a distortion of competition.

60 The appellant submits that this presumption is, however, contrary to Article 107 TFEU as the assessment of an aid measure under this provision would require an analysis of the risk of distortion of competition, within the meaning of Article 107(1) TFEU, an assessment of the consequences of the aid in the circumstances of the present case, in accordance with Article 107(3)(c) TFEU, as well as the balancing of the negative and positive effects of the aid. The appellant goes on to argue that the Commission was therefore required to define the market concerned and to determine the appellant's position on that market.

61 By the second part of the first ground of appeal, the appellant contends that the judgment under appeal is inconsistent with the case-law of the Court.

62 According to the appellant, it is apparent from the case-law of the Court, particularly from paragraph 57 of the judgment of 30 April 2009, *Commission* v *Italy and Wam* (C-494/06 P, EU:C:2009:272), that the Commission is required to examine whether aid is liable to affect trade between Member States and to distort competition, by setting out information relevant to its likely effects in its decision.

63 The appellant further submits that the Court held in paragraph 41 of the judgment of 19 July 2016, *Kotnik and Others* (C-526/14, EU:C:2016:570), that the adoption of a communication does not release the Commission from its obligation to examine the specific circumstances when it applies Article 107(3) TFEU.

64 Finally, the appellant argues that it follows from the judgment of 6 September 2017, *Intel* v *Commission*, (C-413/14 P, EU:C:2017:632), that, since the rules concerning State aid form part of the competition rules set out in the FEU Treaty, it would be inconsistent for analysis of the effects of the aid to be required in the context of the application of Articles 101 and 102 TFEU but not to be carried out in the context of the application of Article 107 TFEU.

65 By the third part of the first ground of appeal, the appellant submits that the General Court erred in law in failing to hold that the Commission should, in the context of the formal investigation procedure set out at Article 108(2) TFEU, have exercised its powers of investigation, in order to dispel the doubts concerning the definition of the market concerned and its position on that market, even though those elements, in themselves, justified the initiation of that procedure.

66 The appellant contends that it is apparent from the 2009 communication that the Commission is required to define the markets concerned and that, to the extent to which possible high market shares are considered indicative of a distortion of competition, their assessment must be refined in the context of an in-depth assessment.

67 If the Commission had in the present case correctly defined the market concerned and the market shares, it would, the appellant argues, have found that trading conditions could not have been affected to an extent contrary to the common interest, within the meaning of Article 107(3)(c) TFEU, and the Commission would not have considered it necessary to reduce the amount of the aid.

68 The Commission considers that the first three parts of the first ground of appeal are inadmissible, as they are in substance new pleas or do not satisfy the requirements of the Rules of Procedure of the Court. The Commission takes the view that these parts of the first ground of appeal are, in any event, unfounded.

– *Findings of the Court*

69 As regards the admissibility of the first three parts of the first ground of appeal, it should first be recalled that, according to Article 170(1) of the Rules of Procedure of the Court, the subject matter of the proceedings before the General Court may not be changed in the appeal. The jurisdiction of the Court of Justice in an appeal is limited to review of the findings of law on the pleas argued before the General Court. Therefore, a party may not raise for the first time before the Court of Justice a plea which it has not raised before the General Court, since that would allow that party to bring before the Court of Justice, whose jurisdiction in appeal proceedings is limited, a wider case than that heard by the General Court (see, to that effect, inter alia, judgments of 17 September 2015, *Total* v *Commission*, C-597/13 P, EU:C:2015:613, paragraph 22, and of 20 December 2017, *Comunidad Autónoma de Galicia and Retegal* v *Commission*, C-70/16 P, EU:C:2017:1002, paragraph 88).

70 In the present case, however, the Commission is wrong to criticise the appellant for raising the infringement of Article 107(1) TFEU for the first time at the present appeal stage in support of the first three parts of the first ground of appeal. Even if the appellant refers to this provision in its supporting arguments relating to this part of the first ground of appeal, it should be pointed out that the appellant's argument is unambiguous that the General Court did not infringe Article 107(1) TFEU, but rather that the General Court infringed Article 107(3) TFEU, on the ground that, in the judgment under appeal, the General Court wrongly assessed the necessity of the aid when examining whether it was compatible.

71 Secondly, according to the settled case-law of the Court, it follows from the second subparagraph of Article 256(1) TFEU, from the first paragraph of Article 58 of the Statute of the Court of Justice of the European Union and from Article 168(1)(d) of the Rules of Procedure of the Court of Justice that an appeal must state 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 that

request. In that regard, Article 169(2) of the Rules of Procedure requires that the pleas in law and legal arguments relied on should identify precisely those points in the grounds of the decision of the General Court which are contested (judgment of 20 September 2016, *Mallis and Others* v *Commission and ECB*, C-105/15 P to C-109/15 P, EU:C:2016:702, paragraphs 33 and 34 and the case-law cited).

72 In the present case, however, the Commission is also wrong to contend that the first and third branches of the first ground of appeal do not comply with these requirements. It is clear from the arguments put forward by the appellant in support of those parts of the first ground of appeal that it criticises the General Court, referring explicitly to paragraphs 145 to 149 of the judgment under appeal, for having erred in law in its assessment of the compatibility of the aid in question through its failure, first, to examine whether the aid was likely to cause a distortion of competition on the market concerned and, secondly, to define the market concerned as well as its position on that market.

73 Thirdly and finally, as regards the Commission's contention that the second part of the first ground of appeal is inadmissible as it is based on an infringement of Article 107(3) TFEU, it must be stated that the claims put forward by the Commission that the appellant is raising a 'ground of appeal which is inadmissible in substance' do not explain why this part of the ground of appeal is inadmissible.

74 It follows that the first three parts of the first ground of appeal are admissible.

75 As to whether the first three parts of the first ground of appeal are well founded, it should be recalled that, when considering the appellant's objections regarding the compatibility under Article 107(3) TFEU of the regional aid in question for a large investment project, the General Court noted first in paragraphs 83 to 142 of the judgment under appeal (which paragraphs are not the subject of the present appeal), that the incentive effect and the proportionality of the aid in question, which amounted to EUR 49 million, corresponded to the difference between the net costs of investing in Munich (Germany) and in Leipzig in accordance with paragraphs 21, 22, and 25 and with paragraph 33 respectively of the 2009 communication. In the present case, this was equivalent to EUR 17 million, as noted in paragraphs 119 and 131 of that judgment.

76 Furthermore, in paragraphs 143 to 150 of the judgment under appeal, the General Court rejected the complaints raised by the appellant regarding the Commission's failure to assess whether competition had been distorted. In that regard, the General Court held in paragraphs 145 and 146 of that judgment that, as the proportionality of the aid in question had not been demonstrated for the part of the aid exceeding EUR 17 million, in accordance with paragraph 33 of the 2009 communication, the Commission had been able to assume a negative effect due to a possible distortion of competition. In paragraphs 147 to 149 of that judgment, the General Court held that this assessment was borne out in particular by paragraphs 7 and 52 of the 2009 communication, from which it was clear to the General Court that the Commission need only have carried out the balancing of positive and negative effects of aid covered by that communication once it had established that aid was necessary as an incentive to carry out the investment in the region concerned. The General Court concluded that, in the present case, the Commission was not required to carry out an economic analysis of the actual situation on the market concerned.

77 In substance, through the arguments put forward in support of the first three parts of the first ground of appeal, the appellant seeks to challenge those conclusions, criticising the General Court's finding that the aid in question did not meet the proportionality requirement as set out in paragraph 33 of the 2009 communication, simply because, in breach of that provision, the amount of the aid exceeded the difference between the net costs of an investment in the assisted region and those of an investment in another region, with no demonstration, by means of a balancing of the positive and negative effects of the aid, that the latter would lead to a distortion of competition on the market concerned.

78 It should be noted that, by these arguments, the appellant is not challenging the validity of the 2009 communication in terms of the rules of the FEU Treaty, which include, notably, Article 107(3). In particular, it should be pointed out that, in the present appeal, the appellant is not seeking to challenge the decision of the General Court in paragraph 96 of the judgment under appeal to reject as inadmissible the arguments which the appellant had put forward on this point at first instance.

79 In this context, for the purpose of assessing this ground of appeal, it should be recalled that the assessment of the compatibility of aid measures with the internal market, under Article 107(3) TFEU, comes within the exclusive competence of the Commission, subject to review by the Courts of the European Union (judgment of 19 July 2016, *Kotnik and Others*, C-526/14, EU:C:2016:570, paragraph 37 and the case-law cited).

80 In this regard, the Commission enjoys wide discretion, the exercise of which involves complex economic and social assessments (judgment of 19 July 2016, *Kotnik and Others*, C-526/14, EU:C:2016:570, paragraph 38 and the case-law cited).

81 In the exercise of that discretion, the Commission may adopt guidelines in order to establish the criteria on the basis of which it proposes to assess the compatibility with the internal market of aid measures envisaged by the Member States (judgment of 19 July 2016, *Kotnik and Others*, C-526/14, EU:C:2016:570, paragraph 39 and the case-law cited).

82 In adopting such guidelines and announcing, through their publication, that they will apply to the cases to which they relate, the Commission imposes a limit on the exercise of that discretion and cannot, as a general rule, depart from those guidelines, at the risk of being found to be in breach of general principles of law, such as equal treatment or the protection of legitimate expectations (judgment of 19 July 2016, *Kotnik and Others*, C-526/14, EU:C:2016:570, paragraph 40 and the case-law cited).

83 It is true, as the appellant correctly points out, that the Commission cannot, by adopting guidelines, waive the exercise of the discretion that Article 107(3) TFEU confers on it. Therefore, the adoption of the 2009 communication does not relieve the Commission of its obligation to examine the specific exceptional circumstances relied on by a Member State, in a particular case, for the purpose of requesting the direct application of Article 107(3) TFEU (see, to that effect, judgment of 19 July 2016, *Kotnik and Others*, C-526/14, EU:C:2016:570, paragraph 41 and the case-law cited).

84 In the present case, however, as the Advocate General observed in point 60 of his Opinion, neither the appellant nor Freistaat Sachsen has claimed that the Federal Republic of Germany had relied on specific circumstances justifying a direct application of Article 107(3) TFEU to the facts of the present case.

85 In the context of the present appeal, it is not disputed that the General Court acted correctly in holding, in paragraphs 83 to 142 of the judgment under appeal, that the aid in question did not, as noted in paragraph 75 of the present judgment, comply with the proportionality requirement as envisaged in paragraph 33 of the 2009 communication, on the ground that the amount of that aid exceeded the difference between the net costs of an investment in Munich and those of an investment in Leipzig, the difference corresponding, moreover, to the amount of aid recognised as being necessary for an incentive effect, under paragraphs 21, 22 and 25 of the 2009 communication. As the General Court found in paragraphs 118 and 145 of the judgment under appeal, under paragraph 29 of the 2009 communication, 'for the regional aid to be proportional, the amount and intensity of the aid must be limited to the minimum needed for the investment to take place in the assisted region'.

86 In those circumstances, it must be held that the General Court correctly interpreted paragraph 52 of the 2009 communication when it held, in paragraph 148 of the judgment under appeal, that the Commission was not obliged to carry out a balancing of the positive effects of the aid, as set out in paragraphs 11 to 36 of that communication, resulting from the analysis of the incentive effect and of the proportionality of the aid, against the negative effects of that aid, which, according to paragraphs 37 to 51 of that communication, involves an assessment of the effects of that aid on competition on the market concerned.

87 It is, admittedly, apparent from paragraph 52 of the 2009 communication that, once the Commission has established that aid is not necessary 'as an incentive' to carry out the investment in the region concerned, it is relieved of the requirement to carry out the balancing of the positive and negative effects of the regional investment aid in favour of a large investment project.

88 However, as has already been noted in paragraph 85 of the present judgment, and as the General Court itself found in substance in paragraphs 108 and 128 of the judgment under appeal, without challenge by the appellant in the present appeal, the condition regarding the incentive effect of the aid in this case overlaps with that of the proportionality of the aid, since the amount of the aid in question found to satisfy the proportionality condition corresponds precisely to the amount necessary for an incentive effect.

89 Moreover, as the Advocate General emphasised in point 51 of his Opinion, aid exceeding the amount necessary for an investment to be carried out in an assisted region cannot be declared compatible simply because it does not have negative effects on competition.

90 Therefore, having found that the aid in question did not comply with the proportionality requirement, as set out in paragraph 33 of the 2009 communication, the General Court acted correctly in holding, in paragraph 146 of the judgment under appeal, that the Commission was entitled, in accordance with paragraph 52 of the 2009 communication, when assessing whether the aid in question was compatible in the light of the conditions set out in that communication, to assume that this caused a distortion of competition on the market concerned.

91 It follows that, for the same reasons, the Commission was also not required to define the market in question for the purpose of assessing the compatibility of the aid in question under those conditions. The General Court therefore did not err in law in holding, in paragraph 149 of the judgment under appeal, that the Commission was not required to determine the situation of the appellant on the market in question for the purposes of that assessment.

92 In contrast to what the appellant suggests, it can in no way be inferred from the foregoing that, in order to categorise a measure as 'State aid' within the meaning of Article 107(1) TFEU, the Commission would thus be relieved of the obligation to establish that the aid fulfils all the conditions of Article 107(1) TFEU, in particular that that measure distorts or threatens to distort competition (see, inter alia, judgment of 21 December 2016, *Commission* v *World Duty Free Group and Others*, C-20/15 P and C-21/15 P, EU:C:2016:981, paragraph 53).

93 The assessment of the compatibility of a national measure under Article 107(3) TFEU requires in any event that that measure constitutes 'State aid' within the meaning of Article 107(1) TFEU.

94 It follows that, in order to determine whether there is 'State aid' within the meaning of Article 107(1) TFEU, the Commission remains under an obligation to examine whether the measure in question is liable to distort competition, and to set out in its decision all the information relevant to the likely effects of that measure (judgment of 30 April 2009, *Commission* v *Italy and Wam*, C-494/06 P, EU:C:2009:272, paragraph 57).

95 However, it should be recalled that the appellant is not relying, in support of the present ground of appeal, as noted in paragraph 70 of the present judgment, or indeed in support of the second ground of appeal, on any argument regarding infringement of Article 107(1) TFEU.

96 Consequently, the first three parts of the first ground of appeal must be rejected as unfounded.

The fourth part of the first ground of appeal

– Arguments of the parties

97 In the fourth part of its first ground of appeal, the appellant contends that the General Court distorted the facts and evidence in holding that aid of EUR 17 million would have been sufficient to trigger the investment decision. The appellant's decision-making process did not envisage aid of that amount, the decision concerning the choice of site having been adopted due to the grant of aid of approximately EUR 50 million.

98 The Commission contends that the fourth part of the first ground of appeal is inadmissible and, in any event, unfounded.

– Findings of the Court

99 According to settled case-law, under Article 256 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 Court's Rules of Procedure, an appellant must state precisely the evidence alleged to have been distorted by the General Court and must point out the errors of appraisal which, in its view, have led to that distortion. Such distortion must, moreover, be obvious from the documents in the case file, without there being any need to carry out a fresh assessment of the facts and the evidence (see, inter alia, judgment of 6 November 2018, *Scuola Elementare Maria Montessori* v *Commission*, *Commission* v *Scuola Elementare Maria Montessori* and *Commission* v *Ferracci*, C-622/16 P to C-624/16 P, EU:C:2018:873, paragraph 86).

100 In the present case, it should be pointed out that the appellant merely criticises the General Court for having distorted the facts and evidence in so far as it held that aid of EUR 17 million was sufficient to provide an incentive to carry out the investment in question, without stating which paragraphs in the grounds of the judgment under appeal are contested, in breach of the requirements noted in paragraph 71 of the present judgment. Nor did the appellant set out the grounds upon which it alleges that the General Court made findings in clear conflict with the evidence in the documents in the case file or attributed to those documents a scope that was clearly incorrect.

101 It is apparent from the foregoing that, whilst purporting to claim that the General Court committed a distortion, the appellant is in reality seeking to have the Court of Justice conduct a new assessment of the facts and evidence, in order to replace the General Court's assessment of these points. This lies outside the jurisdiction of the Court of Justice in the context of an appeal.

102 The fourth part of the first ground of appeal must therefore be rejected as inadmissible.

103 It follows from all of the foregoing that the first ground of appeal must be rejected as being partly inadmissible and partly unfounded.

The second ground of appeal

Arguments of the parties

104 By its second ground of appeal, which is divided into two parts, the appellant submits that the General Court committed several errors of law in holding, in paragraph 165 to 181 of the judgment under appeal, that the Commission had acted correctly in limiting the aid in question to an amount below the individual notification threshold set out in Article 6(2) of Regulation No 800/2008.

105 By the first part of the second ground of appeal, the appellant contends that the General Court vitiated the judgment under appeal by infringing Article 288 TFEU, as well as Article 3 and Article 13(1) of Regulation No 800/2008.

106 As regards, first, the infringement of Article 288 TFEU, the appellant criticises the General Court for having allowed the Commission, in adopting the decision at issue, to derogate from Regulation No 800/2008 by reducing the declaration of compatibility of the aid in question under Article 13(1) of that regulation to a mere presumption.

107 It claims that, while the Commission is competent to declare notified aid to be incompatible with the internal market where the aid exceeds the individual notification threshold set out in Article 6(2) of Regulation No 800/2008, it is not, by contrast, open to the Commission under the hierarchy of norms to declare incompatible that part of the aid which does not exceed that threshold. In this regard, it argues that the General Court failed to appreciate the fact that, in adopting Regulation No 800/2008, the Commission transferred to the Member States the competence to assess the compatibility of aid the amount of which did not exceed that threshold.

108 The appellant submits that Regulation No 800/2008 requires an overall assessment of the positive and negative effects of regional aid, and in particular of any possible distortions of competition resulting from that aid. This overall assessment is reflected in the setting of a threshold in

Article 6(2) of Regulation No 800/2008 at a level up to which the objective of regional development and cohesion assumes greater importance than possible distortions of competition. That regulation thus made it clear that it is a binding requirement to carry out the balancing exercise required in Article 107(3)(c) TFEU between the positive and negative effects of regional aid.

109 It follows, according to the appellant, that Regulation No 800/2008 confers on eligible undertakings the right to have aid granted in accordance with that regulation regarded as being compatible with the internal market. Therefore, in its view, that regulation grants Member States the discretion either to notify aid above the individual notification threshold set out in the regulation or to grant, without notification, aid not exceeding that threshold. However, it contends that the approach taken by the General Court in the judgment under appeal would lead to a Member State which notifies aid above the relevant threshold losing the benefit of the block exemption set out in Regulation No 800/2008, by causing such aid to come within the scope of the Commission's assessment. It believes that such an outcome would be contrary to the reference in the footnote to paragraph 56 of the 2009 communication, according to which aid may always be granted up to the individual notification threshold.

110 This interpretation, the appellant submits, is borne out by Article 7(2) and (3) of Regulation No 659/1999, which provides the Member State concerned with the possibility to modify the notified measure during the formal investigation. The Member State cannot therefore be required to withdraw its notification in order to be able to benefit from the authorisation to grant aid not exceeding the individual notification threshold set out in Article 6(2) of Regulation No 800/2008. Recital 7 of the latter regulation is also based on the interdependence of the individual notification procedure and the block exemption, since it states that the Commission is required in the individual notification procedure to assess aid on the basis of the condition set out in that regulation.

111 The appellant maintains that this argument is also borne out by the case-law relating to aid schemes as set out in particular in the judgment of 6 March 2002, *Diputación Foral de Álava and Others* v *Commission* (T-127/99, T-129/99 and T-148/99, EU:T:2002:59, paragraphs 228 and 229), by which the General Court held that individual aid which is not fully covered by a decision approving the general aid scheme concerned can be reviewed by the Commission only in the case where the grant accorded exceeds the ceiling established in that decision.

112 Secondly, as regards the infringement of Article 3 and Article 13(1) of Regulation No 800/2008, the appellant contends that it follows from those provisions that aid which does not exceed the individual notification threshold and which fulfils the conditions laid down in that regulation is compatible with the internal market. Such aid therefore should, in its view, be regarded as 'existing aid' within the meaning of Article 1(b) of Regulation No 659/1999 and therefore need not be notified to the Commission under Article 108(3) TFEU.

113 By the second part of the second ground of appeal, the appellant claims that the judgment under appeal infringes the principle of non-discrimination, since its competitors would be entitled under the IZG to demand the grant of aid not exceeding the individual notification threshold set out in Article 6(2) of Regulation No 800/2008.

114 The Commission considers that the second ground of appeal is inadmissible for the reason that it constitutes a new plea. In any event, this ground of appeal is, it argues, unfounded.

Findings of the Court

115 By its second ground of appeal, the appellant essentially submits that the General Court, contrary to Article 288 TFEU, failed to have proper regard for the competence of Member States and infringed Articles 3 and 13(1) of Regulation No 800/2008 and the principle of non-discrimination in finding, in paragraphs 165 to 181 of the judgment under appeal, that the Commission was entitled to find that the aid in question was incompatible with the internal market as regards the portion of the aid that was below the individual notification threshold set out in Article 6(2) of that regulation for regional aid granted to large investment projects.

116 This ground of appeal thus seeks to support the argument that the judgment under appeal is vitiated by errors of law in the assessment of the compatibility of the portion of the aid in question which exceeds the amount held to meet the proportionality requirement, as set out in paragraph 33 of the 2009 communication, namely EUR 17 million, but which does not exceed the level of the individual notification threshold, which in the present case the parties agree is EUR 22.5 million.

117 With regard to the admissibility of this second ground of appeal, it is admittedly true, as noted by the Commission, that the appellant did not expressly rely on the infringement of Article 288 TFEU or on that of Articles 3 and 13(1) of Regulation No 800/2008 in support of its action before the General Court.

118 Nonetheless, it is clear from the wording of the application at first instance that, in its action before the General Court, the appellant put forward a third plea, raised in the alternative, as is apparent from paragraphs 162 and 163 of the judgment under appeal. This plea alleged that the Commission had failed to comply with 'Regulation No 800/2008' by 'limiting the amount of the aid to a level below that exempted by the notification requirement'. The appellant claimed in this regard that, where a notification is made, aid up to the threshold which triggers the notification requirement laid down in Regulation No 800/2008 should always be declared compatible and that, accordingly, the Member State should necessarily have the opportunity to grant aid up to that threshold.

119 Furthermore, according to the express terms of the application at first instance, the appellant argued before the General Court that, in limiting the aid to an amount below the threshold which triggers the notification requirement, namely EUR 17 million, the Commission unlawfully undermined the powers of the Federal Republic of Germany, which could, moreover, give rise to 'unlawful discrimination … in comparison with other aid recipients who [could] obtain, by virtue of the IZG, aid of EUR 22.5 million exempt from the notification requirement'.

120 In those circumstances, the view cannot be taken that the present ground of appeal is a new plea raised by the appellant in breach of the case-law noted in paragraph 69 of the present judgment.

121 The second ground of appeal is therefore admissible.

122 As to whether this ground is well founded, it should be noted that it is based on a two-fold premiss according to which, in adopting Regulation No 800/2008, the Commission, first, transferred to the Member States the competence to assess the compatibility with the internal market of State aid not exceeding the individual notification threshold set out in Article 6(2) of that regulation, and,

secondly, declared such aid to be compatible with the internal market, in accordance with Article 3 and Article 13(1) of that regulation, as 'existing aid' within the meaning of Article 1(b) of Regulation No 659/1999 where it meets all of the conditions set out in that regulation.

123 According to the appellant, it follows that, where aid exceeds the threshold for individual notification, the Commission, when examining an individual notification made under Article 108(3) TFEU, is solely competent, under Article 107(3) TFEU, to assess the compatibility of the portion of the aid which exceeds that threshold. By contrast, the Commission cannot, in its final decision adopted under that provision, declare the part of the aid below the threshold incompatible, since such a decision cannot derogate from Article 3 and Article 13(1) of Regulation No 800/2008 without infringing Article 288 TFEU.

124 However, the two-fold premiss underpinning this argument is misconceived, as it fails to have proper regard to both the system for monitoring State aid established by the FEU Treaty and the scope of Regulation No 800/2008.

125 As regards the first part of the two-fold premiss, concerning the respective powers of the Commission and of the Member States in monitoring State aid, it should be recalled that, as stated by the General Court in paragraph 165 of the judgment under appeal, within the system of control put in place by the FEU Treaty, Member States are under an obligation, first, to notify to the Commission each measure intended to grant new aid or alter aid for the purposes of Article 107(1) TFEU and, secondly, not to implement such a measure, in accordance with Article 108(3) TFEU, until that institution has taken a final decision on that measure (see, inter alia, judgment of 5 March 2019, *Eesti Pagar*, C-349/17, EU:C:2019:172, paragraph 56 and the case-law cited).

126 That obligation of the Member State concerned to notify any new aid to the Commission is set out in Article 2 of Regulation No 659/1999 (judgment of 21 July 2016, *Dilly's Wellnesshotel*, C-493/14, EU:C:2016:577, paragraph 32).

127 However, the General Court also found in paragraphs 167 to 169 of the judgment under appeal that the Council is authorised, in accordance with Article 109 TFEU, to make any appropriate regulations for the application of Article 107 TFEU and Article 108 TFEU and may in particular determine the conditions under which Article 108(3) TFEU is to apply and the categories of aid exempt from the procedure under that provision. In addition, as provided for in Article 108(4) TFEU, the Commission may adopt regulations relating to the categories of State aid that the Council has, pursuant to Article 109 TFEU, determined may be exempt from the procedure provided for in Article 108(3) TFEU. Consequently, Council Regulation (EC) No 994/98 of 7 May 1998 on the application of Articles [107 and 108 TFEU] to certain categories of horizontal State aid (OJ 1998 L 142, p. 1), in accordance with which Regulation No 800/2008 was subsequently adopted, had itself been adopted pursuant to Article 94 of the EC Treaty (subsequently Article 89 EC and now Article 109 TFEU) (see, inter alia, judgment of 5 March 2019, *Eesti Pagar*, C-349/17, EU:C:2019:172, paragraphs 57 and 58 and the case-law cited).

128 It follows, as the General Court recalled in paragraph 170 of the judgment under appeal, that, notwithstanding the obligation of prior notification for each measure intended to grant new aid or to alter aid, which is incumbent on the Member States under the Treaties and is one of the fundamental features of the system of monitoring in the field of State aid, if an aid measure adopted by a Member State fulfils the relevant conditions provided for in Regulation

No 800/2008, that Member State may rely on its being exempted as laid down in Article 3 of that regulation from the notification requirement. Conversely, it is apparent from recital 7 of that regulation that State aid not covered by that regulation should remain subject to the notification requirement laid down by Article 108(3) TFEU (see, inter alia, judgment of 5 March 2019, *Eesti Pagar*, C-349/17, EU:C:2019:172, paragraph 59 and the case-law cited).

129 In the present case, it is common ground that the aid in question exceeds the relevant individual notification threshold set in Article 6(2) of Regulation No 800/2008 and that, on that basis alone, such aid, as it falls outside the scope of that regulation, cannot benefit from the exemption from the individual notification requirement provided for in, inter alia, Articles 3 and 13(1) of that regulation (see, by analogy, judgment of 21 July 2011, *Freistaat Sachsen and Land Sachsen-Anhalt* v *Commission*, C-459/10 P, not published, EU:C:2011:515, paragraph 30).

130 Consequently, in the present case, the Member State concerned was required to make an individual notification of that aid to the Commission under Article 108(3) TFEU. It is, moreover, not disputed that this notification was made by the Federal Republic of Germany.

131 In accordance with that provision, the aid in question could therefore not be implemented until the Commission had taken a final decision under Article 7 of Regulation No 659/1999 in relation to that aid.

132 As regards the assessment of the compatibility of such aid with the internal market under Article 107(3) TFEU, it is settled case-law that such assessment comes within the exclusive competence of the Commission, subject to review by the Courts of the European Union, as has already been noted in paragraph 79 of the present judgment.

133 Contrary to what the appellant claims, the Commission did not, by the adoption of Regulation No 800/2008, transfer that competence to the Member States for aid covered by it and not exceeding the individual notification threshold set out in Article 6(2) of that regulation.

134 On the one hand, as observed by the Advocate General in point 100 of his Opinion, since that competence was granted exclusively to the Commission by the primary law of the European Union in Articles 107 and 108 TFEU, the Commission cannot derogate from it by adopting a regulation, whether or not this relates to a specific category of aid.

135 It should also be noted that, by Regulation No 800/2008, in essence, the Commission merely exercised, *ex ante*, the powers conferred on it by Article 107(3) TFEU with respect to all aid satisfying the criteria laid down by that regulation (see, to that effect, judgment of 5 March 2019, *Eesti Pagar*, C-349/17, EU:C:2019:172, paragraph 65).

136 For that purpose, as set out in its recitals 2, 3 and 4, Regulation No 800/2008 lists general compatibility criteria, which have been developed on the basis of the Commission's experience in applying Articles 107 and 108 TFEU. When these criteria are met, the aid in question is, in accordance with Articles 3 and 13(1) of Regulation No 800/2008 in particular, compatible with the internal market within the meaning of Article 107(3) TFEU, and exempted from the notification requirement set out in Article 108(3) TFEU.

137 However, when an aid application is submitted to the competent authority of a Member State under Regulation No 800/2008, that national authority alone will have verified, taking account of the information submitted to it, whether the aid applied for meets all the relevant conditions laid down by that regulation (see, to that effect, judgment of 5 March 2019, *Eesti Pagar*, C-349/17, EU:C:2019:172, paragraphs 66 and 93).

138 As the Court has previously held, it is only if an aid measure adopted by a Member State actually fulfils all the relevant conditions laid down by Regulation No 800/2008 that that Member State will be exempted from its obligation to notify. Conversely, where aid has been granted pursuant to that regulation, although the conditions laid down for eligibility with respect to that regulation were not satisfied, the aid will have been granted in breach of the notification requirement, and such aid must be considered to be unlawful (judgment of 5 March 2019, *Eesti Pagar*, C-349/17, EU:C:2019:172, paragraph 99).

139 In such a situation, according to the Court's case-law, it is the task of both the national courts and the administrative bodies of the Member States to ensure that all appropriate action is taken to address the consequences of an infringement of the final sentence of Article 108(3) TFEU, particularly as regards the validity of measures giving effect to the aid and the recovery of aid granted in disregard of that provision (see, to that effect, judgment of 5 March 2019, *Eesti Pagar*, C-349/17, EU:C:2019:172, paragraphs 89 to 92, 100 and 130).

140 Moreover, under Article 10(1) of Regulation No 659/1999 it is for the Commission to examine such aid granted in breach of Regulation No 800/2008, either on its own initiative or following a complaint by an interested party, within the meaning of Articles 107 and 108 TFEU (see, to that effect, judgment of 5 March 2019, *Eesti Pagar*, C-349/17, EU:C:2019:172, paragraph 114).

141 While the Commission is authorised to adopt regulations for block exemptions of aid, with a view to ensuring efficient supervision of the competition rules concerning State aid and simplifying administration, such regulations cannot in any way weaken Commission monitoring in that area (see, to that effect, judgments of 21 July 2016, *Dilly's Wellnesshotel*, C-493/14, EU:C:2016:577, paragraph 38, and of 5 March 2019, *Eesti Pagar*, C-349/17, EU:C:2019:172, paragraph 60).

142 It follows that, by adopting Regulation No 800/2008, the Commission did not confer on national authorities any power to make a final decision with respect to the extent of the exemption from the notification requirement, nor, therefore, regarding the assessment of the conditions laid down in that regulation governing such an exemption. Those authorities are in the same position, in this respect, as the potential beneficiaries of aid and are required to ensure that their decisions are compliant with that regulation (see, to that effect, judgment of 5 March 2019, *Eesti Pagar*, C-349/17, EU:C:2019:172, paragraphs 101 and 102).

143 Therefore, where a national authority grants aid while misapplying Regulation No 800/2008, its doing so amounts to an infringement both of the provisions of that regulation and of Article 108(3) TFEU (judgment of 5 March 2019, *Eesti Pagar*, C-349/17, EU:C:2019:172, paragraph 103).

144 The General Court thus did not err in law in holding, in paragraph 177 of the judgment under appeal, that when a Member State considers that aid meets the conditions set out in Regulation No 800/2008, that aid benefits at most from a presumption of compatibility with the internal

market. In accordance with the case-law cited in paragraphs 139 and 140 of the present judgment, the compliance of such aid with those conditions may be challenged before a national court or national authority as well as before the Commission.

145 It should also be pointed out in this regard that, according to the Court's settled case-law, it is not possible for a national authority to create a legitimate expectation on the part of the beneficiary of aid granted in misapplication of Regulation No 800/2008 that that aid is lawful. In view of the mandatory nature of the supervision of State aid by the Commission under Article 108 TFEU, undertakings to which aid has been granted may not, in principle, entertain any legitimate expectation that the aid is lawful unless it has been granted in compliance with the procedure laid down in that article (see, to that effect, judgment of 5 March 2019, *Eesti Pagar*, C-349/17, EU:C:2019:172, paragraph 98 and the case-law cited).

146 It follows that Regulation No 800/2008 does not prejudice the exclusive competence of the Commission to assess, under Article 107(3) TFEU, the compatibility of aid granted under that regulation. Therefore, the Commission alone may declare such aid to be compatible with the internal market under that provision, whether or not the amount of the aid exceeds the threshold for individual notification laid down in Article 6(2) of that regulation.

147 As regards the second part of the two-fold premiss mentioned in paragraph 122 of the present judgment – concerning the scope of Regulation No 800/2008, according to which the Commission, in adopting that regulation, declared that State aid not exceeding the threshold for individual notification indicated in Article 6(2) of that regulation is compatible with the internal market where it fulfils all the conditions set out in that regulation, this aid thus being authorised as 'existing aid' within the meaning of Article 1(b) of Regulation No 659/1999 – it should be recalled that Article 3 and Article 13(1) of Regulation No 800/2008 do, it is true, provide that aid fulfilling the conditions laid down in that regulation 'shall be compatible' with the internal market, within the meaning of Article 107(3) TFEU.

148 Contrary to what the appellant argues, however, it does not follow that such aid must be regarded as being 'authorised' as 'existing aid' within the meaning of Article 1(b)(ii) of Regulation No 659/1999. That provision states that, in order for an aid scheme or individual aid to be considered as such, the scheme or the aid must have been authorised 'by the Commission or by the Council'.

149 Aid granted by a Member State pursuant to Regulation No 800/2008 cannot be regarded as having been authorised by the Commission. As is apparent from paragraphs 137 to 142 of the present judgment, while it is the competent national authorities which examine whether aid granted under that regulation fulfils, for a particular measure, the conditions set by that regulation, they themselves have no power to make a final decision concerning the assessment as to whether that aid is compatible with the internal market.

150 Moreover, in view of its very nature, Regulation No 800/2008 also does not carry out any such specific assessment of the compatibility of a particular aid scheme or individual aid granted in the light of the conditions of that regulation. Instead, as stated in paragraph 136 of the present judgment, that regulation merely lists general compatibility criteria for certain categories of aid, based on the Commission's experience in applying Articles 107 and 108 TFEU.

151 Therefore, when a Member State considers that aid fulfils the conditions set out in Regulation No 800/2008, that aid cannot, for that reason alone, be considered to have been authorised by the Commission as aid compatible with the internal market (see, to that effect, judgment of 21 July 2016, *Dilly's Wellnesshotel*, C-493/14, EU:C:2016:577, paragraph 50).

152 Only a decision adopted by the Commission under Article 107 TFEU, such as, in particular, a decision taken in accordance with Article 7(3) of Regulation No 659/1999, involving a specific assessment of that aid, is capable of constituting such authorisation.

153 It follows that, as the General Court correctly held in substance in paragraphs 176, 179 and 180 of the judgment under appeal, aid granted by a Member State pursuant to Regulation No 800/2008 cannot be considered to be existing aid authorised by the Commission on the sole basis that it fulfils all the conditions laid down in that regulation.

154 *A fortiori*, therefore, the mere fact that the amount of aid meets the individual notification threshold set out in Article 6(2) of Regulation No 800/2008 cannot in any way provide entitlement to aid in that amount, contrary to what the appellant argues.

155 On the one hand, apart from the fact that, given the scope of Regulation No 800/2008, such aid could never be regarded as existing aid authorised by the Commission, the condition that the aid amount must not exceed this threshold, while it is one of the conditions that must be complied with for aid to be exempted from notification and to be compatible with the internal market in accordance with Article 3 and Article 13(1) of that regulation, is purely procedural in nature, in the sense that the aid amount corresponding to that threshold does not in any way imply an assessment carried out by the Commission under Article 107(3) TFEU as to the compatibility of aid with the internal market, in particular as to whether such aid is necessary.

156 The threshold for individual notification laid down in Article 6(2) of Regulation No 800/2008 is the result of an arithmetical calculation based on the maximum aid amount that an investment with eligible expenditure of EUR 100 million could receive, in accordance with the threshold applicable to large enterprises, as laid down in the approved State aid map for regional aid on the date on which the aid is to be granted, which in the present case, in accordance with the guidelines on National Regional Aid for 2007-2013, amounted to a maximum rate of 30% for the Leipzig region (see the guidelines on National Regional Aid for 2007-2013 – National regional State aid map: Germany (OJ 2006 C 295, p. 6)).

157 On the other hand, in order to be compatible with the internal market in accordance with Article 3 and Article 13(1) of Regulation No 800/2008, regional investment aid must fulfil all of the substantive conditions laid down by that regulation, in particular the condition regarding incentive effect set out in Article 8(3)(e) of that regulation, which provides that aid granted to large enterprises covered by that regulation are to be considered to have an incentive effect if the Member State has verified, before granting the individual aid concerned, that the documentation prepared by the beneficiary establishes that the project would not have been carried out in the assisted region had it not been for that aid.

158 It follows that aid the amount of which does not exceed the threshold for individual notification laid down in Article 6(2) of Regulation No 800/2008 not only may not be treated as existing aid authorised by the Commission, but also may be considered to be compatible with the internal market in accordance with Article 3 and Article 13(1) of that regulation only if such aid meets all

the substantive conditions listed in that regulation, in particular that the amount of the aid complies with the condition regarding the incentive effect of the aid set out in Article 8(3)(e) of that regulation.

159 Consequently, aid the amount of which exceeds the threshold for individual notification laid down in Article 6(2) of Regulation No 800/2008, which, as already noted in paragraph 129 of the present judgment, falls outside the scope of that regulation and therefore must be notified to the Commission under Article 108(3) TFEU, may not be considered to be aid authorised by that regulation as regards the portion of that aid which does not exceed the threshold, especially when it has not been established that that portion of the aid fulfils all of the substantive conditions set out in that regulation, in particular the condition regarding the incentive effect of the aid.

160 It follows from the foregoing that the General Court did not err in law in holding, in paragraphs 173, 176 and 181 of the judgment under appeal, that aid exceeding the threshold for individual notification set out in Article 6(2) of Regulation No 800/2008 must be assessed, in its entirety, including the portion not exceeding that threshold, as 'new aid' within the meaning of Article 1(c) of Regulation No 659/1999 in the context of an individual investigation under Article 107(3) TFEU.

161 In those circumstances, the compatibility of the entire amount of the aid in question with the internal market had to be reviewed in the context of an individual notification made under Article 108(3) TFEU on the basis, as also set out in recital 7 of Regulation No 800/2008, not only of the substantive conditions indicated in that regulation but also of the criteria set out in the guidelines and specific frameworks adopted by the Commission. By contrast, as noted already in paragraphs 155 and 156 of the present judgment, the threshold for individual notification set out in Article 6(2) of that regulation is irrelevant in this context (see, by analogy, judgment of 21 July 2011, *Freistaat Sachsen and Land Sachsen-Anhalt* v *Commission*, C-459/10 P, not published, EU:C:2011:515, paragraphs 30 and 31).

162 Consequently, the General Court did not err in law in holding, in paragraph 173 of the judgment under appeal, that the assessment of the compatibility of the aid in question under Article 107(3) TFEU must take into account, in particular, the requirements set out in the 2009 communication.

163 As has already been found in the context of the examination of the first ground of appeal, it is not disputed that the General Court acted correctly in law in holding, inter alia in paragraphs 119 and 131 of the judgment under appeal, that the aid in question could not exceed EUR 17 million if it were to comply with the requirements of incentive effect and proportionality of the aid as set out respectively in paragraphs 21, 22 and 25 and paragraph 33 of the 2009 communication.

164 It is, admittedly, true, as emphasised by the appellant at the hearing, that the substantive criteria defined by Regulation No 800/2008 must, as is clear from the case-law mentioned in paragraph 161 of the present judgment, also be taken into account in the assessment of the compatibility of aid which has been the subject of an individual notification made under Article 108(3) TFEU. If a Member State notifies to the Commission aid which complies with the conditions laid down in Regulation No 800/2008, the Commission must generally authorise that aid (see, to that effect, judgment of 19 July 2016, *Kotnik and Others*, C-526/14, EU:C:2016:570, paragraph 43).

165 However, contrary to the appellant's claims, the assessment of the compatibility of aid with the internal market, if it is not to infringe Article 107(3) TFEU, which is the legal basis for both Regulation No 800/2008 and the 2009 communication, cannot in any way vary depending on whether the assessment refers to the conditions laid down in that regulation or to those set out in that communication. In particular, the appellant errs in submitting that it would be entitled to obtain, in accordance with that regulation, aid in an amount exceeding that authorised by the Commission in the decision at issue in the context of an individual notification.

166 It is clear from the Court's case-law relating to Article 107(3) TFEU that, in order to be compatible with the internal market, regional investment aid must be necessary to implement that investment and thereby to achieve the objectives referred to in that provision (see, to that effect, judgments of 21 July 2011, *Freistaat Sachsen and Land Sachsen-Anhalt* v *Commission*, C-459/10 P, not published, EU:C:2011:515, paragraph 33; of 13 June 2013, *HGA and Others* v *Commission*, C-630/11 P to C-633/11 P, EU:C:2013:387, paragraphs 104 and 105, and of 19 July 2016, *Kotnik and Others*, C-526/14, EU:C:2016:570, paragraph 49).

167 Thus, in accordance with Article 107(3) TFEU, the requirements relating to incentive effect and proportionality of aid set out in paragraphs 21, 22, 25 and 33 of the 2009 communication correspond in essence to the condition regarding the incentive effect of the aid laid down in Article 8(3)(e) of Regulation No 800/2008, according to which the application of the exemption provided for in that regulation to regional aid, as referred to in Article 13(1) of that regulation, granted to large enterprises is, as already noted in paragraph 157 of the present judgment, conditional on it being demonstrated that the project would not have been carried out in the assisted region in question had it not been for that aid.

168 It follows that, as stated by the Commission during the hearing in response to a question from the Court, in the context of an individual notification examined in the light of the conditions set out in the 2009 communication, the amount of necessary aid found by the Commission to be compatible would be identical to the amount of aid found to comply with the provisions set out in Regulation No 800/2008.

169 In any event, in the present case, it should be noted that, while the General Court assessed the incentive effect and proportionality of the aid essentially by reference to the requirements set out in the 2009 communication, given that they are more detailed in nature, its assessment of this point also referred explicitly, as observed in paragraph 80 of the judgment under appeal and which the appellant does not contest in its appeal, to Article 8(3)(e) of Regulation No 800/2008 regarding the incentive effect of the aid.

170 In so far as the appellant argued at the hearing that in the present case Article 8(4) of that regulation excludes the application of Article 8(3)(e) thereof, since the aid in question is a 'fiscal measure' within the meaning of that paragraph, it need only be stated that that argument, which seeks to challenge paragraph 80 of the judgment under appeal for the first time at the appeal stage, is not only inadmissible, in accordance with the case-law cited in paragraph 69 of the present judgment, but also entirely unfounded, since the aid in question is manifestly not a fiscal measure. Moreover, the appellant has neither in any way claimed, nor, *a fortiori*, established, that, in accordance with Article 8(4)(a) of Regulation No 800/2008, it had a legal right to that aid under the IZG, without the competent authorities having the slightest discretion as to the investments to be financed.

171 It follows that the appellant errs in maintaining that the aid in question, had it been limited to an amount not exceeding the threshold for individual notification set out in Article 6(2) of Regulation No 800/2008, could have been exempted from the notification requirement, in accordance with Article 3 and Article 13(1) of that regulation, even though that amount might exceed what was necessary to carry out the investment.

172 Consequently, the General Court did not err in law in the judgment under appeal when it held, in paragraph 179 of that judgment, that the Commission was correct to find that the aid in question could be declared compatible with the internal market under Article 107(3) TFEU only if it did not exceed the amount corresponding to the difference between the net costs of investment in Munich and those of investment in Leipzig, since that difference represented the amount necessary to carry out the investment in the assisted region.

173 As the General Court also correctly held in paragraph 179 of the judgment under appeal, these considerations are not invalidated by the footnote relating to paragraph 56 of the 2009 communication, according to which a Member State 'retains the possibility to grant such aid up to the level which corresponds to the maximum allowable amount that an investment with eligible expenditure of EUR 100 million can receive under the applicable rules'. According to the actual wording of that footnote, this possibility refers only to aid granted 'on the basis of an existing regional aid scheme'. As observed in paragraphs 147 to 153 of the present judgment, however, that is not the case with regard to the aid in question.

174 Furthermore, and for the same reasons, the appellant cannot invoke an infringement of the principle of non-discrimination on the ground that its competitors would be entitled to obtain an amount of aid not exceeding the threshold for individual notification set out in Article 6(2) of Regulation No 800/2008, without this being notified to the Commission under Article 108(3) TFEU. That argument is based, once more, on the incorrect premiss that aid of such an amount constitutes existing aid authorised by the Commission. This argument is also based on the incorrect assumption that such aid necessarily fulfils all of the other substantive conditions set out in that regulation, including the condition regarding the incentive effect of the aid.

175 It further follows that, contrary to what it claims, the appellant was also not treated unfavourably by virtue of the choice made by the Member State concerned to notify the aid in question to the Commission under Article 108(3) TFEU.

176 Quite to the contrary, the portion of that aid considered to comply with the requirements regarding incentive effect and proportionality of the aid as set out in the 2009 communication and authorised by the Commission in the decision at issue from that point onwards constituted, to that extent, existing aid, whereas, in the absence of such notification, if the national authority had wrongly applied Regulation No 800/2008, such aid would have been considered to be new aid granted in breach of Article 108(3) TFEU and therefore illegal aid, and accordingly would have attracted the consequences mentioned in paragraphs 139 and 140 of the present judgment.

177 If follows from all of the foregoing that each of the two parts of the second ground of appeal must be rejected as being unfounded.

178 Consequently, the main appeal must be dismissed in its entirety.

Costs

179 In accordance with Article 184(2) of the Rules of Procedure of the Court of Justice, where the appeal is unfounded, the Court is to make a decision as to the costs. Under Article 138(1) of those 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.

180 Since the Commission has applied for costs and the appellant has been unsuccessful, the latter must be ordered to bear its own costs and to pay those incurred by the Commission in respect of the main appeal.

181 In accordance with Article 184(4) of the Rules of Procedure, Freistaat Sachsen is to bear its own costs in respect of the main appeal.

182 With regard to the cross-appeal, since the Commission has been unsuccessful and the appellant and Freistaat Sachsen have applied for costs, the Commission must be ordered to bear its own costs and also to pay the costs incurred by the appellant and Freistaat Sachsen in relation to the cross-appeal.

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

1. **Dismisses the main appeal and the cross-appeal;**

2. **Orders Bayerische Motoren Werke AG to bear its own costs and to pay those incurred by the European Commission in respect of the main appeal;**

3. **Orders Freistaat Sachsen to bear its own costs in respect of the main appeal;**

4. **Orders the European Commission to bear its own costs and to pay those of Bayerische Motoren Werke AG and of Freistaat Sachsen in respect of the cross-appeal.**

[Signatures]