Reports of Cases

OPINION OF ADVOCATE GENERAL
MEDINA
delivered on 9 November 2023 [1]

Joined Cases C-794/21 P and C-800/21 P

Federal Republic of Germany
v
Infineon Technologies Dresden GmbH & Co. KG,
Infineon Technologies AG,
European Commission (C-794/21 P)
and
Infineon Technologies AG,
Infineon Technologies Dresden GmbH & Co. KG
v

European Commission (C-800/21 P)

(Appeal – State aid – Germany – State aid scheme in favour of certain large electricity consumers – Exemption from network charges in 2012 and 2013 – Decision declaring the aid scheme incompatible with the internal market and unlawful and ordering the recovery of the aid granted – Action for annulment – Time limit for bringing proceedings – Admissibility – Concept of aid – State resources – Parafiscal tax or other mandatory levies – State control over the funds)

1. The present Opinion is delivered in Joined Cases C-794/21 P and C-800/21 P. It should be read together with my three other Opinions in parallel appeals, [2] also delivered today, all of which concern the same State aid scheme. By its appeal in Case C-794/21 P, Infineon Technologies Dresden GmbH & Co. KG and Infineon Technologies AG (together, 'the Infineon companies'), semiconductor manufacturers, seek to have the judgment of 6 October 2021, *Infineon Technologies Dresden and Infineon Technologies* v *Commission* (T-233/19 and T-234/19, EU:T:2021:647) ('the judgment under appeal') set aside. That judgment dismissed their action seeking annulment of European Commission Decision of 28 May 2018 on the aid scheme implemented by Germany for baseload consumers under Paragraph 19 StromNEV, [3] in respect of the years 2012 and 2013 ('the decision at issue'). By its appeal in Case C-800/21 P, the Federal

[1] Original language: English.

[2] These are the following three sets of joined cases: (i) C-790/21 P and C-791/21 P; (ii) C-792/21 P and C-793/21 P, and (iii) C-795/21 P and C-796/21 P. Indeed, as many as 37 electricity consumers, such as those in question in the present appeals, brought similar actions before the General Court, seeking annulment of the decision at issue. The cases which gave rise to the four judgments of the General Court under appeal in the parallel cases were designated as 'pilot cases' by the General Court.

[3] Decision (EU) 2019/56 of 28 May 2018 on aid scheme SA.34045 (2013/c) (ex 2012/NN) (notified under document C(2018) 3166) (OJ 2019 L 14, p. 1). 'StromNEV' in the name of that decision refers to the Stromnetzentgeltverordnung (Federal Ordinance on Electricity Network Charges).

Republic of Germany (for the sake of simplicity, the Federal Republic of Germany will be referred to as 'Germany') seeks to have the judgment under appeal set aside. The Commission has brought a cross-appeal in both of the above cases, whereby it too seeks to have the judgment under appeal set aside.

I. Background to the dispute

2. The background to the dispute is set out in paragraphs 1 to 22 of the judgment under appeal. Given that the background is identical to the one I summarised in the parallel Opinion in Joined Cases C-790/21 P and C-791/21 P ('the parallel Opinion'), it is sufficient to cross-refer to points 3 to 14 of the parallel Opinion and the Opinions in these parallel cases should be read together.

II. Legal analysis

3. In its two identical cross-appeals in Cases C-794/21 P and C-800/21 P, the Commission puts forward two grounds of appeal. The two grounds of the cross-appeals are, in essence, identical to the first two grounds raised in the cross-appeals in Cases C-790/21 P and C-791/21 P. In Case C-794/21 P, Germany relies on a single ground of appeal. In Case C-800/21 P, the Infineon companies put forward two grounds of appeal. However, as requested by the Court of Justice, the present Opinion will address only the first ground of the Commission's cross-appeals (admissibility of an action for annulment) and Germany's single ground of appeal, which chimes with the Infineon companies' first and second grounds of appeal, in so far as these concern the condition relating to the existence of an intervention by means of 'State resources'.

A. The first ground of the Commission's cross-appeals: admissibility of an action for annulment

1. Main arguments of the parties

4. The Commission submits that the General Court erred in law, in paragraphs 36 to 43 of the judgment under appeal, by adopting a broad interpretation of the concept of 'publication' within the meaning of the sixth paragraph of Article 263 TFEU. In the first place, according to the Commission, the General Court's interpretation is contrary to the case-law of the Court of Justice, in which the latter established a parallel between the sixth paragraph of Article 263 TFEU and Article 297 TFEU. In the Commission's submission, it is clear from that case-law that publication is the starting point of the period prescribed for instituting proceedings only if it is a precondition for the entry into force of the measure in question, and if it is provided for by the Treaty itself. In the second place, as regards, more specifically, the publication in the *Official Journal of the European Union* ('*Official Journal*') of a Commission decision closing a formal investigation procedure, that does not constitute a 'publication' within the meaning of the second subparagraph of Article 297(2) TFEU. It does not therefore constitute the starting point of the period prescribed for instituting proceedings. In the third place, the Commission puts forward a series of arguments which, in its view, support its interpretation of the sixth paragraph of Article 263 TFEU, such as the scheme of that provision, the principle of equality of arms or the mandatory nature of the time limits for bringing proceedings.

5. Germany and the Infineon companies submit, in essence, that the General Court's interpretation of the concept of 'publication', within the meaning of the sixth paragraph of Article 263 TFEU, is not vitiated by any error of law.

2. Assessment

6. Given that these cross-appeals are identical, word for word, to the ones I have already addressed in the parallel Opinion, I shall limit myself to cross-referring to that Opinion. Indeed, the Opinions should be read together.

7. The Commission argues that, contrary to what the General Court ruled in the judgment under appeal, it is the date on which the decision at issue came to the knowledge of the State aid beneficiary which must be taken into account for the purposes of calculating the time limit for bringing an action for annulment, and not the date of its publication in the *Official Journal*. The Commission therefore submits that the General Court should have declared the Infineon companies' action inadmissible, since it was out of time.

8. As I explain in points 20 to 30 of the parallel Opinion, I propose that the Commission's interpretation should be rejected, as it is supported neither by the wording of the sixth paragraph of Article 263 TFEU, nor by the case-law of the Court, nor by the purpose of that provision.

9. Furthermore, as pointed out in point 31 of the parallel Opinion, the Commission's interpretation would have the effect of limiting the effective legal protection of the aid beneficiary.

10. Finally, in points 32 to 35 of the parallel Opinion, I explain that the Commission's argument that, in the present case, the Infineon companies – which received the decision at issue in the context of the national procedure for the recovery of the aid – brought their action for annulment *before* the publication of the decision at issue in the *Official Journal*, does not alter my conclusion.

11. It follows, in my view, that the General Court rightly held that the inadmissibility raised by the Commission at first instance had to be rejected and that the Commission's cross-appeals should be dismissed as unfounded.

B. Germany's single ground of appeal and the Infineon companies' first and second grounds of appeal: infringement of Article 107(1) TFEU concerning State resources

12. The appeals brought by Germany (Case C-791/21 P and Case C-794/21 P) are identical. Moreover, a great many of the arguments made in the appeal brought by Covestro (Case C-790/21 P) are similar to those made by the Infineon companies in the present appeal (Case C-800/21 P). Therefore, the Opinions in these parallel cases should be read together.

13. Germany's single ground of appeal (Case C-794/21 P) is based on three arguments: (i) the General Court erred in law in finding that the existence of a mandatory charge on consumers or end users and the State control over the funds or over the administrators of those funds were alternative criteria; (ii) the General Court erred in law by finding, in the context of the assessment whether there is a 'mandatory charge on consumers or end users', that the relationship between an electricity supplier and electricity end users was irrelevant, as well as by

taking into account the obligation to levy and not the legal obligation to pay network charges; and (iii) the General Court erred in law by holding that the exclusive use of the network charges collected did not rule out that the State could dispose of those funds.

14. The Infineon companies' first ground of appeal (Case C-800/21 P) is divided into four parts: (i) the existence of State aid requires that its financing 'costs the State money'; (ii) State resources only exist where there is a sufficiently direct link with the State budget; (iii) the General Court misapplied the case-law of the Court of Justice in that respect; and (iv) the General Court erred in law when it considered that the surcharge at issue constituted State resources, when it actually constituted private resources. The second ground of appeal claims that the General Court distorted the facts by misconstruing the meaning and scope of national law. It is submitted that, contrary to the findings of the General Court: (i) the BNetzA did not set the amount of the surcharge at issue; (ii) the BNetzA did not impose on the network operators a detailed method of calculation of that surcharge; (iii) the network operators' loss of revenue resulting from the network exemptions was not entirely financed by way of the surcharge at issue; and (iv) the network operators were not required under national law to collect the surcharge at issue.

15. The Commission contends that Germany's single ground of appeal and the Infineon companies' first and second grounds of appeal must be rejected as unfounded.

16. Given that the various arguments concerning State resources raised by Germany in the single ground of appeal (Case C-794/21 P) and by the Infineon companies' in the first and second grounds of appeal (Case C-800/21 P) significantly overlap, it is appropriate to address them together and in the order and following the structure of the judgment under appeal. As a result, it is first necessary to deal with the alternative nature of the criteria; next, the classification of the surcharge at issue [4] as a 'tax'; and finally the existence of State control over the resources generated by the surcharge at issue.

1. First series of arguments raised by Germany and the Infineon companies (two factors which together form an alternative)

(a) Main arguments of the parties

17. Germany argues, in particular, that the General Court erred in law when it considered that the existence of a tax and State control over the funds generated by that tax (or over the administrators of those funds) were 'two factors which together form an alternative'. The mere existence of such a tax is not sufficient to conclude that the present case involved 'State resources'. The Infineon companies argue, more generally, that the General Court applied legally incorrect State aid criteria when it recognised the State nature of resources in the case of a 'tax'. The Infineon companies submit, inter alia, that the existence of State aid requires that its financing 'cost the State money' and there must be a sufficiently direct link with the State budget.

[4] See points 8 to 12 of the parallel Opinion. In essence, the distribution system operators collected from final consumers a surcharge, the amount of which was passed on to the transmission system operators to compensate them for the loss of revenue caused by the exemption. That exemption from the obligation to pay network charges applied to baseload consumers ('the exemption at issue').

(b) Assessment

18. The General Court examined the case-law on the criterion of 'State resources' and considered that 'in essence, the case-law of the Court of Justice … relies on two main factors in order to assess whether resources are State resources: first, the existence of a compulsory levy on consumers or customers, normally classified as a "charge", or more specifically as a "parafiscal charge", and, secondly, State control over the administration of the scheme, in particular through State control over the funds or the (third-party) administrators of those funds. These are, in essence, *two factors which together form an alternative*' (judgment under appeal, paragraph 63, emphasis added).

19. According to the General Court, 'it is therefore necessary to ascertain whether the [financing] mechanism at issue meets the conditions laid down by the relevant case-law as regards the use of State resources … and therefore whether the surcharge at issue is in fact a compulsory burden and, therefore, comparable to a parafiscal charge or, if not, whether the State has, at the very least, control over the funds collected or over the bodies responsible for managing those funds' (judgment under appeal, paragraph 77).

20. Germany submits that the criteria of a 'tax' and of State control are cumulative and relies on the judgments in *FVE Holýšov I and Others* v *Commission*,[5] *Germany* v *Commission*[6] and PreussenElektra.[7] However, these and other (more recent) judgments of the Court argue instead in favour of the criteria being alternative, in line with what the General Court held in paragraphs 58 and 63 to 65 of the judgment under appeal.[8]

21. I consider that the arguments put forward by Germany are unfounded in so far as they may be rejected on the basis of the Court's most recent case-law, which dispels any possible doubts as to whether the criteria are alternative or cumulative.

22. In the judgment in *DOBELES HES*,[9] the Grand Chamber of the Court dealt with two issues that are relevant to the present appeals: (i) the definition of the concept of a tax and (ii) the relationship between the criterion of a tax and the criterion of State control over the financing mechanism.

23. In paragraph 39 of that judgment, the Court made clear that the relevant criteria in Article 107(1) TFEU form part of an alternative: 'the criterion mentioned in the preceding paragraph of the present judgment [that is, the existence of a charge,] is not the only criterion for identifying "State resources" within the meaning of that provision. The fact that sums constantly remain under public control, and therefore available to the competent national authorities, *is sufficient* for them to be categorised as "State resources"'.

24. It follows that it is sufficient to satisfy one or other of the two criteria, which is confirmed by paragraph 42 of the judgment in *DOBELES HES*, where the Court makes direct reference to the existence of 'two alternative criteria'.

5 Judgment of 16 September 2021 (C-850/19 P, EU:C:2021:740, 'the judgment in *FVE Holýšov I*').

6 Judgment of 28 March 2019 (C-405/16 P, EU:C:2019:268, 'the judgment in *EEG 2012*').

7 Judgment of 13 March 2001 (C-379/98, EU:C:2001:160, 'the judgment in *PreussenElektra*').

8 See, in that regard, judgments in *EEG 2012*, paragraph 72; of 15 May 2019, *Achema and Others* (C-706/17, EU:C:2019:407, paragraphs 64 to 66); of 17 July 2008, *Essent Netwerk Noord and Others* (C-206/06, EU:C:2008:413, 'the judgment in *Essent Netwerk Noord*', paragraph 66); of 13 September 2017, *ENEA* (C-329/15, EU:C:2017:671, paragraph 30) (the Court rejects the first criterion, the existence of a tax, but proceeds to examine the second criterion, State management of the use of the funds (paragraph 31) and the third criterion, State control over the entities managing the funds (paragraphs 34 and 35)); and in *FVE Holýšov I* (paragraph 46).

9 Judgment of 12 January 2023, *DOBELES HES* (C-702/20 and C-17/21, EU:C:2023:1, 'the judgment in *DOBELES HES*').

25. The General Court therefore did not err in law in the judgment under appeal when interpreting Article 107(1) TFEU, as it followed pre-existing case-law of the Court of Justice when it stated in paragraph 63 that the above criteria 'together form an alternative', and that approach has since been again confirmed in the judgment in *DOBELES HES*. As a result, it was sufficient for the General Court to identify, in the judgment under appeal, either the existence of a tax or State control over the financing mechanism, whereas each of those criteria would have been sufficient on its own for the purposes of confirming that State resources were involved. It follows that the arguments put forward by Germany that those criteria are cumulative should, in my view, be rejected as manifestly unfounded.

26. It is true that the General Court did not state this expressly, but I take the view that it is clear from a reading of the judgment under appeal (in particular, paragraph 77) that it examined the second criterion merely for the sake of completeness. Given that the alternative character of the criteria was the subject of much disagreement between the parties before the General Court, the latter was guided by the principle of the sound administration of justice and examined both factors of the alternative.

27. Next, in support of its argument that the criteria of a 'tax' and State control should be cumulative, Germany also submits that the interpretation of Article 107(1) TFEU in the judgment under appeal (which is confirmed by the Court's case-law) is, in any case, contrary to the scheme of the Treaties and would result in 'consequences which are not foreseen in the Treaties'. It states that any tax or additional charge imposed by the State would necessarily come under the notion of 'State resources', which would run counter to the fiscal sovereignty of Member States. It argues further that the prohibition of illegal State aids seeks to safeguard against State infringements of free competition, which implies that only infringements of competition with a link with the State budget or involving resources subject to the State's power of disposal are concerned. A similar argument is made by the Infineon companies.

28. However, as has been pointed out by the Commission, those arguments are based on an incorrect reading of the Treaties [10] as well as on an amalgamation of, on the one hand, the case-law relating to Articles 30 and 110 TFEU and, on the other hand, that relating to Article 34 TFEU. The prohibition of discrimination under the former two articles is explained by the fact that both customs duties and taxes are, by nature, fiscal (they constitute taxes used by the State to achieve political objectives). Moreover, suffice it to point out that the main deciding factor in relation to State resources is that the distortion of competition is the work of the State (and not of an undertaking). However, significantly, contrary to what Germany appears to suggest (point 27 of the present Opinion), the scheme of the Treaties does not contain any indication that only aid 'financed by the State budget' is to be regarded as State aid. Indeed, the Court's case-law has always made clear that the simple fact that the flow of resources passes exclusively through private-law entities is not enough to refute the existence of the State's effective control within the meaning of the notion of aid. [11]

[10] Germany overlooks the exact scheme of the Treaties. Article 30 TFEU is set out under Title II, Chapter 1, entitled 'Customs Union'; Article 110 TFEU is set out under Title VII, Chapter 2, entitled 'Tax Provisions'. They contain an absolute ban on discrimination. In this they are distinct from Article 34 TFEU, which is under Title II, Chapter 3, entitled 'The prohibition of quantitative restrictions between Member States', which governs the free movement of goods and which, at the same time, unlike Articles 30 and 110 TFEU, provides for the possibility that restrictions on the free movement of goods may be justified.

[11] See order of 22 October 2014, *Elcogás* (C-275/13, EU:C:2014:2314, paragraph 25 and the case-law cited). See also judgment of 9 November 2017, *Commission* v *TV2/Danmark* (C-656/15 P, EU:C:2017:836, paragraph 48).

29. Contrary to the arguments advanced by Germany, the systematic difference in position in the FEU Treaty between Articles 30 and 110 and Article 107 has no material impact for the purposes of the present cases. Those three provisions have instead something in common, that is to say, the fact that they relate to the fiscal action of the State. Indeed, the Court has adopted, in relation to the two categories of provision, a broad interpretation of 'State control', in particular, so as to prevent circumvention of the rules contained in those provisions. [12]

30. Furthermore, it is incorrect to claim that 'any [transfer] of assets between private [legal persons], ordered by law, [would be assimilated] to a use of State resources'. For instance, a minimum price set by law is not a tax. It is sufficient to refer to the judgments in *PreussenElektra* and in *EEG 2012*. The judgment in *PreussenElektra* concerned a legal minimum price applied between two private-law entities. The private-law entity which was required to apply the minimum price could not pass the costs on to its customers. Therefore, there was no tax.

31. In the judgment in *EEG 2012*, the Court clarified that the mere *possibility* of an impact on customers was not sufficient to consider that the resources used were State resources. The use of State resources – in the form of a tax – can only be presumed if the private-law entity on which the obligation weighs also has the *obligation* to pass on the additional cost to a third party by way of collecting from it a tax.

32. In my opinion, it follows from all the foregoing considerations that the General Court rightly considered that those criteria form part of an alternative. Therefore, the judgment under appeal is not vitiated by any error of law in that regard and the first series of arguments raised by Germany and by the Infineon companies should be dismissed as unfounded.

2. Second series of arguments raised by Germany and the Infineon companies (classification of the surcharge at issue as a 'tax')

33. Germany and the Infineon companies criticise the General Court in relation to the first of the alternative criteria discussed above, in that it wrongly classified the surcharge at issue as a 'tax'. They argue that that classification is based on an incorrect interpretation of the concept of a 'tax' and on a distortion of national law.

(a) First group of arguments (ultimate debtor of the surcharge at issue)

34. In the first group of arguments, Germany and the Infineon companies submit, in essence, that the General Court misinterpreted the concept of 'final consumer' within the meaning of national law, since neither national law nor the German national authorities impose a payment obligation on consumers or system operators. The Infineon companies argue, inter alia, that even if, in practice, electricity suppliers always passed the surcharge on to final electricity consumers, this would not be sufficient, according to the case-law in the judgment in *EEG 2012*, to establish the existence of a compulsory charge imposed by the State.

35. I consider that it is necessary to examine whether the question of who the ultimate debtors of the surcharge at issue were is a decisive consideration.

[12] See point 28 and footnote 11 of the present Opinion.

36. The Infineon companies argued at first instance that the surcharge was only collected from network users and that it was not compulsorily passed on to final consumers of electricity, so that it should have been understood as a network fee and not as a tax. However, in paragraph 84 of the judgment under appeal, the General Court ruled that that argument was irrelevant, in view of the fact that the ultimate debtors of that surcharge were network users (the providers themselves and the final consumers directly connected to the network), and not other final consumers.

37. Also in paragraph 85 of the judgment under appeal, the General Court found that the decision at issue identified an obligation to collect and pass on the surcharge at issue to 'final consumers'. To my mind, it is relevant that this interpretation was corroborated by point 20 of the judgment of the Bundesgerichtshof (Federal Court of Justice) of 6 October 2015, which rejects the argument made at first instance that the surcharge at issue was a network fee. That court confirmed that the surcharge was not a contractual compensation, but an external collection of charges, which was imposed on the operators.

38. Moreover, it follows from the Court's case-law that, in order for a measure to constitute a 'charge' within the meaning of Articles 30 and 110 TFEU, it is sufficient that that measure was levied on intermediate products or services, without it necessarily being passed on to the final consumers of the downstream products or services. There is no support, in the same case-law of the Court,[13] for the view that a tax implies the existence of State resources only if that tax is applied to final consumers. Indeed, I consider that the concept of tax, which is referred to in Articles 30 and 110 TFEU, must be construed broadly on the basis of a teleological interpretation.

39. The General Court rightly relied on the same case-law in paragraph 86 of the judgment under appeal.

40. I consider that the General Court was correct to base its approach on the question whether private or public bodies, which are tasked with implementing the scheme, must assume the expenses through their own financial resources (a situation involving no State aid) or whether they can collect those resources from third parties (a situation in which there is State aid). It matters little whether those third parties are final consumers or whether they are an intermediate link in the value chain. Indeed, the only decisive factor is the redistributive effect of the tax, namely that a State or a private-law entity collects that tax from undertakings and uses it to finance an advantage granted to another category of undertakings.

41. It follows from a teleological interpretation and the Court's case-law on the concept of 'tax', within the meaning of Articles 30 and 110 TFEU, that the identity of the person liable to pay the tax in each case is irrelevant. The decisive factor is whether the tax relates to the product concerned or to a necessary activity in connection with that product.[14]

42. In my opinion, it follows that the first group of arguments should be rejected as unfounded.

[13] In particular, judgment in *Essent Netwerk Noord* (paragraph 49).

[14] *Ibid.*

(b) Second group of arguments (the tax at issue was not mandatory)

(1) The BNetzA decision of 2011 was declared unlawful by national courts

43. The Infineon companies submit, in essence, that the General Court relied incorrectly on the BNetzA decision of 2011, whereas that decision was declared unlawful, retroactively, by the German courts.

44. The question arises whether the General Court was entitled to conclude that the surcharge at issue was mandatory by way of relying on that BNetzA decision, despite the fact that it was subsequently annulled and declared null and void by the Oberlandesgericht Düsseldorf (Higher Regional Court, Düsseldorf) and, on appeal, by the Bundesgerichtshof (Federal Court of Justice).

45. I would recall that it follows from the judgments in *Commission* v *Aer Lingus and Ryanair Designated Activity*[15] and in *Heiser*,[16] that the possible unlawfulness of a national scheme is not capable of removing its State aid nature.

46. According to the judgment in Heiser, 'even if the legislation providing for the adjustment of deductions … is unlawful, the fact nonetheless remains that that legislation is *liable to have an impact as long as it is not repealed or, at the very least, as long as its unlawfulness is not established*' (emphasis added).

47. Similarly, according to the judgment in *Commission* v *Aer Lingus and Ryanair Designated Activity*, 'the fact that a tax measure is contrary to provisions of EU law other than Articles 107 and 108 TFEU does not mean that the exemption from that measure enjoyed by certain taxpayers cannot be classified as State aid, *as long as the measure in question produces effects* vis-à-vis other taxpayers and has not been either repealed or declared unlawful and, therefore, inapplicable' (emphasis added).

48. As the Commission stated at the hearing, the German legislator dealt with the situation in a manner that ensured that the collection of the surcharge at issue, following the annulment ordered by the Bundesgerichtshof (Federal Court of Justice), was retroactively corrected and continued to have legal effects and, therefore, maintained the obligation of the surcharge at issue.

49. To my mind, in EU law on State aid, a measure must be considered from the viewpoint of its effects.

50. In my opinion, it follows from the aforementioned case-law that the General Court was entitled to hold (in paragraphs 75 and 90 of the judgment under appeal) that for the purposes of reviewing State aid, the fact that the BNetzA decision of 2011 was actually applied and produced legal effects during the relevant period was a decisive factor.

51. That decision was legally binding during the relevant period and required network operators to collect the surcharge at issue from network users.

[15] Judgment of 21 December 2016 (C-164/15 P and C-165/15 P, EU:C:2016:990, paragraph 69).

[16] Judgment of 3 March 2005 (C-172/03, EU:C:2005:130, paragraph 38).

52. The wording of paragraph 3 of the BNetzA decision of 2011 imposed the obligation to collect the surcharge at issue on distribution system operators, which were therefore required to collect that surcharge from their customers. Given that that decision formed part of the scheme in force during the relevant period and produced binding effects – a fortiori since those effects were actually not withdrawn following the annulment ordered by the national courts (by way of provisions which successively repealed that scheme) – the General Court correctly ruled that the scheme based on the surcharge at issue produced legally binding effects (judgment under appeal, paragraph 90).

53. My assessment in the present Opinion is also supported by the Court's judgment in *Deutsche Post* v *Commission*,[17] in which it was held that an annulled decision is still capable of producing legal effects. Since the action for annulment in that case had been brought prior to the General Court giving judgment annulling the decision at issue (and thus retroactively excluding it from the legal order), the admissibility of that action had to be assessed by reference to the time when it was brought since the negative decision of 2002 was still in force and continued to form part of the EU legal order.

54. Finally, it should be pointed out in that regard that the production of legal effects was, moreover, the stated objective of the German legislator.[18]

55. In my opinion, the arguments seeking to rely on the fact that the BNetzA decision of 2011 was declared unlawful by the national courts should therefore be rejected as unfounded.

(2) Articles 30 and 110 TFEU (concept of 'tax') and the Essent Netwerk Noord *case-law (mandatory nature of the charge)*

(i) Articles 30 and 110 TFEU (concept of 'tax')

56. Germany and the Infineon companies submit, in essence, that, in particular, in paragraph 86 of the judgment under appeal, the General Court misinterpreted the concept of 'tax', within the meaning of Articles 30 and 110 TFEU, so as to conclude that the surcharge at issue corresponded to that concept. It is true that, in order to justify the fact that an obligation to levy a surcharge linked to the use of the network can also be a tax, the General Court refers to the concept of tax for the purposes of Articles 30 and 110 TFEU.

57. As explained in point 38 of the present Opinion, the concept of tax, which is referred to in Articles 30 and 110 TFEU, must be construed broadly.

58. In the judgment in *Essent Netwerk Noord* (paragraph 40), the Court held that 'Articles [30 and 110 TFEU] … complement each other in pursuing the objective of prohibiting any national fiscal measure that is liable to discriminate *against products* coming from or destined for other Member States by constituting a restriction on their free movement within the [European Union] in normal conditions of competition' (emphasis added).

[17] Judgment of 24 October 2013 (C-77/12 P, EU:C:2013:695, paragraphs 65 and 66).

[18] According to the Bundestag (German Federal Parliament) Document 18/8915 of 22 June 2016, p. 39, 'the provisions of the new Paragraph 24, first sentence, point 3, and second sentence, point 5, of the EnWG shall enter into force retroactively from 1 January 2012 by virtue of the new Paragraph 9, first sentence. The amendments therefore also apply, retroactively, to a *fait accompli* and belonging to the past, namely the collection of the surcharge [at issue] concerning final electricity consumption. … The retroactive effect provided for in the new Paragraph 9 is also necessary to clarify an ambiguous legal situation. … Annulment would give rise to complex reciprocal payment compensations, without there being a legitimate expectation on the part of the former debtors of the surcharge'.

59. As has been observed in point 41 of the present Opinion, it follows from the concept of 'tax', within the meaning of Articles 30 and 110 TFEU, that the identity of the person liable to pay the tax in each case is irrelevant. The decisive factor is whether such a tax relates to the product concerned or to a necessary activity in connection with that product.

60. In the present cases, the surcharge at issue is collected in respect of the use of the network. In the General Court's correct assessment, the fact that the surcharge does not constitute consideration for the use of the network, but rather a mandatory charge, is decisive for its classification as a tax.

61. The use of the network must be regarded as an intermediate product or, more specifically, as an intermediate service for the purposes of Articles 30 and 110 TFEU, in accordance with the case-law of the Court of Justice discussed above. The General Court therefore did not err in law, in my view, by relying on Articles 30 and 110 TFEU in defining the tax as a charge on a product or service provided.

(ii) The judgment in Essent Netwerk Noord *and the subsequent case-law of the Court (mandatory nature of the charge)*

62. Furthermore, the resolution of the question regarding the mandatory nature of the charge as a condition for determining the existence of State resources can be derived from the existing case-law of the Court, in so far as the present cases are similar to the factual situation which gave rise to the judgment in *Essent Netwerk Noord*.

63. The judgment in *Essent Netwerk Noord* concerned a tax in the Netherlands. A network operator (wholly controlled by public authorities) collected from domestic purchasers of electricity a tax (price surcharge) on the use of its electricity network. Similar to the present cases, in the judgment in *Essent Netwerk Noord*, that tax was foreseen by national law, and the network operator collected money from consumers and in such a manner financed the State aid.

64. The General Court correctly referred to the judgment in that case and pointed out in paragraph 59 of the judgment under appeal that 'the Court concluded that a surcharge on electricity transmitted, fixed according to objective criteria, imposed by legislation on electricity consumers and collected by the system operators, constituted a "charge", the source of which was a State resource'.

65. In the judgment in *Essent Netwerk Noord*, the Court of Justice makes several important observations for the purposes of the present appeals.

66. First, the Court notes that it matters little whether the tax affects the product as such, for instance, electricity, or whether the tax will affect a necessary activity in relation to the product, for instance, the transport of electricity (judgment in *Essent Netwerk Noord*, paragraph 44). In the present cases, the tax affects the transport of electricity.

67. Secondly, the Court points out that the fact that the surcharge is a charge imposed unilaterally is decisive for the existence of a tax (judgment in *Essent Netwerk Noord*, paragraph 45). In the present cases, the BNetzA decision of 2011 imposed on distribution system operators, in a legally binding way, the obligation to collect the surcharge at issue from network users (paragraph 97 of the judgment under appeal).

68. Thirdly, the Court rules that 'it is of little account that the financial charge is not levied by the State' (judgment in *Essent Netwerk Noord*, paragraph 46). In the present cases, distribution system operators were responsible for collecting the surcharge at issue.

69. Finally, in the present cases, similar to the situation which gave rise to the judgment in *Essent Netwerk Noord*, the surcharge at issue was intended to cover network usage costs which German baseload consumers would normally have had to bear themselves.

70. The exemption from network charges for baseload consumers has therefore improved their competitive position. Due to the tax status of the surcharge at issue in the present cases, it would be appropriate to recognise those resources as being State resources within the meaning of Article 107(1) TFEU. Further, that would be consistent with the case-law, according to which the financing of an advantage through the proceeds of a tax implies that the advantage originates from a State resource. [19]

71. I consider that not only the judgment in *Essent Netwerk Noord*, but also that in *FVE Holýšov I* are particularly relevant. Both of those cases have a similar factual background to that of the present cases and show that the Court has, in fact, already addressed the questions raised in the present appeals.

72. In *FVE Holýšov I* (paragraph 46), the Court explained that it does not matter whether or not the financing mechanism in question is classified, under national law, as a tax or a parafiscal charge. EU State aid law is only concerned with knowing that such a charge is levied, and that levy is ordered unilaterally and through an act of the State.

73. In both of those judgments, the Court observes that this is an obligation to collect money unilaterally and that these are therefore State resources. This issue brings us to the recent judgment in *DOBELES HES* (paragraph 34), which provides further clarification of the judgment in *Essent Netwerk Noord*. I consider that this is important for the purposes of the outcome of the present appeals.

74. In that paragraph 34, the Court states that 'as regards, in the second place, the condition that the advantage be granted "through State resources", which the referring court specifically raises, the Court has held that amounts resulting from the price surcharge imposed by the State on purchasers of electricity are similar to a charge which is levied on electricity and have their origin in "State resources" within the meaning of Article 107(1) TFEU'. [20]

75. I would point out that the judgment in *DOBELES HES* goes on, in paragraphs 36 and 37, to clarify other existing case-law in addition to that in the judgment in *Essent Netwerk Noord* (in particular, the judgment in *EEG 2012*, paragraphs 70 and 71).

76. The Court highlights differences between the judgments in *EEG 2012* and *DOBELES HES*. It explains that, in the former case, there was no compulsory contribution, since the collection of the EEG charge was not legally binding and was on a voluntary basis only. The Court therefore makes clear that it is the mandatory nature which is decisive in determining whether the charge in question is a compulsory contribution. The mere fact that money is transferred or can be transferred is not enough in itself. However, in the present cases, there was precisely an obligation to collect the tax (or charge), whereas the judgment in *EEG 2012* did not relate to a tax.

[19] Judgment in *Essent Netwerk Noord* (paragraph 66).

[20] The Court cites, to that effect, judgment in *Essent Netwerk Noord* (paragraphs 47 and 66).

77. Contrary to the situation in the judgment in *EEG 2012*, the collection of the surcharge at issue in the present cases is not a commercial decision of the network operators, but is instead carried out on the basis of legal provisions (in particular, the decision of the BNetzA).

78. Therefore, it is necessary to make a distinction between the financing mechanism at issue in the present cases and the mechanism concerned in the judgment in *EEG 2012*. In the present cases, the *existence of the surcharge* per se is sufficient for it to be classified as constituting State resources.

79. As far as concerns the other of the two criteria from the judgment in *EEG 2012* – that is, *State control* (power of disposal) over the funds themselves or over the entity which administers those funds – as we have seen above, the two criteria are alternative and not cumulative.

80. Had there been a mandatory surcharge in the judgment in *EEG 2012*, then it would not have been necessary for the Court to enter into the discussion in paragraph 72 of that judgment.

81. Indeed, it is precisely because the conditions in paragraph 71 were not met that the Court found it necessary to continue its line of reasoning in paragraph 72.

82. In paragraph 71 of that judgment, the Court ruled that 'the fact, noted by the General Court …, that "in practice", the financial burden resulting from the EEG surcharge was passed on to the final customers and, consequently, could "be assimilated, from the point of view of its effects, to a levy on electricity consumption" is not sufficient for it to be concluded that the EEG surcharge had the same characteristics as the electricity price supplement examined by the Court … in the judgment [in *Essent Netwerk Noord*]'.

83. The Court therefore begins paragraph 72 with the word 'consequently': 'Consequently, it is necessary to determine whether the other two factors, … recalled … in paragraph 62 of the present judgment, allowed [the General Court] nonetheless to conclude that the funds generated by the EEG surcharge constituted State resources, since they constantly remained under public control and were therefore available to the public authorities … In that situation, it is irrelevant whether or not the EEG surcharge may be classified as a "levy"'.

84. In other words, the situation in the judgment in *EEG 2012* was entirely different to the present cases.

85. In the judgment in *EEG 2012*, the German legislature allowed electricity undertakings to collect certain charges, but this was merely a possibility and not an obligation. The State gave the operators a choice: if they availed themselves of that possibility, then the money collected had to be affected to a specific use determined by the State (that is to say, it was intended to compensate supplementary costs linked to renewable energies). Therefore, in that case, the Court came to the conclusion that, as there was no obligation to collect those charges, the State did not control those funds.

86. It follows from the foregoing considerations and case-law that the surcharge at issue was, as the Commission found in the decision at issue, a legally mandatory collection of a tax, as also established by the Bundesgerichtshof (Federal Court of Justice), which, as confirmed most recently in the judgment in *DOBELES HES*, is sufficient to find that State resources are involved.

87. I therefore take the view that the judgment under appeal is not vitiated by an error of law in this regard.

88. In my opinion, the arguments based on Articles 30 and 110 TFEU (concept of 'tax') and on the judgment in *Essent Netwerk Noord* and subsequent case-law (mandatory nature of the charge) should be rejected as unfounded.

(3) Distortion of national law and no obligation to collect the surcharge at issue or pay it

89. The Infineon companies and Germany argue, in essence, that the General Court distorted national law in so far there was no obligation to collect the surcharge at issue.

90. First, Germany cannot dispute that finding of the General Court relating to national law, which is a finding of fact, on appeal before the Court of Justice, and that Member State has in fact refrained from doing so directly.

91. Secondly, I consider that the classification of the surcharge at issue as a tax is not based on any distortion of national law. The Infineon companies challenge the General Court's findings of fact. Although they maintain that the General Court distorted the facts and misunderstood the content and scope of national law, what they ultimately seek is a fresh assessment of the facts, carried out by the Court of Justice. However, the Court does not have jurisdiction to do so in the context of appeal proceedings. [21]

92. According to the case-law of the Court of Justice, 'as regards the examination, in the context of an appeal, of the findings made by the General Court with regard to … national law, the Court of Justice has jurisdiction to determine, first of all, whether the General Court, on the basis of the documents and other evidence submitted to it, distorted the wording of the national provisions at issue or of the national case-law relating to them …; second, whether the General Court, as regards those particulars, made findings that were manifestly inconsistent with their content; and, lastly, whether the General Court, in examining all the particulars, attributed to one of them, for the purpose of establishing the content of the national law at issue, a significance which is not appropriate in the light of the other particulars, where that is manifestly apparent from the documentation in the case file'. [22]

93. To my mind, the arguments made by the Infineon companies manifestly fail to satisfy those requirements. Indeed, it is not sufficient for the appellants to confine themselves to reproducing schematically the General Court's findings of fact and comparing them with their own views on what they believe the correct interpretation of national law should be. They do not indicate which piece of evidence in particular the General Court allegedly distorted, and they fail to explain how that distortion is manifestly apparent from the documents in the file before the Court.

[21] See, for instance, judgment of 25 July 2018, *QuaMa Quality Management* v *EUIPO*, C-139/17 P, EU:C:2018:608, paragraphs 33 and 34 and the case-law cited.

[22] Judgment of 5 July 2011, *Edwin* v *OHIM* (C-263/09 P, EU:C:2011:452, paragraph 53).

94. In paragraphs 85 and 87 to 89 of the judgment under appeal, the General Court found, on the basis of national law (in particular, the decision of the BNetzA of 2011), that the charge at issue was levied on final consumers. Thus, the argument advanced by the Infineon companies and Germany – that there is a 'charge', as defined in the judgment in *Essent Netwerk Noord*, only where the person liable for payment of the charge is the final consumer – is ineffective.

95. As explained in points 36 to 41 of the present Opinion, it follows, in my view, from the case-law that the identity of the person liable to pay the tax in each case is irrelevant. Instead, the decisive factor is whether the tax relates to the product concerned or to a necessary activity in connection with that product.

96. Moreover, I agree with the Commission that the collection obligation and the payment obligation are two sides of the same coin,[23] with the result that any determination as to whether the payment obligation imposed on network users stemmed from the national legislation or the BNetzA decision of 2011 is also irrelevant.

97. In that connection, contrary to the arguments put forward by the Infineon companies, the fact that the BNetzA decision of 2011 made no provision for penalties for the non-collection of the surcharge at issue is not decisive. The BNetzA exercised normal supervisory powers over the transmission system operators, and could address binding decisions to those operators, in the event of failure to comply with their obligations.[24]

98. It follows that the arguments based on the distortion of national law and on the lack of obligation to collect the surcharge at issue and the lack of obligation to pay it should, in my opinion, be rejected as unfounded.

(4) No full compensation for loss of revenue and costs

99. The Infineon companies submit, in essence, that, contrary to what the General Court states in paragraphs 93, 99 and 106 et seq. of the judgment under appeal, the national authorities granted the network operators no full compensation for loss of revenue and costs generated by the exemption from network charges.

100. Contrary to what the Infineon companies maintain, the General Court rightly found that the disputed surcharge made it possible fully to compensate for the loss suffered by the network operators due to the exemptions from network charges. This resulted from the sixth and seventh sentences of Paragraph 19(2) of StromNEV 2011[25] and the BNetzA decision of 2011. What was important for the assessment of the surcharge under EU law on State aid was the fact that the exemption of baseload consumers from network charges and the resulting advantage were entirely financed by the surcharge.[26]

[23] When the regulatory authority requires an entity subject to regulation to collect a tax, it simultaneously requires the tax debtor to pay it. Otherwise, that entity would not be able to fulfil its obligation imposed by the authority.

[24] Paragraphs 29 and 54 of the Energiewirtschaftsgesetz (Law on the protection of the energy supply), as amended by the Gesetz zur Neuregelung energiewirtschaftlicher Vorschriften (Law for the revision of energy industry regulations) of 26 July 2011, BGBl. 2011 I, p. 1554. See the decision at issue (recital 123).

[25] The StromNEV Regulation, Stromnetzentgeltverordnung (Federal Ordinance on Electricity Network Charges) of 25 July 2005, as amended by the Energiewirtschaftsgesetz (Law on the protection of the energy supply), as amended by the Gesetz zur Neuregelung energiewirtschaftlicher Vorschriften (Law for the revision of energy industry regulations) of 26 July 2011, BGBl. 2011 I, p. 1554.

[26] See, in particular, paragraph 91 to 97 of the judgment under appeal.

101. However, in paragraph 95 of the judgment under appeal, the General Court rightly rejected the argument that there was no legal mechanism to ensure full compensation for loss suffered (in particular on the ground that it was impossible to pass on the costs of the surcharge at issue in the event of irrecoverable debts). Indeed, the classification of the surcharge at issue as a parafiscal charge is sufficient for the revenue from that charge to be regarded as State resources, without it being necessary for the State to undertake to offset the losses generated by the non-payment of that surcharge, in particular in the case of irrecoverable debts.

102. It follows, in my view, that the arguments based on the lack of full reimbursement of the loss of revenue and costs should be rejected as unfounded.

103. In my opinion, it follows from all the foregoing considerations that the second series of arguments raised by Germany and the Infineon companies should be rejected as either ineffective or unfounded.

3. Third series of arguments raised by Germany and the Infineon companies (existence of State control over the resources generated by the surcharge at issue)

(a) Main arguments of the parties

104. Germany submits essentially that paragraphs 63 to 65 and 77 of the judgment under appeal contradict paragraphs 99 and 100 of that judgment. As regards the case-law of the Court of Justice, the decisive factor is the control and power of disposal over the funds concerned. It also argues that the General Court erred in finding that the relationship between the supplier and the final consumer of electricity was not decisive in concluding *in casu* that there was a mandatory charge on the ground that the surcharge at issue is not levied on electricity consumption but on the use of the network.

105. The Infineon companies submit, in essence, that the judgment under appeal is vitiated by an error of law, in that the General Court considered that there was State control over the funds generated by the surcharge at issue. The appellants argue that the State did not have any direct or indirect power to dispose of the amounts collected, but merely monitored the proper use of that surcharge. In finding, in those circumstances, that the criterion of 'State resources' within the meaning of Article 107(1) TFEU was fulfilled, the General Court disregarded the concept of State aid.

(b) Assessment

106. Given the alternative nature of the two criteria referred to in my assessment above, the existence of a tax is already sufficient for the State nature of the resources to be recognised. Given that the 'tax' criterion is fulfilled in the present cases and the General Court's assessment in that regard is correct, the third series of arguments in the present appeals is ineffective and it is no longer necessary to examine it.

107. It is therefore only for the sake of completeness that I will make the following remarks.

108. Despite the fact that the 'tax' criterion is met and the assessment of the General Court – and, now on appeal, that of the Court of Justice can stop at this point – the fact remains that the General Court's assessment of the 'State control' criterion would also have to be upheld in the present case.

109. The additional costs resulting from the exemption of network charges for certain consumers were passed on to final consumers in accordance with the binding provisions of the law of the Member State concerned.[27] In addition, the mechanism of the surcharge at issue ensured that network operators were fully compensated for the loss of revenue, since the amount of that surcharge was adapted to that of the resources required on account of the exemption at issue.[28]

110. As regards the Infineon companies' argument that the amount of that surcharge was not prescribed by the State, suffice it to point out that the transmission system operators had no leeway in determining that charge and, as the General Court rightly held in paragraph 99 of the judgment under appeal, there was State control over the funds, that is to say, over the entire mechanism for collecting and allocating the surcharge at issue.

111. Germany and the Infineon companies, seeking to rely on the judgment in *EEG 2012*, submit that the exclusive allocation of the resources generated by the surcharge at issue precludes State control. However, as the General Court rightly explains in paragraphs 109 and 110 of the judgment under appeal, the Court of Justice in that judgment did not reverse its settled case-law – which was moreover, confirmed by more recent case-law[29] – but the Court confined itself to stating that, *in the absence of other factors*, that factor was not *per se* decisive in demonstrating the existence of such control. Indeed, in the present cases, the General Court did identify another such factor: the existence of a tax.

112. The argument that there is no State control over the full mechanism for collecting the surcharge at issue is contradicted by the fact that there is a mandatory hypothecation between, on the one hand, the surcharge at issue (as a parafiscal charge) and, on the other hand, the aid granted in the form of an exemption from network charges. In accordance with the case-law of the Court, where there is such a link between the aid measure and its financing, it automatically follows from the existence of a tax, which serves to finance the aid in well-defined proportion, that the aid is granted by means of State resources (that is, the proceeds of the tax).[30]

113. Finally, I would point out that the rules governing the surcharge at issue in the present cases appear to be stricter than the levy at issue in *EEG 2012*, since the present surcharge is based on binding legal provisions as opposed to a commercial/voluntary decision of the network operators in that case.

114. It follows that the third series of arguments raised by Germany and the Infineon companies should be rejected, in my view, as ineffective and, in any case, unfounded.

27 As the General Court rightly held in paragraphs 87 to 90 of the judgment under appeal.

28 As the General Court rightly held in paragraphs 91 to 92 of the judgment under appeal.

29 See judgments in *Essent Netwerk Noord* (paragraph 69); of 15 May 2019, *Achema and Others* (C-706/17, EU:C:2019:407, paragraph 66); and in *EEG 2012* (paragraph 76). See also judgment of 11 December 2014, *Austria* v *Commission*, T-251/11 (EU:T:2014:1060, paragraph 70).

30 See, to that effect, judgments of 13 January 2005, *Streekgewest* (C-174/02, EU:C:2005:10, paragraph 26); of 27 October 2005, *Distribution Casino France and Others* (C-266/04 to C-270/04, C-276/04 and C-321/04 to C-325/04, EU:C:2005:657, paragraph 40); and in *Essent Netwerk Noord* (paragraph 90).

115. Therefore, the single ground of appeal raised by Germany and the Infineon companies' first and second grounds of appeal and, in so far as these concern the condition relating to the existence of an intervention by means of State resources, should be rejected as unfounded.

III. Conclusion

116. In the light of the foregoing, I propose that the Court of Justice should: (i) reject the first ground of the Commission's cross-appeals; and (ii) reject the single ground of appeal raised by the Federal Republic of Germany and the Infineon companies' first and second grounds of appeal, in so far as these concern the condition relating to the existence of an intervention by means of State resources.