Reports of Cases

OPINION OF ADVOCATE GENERAL
TANCHEV
delivered on 3 April 2019[1]

Case C-654/17 P

Bayerische Motoren Werke AG and Freistaat Sachsen
v

European Commission

(Appeal — Regional aid to large investment projects — Aid granted by Germany for a project by BMW for the manufacturing of electric cars in Leipzig — Decision declaring the aid measure incompatible in part with the internal market — Proportionality of the aid — Regulation (EC) No 800/2008 — Intervention before the General Court)

Table of contents

I. Legal framework 3

II. Background to the proceedings 4

III. Proceedings before the General Court, order of 11 May 2015 and judgment under appeal 4

IV. Proceedings before the Court of Justice and forms of order sought 5

V. The main appeal 6

A. The first ground of appeal, alleging infringement of Article 107(3) TFEU 7

1. Arguments of the parties 7

2. Assessment 8

(a) Admissibility 8

(b) Substance 9

(1) The first part of the first ground of appeal 9

(2) The second part of the first ground of appeal 11

1 Original language: English.

(3) The third part of the first ground of appeal 12

(4) The fourth part of the first ground of appeal 12

B. The second ground of appeal, alleging infringement of Article 288 TFEU, Article 3 and Article 13(1) of the GBER, and the principle of non-discrimination 13

1. Arguments of the parties 13

2. Assessment 14

(a) Admissibility 14

(b) Substance 15

(1) The first part of the second ground of appeal 16

(i) Introduction 16

(ii) The Commission has exclusive competence to assess the compatibility of aid, irrespective of its amount 16

(iii) Aid that meets the conditions of the GBER is not existing aid 18

(iv) Compatibility may be assessed in the light of the proportionality criterion set out in the 2009 Communication 20

(v) Conclusion 21

(2) The second part of the second ground of appeal 21

VI. The cross-appeal 21

A. Arguments of the parties 21

B. Assessment 22

1. Admissibility of the cross-appeal 23

(a) Admissibility of the cross-appeal brought against the order of 11 May 2015 23

(b) Admissibility of the cross-appeal brought against the judgment under appeal in so far it contains a decision granting the application to intervene 26

(c) Admissibility of the cross-appeal against the judgment under appeal in so far as it takes into account the arguments put forward solely by Freistaat Sachsen 27

(d) No obligation for the Court to rule of its own motion on the admissibility of the intervention at first instance 28

2. Substance 29

(a) The first ground of appeal, alleging infringement of the second paragraph of Article 40 of the Statute of the Court of Justice 29

(b) The second ground of appeal, alleging an error in the classification of the facts 30

(c) The third ground of appeal, alleging infringement of the rules on the burden of proof 31

VII. Costs 31

VIII. Conclusion 31

1. By this appeal, Bayerische Motoren Werke AG ('BMW') requests the Court to set aside the judgment of the General Court [2] by which the latter dismissed the action for partial annulment of Commission Decision C(2014) 4531 final on the State aid which the Federal Republic of Germany was planning to grant to BMW for the construction in Leipzig (Germany) of a new production site for the manufacture of two new car models, the 'i3' electric car and the 'i8' hybrid car ('the decision at issue'). [3]

2. In the decision at issue, the Commission considered that the availability of State aid triggered the decision, by BMW, to invest in Leipzig rather than in another location which had been considered, namely, Munich (Germany), where, according to internal company documents, the project would have been EUR 17 million less costly than in Leipzig. The Commission found that the aid, which had been notified in the amount of approximately EUR 45 million, was compatible with the internal market only up to the difference between the costs, for BMW, of investing in Leipzig and the costs of investing in Munich, that is, only up to EUR 17 million. The amount of aid which exceeded EUR 17 million was declared incompatible with the internal market.

3. By the judgment under appeal, the General Court dismissed the appeal brought by BMW, which sought the annulment of the decision at issue in so far as it declared incompatible with the internal market the amount of the notified aid which exceeded EUR 17 million.

4. The appeal brought before this Court raises, in particular, the question of the proportionality of the aid. This case also raises the question of the admissibility of interventions before the General Court. Indeed, the Commission has brought a cross-appeal, whereby it requests the Court to set aside, first, the order of the General Court [4] by which that court granted the application to intervene submitted by Freistaat Sachsen (Saxony, Germany), where Leipzig is located, and, second, the judgment under appeal in so far as it takes into account arguments which were put forward solely by the intervener and, in so doing, contains a decision concerning the admissibility of the intervention.

I. Legal framework

5. Article 6(2) of Commission Regulation (EC) No 800/2008 of 6 August 2008 declaring certain categories of aid compatible with the common market in application of Articles 87 and 88 of the Treaty (General block exemption Regulation) ('the GBER') [5] states:

'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.'

2 Judgment of 12 September 2017, *Bayerische Motoren Werke* v *Commission*, T-671/14, EU:T:2017:599 ('the judgment under appeal').

3 Decision of 9 July 2014 on the State aid No SA.32009 (2011/C) (ex 2010/N) which Germany plans to grant to BMW AG for a large investment project in Leipzig (OJ 2016 L 113, p. 1).

4 Order of 11 May 2015, *Bayerische Motoren Werke* v *Commission*, T-671/14, not published, EU:T:2015:322 ('the order of 11 May 2015').

5 OJ 2008 L 214, p. 3.

6. Article 13(1) of the GBER provides:

'Regional investment and employment aid schemes shall be compatible with the common market within the meaning of Article 87(3) of the Treaty and shall be exempt from the notification requirement of Article 88(3) of the Treaty, provided that the conditions laid down in this Article are fulfilled.

...'

II. Background to the proceedings

7. On 30 November 2010, Germany notified the Commission that it intended to grant aid to BMW in the form of a fiscal allowance for investment up to a total of EUR 45 257 273,[6] pursuant to the Investitionszulagengesetz 2010 (Law on investment subsidies) of 7 December 2008, as amended ('the IZG'),[7] with a view to the construction in Leipzig of a production site for the manufacture of the 'i3' electric car and the 'i8' hybrid car.

8. On 13 July 2011, the Commission decided to initiate the formal investigation procedure laid down in Article 108(2) TFEU.

9. On 9 July 2014, the Commission adopted the decision at issue, by which, as mentioned in point 2 above, it found that the notified aid was compatible with the internal market only up to EUR 17 million, which corresponded to the difference between the costs of investing in Leipzig and the costs of investing in Munich. The portion of the notified aid in excess of EUR 17 million, that is, EUR 28 257 273, was incompatible with the internal market.

III. Proceedings before the General Court, order of 11 May 2015 and judgment under appeal

10. On 19 September 2014, BMW lodged an application for the annulment of the decision at issue in so far as it declared the amount by which the aid exceeded EUR 17 million to be incompatible with the internal market. In the alternative, BMW sought the annulment of the decision at issue in so far as it declared incompatible with the internal market the portion of aid which exceeded the amount of EUR 17 million but did not exceed the amount exempted from the notification requirement under Article 6(2) of the GBER (which, in the present case, amounts to EUR 22.5 million).

11. On 16 January 2015, Freistaat Sachsen lodged an application for leave to intervene in support of BMW. By order of 11 May 2015, the President of the Fifth Chamber of the General Court granted Freistaat Sachsen leave to intervene. The President of the Fifth Chamber of the General Court held that Freistaat Sachsen had an interest in the result of the case submitted to the General Court within the meaning of the second paragraph of Article 40 of the Statute of the Court of Justice of the European Union since, in declaring the aid to be compatible with the internal market only in the amount of EUR 17 million, the Commission had denied Freistaat Sachsen the benefit of the economic repercussions deriving from the grant of aid in the amount notified, so that the decision at issue had a real impact on that region's economy.

12. By the judgment under appeal, the General Court dismissed the action seeking the partial annulment of the decision at issue.

6 I should specify that the aid was notified in the amount of EUR 49 million, and that, following amendment of the notification by Germany, that amount was reduced to EUR 48.125 million (EUR 45 257 273 in discounted value) (see recitals 22 and 189 of the decision at issue).

7 BGBl. 2008 I, p. 2350. The IZG was block exempted under X 167/2008 (OJ 2009 C 280, p. 7).

13. The General Court rejected the first plea in law, alleging infringement of Article 108(3) TFEU. First, the General Court found that the Commission had not failed to carry out a diligent and impartial examination in the course of the preliminary examination procedure and that it could open the formal investigation procedure on the ground that the possibility could not be ruled out that the thresholds laid down in paragraph 68 of the Guidelines on national regional aid 2007-2013 ('the RAG') [8] were exceeded. Second, the General Court held that the Commission carried out a diligent and impartial examination also in the course of the formal investigation procedure and that it could examine whether the criteria set out in the Communication from the Commission concerning the criteria for an in-depth assessment of regional aid to large investment projects ('the 2009 Communication') were met, [9] irrespective of whether the said thresholds were exceeded. Third, the Commission had not committed a manifest error in applying the 2009 Communication.

14. The General Court dismissed the second plea in law, alleging infringement of Article 107(3)(c) TFEU. First, the Commission rightly found that, pursuant to paragraph 22(2) of the 2009 Communication, the aid had an incentive effect since it gave BMW the incentive to locate the investment in Leipzig rather than in Munich. Second, the Commission had not erred in finding that the difference between the costs of investing in Leipzig and the costs of investing in Munich amounted to EUR 17 million, and that the aid was proportionate only up to that amount. Third, in order to declare that the portion of aid which exceeded the amount of EUR 17 million was incompatible with the internal market, the Commission did not have to conduct an economic analysis and to show that that portion of aid would have negative effects on competition. Fourth, the Commission was correct in finding that the assessment of actual costs, provided by Germany after the aid was notified, could not be taken into consideration.

15. Finally, the General Court dismissed the third plea in law, raised in the alternative and alleging that, in declaring that the aid was compatible up to EUR 17 million, that is, up to an amount which was lower than that exempted from the notification requirement under Article 6(2) of the GBER (in the present case, EUR 22.5 million), the Commission had infringed Article 108(3) TFEU and the GBER. Regional aid which, as in the case at issue, exceeded the individual notification threshold set out in Article 6(2) of the GBER had to be assessed, not under the GBER, but in the light of the criteria laid down in the 2009 Communication. The Commission had not exceeded its powers in limiting the amount of the aid to an amount lower than that exempted from the notification obligation, given that aid exempted from the notification obligation is only presumed to be compatible with the internal market.

IV. Proceedings before the Court of Justice and forms of order sought

16. By its appeal, BMW, supported by Freistaat Sachsen, requests the Court to:

– set aside the judgment under appeal;

– annul the decision at issue in so far as it declares incompatible with the internal market the portion of aid amounting to EUR 28 257 273, that is, the portion of the notified aid which exceeds EUR 17 million;

8 OJ 2006 C 54, p. 13. According to paragraph 68 of the RAG, the Commission must open the formal investigation procedure provided for by Article 108(2) TFEU where, first, the amount of regional aid granted to a large investment 'exceeds 75% of the maximum amount of aid an investment with eligible expenditure of EUR 100 million could receive', applying the regional aid ceiling in force, and, second, either the beneficiary accounts for more than 25% of the sales of the product concerned, or the production capacity created by the aid project is more than 5% of the market.

9 OJ 2009 C 223, p. 3.

– in the alternative, annul the decision at issue in so far as it prohibits and declares incompatible with the internal market the portion of aid which does not exceed the amount exempted from the notification obligation laid down in Article 6(2) of the GBER, to the extent that that amount exceeds EUR 17 million;

– order the Commission to pay the costs of the proceedings.

17. The Commission claims that the Court should:

– dismiss the appeal as inadmissible and, in any event, unfounded;

– order BMW to pay the costs.

18. The Commission brought a cross-appeal, requesting the Court to:

– set aside the order of 11 May 2015;

– set aside the decision contained in the judgment under appeal 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;

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

– order BMW to pay the costs.

19. Freistaat Sachsen claims that the Court should:

– dismiss the cross-appeal;

– order the Commission to pay the costs on appeal.

20. BMW claims that the Court should:

– dismiss the cross-appeal;

– order the Commission to pay the costs.

21. At the hearing on 23 January 2019, BMW, the Commission and Freistaat Sachsen presented oral argument.

V. The main appeal

22. BMW puts forward two grounds of appeal. First, it contends that the General Court infringed Article 107(3) TFEU in finding that the Commission could limit the amount of the aid to EUR 17 million without conducting an economic analysis in order to verify that the portion of aid which exceeded EUR 17 million would result in a distortion of competition. Second, BMW submits that the General Court infringed Article 288 TFEU, Article 3 and Article 13(1) of the GBER, and the prohibition of discrimination, in finding that the Commission had not erred in limiting the amount of the aid to a lower amount than that exempted from the notification obligation laid down in Article 6(2) of the GBER, that is, EUR 22.5 million.

A. The first ground of appeal, alleging infringement of Article 107(3) TFEU

1. Arguments of the parties

23. By its first ground of appeal, BMW submits that the General Court infringed Article 107(3) TFEU in finding, in paragraphs 145 to 149 of the judgment under appeal, that the Commission could limit the aid to EUR 17 million, that is, to the amount corresponding to the difference between the costs of investing in Leipzig and the costs of investing in Munich, without verifying that the portion of aid in excess of EUR 17 million would result in a distortion of competition.

24. The first ground of appeal is divided into four parts.

25. In the first part of its first ground of appeal, BMW submits that it cannot be presumed that any amount of aid in excess of that which, in accordance with paragraph 33 of the 2009 Communication, has been found to be proportionate, that is, any amount of aid in excess of the difference in costs, results in a distortion of competition. Indeed, Article 107(3)(c) TFEU prohibits only aid which 'adversely affect[s] trading conditions to an extent contrary to the public interest'. Therefore, the Commission could not declare incompatible with the internal market the amount of aid in excess of the difference in costs without defining the relevant market and without assessing the beneficiary's position on that market.

26. In the second part of its first ground of appeal, BMW contends that the General Court's finding, in paragraph 149 of the judgment under appeal, that the Commission was not required to verify that the portion of aid which exceeds EUR 17 million distorts competition, is inconsistent with the case-law.

27. In the third part of its first ground of appeal, BMW claims that the General Court should have criticised the Commission for failing to dispel the doubts concerning the exact definition of the relevant market and the position of the beneficiary on that market.

28. In the fourth part of its first ground of appeal, BMW submits that, in finding that aid in the amount of EUR 17 million was sufficient to trigger the decision to invest in Leipzig, the General Court distorted the facts. This is because that decision was taken on the assumption that aid would be granted up to an amount of almost EUR 50 million.

29. The Commission contends that the first ground of appeal is inadmissible in whole and unfounded in part.

30. In the Commission's view, the first part of the first ground of appeal is inadmissible as it is a new plea in law. By the first part of its first ground of appeal, BMW submits, before the Court, that, in finding that the Commission was not required to assess the negative effects on competition, the General Court infringed Article 107(1) TFEU. However, before the General Court, BMW alleged infringement of paragraph 3 of Article 107 TFEU, not of paragraph 1 of that provision.

31. In the Commission's opinion, the second part of the first ground of appeal is also inadmissible. Either the appellant alleges infringement of Article 107(1) TFEU, which is a new plea in law and is, as such, inadmissible. Or the appellant alleges infringement of Article 107(3) TFEU. However, in the latter case, it is clear from the case-law cited by the appellant that what it really questions is the classification of the State measure at issue as State aid within the meaning of Article 107(1) TFEU, which, again, is a new plea in law. In any event, the second part of the first ground of appeal is unfounded since, in order to declare incompatible with the internal market the amount of aid in excess of EUR 17 million, the Commission was not required to assess whether that amount would result in a distortion of competition.

32. According to the Commission, the third part of the first ground of appeal is inadmissible. In so far as, again, it alleges infringement of Article 107(1) TFEU, it is a new plea in law. In so far as it alleges infringement of Article 107(3) TFEU, it does not meet the requirements of Article 168(1)(d) and Article 169(2) of the Rules of Procedure of the Court of Justice. In any event, the third part of the first ground of appeal is unfounded.

33. In the Commission's view, the fourth part of the first ground of appeal is inadmissible as the appellant did not specify which paragraphs of the judgment under appeal are contested. In any event, the fourth part of the second ground of appeal is unfounded since, in paragraph 154 of the judgment under appeal, the General Court found that the documents allegedly showing that the difference between the costs of investing in Leipzig and the costs of investing in Munich amounted to almost EUR 50 million, not EUR 17 million, had been prepared after the decision to invest in Leipzig had been taken and they could not, consequently, be relied upon by the Commission. Moreover, it is for the Member State concerned to provide all the information to enable the Commission to verify that the conditions for compatibility are fulfilled.

34. BMW replies that the first ground of appeal is admissible.

35. Freistaat Sachsen fully concurs with the observations submitted by BMW. It contends that the General Court infringed Article 107(3) TFEU. First, the Commission erred in taking the view that the plausible product market should include the lowest level for which statistics are available, which means the electric car market, and in failing to define the relevant geographic market. The General Court incorrectly found that it was unnecessary to address the issue of market definition as the Commission could open the formal investigation procedure even if the thresholds set out in paragraph 68 of the RAG had not been exceeded. Second, in finding that the Commission could limit the amount of the aid to the difference in costs, the General Court wrongly assimilated the notions of the incentive effect and the proportionality of the aid. Third, the General Court erred in finding that the Commission is required to verify the negative effects on competition only after it has established that the aid is necessary.

2. Assessment

36. In the decision at issue, the Commission declared incompatible with the internal market the portion of the notified aid which exceeded the difference between the costs of investing in Leipzig and the costs of investing in Munich, that is, the portion of the notified aid which exceeded EUR 17 million. By its first ground of appeal, BMW contends that the General Court infringed Article 107(3) TFEU in finding that the Commission could limit the amount of the aid to the difference in costs without conducting an economic analysis in order to verify that the portion of aid which exceeded that difference in costs resulted in a distortion of competition.

(a) Admissibility

37. First, the Commission's plea alleging inadmissibility of the first, second and third parts of the first ground of appeal on the ground that they allege infringement of Article 107(1) TFEU, and that that plea was not raised before the General Court, must be dismissed. It is true that reference is made, in the appeal, to paragraph 1 of Article 107 TFEU, and that the infringement of that paragraph was not raised before the General Court. However, reference is also made, in the appeal, to paragraph 3 of Article 107 TFEU, which was raised before the General Court. It is clear from the arguments put forward by BMW, which pertain to the assessment of the proportionality of the aid, that the first ground of appeal alleges infringement of paragraph 3, not paragraph 1, of Article 107 TFEU.

38. Second, the Commission's plea alleging inadmissibility of the third part of the first ground of appeal on the ground that no arguments are provided in that regard, as required by Article 168(1)(d) of the Rules of Procedure of the Court of Justice, must be dismissed. In the third part of its first ground of appeal, BMW claims that, in order to declare an aid measure incompatible with the internal market, the Commission must show that it has negative effects on competition and that, to that end, it must define the relevant market and assess the position of the beneficiary on that market. Thereby, BMW provides arguments to support the plea alleging that, in failing to dispel the doubts concerning market definition, the Commission infringed Article 107(3) TFEU.

39. Similarly, the Commission's plea alleging inadmissibility of the third part of the first ground of appeal on the ground that it does not identify the paragraphs of the judgment under appeal which are contested, as Article 169(2) of the Rules of Procedure of the Court of Justice requires, must be dismissed. Reference is made, in the first ground of appeal, to paragraphs 145 to 149 of the judgment under appeal. In those paragraphs, the General Court held that the Commission is not required, in order to limit an aid measure to the amount regarded as proportionate, to demonstrate that the portion of aid which exceeds that amount has negative effects on competition and that it would reinforce the beneficiary's position on the market. Therefore, the third part of the first ground of appeal, as summarised in the preceding point, rightly challenges paragraphs 145 to 149 of the judgment under appeal.

40. Third, the Commission's plea alleging inadmissibility of the fourth part of the first ground of appeal on the ground that it does not identify the paragraphs of the judgment under appeal which are contested, must, in my opinion, be upheld. This is because, in the fourth part of its first ground of appeal, BMW contends that the General Court distorted the facts and the evidence in finding that the decision to invest in Leipzig was taken on the assumption that aid would be granted in the amount of EUR 17 million, not almost EUR 50 million. That question is addressed by the General Court in paragraphs 154 to 161 of the judgment under appeal. However, reference is only made, in the first ground of appeal, to paragraphs 145 to 149 of the judgment under appeal.

41. I conclude that the first, second and third parts of the first ground of appeal are admissible, but that the fourth part of that ground is inadmissible.

(b) Substance

(1) The first part of the first ground of appeal

42. In the first part of its first ground of appeal, BMW contends that the General Court infringed Article 107(3) TFEU in finding that the Commission could presume that the portion of the notified aid which exceeded the difference between the costs of investing in Leipzig and the costs of investing in Munich resulted in a distortion of competition. The Commission was, in BMW's view, required to show that that portion of aid resulted in a distortion of competition and, to that end, to conduct an economic analysis.

43. I consider that the first part of the first ground of appeal should be dismissed.

44. Under the 2009 Communication, the Commission is not required, in order to declare an aid measure incompatible with the internal market, to show that it would distort competition.

45. The 2009 Communication sets out the criteria that apply to the assessment of the compatibility of regional aid granted for large investment projects [10] when, as in the present case, [11] a formal investigation procedure has been opened. [12] Under that communication, the Commission must balance the positive effects which regional aid can have, 'in particular in terms of promoting cohesion through attracting investment to disadvantaged areas', with 'the potential negative effects' on competitors of the beneficiary and on other regions. [13]

46. On the one hand, the Commission should assess the positive effects of a regional aid measure. That measure should, first, seek to help reduce the gap between the development levels of the various regions in the EU; second, be the appropriate instrument to achieve that objective; third, have an incentive effect; and, fourth, be proportionate. [14] As regards, in particular, the third condition, it is met in two possible scenarios: either where, in the absence of aid, the investment would not be made (first scenario); or where, in the absence of aid, the investment would be made in an alternative location (second scenario). In the present case, the aid was found to have an incentive effect on the basis of the second scenario since, in the absence of aid, the investment would have been made in Munich, not in Leipzig. [15] As for the fourth condition, the aid is considered to be proportionate, in a second scenario situation, if it equals the difference between the costs for the beneficiary to invest in the assisted region and the costs for it to invest in the alternative region. In the present case, the amount of the aid was limited to EUR 17 million because the difference, for BMW, between the costs of investing in Leipzig and the costs of investing in Munich amounted to EUR 17 million. [16]

47. On the other hand, the positive effects described in the preceding point should be balanced with the negative effects which an aid measure may have on competition, namely, the creation of market power and the creation or maintenance of inefficient market structures, and its negative effects on trade. [17]

48. However, under the 2009 Communication, the Commission may carry out a balancing test only if it has established that the aid measure is necessary to carry out the investment in the assisted region concerned, as described in point 46 above. Indeed, according to paragraph 52 of that communication, '*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 … with its negative effects'. [18]

49. Conversely, where the Commission finds that an aid measure is not necessary, it may declare that measure incompatible with the internal market without verifying whether that measure distorts competition.

50. It follows that, where an aid measure is not necessary to carry out the investment in the assisted region concerned, that measure may be declared incompatible with the internal market even if there is evidence (adduced by the Member State concerned) that it would not result in a distortion of competition, or that it would enhance competition. The effects on competition, either negative or positive, of an aid measure which is not found to be necessary are simply not taken into account under the 2009 Communication.

10 Large investment projects are projects with eligible costs above EUR 50 million (see paragraph 60 of the RAG).

11 See recitals 2 to 4 of the decision at issue.

12 As mentioned above, the Commission must open the formal investigation procedure where the thresholds set out in paragraph 68 of the RAG are exceeded (see footnote 8 above). Footnote 63 of the RAG stated that the Commission would 'draw up further guidance on the criteria' which apply, in that situation, to the compatibility assessment. That guidance was adopted by the Commission in the form of the 2009 Communication (see paragraph 8 of that communication).

13 See paragraph 2 of the 2009 Communication.

14 See paragraphs 11 to 36 of the 2009 Communication.

15 See paragraph 22 of the 2009 Communication and recital 173 of the decision at issue.

16 See paragraph 33 of the 2009 Communication and recitals 175 and 189 of the decision at issue.

17 See paragraphs 37 to 51 of the 2009 Communication.

18 Emphasis added.

51. I should stress that the reference, in paragraph 52 of the 2009 Communication, to aid which has been found to be 'necessary as an incentive to carry out the investment in the region concerned', must be understood as a reference to aid which has been found, not only to have an incentive effect, but also to be proportionate. Where the aid is necessary but disproportionate, the portion of aid in excess of the proportionate amount may be declared incompatible with the internal market even if there is evidence that it would not result in a distortion of competition. I should point out, in that regard, that the portion of aid in excess of the proportionate amount may be regarded as having no incentive effect. Moreover, it would be inconsistent with the rationale of regional aid to find that the lack of negative effects of an aid measure on competition offsets its disproportionate amount, so that it must be declared compatible.

52. I conclude that, under the 2009 Communication, the Commission is not required, in order to limit the amount of the notified aid to the difference between the costs of investing in the region concerned and the costs of investing in the alternative location, to show that the portion of aid which exceeds that difference in costs would result in a distortion of competition.

53. I note that BMW has not challenged the legality of the 2009 Communication.

54. It follows that the General Court did not err in finding, at paragraph 146 of the judgment under appeal, that, as regards the portion of aid which had been found to be disproportionate as it exceeded the difference between the costs of investing in Leipzig and the costs of investing in Munich, the Commission could 'assume' that it would distort competition and that it was not required, before it declared that portion of aid incompatible with the internal market, to 'analys[e] potential positive effects'.

(2) The second part of the first ground of appeal

55. In the second part of its first ground of appeal, BMW contends that the General Court's finding that the Commission may declare incompatible with the internal market the portion of aid which exceeds the difference in costs without showing that that portion distorts competition, is inconsistent with the case-law.

56. In my view, the second part of the first ground of appeal should be dismissed.

57. BMW relies on the judgment in *Wam*, where the Court held that the Commission is 'obliged to examine whether the aid is liable … to distort competition'.[19] However, that statement pertains to the classification of an aid measure as State aid within the meaning of Article 107(1) TFEU, not to the assessment of the compatibility of that aid with the internal market. Furthermore, in *Wam*, the Court held, in the paragraph following the one containing the statement cited above, that the Commission 'was not obliged to carry out an economic analysis of the actual situation on the relevant market' in order to classify a State measure as State aid.[20]

58. Admittedly, the General Court should not, in paragraph 149 of the judgment under appeal, have relied on the latter citation from the judgment in *Wam*, since that citation pertains to classification of a State measure as State aid, not to the assessment of the compatibility of aid. However, the fact remains that the General Court rightly held, at paragraph 146 of the judgment under appeal, that, in order to find that disproportionate aid is incompatible with the internal market, the Commission is not required to analyse the positive effects on competition which that aid may have, in other words, the Commission is not required to carry out an economic analysis in that regard.

19 Judgment of 30 April 2009, *Commission* v *Italy and Wam*, C-494/06 P, EU:C:2009:272, paragraph 57.
20 Judgment of 30 April 2009, *Commission* v *Italy and Wam*, C-494/06 P, EU:C:2009:272, paragraph 58.

59. BMW also relies on the judgment in *Smurfit Kappa*, which concerned regional aid for a large investment project (the setting-up of a paper mill in Brandenburg-Nordost). It is true that, in that judgment, the General Court held that the Commission could not, in order to declare the aid compatible, 'confin[e] itself to verifying that the disadvantages caused by the subsidised project in terms of distortions to competition would be kept at a limited level, but not that the advantages in terms of regional development would outweigh the disadvantages, however minimal the latter might be'.[21] However, I stress that, in *Smurfit Kappa*, the General Court itself noted that, at the time when the decision contested in that judgment was issued, the 2009 Communication had not yet been adopted.[22]

60. Furthermore, BMW relies on the judgment in *Kotnik*, where the Court held that 'the adoption of a 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)(b) TFEU, and to provide reasons for its refusal to grant such a request'.[23] However, it does not follow that, in the present case, the Commission should have assessed the compatibility of the aid at issue, not under the 2009 Communication, but under Article 107(3) TFEU. Indeed, where a communication sets out criteria for the compatibility assessment of certain aid, compatibility may be assessed directly under Article 107(3) TFEU only upon request by the Member State concerned, which must prove to the requisite legal standard that there are exceptional circumstances which require the direct application of that provision.[24] In the present case, it has not been alleged that Germany requested the direct application of Article 107(3) TFEU.

61. I conclude that the second part of the first ground of appeal must be dismissed.

(3) The third part of the first ground of appeal

62. In the third part of its first ground of appeal, BMW contends that the General Court infringed Article 107(3) TFEU in not criticising the Commission for failing to dispel the doubts concerning the relevant market and the position of the beneficiary on that market. Had the Commission defined the relevant market, it would have found that the beneficiary had no power on that market, so that it was not necessary to limit the amount of the notified aid to EUR 17 million.

63. It is true that, according to paragraph 37 of the 2009 Communication, 'to assess market shares and potential overcapacity in a market in structural decline, the Commission needs to define the relevant product market and geographic market'. However, that paragraph is part of Section 3 of the 2009 Communication, which pertains to the negative effects of the aid. I have come to the conclusion that those effects need not be assessed when the aid has been found to be disproportionate. Therefore, in that situation, the Commission 'need' not define the relevant market.

64. Consequently, the third part of the first ground of appeal must be dismissed.

(4) The fourth part of the first ground of appeal

65. By the fourth part of its first ground of appeal, BMW submits that the General Court distorted the facts and the evidence in finding that the decision to invest in Leipzig was taken on the assumption that aid would be granted up to an amount of EUR 17 million, not almost EUR 50 million.

21 Judgment of 10 July 2012, *Smurfit Kappa Group* v *Commission*, T-304/08, EU:T:2012:351, paragraph 94.

22 Judgment of 10 July 2012, *Smurfit Kappa Group* v *Commission*, T-304/08, EU:T:2012:351, paragraph 95.

23 Judgment of 19 July 2016, *Kotnik and Others*, C-526/14, EU:C:2016:570, paragraph 41.

24 Judgment of 8 March 2016, *Greece* v *Commission* (C-431/14 P, EU:C:2016:145, paragraphs 72 to 75).

66. As mentioned in point 40 above, the fourth part of the first ground of appeal is, in my opinion, inadmissible. However, should the Court consider it to be admissible, I will show that it is, in any event, unfounded.

67. Suffice it to say, in that regard, that company documents dating from December 2009 estimated that the cost difference between the two locations amounted to EUR 17 million,[25] and that it was not until September 2012, that is, after the project to invest in Leipzig was notified to the Commission on 30 November 2010,[26] that Germany submitted that additional costs of EUR 29 million should be added to the initial amount of EUR 17 million.[27] Therefore, the General Court did not distort the facts or the evidence in finding, at paragraph 160 of the judgment under appeal, that the decision to invest in Leipzig was taken on the basis of a cost difference of EUR 17 million, and that account should not be taken of the additional costs of EUR 29 million.

68. I conclude that the first ground of appeal should be dismissed as partly inadmissible (as regards the fourth part) and partly unfounded (as regards the first, second and third parts).

B. The second ground of appeal, alleging infringement of Article 288 TFEU, Article 3 and Article 13(1) of the GBER, and the principle of non-discrimination

1. Arguments of the parties

69. The second ground of appeal supports the form of order raised in the alternative, which seeks the annulment of the decision at issue in so far as it declares incompatible with the internal market the portion of aid which exceeds EUR 17 million, but does not exceed the notification threshold set out in Article 6(2) of the GBER, which, in the present case, amounts to EUR 22.5 million.

70. The second ground of appeal is divided into two parts.

71. In the first part of its second ground of appeal, BMW submits that the General Court infringed, first, Article 288 TFEU, and, second, Article 3 and Article 13(1) of the GBER by upholding the limitation, in the decision at issue, of the amount of the aid to a lower amount than that exempted from the notification requirement.

72. First, BMW contends that the General Court infringed Article 288 TFEU. In upholding the limitation, in the decision at issue, of the amount of the aid to an amount lower than that laid down in Article 6(2) of the GBER, the General Court allowed a decision to derogate from a regulation, thereby infringing Article 288 TFEU. This is inconsistent with the objective of regional aid and with the scheme of the GBER.

73. Second, BMW contends that the General Court infringed Article 3 and Article 13(1) of the GBER. Aid in an amount below the threshold laid down in Article 6(2) of that regulation must be regarded as compatible with the internal market and, as such, as existing aid within the meaning of Article 1(b) of Council Regulation (EC) No 659/1999.[28]

25 See recitals 85 and 175 of the decision at issue.

26 See recital 1 of the decision at issue.

27 See recitals 101 and 176 of the decision at issue.

28 Regulation of 22 March 1999 laying down detailed rules for the application of Article 108 of the treaty on the functioning of the European Union (OJ 1999 L 83, p. 1).

74. In the second part of its second ground of appeal, BMW submits that the General Court infringed the principle of non-discrimination by upholding the limitation, in the decision at issue, of the aid to a lower amount than that exempted from the notification requirement. This is because any competitor of BMW could have been granted aid in an amount equal to that laid down in Article 6(2) of the GBER.

75. The Commission contends that the second ground of appeal is inadmissible as it is a new plea in law and that it is, in any event, unfounded.

76. In the Commission's view, the first part of the second ground of appeal is unfounded. Aid which is exempted from the notification requirement pursuant to Article 3 and Article 13(1) of the GBER does not constitute existing aid within the meaning of Article 1(b) of Regulation No 659/1999. In particular, it does not constitute authorised aid within the meaning of point (ii) of that provision.

77. In the Commission's opinion, the second part of the second ground of appeal is unfounded. First, BMW's argument is hypothetical. Second, that hypothetical competitor would be granted aid equal to the amount laid down in Article 6(2) of the GBER only if all conditions set out in that regulation were met. Third, BMW would not be in the same situation as that competitor, given that the latter would be granted exempted aid whereas BMW would be granted authorised aid. Fourth, should there be unequal treatment, it should be attributed to the Member State concerned, not the Commission.

78. BMW replies that the first and second parts of the second ground of appeal are admissible as they are not new pleas in law.

79. Freistaat Sachsen contends that the General Court infringed, first, Article 288 TFEU and, second, Article 3 and Article 13(1) of the GBER by upholding the limitation, in the decision at issue, of the amount of the aid to a lower amount than that exempted from the notification requirement. According to Freistaat Sachsen, aid that does not exceed the notification threshold laid down in Article 6(2) of the GBER cannot raise competition concerns. Aid should be granted up to that threshold, in accordance with the footnote to paragraph 56 of the 2009 Communication. Any other solution would lead to unfavourable treatment of aid that is notified and would infringe the principles of legal certainty and the protection of legitimate expectations.

2. Assessment

80. The second ground of appeal supports the form of order raised in the alternative, which seeks the annulment of the decision at issue in so far as it declares incompatible with the internal market the portion of aid which exceeds EUR 17 million, but does not exceed the threshold laid down in Article 6(2) of the GBER. By this ground of appeal, BMW alleges infringement, first, of Article 288 TFEU and of Article 3 and Article 13(1) of the GBER and, second, of the principle of non-discrimination.

(a) Admissibility

81. The Commission contends that the first and second parts of the second ground of appeal are inadmissible as they were not raised before the General Court.

82. In my view, those pleas of inadmissibility should be dismissed.

83. First, the Commission claims that the plea alleging infringement of Article 3 and Article 13(1) of the GBER is a new plea in law.

84. It is true that, in its application before the General Court, BMW simply alleged infringement of the GBER. It did not specify which provisions of that regulation the Commission allegedly infringed. In particular, it made no reference to Article 3 or Article 13(1) of the GBER. However, BMW's plea, raised before the General Court, that 'even in the case of a notification, aid in an amount up to the notification threshold must always be considered as compatible with the internal market', can be read only as a reference to Article 3 and Article 13(1) of the GBER, given that it is those provisions which state that aid that meets the conditions set out in that regulation (in particular, aid which is below the notification threshold laid down in Article 6(2) thereof) is compatible with the internal market. Therefore, the plea alleging infringement of Article 3 and Article 13(1) of the GBER cannot be regarded as a new plea in law.

85. Second, the Commission contends that BMW's plea alleging infringement of Article 288 TFEU was not raised before the General Court.

86. BMW's argument before the Court of Justice is as follows. The GBER conferred on Member States the competence to assess the compatibility with the internal market of aid that does not exceed the threshold laid down in Article 6(2) of that regulation, thereby depriving the Commission of competence in that regard. Consequently, where, as in the present case, the Commission exercises that competence and assesses the compatibility with the internal market of aid that does not exceed that threshold, the decision of that institution infringes Article 288 TFEU. Indeed, it follows from that provision that regulations, unlike decisions, have general application and that, consequently, the former take precedence over the latter.

87. It is true that, before the General Court, BMW did not raise a plea alleging infringement of Article 288 TFEU. However, in its application before the General Court, BMW argued that, in limiting the amount of the aid to an amount lower than that exempted from the notification requirement, 'the Commission exceeded its powers and unlawfully limited the competence of [Germany] to grant aid without prior notification under the approved IZG scheme'. Therefore, although no reference was made to Article 288 TFEU, the plea alleging that the Commission had no power to assess the compatibility of the portion of aid that did not exceed the threshold laid down in Article 6(2) of the GBER and that the hierarchy of norms was infringed cannot be regarded as a new plea in law.

88. Third, the Commission submits that the plea alleging infringement of the principle of non-discrimination is new.

89. In that regard, suffice it to say that, in its application before the General Court, BMW argued that, were that court to find that the Commission had not erred in limiting the aid to an amount lower than the notification threshold, 'this would lead to unlawful discrimination against BMW compared to other aid recipients who could obtain, under the IZG, aid up to EUR 22.5 million'. Consequently, the plea alleging infringement of the principle of non-discrimination is not new.

90. Therefore, the second ground of appeal is, in my opinion, admissible.

(b) Substance

91. By its second ground of appeal, raised in the alternative, BMW contends that the aid notified in the amount of EUR 45 257 273 should have been declared compatible with the internal market up to the notification threshold laid down in Article 6(2) of the GBER, which, in this case, amounts to EUR 22.5 million.[29] However, the Commission declared the aid compatible only up to EUR 17 million, that is, up to the difference between the costs of investing in Leipzig and the costs of

29 See footnote 33 below.

investing in Munich. Therefore, BMW submits that, in finding that the Commission had not erred in declaring that the notified aid was compatible with the internal market up to EUR 17 million, rather than EUR 22.5 million, the General Court infringed, first, Article 288 TFEU and Article 3 and Article 13(1) of the GBER, and, second, the principle of non-discrimination.

(1) The first part of the second ground of appeal

(i) Introduction

92. The reason why, according to BMW, the aid at issue should have been declared compatible with the internal market, up to the notification threshold laid down in Article 6(2) of the GBER, is that the Commission does not have competence to assess the compatibility of aid measures whose amount does not exceed that threshold. Indeed, with the adoption of the GBER, that competence was, in BMW's submission, transferred to the Member States. Consequently, where the amount of an aid measure does not exceed the notification threshold laid down in Article 6(2) of the GBER, and the Member State concerned finds that all conditions set out in that regulation are met, that aid is compatible. The Commission cannot assess the compatibility of that aid, let alone find that it is incompatible with the internal market. Where, on the other hand, the amount of an aid measure exceeds the notification threshold laid down in Article 6(2) of the GBER, the Commission may only assess the compatibility of the portion of aid which exceeds that threshold, and only that portion may be declared incompatible with the internal market. As for the portion of aid which is below the said threshold, the Commission is obliged to declare it compatible. Consequently, so BMW argues, the General Court erred in finding that the Commission could, in the decision at issue, limit the aid to an amount lower than the notification threshold laid down in Article 6(2) of the GBER.

93. The Commission, for its part, submits that it has exclusive competence to assess the compatibility of aid. It is irrelevant, in that regard, whether or not the amount of the aid exceeds the notification threshold laid down in Article 6(2) of the GBER. Therefore, on the one hand, where the amount of an aid measure does not exceed that threshold, and the Member State concerned finds that all conditions set out in that regulation are met, the Commission may nonetheless find that aid to be incompatible with the internal market. This is because aid which the Member State concerned finds meets all conditions of the GBER cannot be regarded as aid which has been authorised. On the other hand, where the amount of an aid measure exceeds the notification threshold laid down in Article 6(2) of the GBER, the Commission may assess the compatibility of the whole amount of that aid. It may find that that aid is incompatible with the internal market in its entirety.

94. For the reasons set out below, I consider that the first part of the second ground of appeal should be dismissed. In my view, the Commission has competence to assess the compatibility of aid measures even where their amount does not exceed the notification threshold laid down in Article 6(2) of the GBER. It follows that where, as is the case here, the amount of an aid measure exceeds that threshold, the Commission has competence to assess the compatibility of the *whole amount* of that aid, and it is not obliged to declare the aid compatible up to the amount exempted from the notification obligation.

(ii) The Commission has exclusive competence to assess the compatibility of aid, irrespective of its amount

95. According to case-law, the implementation of the system of prior scrutiny of plans to grant new aid established by Article 108(3) TFEU is a matter for both the Commission and the national courts, their respective roles being complementary but separate. Whilst the assessment of the compatibility of aid measures with the internal market falls within the exclusive competence of the Commission, subject to review by the Courts of the European Union, it is for the national courts to ensure the safeguarding, until the final decision of the Commission, of the rights of individuals faced with a

possible breach by State authorities of the prohibition laid down by Article 108(3) TFEU. [30]

96. I disagree with BMW's argument that, with the adoption of the GBER, the competence to assess the compatibility of aid whose amount does not exceed the notification threshold laid down in Article 6(2) of that regulation was transferred to the Member States.

97. In that regard, I note that the GBER lays down general compatibility criteria, which are based on the Commission's experience in the areas within the scope of that regulation. [31] According to Article 3 of the GBER, where an aid measure [32] meets the conditions set out in Chapter I of that regulation and the relevant provisions of Chapter II thereof, it '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]'. Article 13(1) of the GBER, which pertains to regional aid, has similar wording. Conversely, where an aid measure does not meet the conditions of the GBER, it must be notified to the Commission, which carries out an individual assessment of compatibility with the internal market under Article 107(3) TFEU. That aid cannot be implemented until the Commission has issued a final decision. That is the case, in particular, where the amount of an aid measure exceeds the notification threshold laid down in Article 6(2) of the GBER, which, in the present case, amounts to EUR 22.5 million. [33]

98. It is for the Member State concerned to assess whether an aid measure meets the conditions set out in the GBER and whether, consequently, it may be implemented without prior notification to the Commission. As stated by the Commission in its proposal for what would become the Enabling Regulation, [34] the adoption of group exemption regulations such as the GBER reflects the 'decentralization of State aid control'. [35]

99. However, the determination, by the Member State concerned, that an aid measure meets the conditions of the GBER does not preclude the Commission from verifying whether or not those conditions are met and, should they not be, from finding that that aid measure is incompatible with the internal market.

100. This is because, first, the competence to assess the compatibility of aid measures was conferred on the Commission by Article 107(3) TFEU. I fail to see how a regulation such as the GBER could have deprived the Commission of a competence conferred on it by primary law.

30 Judgments of 21 November 1991, *Fédération nationale du commerce extérieur des produits alimentaires and Syndicat national des négociants et transformateurs de saumon*, C-354/90, EU:C:1991:440, paragraphs 8 to 11; of 5 October 2006, *Transalpine Ölleitung in Österreich*, C-368/04, EU:C:2006:644, paragraphs 36 to 38; of 21 November 2013, *Deutsche Lufthansa*, C-284/12, EU:C:2013:755, paragraphs 27 and 28; and of 23 January 2019, *Fallimento Traghetti del Mediterraneo*, C-387/17, EU:C:2019:51, paragraphs 54 and 55.

31 See recital 4 of Council Regulation (EC) No 994/98 of 7 May 1998 on the application of Articles 92 and 93 of the Treaty establishing the European Community to certain categories of horizontal State aid ('the Enabling Regulation') (OJ 1998 L 142, p. 1). The Enabling Regulation enables the Commission to adopt group exemption regulations as regards certain categories of aid. The GBER was adopted on the basis of the Enabling Regulation.

32 The GBER applies to State measures that constitute State aid within the meaning of Article 107(1) TFEU (see Article 2(1) of that regulation).

33 According to Article 6(2) of the GBER, regional aid granted 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 regional aid threshold in force in the assisted region concerned. It is not disputed that the aid project at issue is a large investment project, that is, a project with eligible costs above EUR 50 million (see footnote 10 above). The regional aid threshold for Leipzig in force when the aid was granted amounted to 30% (see recital 11 of the decision at issue and the Regional State aid map for Germany: 2007-2013, OJ 2006 C 295, p. 6). Therefore, the notification threshold under Article 6(2) of the GBER amounted to EUR 22.5 million (75% x 30% x EUR 100 million) (see recital 201 of the decision at issue and paragraph 182 of the judgment under appeal).

34 See footnote 31 above.

35 See Section 3.2 of the grounds for the Proposal for a Council Regulation (EC) on the application of Articles 92 and 93 of the EC Treaty to certain categories of horizontal State aid, submitted by the Commission on 15 July 1997 (COM(97) 396 final). According to Section 3.1 thereof, the adoption of group exemption regulations 'would render the Commission's State aid control more efficient by alleviating the Commission from the task of examining notifications of both aid schemes and individual aid in a situation where the Commission is receiving a large number of notified plans to grant or alter aid that are compatible with the [internal] market because they fulfil criteria for compatibility established by the Commission'. See also point 2.1 of the Opinion of the Economic and Social Committee on the 'Proposal for a Council Regulation (EC) on the application of Articles 92 and 93 of the EC Treaty to certain categories of horizontal State aid' (OJ 1998 C 129, p. 70).

101. Consequently, where an interested party such as a competitor of the beneficiary submits a complaint alleging, for instance, that a State measure was implemented in breach of Article 108(3) TFEU as it does not meet the conditions set out in the GBER, the Commission is obliged to examine it.[36] This follows from the second subparagraph of Article 10(1) of Regulation nº 659/1999.[37]

102. Second, where the Member State concerned finds that an aid measure meets the conditions of the GBER, *that finding does not amount to a declaration of compatibility*. In verifying whether the conditions of the GBER are met, a national court applies general compatibility criteria established by the Commission on the basis of its experience.[38] It does not carry out an individual assessment of the aid measure under Article 107(3) TFEU or, as concerns regional aid granted for large investment projects, the 2009 Communication. Only the latter assessment, which the Commission has *exclusive* competence to carry out, may lead to a declaration of compatibility.[39] As the Enforcement Notice states, a national court 'can only assess whether all the conditions of the [GBER] are met. It cannot assess the compatibility of an aid measure where this is not the case, since that assessment is the exclusive responsibility of the Commission'.[40]

103. Consequently, where a national court finds that an aid project meets the conditions of the GBER, that finding amounts to a simple presumption of compatibility, a 'presumption of compliance with the internal market', as the General Court rightly held in paragraph 177 of the judgment under appeal.

(iii) Aid that meets the conditions of the GBER is not existing aid

104. It follows that, as the Commission submits and contrary to what BMW contends, aid that the Member State concerned finds fulfils the conditions set out in the GBER does not constitute 'existing aid' within the meaning of Article 1(b) of Regulation No 659/1999. According to point (ii) of that provision, existing aid may, in particular, be aid 'which [has] been authorised by the Commission or the Council'. Aid that the Member State concerned finds fulfils the conditions of the GBER has not been 'authorised' as its compatibility with the internal market is simply presumed. It has not been authorised 'by the Commission or the Council'[41] as the assessment was carried out by the Member State concerned. I should mention, in that regard, that, where a Member State finds that an aid measure meets the conditions of the GBER, that Member States need only provide the Commission with a summary of the information regarding that measure.[42] Obviously, that summary does not compare to the information which must be provided when an aid measure is notified.[43]

105. Consequently, aid that was erroneously found, by the Member State concerned, to meet the conditions of the GBER, is 'new aid' within the meaning of Article 1(c) of Regulation No 659/1999. As new aid, it must be notified to the Commission,[44] which will assess its compatibility with the internal market.

36 Judgment of 9 September 2009, *Diputación Foral de Álava and Others* v *Commission*, T-30/01 to T-32/01 and T-86/02 to T-88/02, EU:T:2009:314, paragraph 260.

37 The second subparagraph of Article 10(1) of Regulation No 659/1999 provides that the Commission 'shall' examine any complaint, provided that it is brought by an interested party within the meaning of Article 1(h) of that regulation and that that completes the form referred to in the first subparagraph of Article 20(2) of the same regulation.

38 See point 95 above.

39 See Sinnaeve, I., 'Block Exemptions for State aid: More Scope for State Aid Control by Member States and Competitors', *Common Market Law Review*, Volume 38 (2001), Issue 6, p. 1479 (p. 1495). See also Berghofer, M., 'The General Block Exemption Regulation: A Giant on Feet of Clay', *European State Aid Law Quarterly*, Volume 8 (2009), Issue 3, p. 323 (p. 328 and footnote 55).

40 See paragraph 16 of Commission notice on the enforcement of State aid law by national courts ('the Enforcement Notice') (OJ 2009 C 85, p. 1).

41 The reference to authorisation by the Council is a reference to the power conferred on the Council by the third subparagraph of Article 108(2) TFEU to declare, under 'exceptional circumstances', a State measure compatible with the internal market.

42 See Article 9(1) and Annex III of the GBER.

43 See the form in Annex I to Commission Regulation (EC) No 794/2004 of 21 April 2004 implementing Regulation No 659/1999 (OJ 2004 L 140, p. 1).

44 Should it have been put into effect, it must be regarded as 'unlawful aid' within the meaning of Article 1(f) of Regulation No 659/1999 (Opinion of Advocate General Wathelet in *Eesti Pagar*, C-349/17, EU:C:2018:768, point 107).

106. Consequently, the General Court did not err in finding, at paragraph 176 of the judgment under appeal, that the aid at issue did not constitute authorised existing aid.

107. I would stress, moreover, that, contrary to what BMW argues, it does not follow from the footnote to paragraph 56 of the 2009 Communication that, in the present case, Germany retains the power to grant aid up to the notification threshold laid down in Article 6(2) of the GBER.

108. The footnote to paragraph 56 of the 2009 Communication states that, 'when 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'.

109. The power retained by the Member State under that footnote applies to aid granted on the basis of an 'existing' scheme, that is, in particular, aid which has been the subject of an authorisation decision by the Commission, as Article 1(b)(ii) of Regulation No 659/1999 provides. That power does not apply when aid is granted on the basis of an exempted scheme, that is, on the basis of a scheme whose compatibility with the internal market is only presumed because the Member State concerned found that it met the conditions of the GBER. An exempted scheme is not 'existing' aid.

110. In the present case, the legal basis for the notified aid is the IZG.[45] Germany considered that the IZG met the conditions set out in the GBER and that it was exempt from the notification obligation and compatible with the internal market.[46] Therefore, the IZG is not an 'existing' aid scheme, and BMW cannot rely on the footnote to paragraph 56 of the 2009 Communication to contend that Germany retains the power to grant aid up to the notification threshold laid down in Article 6(2) of the GBER.

111. Contrary to what BMW argues, it does not follow from the judgment in *Diputación Foral de Álava* that the Commission has competence to assess only the portion of aid in excess of that threshold. In that judgment, the General Court held that the aid granted under an approved aid scheme 'constituted new aid in so far as it exceeded the ceiling established in its decision approving the scheme'.[47] However, in *Diputación Foral de Álava*, the Commission had issued a decision approving the aid scheme at issue. By contrast, in the present case, there has been no such decision. Therefore, as the General Court rightly found in paragraph 181 of the judgment under appeal, the Commission could assess the compatibility of the whole amount of the aid at issue without infringing the principles set out in *Diputación Foral de Álava*.

112. Consequently, the General Court did not err in finding, at paragraph 179 of the judgment under appeal, that the footnote to paragraph 56 of the 2009 Communication did not preclude the Commission from assessing whether the aid at issue was proportionate, given that that aid 'had to be assessed as individual aid, not as aid granted under an approved regional aid scheme'.

113. I conclude that the Commission has competence to assess the compatibility of an aid measure, even where the amount of that aid does not exceed the notification threshold laid down in Article 6(2) of the GBER.

45 See recital 12 of the decision at issue.

46 The summary referred to in Article 9(1) of the GBER was provided to the Commission, which published it in the Official Journal (Information communicated by Member States regarding State aid granted under Regulation No 800/2008, OJ 2009 C 280, p. 5).

47 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, paragraph 229.

114. It follows that, where, as in the present case, the amount of the notified aid exceeds that threshold, the Commission may assess the compatibility of the *whole amount* of the aid, and that, contrary to what BMW argues, it is not obliged to declare the aid compatible up to the amount which is exempted from the notification obligation.

115. It also follows that, as I will show below, the Commission may carry out that compatibility assessment by applying, not only the criteria set out in the GBER, but also other criteria, such as those set out in the 2009 Communication.

(iv) Compatibility may be assessed in the light of the proportionality criterion set out in the 2009 Communication

116. Reference should be made, in that regard, to the judgment in *Freistaat Sachsen*.[48]

117. In that judgment, the Court held that, where the amount of the aid exceeds the individual notification threshold laid down in a block exemption regulation,[49] the Commission may assess that aid, not only in the light of the criteria set out in that regulation, but also in the light of other criteria or other instruments of EU law. First, the criteria set out in that block exemption regulation may be applied, given that the substantive provisions of that regulation, unlike the provision laying down an exemption from the notification requirement, apply. Second, criteria which are not set out in that block exemption regulation may be applied. In that regard, the Court relied on recital 4 of Regulation No 68/2001, which states that that regulation is without prejudice to the possibility for Member States of notifying aid projects, and that 'such notifications will be assessed by the Commission in particular in the light of the criteria set out in this Regulation, *or in accordance with the applicable Community guidelines and frameworks*, if such guidelines and frameworks exist'.[50] According to the Court, the use, in recital 4 of Regulation No 68/2001, of the term 'in particular' meant that the aid had to be examined in particular, but not exclusively, in the light of the criteria set out in that regulation.[51] Therefore, the Commission could apply a criterion not set out in Regulation No 68/2001 and require that the aid was necessary to implement the training measures under consideration.[52]

118. Similarly, in the present case, in order to declare the aid at issue compatible with the internal market, the Commission may require that it meets the criterion set out in paragraph 33 of the 2009 Communication, that is, that the amount of the aid is limited to the difference between the costs of investing in Leipzig and the costs of investing in Munich (EUR 17 million). I note, in that regard, that recital 7 of the GBER states, like recital 4 of Regulation No 68/2001, that it is 'without prejudice to the possibility for Member States to notify' regional aid measures, and that such aid measures '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*'.[53]

119. Therefore, the General Court did not err in finding, at paragraph 173 of the judgment under appeal, that the aid at issue had to be assessed under the 2009 Communication, the RAG and Article 107(3) TFEU.

48 Judgment of 21 July 2011, *Freistaat Sachsen and Land Sachsen-Anhalt* v *Commission*, C-459/10 P, not published, EU:C:2011:515.

49 In *Freistaat Sachsen*, the applicable block exemption regulation was Commission Regulation (EC) No 68/2001 of 12 January 2001 on the application of Articles 87 and 88 of the EC Treaty to training aid (OJ 2001 L 10, p. 20).

50 Emphasis added.

51 Judgment of 21 July 2011, *Freistaat Sachsen and Land Sachsen-Anhalt* v *Commission*, C-459/10 P, not published, EU:C:2011:515, paragraph 31.

52 Judgment of 21 July 2011, *Freistaat Sachsen and Land Sachsen-Anhalt* v *Commission*, C-459/10 P, not published, EU:C:2011:515, paragraph 33.

53 Emphasis added.

(v) Conclusion

120. It follows that, in finding that the Commission could limit the aid to an amount lower than that exempted from the notification requirement laid down in Article 6(2) of the GBER, the General Court did not infringe Article 3 and Article 13(1) of the GBER, given that those provisions only lay down a *presumption* of compatibility of aid that meets the conditions of that regulation. Where the amount of an aid measure exceeds the said threshold, those provisions do not preclude the Commission from assessing the compatibility of that measure in the light of criteria other than those set out in the GBER and from finding, on the basis of such criteria, that the aid is compatible up to an amount lower than that exempted from the notification obligation under Article 6(2) of the GBER.

121. It also follows that the General Court did not infringe Article 288 TFEU as the decision at issue is consistent with the GBER.

122. I conclude that the first part of the second ground of appeal must be rejected.

(2) The second part of the second ground of appeal

123. In the second part of its second ground of appeal, BMW alleges that the General Court infringed the principle of non-discrimination in finding that the Commission could limit the aid granted to BMW to an amount lower than that exempted from the notification requirement, whereas any competitor of BMW could have been granted, under the IZG, aid up to the notification threshold laid down in Article 6(2) of the GBER.

124. In that regard, suffice it to say that any aid granted to a hypothetical competitor of BMW under the IZG without prior notification to the Commission would not constitute existing aid within the meaning of Article 1(b) of Regulation No 659/1999. By contrast, in the present case, the aid granted to BMW was declared compatible by the Commission in the decision at issue (albeit only up to EUR 17 million) and it is, therefore, existing aid. It follows that, as the Commission submits, that hypothetical competitor and BMW are not in a similar situation, and that the second part of the second ground of appeal must be dismissed as unfounded.

125. I conclude that the second ground of appeal must be dismissed as unfounded in its entirety. Consequently, the appeal should be dismissed.

VI. The cross-appeal

A. Arguments of the parties

126. The Commission has brought a cross-appeal. It requests the Court to set aside, on the one hand, the order of 11 May 2015, whereby Freistaat Sachsen was granted leave to intervene in the action seeking partial annulment of the decision at issue, and, on the other hand, the decision contained in the judgment under appeal to declare the intervention admissible and to take into account the arguments put forward by the intervener. The Commission also requests the Court to give final judgment in the matter and to dismiss Freistaat Sachsen's application to intervene.

127. The Commission submits that its cross-appeal is admissible.

128. In that regard, the Commission contends that the order of 11 May 2015 and the decision contained in the judgment under appeal concerning the admissibility of the intervention may be the subject matter of a cross-appeal pursuant to Article 178(1) or (2) of the Rules of Procedure of the Court of Justice. The Commission argues that the decision whereby the General Court erroneously

granted an application to intervene may be challenged in the appeal brought against the final judgment, as a breach of procedure which adversely affected the Commission's interests. In taking into account, in paragraphs 20, 21, 27, 31, 55, 57, 77, 97, 98, 124, 152, 163, 176, 177 and 180 of the judgment under appeal, the arguments put forward by Freistaat Sachsen, the General Court extended the subject matter of the proceedings and adversely affected the procedural interests of the Commission.

129. In support of its cross-appeal, the Commission puts forward three grounds of appeal.

130. By its first ground of appeal, the Commission submits that the General Court infringed the second paragraph of Article 40 of the Statute of the Court of Justice in finding, at paragraph 20 of the order of 11 May 2015, that Freistaat Sachsen had an interest in the result of the case and could, therefore, intervene before the General Court by reason of the alleged economic repercussions deriving from the location of the investment in Leipzig. According to the Commission, a party has an interest in the result of the case only if that result may alter that party's legal position.

131. By its second ground of appeal, the Commission contends that, should the Court consider that an interest in the result of the case submitted to the General Court may be of an economic nature, the General Court erred in finding that Freistaat Sachsen had such an interest. It could have an interest only in an action seeking the annulment of the decision at issue in its entirety, not in an action seeking the annulment of the decision at issue in so far as it declared incompatible with the internal market the amount of aid which exceeded EUR 17 million.

132. By its third ground of appeal, the Commission claims that the General Court infringed the rules on the burden of proof, given that it did not require Freistaat Sachsen to adduce evidence in support of the allegation that it had an economic interest in the result of the case.

133. Freistaat Sachsen contends that the cross-appeal is inadmissible and, in any event, unfounded. It argues that the cross-appeal is inadmissible since, first, the decision of the General Court to grant an application to intervene does not fall within the scope of Article 178(1) or (2) of the Rules of Procedure of the Court of Justice, and, second, the first paragraph of Article 57 of the Statute provides for an appeal against the decision of the General Court to dismiss an application to intervene, not to grant that application. In any event, the cross-appeal is unfounded given that, for a person to intervene in a case before the General Court, it is sufficient that it has an economic interest in the result of that case.

134. BMW submits that the cross-appeal is inadmissible as the Commission does not explain how, in taking into account, in the judgment under appeal, the arguments put forward by Freistaat Sachsen, the General Court adversely affected the procedural interests of the Commission. BMW further submits that the cross-appeal is ineffective as the arguments at issue were raised, not only by Freistaat Sachsen, but also by BMW. In any event, the cross-appeal is unfounded.

B. Assessment

135. By its cross-appeal, the Commission seeks to have set aside, first, the order of 11 May 2015 and, second, the judgment under appeal in so far as that judgment (i) held the intervention to be admissible and (ii) at paragraphs 20, 21, 27, 31, 55, 57, 77, 97, 98, 124, 152, 163, 176, 177 and 180, took into account the arguments put forward solely by Freistaat Sachsen (as opposed to the arguments put forward by Freistaat Sachsen *and BMW*).

136. BMW and Freistaat Sachsen contend that the cross-appeal is inadmissible and, in any event, unfounded.

137. I should point out that, were the Court to find that, as I propose, the appeal should be dismissed, it may consider that there is no need to adjudicate on the cross-appeal.

138. This is because, in the present case, the cross-appeal seeks to have the judgment under appeal set aside in so far as it contains a decision whereby leave is granted to intervene, and in so far as, consequently, it takes into consideration the arguments put forward by the intervener. Were the Court to find that the General Court erred in that regard, it would not follow that the judgment under appeal should be set aside. That judgment may be set aside only if the Court finds that the General Court erred in dismissing a form of order sought, or a plea put forward, by *a party*, not by the intervener. This is because the intervener is not permitted to pursue its own forms of order or raise its own pleas.[54] Consequently, were the Court to find that the appeal must be dismissed, the judgment under appeal would be upheld even if the Court found that the General Court erred in granting Freistaat Sachsen's application to intervene.[55] I stress that the Commission itself submits that, were the Court to find that the General Court erred in granting Freistaat Sachsen's application to intervene, the judgment under appeal should not be set aside (but the breach of procedure before the General Court would thereby be remedied).

139. However, for the sake of completeness, I will examine the cross-appeal. I consider that it is inadmissible and that, aside from being ineffective, it is, in any event, unfounded.

1. Admissibility of the cross-appeal

140. Freistaat Sachsen contends that the cross-appeal is inadmissible since, first, the first paragraph of Article 57 of the Statute of the Court of Justice provides for an appeal against the decision of the General Court to dismiss an application for leave to intervene, not for an appeal against that court's decision to grant such an application; and, second, the latter decision cannot be regarded as a decision open to appeal within the meaning of Article 178(1) or (2) of the Rules of Procedure of the Court of Justice.

141. The cross-appeal is, in my view, wholly inadmissible. I will set out below the reasons why I have come to that conclusion.

142. In that regard, I will assess, first, the admissibility of the cross-appeal brought against the order of 11 May 2015; second, the admissibility of the cross-appeal brought against the judgment under appeal in so far as that judgment contains a decision relating to the admissibility of the intervention; and, third, the admissibility of the cross-appeal brought against the judgment under appeal in so far as, in that judgment, the General Court took into account the arguments allegedly put forward solely by Freistaat Sachsen. Finally, I will address the Commission's argument to the effect that the Court is obliged to rule of its own motion on the admissibility of an application to intervene before the General Court, where the intervener at first instance brings a cross-appeal before the Court of Justice or where, as in the present case, the intervener at first instance submits observations before the Court of Justice.

(a) Admissibility of the cross-appeal brought against the order of 11 May 2015

143. I consider that the cross-appeal brought by the Commission against the order of 11 May 2015, whereby the General Court granted Freistaat Sachsen's application to intervene, is inadmissible since a decision granting leave to intervene is not amenable to appeal.

54 See point 153 below.

55 See, by analogy, order of the President of the Court of 12 October 2000, Comunidad Autónoma del País Vasco *and Others* v *Council*, C-299/00 P(I), not published, EU:C:2000:566.

144. In that respect, Article 178(1) of the Rules of Procedure of the Court of Justice provides that a cross-appeal may seek to have set aside 'the decision of the General Court'. Article 178(2) of those rules further states that a cross-appeal may also seek to have set aside 'an express or implied decision relating to the admissibility of the action before the General Court'.

145. First, the order of 11 May 2015 does not fall under Article 178(2) of the Rules of Procedure of the Court of Justice since it is a decision relating to the admissibility of an intervention before the General Court, not a decision relating to the admissibility of the action before that court.

146. Second, that order does not fall either, in my opinion, under Article 178(1) of the Rules of Procedure of the Court of Justice.

147. In that regard, Article 178 of the Rules of Procedure of the Court of Justice should be read in conjunction with the first paragraph of Article 56 of the Statute.[56] The latter provision defines the decisions amenable to appeal, namely, first, 'final decisions of the General Court'; second, decisions of that court 'disposing of the substantive issues in part only'; and, third, decisions 'disposing of a procedural issue concerning a plea of lack of competence or inadmissibility'.

148. A decision granting leave to intervene cannot be regarded as a final decision within the meaning of the first paragraph of Article 56 of the Statute of the Court of Justice.[57] Nor can it be regarded as a decision disposing of the substantive issues in part only.[58] The question arises, however, whether a decision granting leave to intervene may be considered a decision disposing of a procedural issue concerning a plea of inadmissibility, given that the aforementioned provision does not specify whether it pertains to the inadmissibility of the action or the inadmissibility of the intervention.

149. According to case-law, the dismissal, by the General Court, of a plea alleging inadmissibility of the action is amenable to appeal (and to cross-appeal), even if the General Court went on to dismiss the action as unfounded.[59] That decision may be regarded as a decision disposing of a procedural issue concerning a plea of inadmissibility within the meaning of the first paragraph of Article 56 of the Statute of the Court of Justice.

56 It is true that the first paragraph of Article 56 of the Statute of the Court of Justice pertains to appeals, not to cross-appeals. However, given that there is no provision in the Statute dealing specifically with cross-appeals, I see no reason why the provisions dealing with appeals should not apply to cross-appeals.

57 The final decision of the General Court within the meaning of the first paragraph of Article 56 of the Statute of the Court of Justice is the decision bringing the proceedings before that court to an end. The following decisions should, in my view, be regarded as final decisions: the judgment upholding or dismissing the action; the decision whereby the General Court finds that there is no need to adjudicate (judgment of 18 November 2010, *ArchiMEDES* v *Commission*, C-317/09 P, not published, EU:C:2010:700, paragraphs 94 and 95); a judgment given by default (judgments of 13 November 2008, *Commission* v *Alexiadou*, C-436/07 P, not published, EU:C:2008:623, paragraph 7; of 21 April 2015, *Anbouba* v *Council*, C-605/13 P, EU:C:2015:248, paragraph 14; and of 9 June 2015, *Navarro* v *Commission*, T-556/14 P, EU:T:2015:368, paragraph 5); and a judgment dismissing an application for revision (judgments of 18 March 1999, *de Compte* v *Parliament*, C-2/98 P, EU:C:1999:158, paragraphs 15 to 23, and of 8 July 1999, *DSM* v *Commission*, C-5/93 P, EU:C:1999:364, paragraph 30).

58 A decision of the General Court disposing of the substantive issues in part only may be, for instance, a decision whereby the General Court finds that the Union incurs non-contractual liability but does not rule on the amount of damages (see, for instance, the judgment of 16 July 2009, *Commission* v *Schneider Electric*, C-440/07 P, EU:C:2009:459).

59 Judgments of 21 January 1999, *France* v *Comafrica and Others*, C-73/97 P, EU:C:1999:13; of 26 February 2002, *Council* v *Boehringer*, C-23/00 P, EU:C:2002:118, paragraph 50; of 23 March 2004, *Ombudsman* v *Lamberts*, C-234/02 P, EU:C:2004:174, paragraphs 31 to 33; of 22 February 2005, *Commission* v *max.mobil*, C-141/02 P, EU:C:2005:98, paragraphs 45 to 52; of 7 June 2007, *Wunenburger* v *Commission*, C-362/05 P, EU:C:2007:322, paragraph 37; and of 10 September 2009, *Commission* v *Ente per le Ville vesuviane* and E*nte per le Ville vesuviane* v *Commission*, C-445/07 P and C-455/07 P, EU:C:2009:529, paragraph 40. I should specify that, as regards cross-appeals, that situation now falls within the scope of Article 178(1) of the Rules of Procedure of the Court of Justice since that provision, unlike Article 169(1) of those rules (which pertains to appeals), does not specify that the subject of the cross-appeal should be the decision of the General Court 'as set out in the operative part of that decision'.

150. Conversely, the following decisions have been found *not* to be amenable to appeal: the decision of the President of the General Court not to join two cases;[60] the order whereby the General Court instructs the Commission to produce certain documents;[61] the order whereby the Civil Service Tribunal finds that it does not have jurisdiction and refers the action to the General Court, in accordance with Article 8(2) of the Annex to the Statute of the Court of Justice;[62] the order whereby the Civil Service Tribunal orders the deletion of certain passages of the written pleadings due to their defamatory nature;[63] the decision whereby the Registrar of the General Court refuses to grant the applicant's request to be represented by a Trade Mark and Design Litigator;[64] the order dismissing an application for legal aid;[65] the decision dismissing a request for the recusal of a judge;[66] and the decision of the General Court staying the proceedings until the Court of Justice delivers judgment in the proceedings brought before it for the annulment of the same measure as that challenged before the General Court.[67] Therefore, those decisions are not decisions disposing of a procedural issue within the meaning of the first paragraph of Article 56 of the Statute of the Court of Justice (otherwise they would be amenable to appeal).

151. In my view, a decision granting leave to intervene cannot be regarded as a decision disposing of a procedural issue concerning a plea of inadmissibility within the meaning of the first paragraph of Article 56 of the Statute of the Court of Justice. Admittedly, unlike most of the decisions cited in the preceding point, a decision granting leave to intervene cannot be regarded as a simple organisational measure, given (i) that the intervener at first instance may bring an appeal against the judgment of the General Court,[68] and (ii) that, should an appeal be brought by a party to the proceedings at first instance, it is regarded as a party to the proceedings before the Court of Justice.[69] However, the fact remains that the decisions cited in point 149 above, which have been found to be amenable to appeal, pertain to the admissibility of the action, not the intervention. It follows, in my view, that a decision granting leave to intervene cannot be regarded as a decision disposing of a procedural issue and that, therefore, it falls outside the scope of the first paragraph of Article 56 of the Statute of the Court of Justice.

152. Third, I should emphasise that the first paragraph of Article 57 of that Statute provides that an appeal may be brought against a decision *dismissing* an application to intervene, and that that appeal may be brought by the person whose application to intervene has been dismissed. It follows from that provision, read *a contrario*, that no appeal lies against a decision granting an application to intervene.

60 Judgment of 8 January 2002, *France* v *Monsanto and Commission*, C-248/99 P, EU:C:2002:1, paragraph 46, and order of 28 November 2008, *Combescot* v *Commission*, C-526/07 P, EU:C:2008:665, paragraph 36.

61 Order of 4 October 1999, *Commission* v *ADT Projekt*, C-349/99 P, EU:C:1999:475.

62 Judgment of 4 September 2008, *Gualtieri* v *Commission*, T-413/06 P, EU:T:2008:309, paragraphs 21 to 29; orders of 8 July 2010, *Marcuccio* v *Commission*, T-166/09 P, EU:T:2010:299, paragraphs 26 to 33; and of 12 June 2012, *Strack* v *Commission*, T-65/12 P, EU:T:2012:285, paragraphs 8 to 15.

63 Order of 14 December 2007, *Nijs* v *Court of Auditors*, T-311/07 P, EU:T:2007:394.

64 Order of 10 July 2009, *Hasbro*, C-59/09 P, not published, EU:C:2009:452.

65 Order of 12 February 2015, *Meister* v *Commission*, C-327/14 P, not published, EU:C:2015:99, paragraphs 22 and 23.

66 Order of 29 October 2015, *De Nicola* v *EIB*, T-377/15 P, not published, EU:T:2015:851.

67 Order of 26 November 2003, *Associazione bancaria italiana and Others* v *Commission*, C-366/03 P to C-368/03 P, C-390/03 P, C-391/03 P and C-394/03 P, not published, EU:C:2003:638.

68 Provided that, as required by the second paragraph of Article 56 of the Statute of the Court of Justice, the judgment of the General Court 'directly affects' it.

69 Judgment of 11 February 1999, *Antillean Rice Mills and Others* v *Commission*, C-390/95 P, EU:C:1999:66, paragraph 20.

153. Fourth, this is consistent with the ancillary nature of the intervention. According to the fourth paragraph of Article 40 of the Statute of the Court of Justice and Article 132(2) of its Rules of Procedure, an application to intervene is limited to supporting, in whole or in part, the form of order sought by one of the parties.[70] Moreover, the intervener may not raise pleas in law which were not put forward by the party supported by the intervention.[71] Therefore, should a person be erroneously granted leave to intervene, this would not alter the subject matter of the dispute.

154. Consequently, the cross-appeal brought against the order of 11 May 2015 is inadmissible.

(b) Admissibility of the cross-appeal brought against the judgment under appeal in so far it contains a decision granting the application to intervene

155. The cross-appeal seeks the annulment, not only of the order of 11 May 2015, but also of the judgment under appeal, in so far as it contains a decision granting Freistaat Sachsen's application to intervene.

156. I agree with the Commission that the judgment under appeal contains an (implied) decision whereby leave is granted to intervene. Otherwise, there would be no mention, in that judgment, of the arguments put forward by Freistaat Sachsen.

157. However, contrary to what the Commission argues, I consider that that decision is not amenable to appeal.

158. As I have shown in points 148 to 151 above, a decision of the General Court granting an application to intervene is not a 'decision' within the meaning of the first paragraph of Article 56 of the Statute of the Court of Justice. It is irrelevant, in determining whether a decision of the General Court must be regarded as a 'decision' within the meaning of that provision, whether it is contained in a separate instrument such as the order of 11 May 2015 or whether it is part of the judgment under appeal.

159. Moreover, the reasons set out in point 153 of this Opinion with regard to the cross-appeal brought against the order of 11 May 2015 apply to the cross-appeal brought against the judgment under appeal in so far as it contains a decision on the admissibility of the intervention.

160. Therefore, the cross-appeal brought against the judgment under appeal in so far as it contains a decision granting Freistaat Sachsen's application to intervene is inadmissible.

161. However, this only means that the decision of the General Court granting an application to intervene cannot be *the subject matter* of an appeal, given that it is not a 'decision' within the meaning of the first paragraph of Article 56 of the Statute of the Court of Justice. This does not mean that the admissibility of an intervention at first instance cannot be challenged at all before the Court of Justice.

70 Judgment of 10 November 2016, DTS Distribuidora de Televisión Digital v Commission, C-449/14 P, EU:C:2016:848, paragraph 121. As Advocate General Romer noted, 'our procedure does not provide for interpleader proceedings whereby a third party may pursue claims of his own against both parties to the principal action' (Opinion of Advocate General Roemer in Joined Cases *Belgium v Vloeberghs and High Authority*, 9/60-TO and 12/60-TO, EU:C:1962:17, p. 188).

71 Judgments of 7 October 2014, *Germany* v *Council*, C-399/12, EU:C:2014:2258, paragraph 27; of 10 November 2016, *DTS Distribuidora de Televisión Digital* v *Commission*, C-449/14 P, EU:C:2016:848, paragraph 121; and of 25 October 2017, *Commission* v *Council (WRC-15)*, C-687/15, EU:C:2017:803, paragraph 23.

162. Indeed, the admissibility of the intervention at first instance may be challenged by *a plea in law* alleging breach of procedure before the General Court within the meaning of the first paragraph of Article 58 of the Statute of the Court of Justice. However, that plea will be examined by the Court only if it is raised in an appeal which is admissible. For that appeal to be admissible, it must be seeking the annulment of a 'decision' of the General Court within the meaning of the first paragraph of Article 56 of the Statute of the Court of Justice. In other words, *it must have as its subject matter a decision other than that granting the application to intervene* since, as I have shown above, the latter is not a 'decision' within the meaning of that provision.

163. For instance, in *Gaki-Kakouri*, the Court examined the plea alleging that, in refusing evidence offered by a party, the General Court infringed Article 85(3) of its Rules of Procedure, the adversarial principle and the principle of equality of arms. However, in that case, the appeal did not seek the annulment of the decision of the General Court refusing the evidence. The appeal sought the annulment of the decision whereby, in the operative part of its judgment, the General Court dismissed the action brought against the Court of Justice's refusal to award the applicant, the widow of a former judge of that court, a survivor's pension.[72]

164. In the present case, in its cross-appeal, the Commission contends, not only that the decision contained in the judgment under appeal, whereby the General Court granted Freistaat Sachsen's application to intervene, is amenable to appeal,[73] but also that that decision constitutes a breach of procedure within the meaning of the first paragraph of Article 58 of the Statute of the Court of Justice. In that regard, I stress that the plea alleging that the decision granting the application to intervene is a breach of procedure is raised in a cross-appeal that seeks the annulment *of that very decision*. By contrast, in *Gaki-Kakouri*, the plea alleging that the decision refusing the evidence was a breach of procedure was raised in an appeal that sought the annulment of *another decision* of the General Court, which was set out in the operative part of its judgment. Therefore, in the present case, the plea alleging a breach of procedure before the General Court cannot be examined by the Court because it is raised in a cross-appeal which, given that it does not seek the annulment of a 'decision' within the meaning of the first paragraph of Article 56 of the Statute of the Court of Justice,[74] is inadmissible.

(c) Admissibility of the cross-appeal against the judgment under appeal in so far as it takes into account the arguments put forward solely by Freistaat Sachsen

165. Finally, the cross-appeal seeks the annulment of the judgment under appeal in so far as it takes into account the arguments put forward solely by Freistaat Sachsen, at paragraphs 20, 21, 27, 31, 55, 57, 77, 97, 98, 124, 152, 163, 176, 177 and 180.

166. I fail to see how, in accepting or rejecting *arguments*, not pleas in law or forms of order, the General Court could be regarded as having taken a 'decision' within the meaning of the first paragraph of Article 56 of the Statute of the Court of Justice. Therefore, the cross-appeal brought against the judgment under appeal in so far as it takes into account the arguments put forward solely by Freistaat Sachsen is inadmissible.

72 Judgment of 14 April 2005, *Gaki-Kakouri* v *Court of Justice*, C-243/04 P, not published, EU:C:2005:238, paragraphs 33 and 34.

73 As I have shown in points 157 to 160 above, that decision is not amenable to appeal and the cross-appeal is, therefore, inadmissible in so far as it seeks the annulment of that decision.

74 Neither the decision of the General Court granting Freistaat Sachsen's application to intervene nor its decision to dismiss the arguments put forward by Freistaat Sachsen may be regarded as 'decision[s]' within the meaning of the first paragraph of Article 56 of the Statute of the Court of Justice (see point 158 above and point 166 below).

167. In any event, it is ineffective. Indeed, in the paragraphs of the judgment under appeal cited by the Commission, either the General Court does not rule on the arguments put forward by the intervener,[75] or it considers arguments put forward by the intervener *and BMW*,[76] or it rejects arguments put forward solely by Freistaat Sachsen.[77]

(d) No obligation for the Court to rule of its own motion on the admissibility of the intervention at first instance

168. In *Stadtwerke Schwäbisch Hall*, the Court held that, when ruling on an appeal under Article 56 of its Statute, it is required to rule, *if necessary of its own motion*, on the admissibility of the action at first instance.[78]

169. The Commission relies on that judgment to claim that the Court is obliged to rule of its own motion on the admissibility of an application to intervene before the General Court where the intervener at first instance brings a cross-appeal before the Court or where it submits observations before the Court.

170. That argument cannot be accepted.

171. In the present case, the Commission challenges the admissibility of an *intervention* before the General Court, not the admissibility of the *action* before that court, which was at stake in *Stadtwerke Schwäbisch Hall* and in the subsequent case-law.[79] I should stress that, should the Court find that the General Court erred in granting an application to intervene, this would have no impact on the admissibility of the action before the General Court.[80]

172. It is true that, should the General Court erroneously grant an application to intervene, the intervener at first instance may bring an appeal against the judgment of the General Court and it may, before the Court of Justice, raise pleas which are not put forward by the party supported, at first instance, by the intervention.[81] However, I should point out that, pursuant to the second paragraph of Article 40 of the Statute of the Court of Justice, any person may intervene before the General Court if that person can establish an interest in the result of a case submitted to that court. I should also point out that, pursuant to the second paragraph of Article 56 of the Statute of the Court of Justice, interveners at first instance may bring an appeal against the judgment of the General Court *only if that judgment directly affects them*. In my view, a person that has no interest in the result of the case submitted to the General Court and that, consequently, has no right to intervene before that Court, cannot be regarded as directly affected by its judgment. In any event, the other parties to the proceedings before the Court of Justice may submit observations in response to those of the intervener at first instance.

75 Paragraphs 20, 21 and 27 are part of the section of the judgment under appeal entitled 'Procedure and forms of order sought'. Paragraphs 31, 57, 77, 152 and 163 of that judgment simply summarise the arguments put forward by the intervener. In paragraph 55, the General Court finds that it is not necessary to rule on the submission of Freistaat Sachsen.

76 See paragraphs 124, 176 and 177 of the judgment under appeal.

77 See paragraphs 97, 98 and 180 of the judgment under appeal.

78 Judgment of 29 November 2007, *Stadtwerke Schwäbisch Hall and Others* v *Commission*, C-176/06 P, not published, EU:C:2007:730, paragraph 18.

79 Judgment of 23 April 2009, *Sahlstedt and Others* v *Commission*, C-362/06 P, EU:C:2009:243, paragraphs 21 to 23; order of 23 September 2009, *Complejo Agrícola* v *Commission*, C-415/08 P, not published, EU:C:2009:574, paragraphs 21 and 22; order of 23 September 2009, *Calebus* v *Commission*, C-421/08 P, not published, EU:C:2009:575, paragraphs 21 and 22; judgment of 27 October 2011, *Austria* v *Scheucher - Fleisch and Others*, C-47/10 P, EU:C:2011:698, paragraph 97; orders of 15 February 2012, *Internationaler Hilfsfonds* v *Commission*, C-208/11 P, not published, EU:C:2012:76, paragraph 34; and of 5 September 2013, *ClientEarth* v *Council*, C-573/11 P, not published, EU:C:2013:564, paragraph 20; judgments of 27 February 2014, *Stichting Woonlinie and Others* v *Commission*, C-133/12 P, EU:C:2014:105, paragraph 32; and of 20 September 2018, *Spain* v *Commission*, C-114/17 P, EU:C:2018:753, paragraph 48.

80 This is because the intervention is ancillary to the main proceedings, not the opposite. Where the application is declared inadmissible, the intervention is devoid of purpose (order of 19 July 2017, *Lysoform Dr. Hans Rosemann and Ecolab Deutschland* v *ECHA*, C-663/16 P, not published, EU:C:2017:568, paragraphs 47 and 48).

81 Judgment of 11 February 1999, *Antillean Rice Mills and Others* v *Commission*, C-390/95 P, EU:C:1999:66, paragraphs 21 and 22.

173. I conclude that the cross-appeal is inadmissible in its entirety.

174. However, for the sake of completeness, I will show that it is, in any event, unfounded.

2. Substance

175. In support of its cross-appeal, the Commission raises three grounds of appeal, alleging, respectively, infringement of the second paragraph of Article 40 of the Statute of the Court of Justice, an error in the legal classification of facts, and an infringement of the rules on the burden of proof.

(a) The first ground of appeal, alleging infringement of the second paragraph of Article 40 of the Statute of the Court of Justice

176. In its first ground of appeal, the Commission submits that the General Court infringed the second paragraph of Article 40 of the Statute of the Court of Justice in finding, at paragraph 20 of the order of 11 May 2015, that Freistaat Sachsen had an interest in the result of the case submitted to the General Court because, by limiting the aid to EUR 17 million, the decision at issue denied Freistaat Sachsen the economic benefits deriving from aid amounting to approximately EUR 45 million.

177. Pursuant to the second paragraph of Article 40 of the Statute of the Court of Justice, any person may intervene before the Courts of the European Union if that person can establish an interest in the result of a case submitted to one of those courts.

178. It is settled case-law of the Court of Justice that the concept of 'an interest in the result of the case', within the meaning of that provision, must be defined in the light of the precise subject matter of the case and be understood as meaning a direct and existing interest in the ruling on the forms of order sought and not as an interest in relation to the pleas in law or arguments put forward. The term 'the result of the case' refers to the final decision sought, as set out in the operative part of the future judgment. In that regard, it should be ascertained, in particular, whether the applicant for leave to intervene is directly affected by the contested measure and whether his interest in the result of the case is established. In principle, an interest in the result of the case can be considered to be sufficiently direct only in so far as that result is capable of altering the legal position of the applicant to intervene. [82]

179. The Commission submits that an interest in the result of the case within the meaning of the second paragraph of Article 40 of the Statute of the Court of Justice may only be a legal interest, not an economic interest.

82 Orders of the Vice-President of the Court of 6 October 2015, *Metalleftiki kai Etairia Larymnis Larko* v *Commission*, C-385/15 P(I), not published, EU:C:2015:681, paragraphs 6 and 7; of 1 March 2016, *Cousins Material House* v *Commission*, C-635/15 P(I), not published, EU:C:2016:166, paragraphs 5 and 6; and of 17 May 2018, *United States of America v Apple Sales International and Others*, C-12/18 P(I), not published, EU:C:2018:330, paragraphs 7 and 8; orders of the President of the Court of 11 June 2018, *Comune di Milano* v *Council*, C-182/18, not published, EU:C:2018:445, paragraph 8; of 20 September 2018, *Crédit Mutuel Arkéa* v *ECB*, C-152/18 P and C-153/18 P, not published, EU:C:2018:765, paragraphs 6 to 8; of 9 October 2018, *Poland* v *Commission*, C-181/18 P, not published, EU:C:2018:826, paragraphs 5 and 6; and of 9 October 2018, *PGNiG Supply & Trading* v *Commission*, C-117/18 P, not published, EU:C:2018:897, paragraphs 5 and 6.

180. Freistaat Sachsen and BMW contend that an economic interest is sufficient. They rely on the order in *Ramondín*, where it was held that the Comunidad Autónoma de La Rioja had an interest in the result of the action seeking the annulment of the decision whereby the Commission declared incompatible the aid scheme adopted by the Territorio Histórico de Álava. In that order, the President of the Court noted that the Comunidad Autónoma de La Rioja borders the Territorio Histórico de Álava, and that Ramondín, an undertaking which had been established in La Rioja since 1971, benefited from the contested aid scheme when it relocated to Álava. [83]

181. It is true that, as the Commission stresses, the case-law cited in point 178 above requires that the legal position of the applicant to intervene is altered, or is capable of being altered, by the result of the case concerned.

182. However, according to that case-law, that requirement applies only 'in principle'. I note that, in *Ramondín*, the Comunidad Autónoma de La Rioja was considered to have an interest in the result of the case because the aid scheme caused the relocation of certain undertakings established in La Rioja, and it adversely affected the competitive situation of the undertakings which remained in La Rioja. In the present case, the decision at issue entails the construction of a new production facility in Saxony, and the applicant to intervene is, precisely, Freistaat Sachsen. The context is that of regional aid, and the applicant to intervene is the assisted region whose economic development is enhanced by the aid at issue. In my opinion, in this situation, an economic interest may be regarded as sufficiently direct. The facts of the present case differ from the facts in *Provincia di Ascoli Pisceno*, in which the Court found that an Italian region, whose economic structure was allegedly essentially dependent on shoe manufacturing, had no interest in the result of the action seeking the annulment of a regulation imposing an anti-dumping duty on imports of certain footwear with uppers of leather originating in China. [84]

183. It is true that, as the Commission alleges, in *Ramondín*, the Comunidad Autónoma de La Rioja had submitted a complaint to the Commission, whereas, in the present case, Freistaat Sachsen did not. However, in *Ramondín*, the Court did not rely on this element. Moreover, according to case-law, participation in the administrative procedure and the filing of a complaint are among the factors capable of establishing the existence of an interest in the result of the case. [85] It does not follow that the filing of a complaint is a requirement for establishing that interest.

184. Consequently, the first ground of appeal must be dismissed.

(b) The second ground of appeal, alleging an error in the classification of the facts

185. In its second ground of appeal, the Commission submits that, should the Court consider that an interest in the result of the case within the meaning of the first paragraph of Article 40 of its Statute may be an economic interest, the General Court erred in finding that Freistaat Sachsen had such an interest. According to the Commission, Freistaat Sachsen has an interest in the result of an action seeking the annulment of the decision at issue in its entirety. It does not have an interest in the result of the action seeking the annulment of the decision at issue in so far as it found that the amount of aid above EUR 17 million was incompatible with the internal market.

186. I consider that the second ground of appeal must be dismissed. In my opinion, Freistaat Sachsen has an interest in benefiting from the economic effects deriving from aid in an amount equal to three times the amount declared compatible in the decision at issue.

83 Order of the President of the Court of 6 March 2003, *Ramondín and Ramondín Cápsulas* v *Commission*, C-186/02 P, EU:C:2003:141, paragraphs 9 and 10.

84 Order of the President of the Court of 25 January 2008, *Provincia di Ascoli Piceno and Comune di Monte Urano* v *Sun Sang Kong Yuen Shoes Factory and Others*, C-461/07 P(I), not published, EU:C:2008:46, paragraph 17.

85 Order of the President of the Court of 11 June 2018, *Comune di Milano* v *Council*, C-182/18, not published, EU:C:2018:445, paragraph 16.

187. Therefore, the second ground of appeal should be dismissed as unfounded.

(c) The third ground of appeal, alleging infringement of the rules on the burden of proof

188. In its third ground of appeal, the Commission contends that, in failing to require Freistaat Sachsen to adduce evidence that it had an interest in the result of the case, the General Court infringed the rule which states that it is normally for the person alleging facts in support of a claim to adduce proof of such facts.

189. I note that, in paragraph 19 of the order of 11 May 2015, the General Court pointed out that Freistaat Sachsen had submitted that the aid at issue would create 800 jobs, would create synergies with the regional automotive industries and promote the transfer of knowledge, and would accelerate the innovation process. It is true that Freistaat Sachsen did not adduce evidence in support of those allegations of fact. However, it is also true that, in its observations on the application to intervene, the Commission did not dispute those allegations of fact, and that the General Court stressed, in paragraph 20 of the order of 11 May 2015, that they were not disputed. In my view, in those circumstances, the General Court did not infringe the rules on the burden of proof.

190. Therefore, the third ground of appeal must be dismissed as unfounded.

191. I conclude that the cross-appeal must be dismissed.

VII. Costs

192. In accordance with Article 184(2) of the Rules of Procedure, where an appeal is unfounded, the Court is to make a decision as to the costs.

193. Under Article 138(1) of the Rules of Procedure, which is applicable 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. As BMW has been unsuccessful, and as the Commission has applied for costs, BMW should be ordered to pay, in addition to its own costs, the costs incurred by the Commission in the main proceedings. Under Article 184(4) of the Rules of Procedure, where an intervener at first instance takes part in the appeal proceedings, the Court may decide that he shall bear his own costs. As Freistaat Sachsen took part in the appeal, it should bear its own costs in the main proceedings.

194. As regards the cross-appeal, since the Commission has been unsuccessful and Freistaat Sachsen has applied for costs, the Commission should be ordered to pay, in addition to its own costs, the costs incurred by Freistaat Sachsen in the cross-appeal. As BMW took part in the cross-appeal, it should bear its own costs in the cross-appeal.

VIII. Conclusion

195. I therefore consider that the Court should:

– dismiss the appeal;

– dismiss the cross-appeal;

– order Bayerische Motoren Werke AG to bear its own costs and to pay the costs incurred by the European Commission relating to the main appeal;

– order Freistaat Sachsen to bear its own costs relating to the main appeal;

– order the European Commission to bear its own costs and to pay the costs incurred by Freistaat Sachsen relating to the cross-appeal;

– order Bayerische Motoren Werke AG to bear its own costs relating to the cross-appeal.