



Press and Information

General Court of the European Union

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Judgment in Case T-47/19  
Dansk Erhverv v Commission

## **The General Court annuls the Commission decision finding that the non-charging of a deposit on certain drinks packaging sold by German border shops to customers resident in Denmark does not constitute State aid**

*The Commission was not in a position to overcome, at the preliminary stage, all the serious difficulties encountered in determining whether the non-charging of the deposit constitutes State aid*

The German Federal legislation ‘VerpackV’<sup>1</sup> transposes Directive 94/62 on packaging and packaging waste.<sup>2</sup> In respect of certain non-reusable drinks packaging, that legislation establishes a deposit scheme, including value added tax (VAT) which must be charged at each distribution level until transfer to the end-consumer and refunded on return of the packaging. Failure to collect the deposit constitutes an administrative offence punishable by a fine of up to € 100 000.

Under the division of competences laid down in the Basic Law for the Federal Republic of Germany, the implementation of that legislation is the responsibility of the regional authorities which are in a position to enforce it through administrative orders or the imposition of fines. In that context, the authorities of Schleswig-Holstein and Mecklenburg-Vorpommern (Germany) took the view that the obligation to charge the deposit did not apply to border shops if the beverages were sold only to customers resident in particular in Denmark and if those customers undertook in writing (by signing an export declaration) to consume those beverages and to dispose of their packaging outside Germany.

Taking the view that the exemption from charging the deposit on non-reusable drinks packaging amounted to granting unlawful aid incompatible with the internal market to a group of North German retail undertakings, Dansk Erhverv, a trade association representing the interests of Danish undertakings, submitted a State aid complaint to the Commission. At the end of the preliminary examination stage, the Commission adopted a decision finding that the measures at issue, namely the non-charging of the deposit, the non-collection of VAT relating to the deposit and the non-imposition of a fine on the undertakings which do not charge the deposit, do not constitute State aid within the meaning of Article 107(1) TFEU.<sup>3</sup>

On 23 January 2019, Dansk Erhverv brought an action for annulment of that decision. In its examination of that action, the General Court of the European Union provides important clarifications, first, as regards the relationship between the provisions on State aid and other provisions of EU or national law and, secondly, on the appropriate conclusions to be drawn, concerning fines, from the existence of difficulties in interpreting the applicable legislation in determining whether a State resource exists.

### Findings of the General Court

<sup>1</sup> The Verordnung über die Vermeidung und Verwertung von Verpackungsabfällen (Verpackungsverordnung) is an ordinance of 21 August 1998 on the prevention and recycling of packaging waste (BGBl. 1998 I, p. 2379).

<sup>2</sup> European Parliament and Council Directive 94/62/EC of 20 December 1994 on packaging and packaging waste (OJ 1994 L 365, p. 10).

<sup>3</sup> Commission Decision C(2018) 6315 final of 4 October 2018 concerning State Aid SA.44865 (2016/FC) – Germany – Alleged State aid to German beverage border shops.

In the first place, the General Court clarifies to what extent infringement of provisions which do not relate to the law on State aid may usefully be relied on in order to establish that a relevant decision adopted by the Commission is unlawful. In that regard, according to the General Court, a distinction must be made depending on whether the Commission's decision concerns the compatibility of aid with the internal market or whether it concerns the existence of aid. In the first situation, where aid which, by some of its conditions, contravenes other provisions of the FEU Treaty cannot be declared compatible with the internal market, failure by a national measure, classified as State aid, to have regard to provisions of the FEU Treaty other than those relating to State aid may properly be relied on to challenge the legality of a decision by which the Commission considers that such aid is compatible with the internal market.

On the other hand, according to the General Court, the same is not true of decisions on the existence of State aid. In that regard, it notes that it is true that Article 11 TFEU provides that environmental protection requirements must be integrated into the definition and implementation of EU policies and activities. However, such integration is intended to be carried out at the stage of the examination of the compatibility of aid and not that of the examination of its existence. Since the taking into account of a ground of general interest is ineffective at the stage of classification as State aid, the General Court holds that the fact that a national measure infringes provisions of EU law other than those relating to State aid cannot properly be relied on, in itself, for the purpose of establishing that that measure is State aid. It is contrary to the wording of Article 107(1) TFEU to consider that a national measure, because it infringes other provisions of the Treaties, constitutes aid even though it does not fulfil the conditions expressly laid down by that provision for the purpose of identifying aid.

According to the General Court, the same applies, a fortiori, to legislation of a Member State. The need for uniform application of EU law and the principle of equality require that the terms of a provision of EU law which makes no express reference to the law of the Member States for the purpose of determining its meaning and scope must normally be given an autonomous and uniform interpretation throughout the European Union; that interpretation must take into account the context of the provision and the purpose of the legislation in question. The General Court finds that no express reference is made to the law of the Member States in Article 107(1) TFEU. Furthermore, it is not for the Commission, but for the competent national courts, to review the legality of national measures in the light of national law. In that regard, if it were accepted that infringement of a Member State's legislation must lead the Commission to classify national measures as State aid, it might be required to decide on the lawfulness of those measures in the light of national law, in disregard of the jurisdiction of the national courts.

Thus, the General Court **rejects Dansk Erhverv's claim that the Commission should have taken into consideration, in examining whether the measure consisting of exemption from charging of the deposit was State aid, Germany's obligations under Directive 94/62, the 'polluter pays principle' and German law.**

In the second place, in examining the complaint that, in order to determine whether the non-imposition of a fine constituted an advantage financed through State resources, the Commission wrongly applied an unprecedented legal test alleging the existence of difficulties in interpreting the legislation at issue, the General Court notes that, in the present case, the non-imposition of a fine is inseparable from the non-charging of the deposit and, therefore, from the interpretation of the legislation in force accepted in practice by the competent German regional authorities. Such a context does not correspond to any of the situations hitherto considered in the case-law on fines.

In those circumstances, according to the General Court, the Commission was right to rely on a new legal test, based on the link between the interpretation of the relevant legislation and the exercise of the power to impose penalties by the authorities with that power, in order to examine whether the non-imposition a fine could be regarded as an advantage financed through State resources. The Commission was also fully entitled to take the view that the difficulties in interpreting legislation were, in principle, capable of precluding the non-imposition of a fine from being regarded as an exemption from a fine constituting State aid. The situation in which there are difficulties in interpreting a provision, non-compliance with which may be penalised by the imposition of a fine, is

clearly different, from the point of view of the advantage in question, from that in which the competent authority decides to exempt an undertaking from payment of a fine which it would have to bear under the legislation. In the first situation, unlike the position in the second, there is no pre-existing charge. In view of the uncertain scope of the provision, the existence of unlawful conduct is not obvious and the penalising of such conduct by a fine does not therefore appear, where there is such uncertainty, to be necessary or inevitable.

The General Court states, however, that the test relating to the existence of difficulties in interpreting the applicable legislation can apply only on condition that those difficulties are temporary and that they form part of a process of gradual clarification of legislative provisions. The Commission did not refer to the temporary and inherent nature of the gradual clarification of legislative provisions and difficulties of interpretation, although those two conditions must be satisfied in order for it to be possible to reach a finding that there are no State resources. As regards the temporary nature of any difficulties in interpreting the applicable legislation, the General Court notes that **the Commission does not refer to any particular circumstance capable of justifying the continuation of such uncertainty from 2005, or even 2003. Furthermore, as regards the inherent nature of the gradual clarification of the difficulties in interpreting the applicable legislation, it is noted that there is nothing in the documents before the General Court to suggest that such difficulties were in the process of being resolved.**

Consequently, **the General Court holds that the Commission erred in law in concluding that the condition relating to State resources was not satisfied without examining whether the difficulties of interpretation on which it relied were temporary and inherent in the gradual clarification of the legislative provisions.** That finding constitutes evidence from which it may be concluded that the Commission was not in a position to overcome, at that preliminary stage, all the serious difficulties encountered in determining whether the non-charging of the deposit and the non-imposition of a fine constituted State aid. **Since other evidence of serious difficulties which the Commission could not overcome at the preliminary examination stage were identified, the General Court annuls the contested decision in its entirety.**

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**NOTE:** An appeal, limited to points of law only, may be brought before the Court of Justice against the decision of the General Court within two months and ten days of notification of the decision.

**NOTE:** An action for annulment seeks the annulment of acts of the institutions of the European Union that are contrary to European Union law. The Member States, the European institutions and individuals may, under certain conditions, bring an action for annulment before the Court of Justice or the General Court. If the action is well founded, the act is annulled. The institution concerned must fill any legal vacuum created by the annulment of the act.

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The [full text](#) of the judgment is published on the CURIA website on the day of delivery

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