Provisional text

JUDGMENT OF THE COURT (Second Chamber)

28 June 2018(*)

(Appeal — State aid — German tax legislation concerning the possibility of carrying certain losses forward to future tax years (‘restructuring clause’) — Decision declaring the aid scheme incompatible with the internal market — Actions for annulment — Admissibility — Article 263, fourth paragraph, TFEU — Person individually concerned — Article 107(1) TFEU — Concept of ‘State aid’ — Condition relating to selectivity — Determination of the reference framework — Legal classification of the facts)

In Case C?203/16 P,

APPEAL under Article 56 of the Statute of the Court of Justice of the European Union, brought on 12 April 2016,

Dirk Andres, acting as liquidator in the insolvency of Heitkamp BauHolding GmbH, residing in Düsseldorf (Germany), represented by W. Niemann, S. Geringhoff and P. Dodos, Rechtsanwälte,

applicant,

the other parties to the proceedings being:

European Commission, represented by R. Lyal, T. Maxian Rusche and K. Blanck-Putz, acting as Agents,

defendant at first instance,

Federal Republic of Germany, represented by T. Henze and R. Kanitz, acting as Agents,

intervener at first instance,

THE COURT (Second Chamber),

composed of M. Ileši?, President of the Chamber, A. Rosas, C. Toader, A. Prechal and E. Jaraši?nas (Rapporteur), Judges,

Advocate General: N. Wahl,

Registrar: I. Illéssy, Administrator,

having regard to the written procedure and further to the hearing on 19 October 2017,

after hearing the Opinion of the Advocate General at the sitting on 20 December 2017,

gives the following

Judgment

1 By his appeal, Dirk Andres, acting as liquidator in the insolvency of Heitkamp BauHolding

GmbH (‘HBH’) seeks, primarily, annulment of the judgment of the General Court of the European Union of 4 February 2016, *Heitkamp BauHolding* v *Commission* (T?287/11, ‘the judgment under appeal’, EU:T:2016:60), in so far as, by that judgment, the General Court rejected as unfounded HBH’s action for the annulment of Commission Decision 2011/527/EU of 26 January 2011 on State aid C 7/10 (ex CP 250/09 and NN 5/10) implemented by Germany — Scheme for the carry-forward of tax losses in the case of restructuring of companies in difficulty (Sanierungsklausel) (OJ 2011 L 235, p. 26, ‘the contested decision’), and the annulment of that decision.

2 By its cross-appeal, the European Commission asks the Court to set aside the judgment under appeal in so far as, by that judgment, the General Court dismissed the plea of inadmissibility which it had raised against that action and, consequently, to dismiss the action at first instance as inadmissible.

Background to the dispute and the contested decision

3 The facts giving rise to the dispute and the contested decision, as set out in paragraphs 1 to 35 of the judgment under appeal, may be summarised as follows.

German law

4 In Germany, pursuant to Paragraph 10d(2) of the Einkommensteuergesetz (Law on income tax, ‘the EStG’), losses made in the course of a tax year may be carried forward to later tax years, with the result that the losses in question may be subtracted from the taxable income of the following years (‘the loss carry-forward rule’). Pursuant to Paragraph 8(1) of the Körperschaftsteuergesetz (Law on corporation tax; ‘the KStG’), the loss carry-forward rule applies to undertakings subject to corporation tax.

5 The possibility of carrying losses forward led to the acquisition, for the sole purpose of tax savings, of undertakings which had ceased trading, but whose losses could still be carried forward. In order to prevent such transactions, considered to be unlawful, the German legislature, in 1997, inserted Paragraph 8(4) into the KStG, which restricts the possibility of carrying forward losses to those companies legally and economically identical to those which incurred the losses.

6 Paragraph 8(4) of the KStG was repealed with effect from 1 January 2008 by the Unternehmensteuerreformgesetz (Business Taxation Reform Act). That law inserted a new Paragraph 8c(1) into the KStG (‘the rule governing the forfeiture of losses’) which limits or excludes the possibility of carrying forward losses where 25% or more of the shares in a company are acquired (‘the prejudicial acquisition of a shareholding’). Under that provision, if, within a period of five years, 25% to 50% of the subscribed share capital, membership rights, ownership rights or voting rights is transferred, unused losses are forfeited on a pro rata basis. Moreover, unused losses are forfeited if more than 50% of the share capital, membership rights, ownership rights or voting rights is transferred to an acquirer.

7 No exception to the rule governing the forfeiture of losses was envisaged. The tax authorities were entitled, however, in the event of a prejudicial acquisition of a shareholding whose purpose was to reorganise an undertaking in difficulty, to grant tax relief based on considerations of equity, pursuant to a decree of the Bundesministerium der Finanzen (Federal Ministry of Finance, Germany) of 27 March 2003.

8 In June 2009, the Bürgerentlastungsgesetz Krankenversicherung (Law on Citizens’ Relief — Health Insurance Fund), inserted subparagraph 1a into Paragraph 8c of the KStG (‘the restructuring clause’ or ‘the measure at issue’). Pursuant to that new provision, an entity may carry losses forward, even in the event of a prejudicial acquisition of a shareholding within the meaning

of Paragraph 8c(1) of the KStG, provided that: (i) the acquisition serves the purpose of restructuring the corporate entity, (ii) the company is, or is likely to be, insolvent or over-indebted at the time of the acquisition, (iii) the company's fundamental business structures are preserved, which essentially entails the safeguarding of jobs, a significant injection of business assets, or write-off of debts which are still recoverable, (iv) the company does not change its sector of activity during the five years following the acquisition, and (v) the company had not ceased operation at the time of the acquisition.

9 The disputed measure came into force on 10 July 2009 and was applicable retroactively from 1 January 2008, the date of entry into force of the rule governing the forfeiture of losses.

The contested decision

10 In Article 1 of the contested decision, the Commission found that 'the State aid granted unlawfully on the basis of Paragraph 8c(1a) of the [KStG], unlawfully put into effect by [the Federal Republic of Germany] ..., is incompatible with the internal market'.

11 For the purposes of the classification of the restructuring clause as State aid within the meaning of Article 107(1) TFEU, the Commission found, inter alia, that that clause created an exception to the rule established by Paragraph 8c(1) of the KStG, which provided for the forfeiture of losses not used by companies whose ownership had changed, and that that clause was therefore liable to confer a selective advantage on companies that met the requirements for benefiting therefrom, which was not justified by the nature or general scheme of the tax system, since the purpose of the measure at issue was to tackle problems due to the economic and financial crisis, an objective which was extrinsic to that system. In Articles 2 and 3 of that decision, the Commission nevertheless found that some individual aid granted under that scheme was, subject to compliance with certain conditions, compatible with the internal market.

12 In Article 4 of the contested decision, the Commission ordered the Federal Republic of Germany to recover from the beneficiaries the incompatible aid granted under the scheme referred to in Article 1 of that decision. Pursuant to Article 6 of the latter, that Member State was required, in particular, to provide the Commission with a list of those beneficiaries.

Background to the dispute

13 HBH is a company which has been at risk of insolvency since 2008. On 20 February 2009, its parent company acquired the shares therein in order to merge with it for the purposes of its restructuring. On the date of the transaction, HBH met the conditions for application of the restructuring clause. That is clear from the binding information of 11 November 2009 issued by the Finanzamt Herne (Herne tax office, Germany) ('the binding information'). Furthermore, on 29 April 2010, HBH received from the Herne tax office a notice of advance payment relating to corporation tax for the 2009 tax year, which took account of the losses carried forward pursuant to the restructuring clause.

14 By letter of 24 February 2010, the Commission informed the Federal Republic of Germany of its decision to initiate the formal investigation procedure provided for under Article 108(2) TFEU in respect of the measure at issue. By letter of 30 April 2010, the Federal Ministry of Finance ordered the German tax authorities to stop applying that measure.

15 On 27 December 2010, the notice of advance payment of 29 April 2010 was replaced by a new notice of advance payment relating to corporation tax for the 2009 tax year which did not take account of the restructuring clause. In January 2011, HBH inter alia received notices of advance payment relating to corporation tax on the subsequent tax years and which also disregarded the

restructuring clause. On 1 April 2011, it received a notice of advance payment relating to corporation tax for the 2009 tax year. Since Paragraph 8c(1a) of the KStG was not applicable, it was not able to carry forward the losses existing on 31 December 2008.

16 On 19 April 2011, the Herne tax office annulled the binding information.

17 On 22 July 2011, the Federal Republic of Germany sent the Commission the list of undertakings which had benefited from the measure at issue. It also sent the Commission a list of companies for which binding information concerning the application of the restructuring clause had been annulled, which included HBH.

The procedure before the General Court and the judgment under appeal

18 By application lodged at the Registry of the General Court on 6 June 2011, HBH brought an action for annulment of the contested decision.

19 By a separate document lodged at the Court Registry on 16 September 2011, the Commission raised an objection of inadmissibility under Article 114 of the Rules of Procedure of the General Court of 2 May 1991.

20 On 29 August 2011, the Federal Republic of Germany applied for leave to intervene in support of the form of order sought by HBH. That application was granted by order of the President of the Second Chamber of the General Court of 5 October 2011.

21 Consideration of the objection of inadmissibility was reserved for the final judgment, in accordance with Article 114(4) of those Rules of Procedure, by order of the Court of 21 May 2014.

22 In support of its action, HBH relied on two pleas in law: first, that the measure at issue was not prima facie selective and, second, that it was justified by the nature or general scheme of the system.

23 By the judgment under appeal, the General Court, on the one hand, dismissed the objection of inadmissibility; it held that HBH was directly and individually concerned by the contested decision on the ground, in essence, that it had, before the adoption of the decision to initiate the formal investigation procedure, an acquired right to a tax saving, certified by the German tax authorities, and had, in addition, an interest in bringing proceedings. The General Court further dismissed the action of HBH as unfounded.

Forms of order sought and procedure before the Court of Justice

24 By its appeal, HBH claims that the Court should:

– set aside points 2 and 3 of the operative part of the judgment under appeal, and the contested decision;

– in the alternative, annul points 2 and 3 of the operative part of the judgment under appeal and refer the case back to the General Court;

– order the Commission to pay the costs.

25 The Commission claims that the Court should dismiss the appeal and order HBH to pay the costs.

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

– set aside point 1 of the operative part of the judgment under appeal;

– dismiss the action brought at first instance as inadmissible;

– dismiss the appeal;

– set aside point 3 of the operative part of the judgment under appeal ordering the Commission to pay a third of its costs; and

– order HBH to pay the costs of the proceedings before the Court of Justice and before the General Court.

27 HBH contends that the cross-appeal should be dismissed and that the Commission should be ordered to pay the costs.

28 At the hearing, the Federal Republic of Germany presented oral observations, from which it is apparent that it supports HBH's heads of claim seeking dismissal of the cross-appeal, annulment of the judgment under appeal in so far as it dismissed the action at first instance as unfounded, and annulment of the contested decision.

The cross-appeal

29 Since the cross-appeal relates to the admissibility of the action at first instance, a question which must be resolved before turning to the merits raised by the main appeal, it is appropriate to examine it first.

Arguments of the parties

30 The Commission submits that, in paragraphs 50 to 79 of the judgment under appeal, the General Court erred in law in its interpretation of the concept of individual concern within the meaning of Article 263, fourth paragraph, TFEU.

31 First, referring to the judgments of 19 October 2000, *Italy and Sardegna Lines* v *Commission* , C?15/98 and C?105/99, EU:C:2000:570), and of 9 June 2011, *Comitato 'Venezia vuole vivere' and Others* v *Commission* (C?71/09 P, C?73/09 P and C?76/09 P, EU:C:2011:368), the Commission submits that the relevant criterion for establishing whether an applicant is individually concerned by a Commission decision declaring an aid scheme incompatible with the internal market lies in whether the applicant is an actual or potential recipient of aid granted under the scheme. Only actual recipients are individually concerned by such a decision.

32 In paragraphs 62, 70 and 74 of the judgment under appeal, the General Court based its decision not on that case-law, but on judgments which are not relevant to the present case. None of the circumstances which led to the conclusion, in the cases which gave rise to the judgments of 17 January 1985, *Piraiki-Patraiki and Others* v *Commission* (11/82, EU:C:1985:18); of 22 June 2006, *Belgium and Forum 187* v *Commission* (C?182/03 and C?217/03, EU:C:2006:416); of 17 September 2009, *Commission* v *Koninklijke FrieslandCampina* (C?519/07 P, EU:C:2009:556); of 27 February 2014, *Stichting Woonpunt and Others* v *Commission* (C?132/12 P, EU:C:2014:100); and of 27 February 2014, *Stichting Woonlinie and Others* v *Commission* (C?133/12 P, EU:C:2014:105), on which the General Court relies in those paragraphs, that the applicants were individually concerned, are material in the present case.

33 Thus, contrary to what the General Court stated at paragraphs 63 and 74 of the judgment under appeal, the assessment of the admissibility of the action at first instance does not depend on the ‘factual and legal situation’ of HBH or the existence of an ‘acquired right’, but exclusively on whether HBH did indeed receive aid under the aid scheme in question. Paragraphs 75 and 76 of the judgment under appeal are also allegedly flawed in that, by the judgment of 9 June 2011, *Comitato ‘Venezia vuole vivere’ and Others* v *Commission* (C?71/09 P, C?73/09 P and C?76/09 P, EU:C:2011:368), on which the General Court relied in paragraph 76 of that judgment, it can only be inferred that it is irrelevant, for the purposes of assessing individual concern, that the Commission’s decision is accompanied by a recovery order of aid actually granted.

34 Secondly, the Commission notes that the determining factor used by the General Court, in its analysis of the ‘factual and legal situation’ of HBH, in order to establish that it is individually concerned by the contested decision, is the existence of an ‘acquired right’ referred to at paragraph 74 of the judgment under appeal. If that ‘acquired right’ were to be understood as an acquired right within the meaning of EU law, then the General Court erred in law. Such a right can be afforded only pursuant to the principle of the protection of legitimate expectations and, according to the case-law of the Court, the benefit of that protection is excluded in principle as regards aid granted in breach of the obligation of notification laid down in Article 108(3) TFEU.

35 Thirdly, on the basis of that observation, the Commission submits that, in the event that, by ‘acquired right’, the Court was concerned with a right acquired under national law, it also erred in law, since the benefit derived from a right acquired under national law is, in the circumstances of the present case, also contrary to the case-law excluding, in the case of aid granted in breach of Article 108(3) TFEU, the benefit derived from such a right.

36 Point 1 of the operative part of the judgment under appeal should therefore be set aside and, since HBH is not an actual beneficiary of the aid scheme in question, the application at first instance should be dismissed as inadmissible.

37 HBH and the Federal Republic of Germany submit that the cross-appeal is unfounded.

Findings of the Court

38 Under the fourth paragraph of Article 263 TFEU, any natural or legal person may, under the conditions laid down in the first and second paragraphs of that article, institute proceedings against an act addressed to that person or which is of direct and individual concern to them, and against a regulatory act which is of direct concern to them and does not entail implementing measures.

39 In the present case, first, it is common ground that, as the General Court observed in paragraph 57 of the judgment under appeal, the contested decision is addressed solely to the Federal Republic of Germany. Moreover, as is apparent from paragraphs 58 to 79 of that judgment, whereas HBH was directly and individually concerned by that decision, and thus by virtue of the second situation referred to in that provision, the General Court held that HBH had locus standi.

40 By the first part of its single ground of appeal, the Commission submits, in essence, that, in paragraphs 62, 63, 70 and 74 to 77 of the judgment under appeal, the General Court erred in law in assessing the condition of admissibility of HBH’s action in the light of the latter’s factual and legal situation, whereas the only relevant criterion was whether it was an actual or potential recipient of the aid scheme in question.

41 According to the settled case-law of the Court, persons other than those to whom a decision

is addressed may claim to be individually concerned only if the decision affects them by reason of certain attributes peculiar to them or by reason of circumstances in which they are differentiated from all other persons and if, by virtue of those factors, it distinguishes them individually in the same way as the person addressed (judgments of 15 July 1963, *Plaumann* v *Commission*, 25/62, EU:C:1963:17, p. 107, and of 27 February 2014, *Stichting Woonpunt and Others* v *Commission*, C?132/12 P, EU:C:2014:100, paragraph 57).

42 The possibility of determining more or less precisely the number, or even the identity, of the persons to whom a measure applies by no means implies that it must be regarded as being of individual concern to them as long as that measure is applied by virtue of an objective legal or factual situation defined by it (judgments of 16 March 1978, *Unicme and Others* v *Council*, 123/77, EU:C:1978:73, paragraph 16, and of 19 December 2013, *Telefónica* v *Commission*, C?274/12 P, EU:C:2013:852, paragraph 47 and the case-law cited).

43 Thus, the Court stated that an undertaking cannot, as a general rule, contest a decision of the Commission which prohibits a sectoral aid scheme if it is concerned by that decision solely by virtue of belonging to the sector in question and being a potential beneficiary of the scheme. Such a decision is, vis-à-vis such an undertaking, a measure of general application covering situations which are determined objectively and entails legal effects for a class of persons envisaged in a general and abstract manner (see judgments of 19 October 2000, *Italy and Sardegna Lines* v *Commission*, C?15/98 and C?105/99, EU:C:2000:570, paragraph 33 and the case-law cited, and of 19 December 2013, *Telefónica* v *Commission*, C?274/12 P, EU:C:2013:852, paragraph 49).

44 In contrast, where the decision affects a group of persons who were identified or identifiable when that measure was adopted by reason of criteria specific to the members of the group, those persons might be individually concerned by that measure inasmuch as they form part of a limited class of traders (judgments of 13 March 2008, *Commission* v *Infront WM*, C?125/06 P, EU:C:2008:159, paragraph 71 and the case-law cited, and of 27 February 2014, *Stichting Woonpunt and Others* v *Commission*, C?132/12 P, EU:C:2014:100, paragraph 59).

45 Thus, the actual recipients of individual aid granted under an aid scheme of which the Commission has ordered the recovery are, accordingly, individually concerned within the meaning of the fourth paragraph of Article 263 TFEU (see, to that effect, judgment of 19 October 2000, *Italy and Sardegna Lines* v *Commission*, C?15/98 and C?105/99, EU:C:2000:570, paragraphs 34 and 35; see, also, judgment of 9 June 2011, *Comitato 'Venezia vuole vivere' and Others* v *Commission*, C?71/09 P, C?73/09 P and C?76/09 P, EU:C:2011:368, paragraph 53).

46 Admittedly, as argued by the Commission, it follows from that case-law that the Court, on the one hand, acknowledges that the actual recipients of individual aid granted under an aid scheme incompatible with the internal market are individually concerned by a Commission decision declaring that scheme incompatible with the internal market and ordering its recovery, and, on the other hand, precludes an applicant from being regarded as individually concerned merely because it is a potential beneficiary of the scheme. However, it cannot be inferred, as the Commission claims, that, where a Commission decision declaring an aid scheme incompatible with the internal market is at issue, the only relevant criterion for the purpose of determining whether an applicant is individually concerned, within the meaning of the fourth paragraph of Article 263 TFEU, by such a decision, is whether the applicant is an actual or potential recipient of aid granted under the scheme.

47 As also noted, in essence, by the Advocate General in points 57, 59, 67 and 68 of his Opinion, the case-law cited in paragraphs 43 and 45 of the present judgment, in the specific context of State aid, is merely a specific expression of the relevant legal test for assessing individual concern, within the meaning of the fourth paragraph of Article 263 TFEU, stemming from

the judgment of 15 July 1963, *Plaumann* v *Commission* (25/62, EU:C:1963:17). According to that judgment, an applicant is individually concerned by a decision addressed to another person where that decision affects them by reason of certain attributes which are peculiar to them, or by reason of circumstances in which they are differentiated from all other persons (see also, in the field of State aid, judgments of 19 October 2000, *Italy and Sardegna Lines* v *Commission*, C?15/98 and C?105/99, EU:C:2000:570, paragraph 32, and of 9 June 2011, *Comitato 'Venezia vuole vivere' and Others* v *Commission*, C?71/09 P, C?73/09 P and C?76/09 P, EU:C:2011:368, paragraph 52, and, in other fields, judgments of 17 January 1985, *Piraiki-Patraiki and Others* v *Commission*, 11/82, EU:C:1985:18, paragraphs 11, 19 and 31, and of 13 March 2018, *European Union Copper Task Force* v *Commission*, C?384/16 P, EU:C:2018:176, paragraph 93).

48 Consequently, the fact that an applicant may fall within or outside the category of actual or potential recipients of individual aid granted under an aid scheme declared incompatible with the internal market by a Commission decision is not decisive as regards determining whether the applicant is individually concerned by that decision, where it is in any event established that the applicant is otherwise affected by it by reason of certain attributes which are peculiar to it or a factual situation which differentiates it from all other persons.

49 It follows from the foregoing that it is without erring in law that, after setting out, in paragraphs 60 to 62 of the judgment under appeal, the case-law set out in paragraphs 41 to 44 of the present judgment, the General Court, in paragraph 63 of the judgment under appeal, committed 'to determine whether, given its legal and factual situation, [HBH] must be regarded as being individually concerned by the contested decision'.

50 It also follows that it is without erring in law that, in paragraphs 62, 70 and 74 of the judgment under appeal, the General Court, in support of its analysis, relied on the judgments referred to in paragraph 32 of the present judgment, since they all consist in applying the criterion of individual concern laid down in the judgment of 15 July 1963, *Plaumann* v *Commission* (25/62, EU:C:1963:17), in circumstances where, as in the present case, the specific expression of that case-law, taking the form of a distinction between the actual and potential recipients of individual aid granted under an aid scheme declared incompatible with the internal market, did not appear relevant.

51 Likewise, nor did the General Court err in law, in paragraphs 75 and 76 of the judgment under appeal, in rejecting the Commission's argument that only an advantage effectively granted through State resources could establish that HBH was individually concerned on the basis of the judgment of 9 June 2011, *Comitato 'Venezia vuole vivere' and Others* v *Commission* (C?71/09 P, C?73/09 P and C?76/09 P, EU:C:2011:368). As has already been stated in paragraph 47 of present judgment, in order to establish that an applicant is individually concerned, within the meaning of the fourth paragraph of Article 263 TFEU, by a Commission decision declaring an aid scheme incompatible with the internal market, the relevant criterion is whether the applicant is affected by that decision by reason of certain attributes which are peculiar to it or a factual situation which differentiates it from all other persons, which the General Court also correctly recalled in paragraph 76 of the judgment under appeal.

52 Consequently, since the first part of the single ground of appeal of the cross-appeal is unfounded, it must be rejected.

53 As regards the second and third parts of that single ground of appeal, it should be recalled that, in them, the Commission alleges that the General Court, in paragraph 74 of the judgment under appeal, erred in law in holding that HBH was individually concerned on the ground that that company had had an 'acquired right' to receive aid under the measure at issue.

54 In that respect, it should be noted that, in paragraph 74 of that judgment, the General Court stated in particular that ‘in the present case, ... it was found that, because of the particularities of the German tax legislation, [HBH] had an acquired right to a tax saving, certified by the German tax authorities ..., that circumstance setting it apart from other operators which are concerned only as potential beneficiaries of the measure at issue’, referring in that respect to paragraph 68 of the judgment.

55 In paragraph 68 of that judgment, the General Court found that the circumstances which it had identified in paragraphs 66 and 67 of that judgment as characterising HBH’s legal and factual situation within the meaning of the judgment of 15 July 1963, *Plaumann* v *Commission* (25/62, EU:C:1963:17), had been certified by the German tax authorities, in particular by means of binding information. Those circumstances consisted, on the one hand, in the fact that, prior to the initiation of the formal investigation procedure by the Commission, HBH had a right, under German legislation, to carry its losses forward where the conditions stipulated by the restructuring clause were satisfied and, on the other, in the fact that, during 2009, HBH made taxable profits from which it claims to have deducted the losses carried forward under the restructuring clause.

56 It concluded, in paragraph 69 of the judgment under appeal, that, ‘pursuant to the German legislation, it was certain that, at the close of the 2009 tax year, [HBH] would have made a tax saving, which it was, moreover, able to quantify precisely’, since ‘the German authorities had no discretion with regard to the application of the measure at issue, the realisation of that tax saving was only a matter of time, under the detailed rules for the implementation of the tax system’. In point 69, it stated that, consequently, HBH ‘had an acquired right, certified by the German authorities before the adoption of the opening decision and, subsequently, of the contested decision, to the application of that tax saving, which, had it not been for those decisions, would have crystallised as a result of the issue of a tax assessment authorising the loss carry-forward and the consequent posting thereof to the applicant’s balance sheet’ and that it ‘was, therefore, easily identifiable by the German tax authorities and the Commission’.

57 It concluded, in paragraph 70 of the judgment under appeal, that HBH ‘may not be regarded solely as an undertaking concerned by the contested decision because it belongs to the sector in question and because of its status as a potential beneficiary, but must rather be seen as being part of a closed category of traders, who were identified or at least readily identifiable at the time of the adoption of the contested decision, within the meaning of the judgment [of 15 July 1963, *Plaumann* v *Commission* (25/62, EU:C:1963:17)]’.

58 It is thus apparent from a reading of the relevant passages of the judgment under appeal that the use by the General Court, in paragraph 74 of that judgment, of the words ‘acquired right’ was intended only to refer briefly to HBH’s specific factual and legal situation, making it possible to regard it as being individually concerned by the contested decision within the meaning of the judgment of 15 July 1963, *Plaumann* v *Commission* (25/62, EU:C:1963:17).

59 Since the second and third parts of the single ground of appeal are thus based on a misreading of the judgment under appeal, they must be rejected as unfounded, and, accordingly, the cross-appeal must be dismissed in its entirety.

The main appeal

60 In support of its appeal, HBH relies on two grounds, the first alleging infringement of the obligation to state reasons to which the General Court is subject, and the second alleging infringement of Article 107 TFEU. The second ground of appeal must be examined first of all.

Arguments of the parties

61 By its second ground of appeal, HBH submits, first, that the General Court infringed Article 107 TFEU in that, in confirming the Commission's position that the rule governing the forfeiture of losses constitutes the relevant reference framework in the present case, it established that reference framework incorrectly. In paragraphs 103 and 106 of the judgment under appeal, the General Court, first of all, correctly identified the general tax scheme, namely the loss carry-forward rule. However, it is the rule governing the forfeiture of losses provided for in Paragraph 8c(1) of the KStG and, therefore, the exception to the general scheme, that it accepted as constituting the applicable common or normal tax regime for the purposes of assessing the condition relating to selectivity. It incorrectly failed to take account of the loss carry-forward rule. By classifying an exception to the general tax system as a 'reference framework', the General Court erred in law or, at the very least, distorted the evidence submitted to it or national law.

62 Establishing the common or normal tax regime by combining the basic rule and the exception also constitutes an error of law, especially since the rules which the General Court is alleged to have combined in paragraph 104 of the judgment under appeal do not fall on the same legal footing, the loss carry-forward rule constituting an expression of the constitutional principle of taxation according to ability to pay.

63 Furthermore, it is clear from paragraphs 104 and 107 of the judgment under appeal that the General Court, in its identification of the reference framework, also conflated the first and second stages of the examination of the condition relating to selectivity and thus incorrectly applied the case-law.

64 Secondly, the General Court infringed Article 107 TFEU in its review of the a priori selective nature of the measure at issue. On the one hand, it erred in law in holding that the legal and factual situation of the undertakings requiring restructuring and that of the healthy companies were comparable. In particular, the objective, pursued by all provisions relating to taxation, of generating tax revenue does not suffice to give rise to the comparability of the situations of the operators concerned.

65 On the other hand, the restructuring clause is a general measure. Paragraph 141 of the judgment under appeal conflicts with the case-law according to which the only relevant factor for the purposes of assessing the general nature of a measure is whether it applies irrespective of the nature or scope of the business of the undertaking or if its application requires the undertaking to change its activity.

66 Thirdly, the General Court is alleged to have infringed Article 107 TFEU in rejecting the justification for the restructuring clause. In paragraphs 158 to 160 and 164 to 166 of the judgment under appeal, it incorrectly held that the purpose of that clause is to promote the restructuring of undertakings in difficulty and concluded that that objective was extrinsic to the tax system. In paragraphs 166 to 170 of that judgment, it also rejected the justification based on the principle of taxation according to ability to pay.

67 HBH also submits that the second ground of appeal is admissible, since it raises only questions of law. In particular, it does not relate to the assessment of facts, but to the application of erroneous criteria in order to determine the reference framework and the legal characterisation of the facts by the General Court, which is subject to review by the Court in the context of an appeal.

68 The Commission contends, primarily, that the second ground of appeal is inadmissible. The

first and third parts thereof relate to the determination of national law, and thus also matters of fact. In any event, in so far as, by the first part of that ground of appeal, HBH criticises the General Court for having determined the reference framework by taking account of a regulation applicable only to a specific group of companies, it is based on a misreading of paragraphs 103 to 109 of the judgment under appeal. It follows that the General Court merely identified the law applicable to all undertakings, insofar as economic identity and continuity are the decisive factor in respect of the carry-forward of losses, and they are issues of fact.

69 Consequently, the second part of the second ground of appeal is also inadmissible. On the one hand, the issue of the comparability of the situation of economic operators and that of identifying the relevant objective in that regard are questions of fact. On the other, the General Court erred in law in declaring admissible the argument which was submitted to it by HBH concerning the classification of the contested measure as a general measure, since it could not be regarded as an expansion of the first part of the first plea raised before it.

70 In the alternative, the second ground of appeal is unfounded. First of all, the argument put forward by HBH regarding the definition of the reference framework is not supported either by German law or by the documents submitted to the Court. In addition, the German legislature itself established the rule governing the forfeiture of losses as being the new basic rule. The General Court did not therefore err in stating that, further to the introduction of Paragraph 8c(1) of the KStG, the abolition of the loss carry-forward rule in the event of a prejudicial acquisition of a shareholding is the new rule of principle of German tax law.

71 Secondly, HBH’s argument relating to the alleged lack of comparability of the situation of the relevant traders stems from a misreading of the judgment under appeal. On the one hand, from the point of view of the change in economic identity, there is no difference between companies requiring restructuring and those which require no such restructuring.

72 On the other hand, the restructuring clause is not a general measure, but a selective measure. In that regard, the judgment of 7 November 2014, *Autogrill España* v *Commission* (T?219/10, EU:T:2014:939), does not effectively support the position of HBH.

73 Thirdly, the General Court correctly established, in its unappealable assessment of the facts, that the purpose of the restructuring clause is to help struggling businesses. In any event, the argument that the purpose of that clause is to prevent excessive taxation is ineffective, since the General Court, at paragraphs 167 to 173 of the judgment under appeal, found that there was no justification even if that objective is retained. Furthermore, the General Court also correctly rejected the arguments based on German constitutional law and fictitious profits.

74 The Federal Republic of Germany submits that the General Court, like the Commission, erred in law when determining the reference framework. Referring to the judgments of 15 November 2011, *Commission and Spain* v *Government of Gibraltar and United Kingdom* (C?106/09 P et C?107/09 P, EU:C:2011:732), and of 21 December 2016, *Commission* v *World Duty Free and Others*, (C?20/15 P et C?21/15 P, EU:C:2016:981), that Member State notes that, in order to classify a measure as ‘selective’, the Commission must first identify the normal tax regime applicable in the Member State concerned and then demonstrate that the measure under examination differentiates between undertakings which, in the light of the objective pursued by that regime, find themselves in a comparable factual and legal situation. For those purposes, an approach based solely on the regulatory technique cannot be accepted.

75 In the present case, however, the Commission’s approach was based solely on the regulatory technique; the General Court, in failing to call it into question even though it is contrary to the case-law of the Court, erred in law. Thus, in the judgment under appeal, the General Court

correctly recorded the content and scope of the relevant tax provisions, but gave them an incorrect legal characterisation.

Findings of the Court

76 By the first part of its second ground of appeal, HBH, supported by the Federal Republic of Germany, submits, in essence, that the General Court, in paragraphs 103 to 107 of the judgment under appeal, incorrectly determined the reference framework within which the selectivity of the measure at issue was to be examined.

77 Since the Commission objected to the admissibility of that first limb, on the ground that it concerned questions of fact, it should be noted that, admittedly, the assessment of facts and evidence does not constitute, save where the clear sense of the facts and evidence has been distorted, a question of law which is subject, as such, to review by the Court of Justice in the context of an appeal. However, where the General Court has determined or assessed the facts, the Court of Justice has jurisdiction under Article 256 TFEU to review their legal characterisation and the legal conclusions which were drawn therefrom (judgments of 3 April 2014, *France* v *Commission*, C?559/12 P, EU:C:2014:217, paragraph 78 and the case-law cited, and of 20 December 2017, *Comunidad Autónoma del País Vasco and Others* v *Commission*, C?66/16 P to C?69/16 P, EU:C:2017:999, paragraph 97).

78 Thus, with respect to the assessment, in the context of an appeal, of the General Court's findings on national law, which, in the field of State aid, constitute findings of fact, the Court of Justice has jurisdiction only to determine whether that law was distorted (see, to that effect, judgments of 3 April 2014, *France* v *Commission*, C?559/12 P, EU:C:2014:217, paragraph 79 and the case-law cited, and of 20 December 2017, *Comunidad Autónoma del País Vasco and Others* v *Commission*, C?66/16 P to C?69/16 P, EU:C:2017:999, paragraph 98). By contrast, since the assessment, in the context of an appeal, of the legal classification which has been given to that national law by the General Court in the light of a provision of EU law constitutes a question of law, it falls within the jurisdiction of the Court of Justice (see, to that effect, judgments of 3 April 2014, *France* v *Commission*, C?559/12 P, EU:C:2014:217, paragraph 83, and of 21 December 2016, *Commission* v *Hansestadt Lübeck*, C?524/14 P, EU:C:2016:971, paragraphs 61 to 63).

79 In the present case, it must be stated that, by that first part, HBH is not disputing the content or the scope of national law as found by the General Court, but rather the classification as a 'reference framework' which, like the Commission in the contested decision, the General Court gave to the rule governing the forfeiture of losses.

80 However, the concept of 'reference framework' refers to the first step of the assessment of the condition relating to the selectivity of the advantage, which, according to the case-law of the Court, is a constituent factor in the concept of 'State aid' within the meaning of Article 107(1) TFEU (judgments of 15 November 2011, *Commission and Spain* v *Government of Gibraltar and United Kingdom*, C?106/09 P and C?107/09 P, EU:C:2011:732, paragraph 74 and the case-law cited, and of 21 December 2016, *Commission* v *World Duty Free Group and Others*, C?20/15 P and C?21/15 P, EU:C:2016:981, paragraph 54).

81 Since the purpose of HBH's line of argument is to call into question the legal characterisation of the facts by the General Court, the first part of the second ground of appeal is admissible.

82 On the merits, it should be recalled that, according to the Court's settled case-law, classification of a national measure as 'State aid', within the meaning of Article 107(1) TFEU, requires all the following conditions to be fulfilled. First, there must be an intervention by the State

or through State resources. Second, the intervention must be liable to affect trade between Member States. Third, it must confer a selective advantage on the recipient. Fourth, it must distort or threaten to distort competition (judgments of 10 June 2010, *Fallimento Traghetti del Mediterraneo*, C?140/09, EU:C:2010:335, paragraph 31 and the case-law cited, and of 21 December 2016, *Commission* v *World Duty Free Group and Others*, C?20/15 P and C?21/15 P, EU:C:2016:981, paragraph 53 and the case-law cited).

83 So far as concerns the condition relating to the selectivity of the advantage, it is clear from settled case-law that, in order to assess that condition, it is necessary to determine whether, under a particular legal regime, the national measure in question is such as to favour ‘certain undertakings or the production of certain goods’ over others which, in the light of the objective pursued by that regime, are in a comparable factual and legal situation and which are accordingly subject to different treatment that can, in essence, be classified as discriminatory (see judgment of 21 December 2016, *Commission* v *World Duty Free Group and Others*, C?20/15 P and C?21/15 P, EU:C:2016:981, paragraph 54 and the case-law cited).

84 Further, where the measure at issue is conceived as an aid scheme and not as individual aid, it is for the Commission to establish that that measure, although it confers an advantage of general application, confers the benefit of that advantage exclusively on certain undertakings or certain business sectors (judgment of 21 December 2016, *Commission* v *World Duty Free Group and Others*, C?20/15 P and C?21/15 P, EU:C:2016:981, paragraph 55 and the case-law cited).

85 As regards, in particular, national measures that confer a tax advantage, it must be recalled that a measure of that nature which, although not involving the transfer of State resources, places the recipients in a more favourable position than other taxpayers is capable of procuring a selective advantage for the recipients and, consequently, constitutes State aid, within the meaning of Article 107(1) TFEU. On the other hand, a tax advantage resulting from a general measure applicable without distinction to all economic operators does not constitute aid within the meaning of that provision (see, to that effect, judgment of 15 November 2011, *Commission and Spain* v *Government of Gibraltar and United Kingdom*, C?106/09 P and C?107/09 P, EU:C:2011:732, paragraphs 72 and 73 and the case-law cited; see, also, judgment of 21 December 2016, *Commission* v *World Duty Free Group and Others*, C?20/15 P and C?21/15 P, EU:C:2016:981, paragraph 56).

86 In that context, in order to classify a national tax measure as ‘selective’, the Commission must begin by identifying the ordinary or ‘normal’ tax system applicable in the Member State concerned, and thereafter demonstrate that the tax measure at issue is a derogation from that ordinary system, in so far as it differentiates between operators who, in the light of the objective pursued by that ordinary tax system, are in a comparable factual and legal situation (see to that effect, inter alia, judgment of 21 December 2016, *Commission* v *World Duty Free Group and Others*, C?20/15 P and C?21/15 P, EU:C:2016:981, paragraph 57 and the case-law cited).

87 The concept of ‘State aid’ does not, however, cover measures that differentiate between undertakings which, in the light of the objective pursued by the legal regime concerned, are in a comparable factual and legal situation, and are, therefore, a priori selective, where the Member State concerned, thirdly, is able to demonstrate that that differentiation is justified since it flows from the nature or general structure of the system of which the measures form part (see, to that effect, judgment of 6 September 2006, *Portugal* v *Commission*, C?88/03, EU:C:2006:511, paragraph 52; see also judgment of 21 December 2016, *Commission* v *World Duty Free Group and Others*, C?20/15 P and C?21/15 P, EU:C:2016:981, paragraph 58 and the case-law cited).

88 The examination of the selectivity condition therefore implies, in principle, the determination, first, of the reference framework within which the measure concerned falls, that determination

being of greater importance in the case of tax measures, since the very existence of an advantage may be established only when compared with ‘normal’ taxation (see, to that effect, judgments of 6 September 2006, *Portugal* v *Commission*, C?88/03, EU:C:2006:511, paragraph 56, and of 21 December 2016, *Commission* v *Hansestadt Lübeck*, C?524/14 P, EU:C:2016:971, paragraph 55).

89 Thus, the determination of the set of undertakings which are in a comparable factual and legal situation depends on the prior definition of the legal regime in the light of whose objective it is necessary, where applicable, to examine whether the factual and legal situation of the undertakings favoured by the measure in question is comparable with that of those which are not (judgment of 21 December 2016, *Commission* v *Hansestadt Lübeck*, C?524/14 P, EU:C:2016:971, paragraph 60).

90 However, the classification of a tax system as ‘selective’ is not conditional upon that system being designed in such a way that undertakings which might enjoy a selective advantage are, in general, subject to the same tax burden as other undertakings but benefit from derogating provisions, so that the selective advantage may be identified as being the difference between the normal tax burden and that borne by those former undertakings (judgment of 15 November 2011, *Commission and Spain* v *Government of Gibraltar and United Kingdom*, C?106/09 P and C?107/09 P, EU:C:2011:732, paragraph 91).

91 Such an interpretation of the selectivity criterion would require that in order for a tax system to be classifiable as ‘selective’ it must be designed in accordance with a certain regulatory technique; the consequence of this would be that national tax rules fall from the outset outside the scope of control of State aid on account of the sole fact that they were adopted under a different regulatory technique although, by adjusting and combining various tax rules, they produce the same effects in law and/or in fact. It therefore conflicts with settled case-law that Article 107(1) TFEU does not distinguish between measures of State intervention by reference to their causes or their aims but defines them in relation to their effects, and thus independently of the techniques used (see, to that effect, judgment of 15 November 2011, *Commission and Spain* v *Government of Gibraltar and United Kingdom*, C?106/09 P and C?107/09 P, EU:C:2011:732, paragraphs 87, 92 and 93 and the case-law cited).

92 If, on the basis of that case-law, the use of a regulatory technique cannot enable national tax rules to escape from the outset the scrutiny concerning State aid provided for under the FEU Treaty, resorting to the regulatory technique used is not sufficient to define the relevant reference framework for the purposes of assessing the condition relating to selectivity, except in order to ensure that the form of State intervention prevails decisively over its effects. Consequently, as also noted, in essence, by the Advocate General in point 108 of his Opinion, the regulatory technique used cannot be decisive for the purposes of determining the reference framework.

93 However, it also follows from that case-law that while, for the purposes of establishing the selectivity of a tax measure, the regulatory technique used is not decisive, with the result that it is not always necessary for it to derogate from a common tax system, the fact that it is a derogation as a result of the use of that regulatory technique is relevant for those purposes where it follows that two categories of operators are distinguished and a priori treated differently, namely those covered by the derogation and those which are covered by the ordinary taxation regime, even though those two categories are in a comparable situation with regard to the objective pursued by that system (see, to that effect, judgment of 21 December 2016, *Commission* v *World Duty Free Group and Others*, C?20/15 P and C?21/15 P, EU:C:2016:981, paragraph 77).

94 Further, it must be recalled that the fact that only taxpayers satisfying the conditions for the application of a measure may benefit from the measure does not, in itself, make it selective (judgments of 29 March 2012, *3M Italia*, C?417/10, EU:C:2012:184, paragraph 42, and of 21

December 2016, *Commission* v *World Duty Free Group and Others*, C?20/15 P and C?21/15 P, EU:C:2016:981, paragraph 59).

95 It is in the light of those considerations that the Court must examine whether, as maintained by HBH and the Federal Republic of Germany, the General Court disregarded, in the present case, Article 107(1) TFEU, as interpreted by the Court of Justice, in holding that the Commission had not erred in holding that the relevant reference framework for assessing the selectivity of the measure at issue was constituted by the rule governing the forfeiture of losses.

96 In that regard, it should be noted that, in paragraph 103 of the judgment under appeal, the General Court noted that 'in the contested decision, the Commission established ... the rule governing the forfeiture of losses as being the general rule in respect of which it was appropriate to examine whether there was a distinction between the undertakings that were in a comparable factual and legal situation, while [HBH] refers to the more general rule of loss carry-forward, which applies to all taxation'.

97 It also pointed out, in paragraph 104 of that judgment, that 'it is open to all undertakings to make use of the loss carry-forward rule in the context of the levying of corporation tax' and that 'the rule governing the forfeiture of losses restricts the use of that option in the event of the acquisition of a shareholding equal to or greater than 25% of the share capital and withdraws it in the event of the acquisition of more than 50% of the share capital', stating that 'the latter rule therefore applies systematically to all cases of a change of ownership of 25% or more of a company's share capital, without drawing any distinction on the basis of the nature or characteristics of the undertakings concerned'.

98 In paragraph 105 of that judgment, the General Court additionally stated 'furthermore, the restructuring clause is worded in the form of an exception to the rule governing the forfeiture of losses and applies only to those well-defined situations which are subject to that rule'.

99 In paragraph 106 of that judgment, it concluded that 'it is clear that the rule governing the forfeiture of losses, like the loss carry-forward rule, is part of the legislative framework in the context of which the measure at issue arises', that 'in other words, the general loss carry-forward rule, as limited by the rule governing the forfeiture of losses, constitutes the relevant legal framework in the present case, and [that] it is precisely within that framework that it is appropriate to check whether the measure at issue differentiates between operators in a comparable factual and legal situation'.

100 In paragraph 107 of the judgment under appeal, the General Court held that 'the Commission did not err when, while noting the existence of a more general rule, namely the loss carry-forward rule, it determined that the legislative framework of reference established in order to assess the selectivity of the measure at issue was constituted by the rule governing the forfeiture of losses'.

101 As submitted by HBH and the Federal Republic of Germany, that reasoning led the General Court to classify incorrectly the rule governing the forfeiture of losses as the reference framework within the meaning of the case-law on Article 107(1) TFEU, while excluding from that reference framework the general rule of loss carry-forward.

102 It is apparent from that reasoning that, although the General Court found that there was a general tax rule applicable to all undertakings subject to corporation tax, namely the loss carry-forward rule, it held, however, that the Commission did not err in taking the view that the relevant reference framework for the purposes of examining the selective nature of the measure at issue was constituted only by the rule governing the forfeiture of losses, despite the fact that it was not

disputed that that rule was itself an exception to the loss carry-forward rule and even though an overall examination of the content of those provisions should have made it possible to find that the restructuring clause's effect was to define a situation falling under the general loss carry-forward rule.

103 As also noted, in essence, by the Advocate General in point 109 of his Opinion, it follows from the case-law of the Court, recalled in paragraphs 90 to 93 of the present judgment, that the selectivity of a tax measure cannot be precisely assessed on the basis of a reference framework consisting of some provisions that have been artificially taken from a broader legislative framework. Therefore, by thus excluding from the relevant reference framework in the present case the general rule of loss carry-forward, manifestly the General Court defined it too narrowly.

104 To the extent that, in reaching that conclusion, the Court relied on the fact that the measure at issue was worded in the form of an exception to the rule governing the forfeiture of losses, it should be recalled that, as has already been pointed out in paragraph 92 of the present judgment, the regulatory technique used cannot be decisive for the purposes of the determination of the reference framework.

105 In addition, any argument in support of the judgment under appeal cannot, in this case, be based on the judgment of 18 July 2013, *P* (C?6/12, EU:C:2013:525), since, in that judgment, the Court did not rule on what should constitute the reference framework in the case before it.

106 It follows from all of the foregoing that the first part of HBH's second ground of appeal is well founded, without it being necessary to examine the second part of the argument put forward to support it. It should also be noted that it is on the basis of its flawed legal assessment — that the Commission did not err in holding that the relevant reference framework in the present case for the purposes of assessing the selectivity of the measure at issue was made up only of the rule governing the forfeiture of losses — that the General Court analysed the submissions made to it by HBH, seeking to show, on the one hand, the lack of a priori selectivity of the measure at issue and, on the other hand, the justification of the measure by the nature and overall structure of the tax system.

107 As is apparent from the case-law referred to in paragraphs 83 and 86 to 89 of the present judgment, an error in the determination of the reference framework against which the selectivity of the measure should be assessed necessarily vitiates the whole of the analysis of the condition relating to selectivity. In those circumstances, the Court must uphold the appeal and set aside points 2 and 3 of the operative part of the judgment under appeal, without it being necessary to examine the second and third parts of the second ground of appeal, or the first ground of appeal.

The action before the General Court

108 In accordance with the first paragraph of Article 61 of the Statute of the Court of Justice of the European Union, if the Court quashes the decision of the General Court, it may itself give final judgment in the matter, where the state of the proceedings so permits.

109 That is the case here. In those circumstances, it is sufficient to note that it is apparent from the grounds set out in paragraphs 82 to 107 of the present judgment that the first limb of the first plea of HBH's action before the General Court, in so far as it seeks to establish that the Commission erred in its determination of the relevant reference framework for the purposes of assessing the selectivity of the measure at issue, in that it defined it as being made up only of the rule governing the forfeiture of losses, is well founded. The selective nature of the measure at issue having thus been assessed by the Commission against a reference framework which was incorrectly determined, it is necessary to annul the contested decision.

Costs

110 Under Article 184(2) of the Rules of Procedure of the Court of Justice, where the appeal is unfounded or where the appeal is well founded and the Court itself gives final judgment in the case, the Court is to make a decision as to costs.

111 Under Article 138(1) of those rules, 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.

112 Since the Commission has been unsuccessful in the main appeal and in the cross-appeal, the contested decision having been annulled and HBH having applied for the Commission to be ordered to pay the costs, the Commission must be ordered to pay, in addition to its own costs, the costs incurred by HBH, relating both to the proceedings at first instance and on appeal.

113 Under Article 184(4) of those Rules of Procedure, where the appeal has not been brought by an intervener at first instance, he may not be ordered to pay costs in the appeal proceedings unless he participated in the written or oral part of the proceedings before the Court of Justice. Where an intervener at first instance takes part in the proceedings, the Court may decide that he shall bear his own costs.

114 The Federal Republic of Germany, intervener at first instance who participated in the oral procedure before the Court, has not applied for the Commission to be ordered to pay the costs. In those circumstances, it must be held that it is to bear its own costs relating to the appeal proceedings.

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

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

2. **Annuls points 2 and 3 of the operative part of the judgment of the General Court of the European Union of 4 February 2016,** *Heitkamp BauHolding* **v** *Commission* **(T?287/11, EU:T:2016:60);**

3. **Annuls Commission Decision 2011/527/EU of 26 January 2011 on State aid C 7/10 (ex CP 250/09 and NN 5/10) implemented by Germany — Scheme for the carry-forward of tax losses in the case of restructuring of companies in difficulty (Sanierungsklausel);**

4. **Orders the European Commission to pay, in addition to its own costs, the costs incurred by Dirk Andres, acting as liquidator in the insolvency of Heitkamp BauHolding GmbH, relating both to the proceedings at first instance and on appeal;**

5. **Orders the Federal Republic of Germany to bear its own costs relating to the appeal proceedings.**

[Signatures]

* Language of the case: German