JUDGMENT OF THE COURT (Eighth Chamber)

24 January 2013 (*)

(Appeal – State aid – Tax-reduction measures – Seafarers working on board vessels registered in the Danish International Register – Article 88(3) EC – Preliminary examination stage – Commission decision not to raise objections – Action for annulment – Conditions for initiating the formal investigation procedure – Existence of doubts regarding the compatibility of the aid with the common market – Period for the examination)

In Case C-646/11 P,

APPEAL under Article 56 of the Statute of the Court of Justice of the European Union, brought on 8 December 2011,

Falles Fagligt Forbund (3F), formerly Specialarbejderforbundet i Danmark (SID), established in Copenhagen (Denmark), represented by P. Torbøl, advokat, S. Aparicio Hill, abogada, and V. Edwards, Solicitor,

appellant,

the other parties to the proceedings being:

European Commission, represented by H. van Vliet and P.-J. Loewenthal, acting as Agents, with an address for service in Luxembourg,

defendant at first instance,

Kingdom of Denmark, represented by C. Vang and C. Thorning, acting as Agents,

intervener at first instance,

THE COURT (Eighth Chamber),

composed of E. Jarašiūnas, President of the Chamber, A. Ó Caoimh (Rapporteur) and C. Toader, Judges,

Advocate General: E. Sharpston,

Registrar: K. Malacek, Administrator,

having regard to the written procedure and further to the hearing on 12 November 2012,

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,

gives the following

Judgment

1 By its appeal, Falles Fagligt Forbund (3F), formerly Specialarbejderforbundet i Danmark (SID) (‘3F’), the general trade union for workers in Denmark, asks the Court to set aside the judgment of the General Court of the European Union of 27 September 2011 in Case T-30/03 RENV *3F* v *Commission*, not yet published

in the ECR (‘the judgment under appeal’), by which the General Court dismissed its action for annulment of Commission Decision C(2002) 4370 final of 13 November 2002 not to raise objections to the Danish fiscal measures applicable to seafarers employed on board vessels registered in the Danish International Register (‘the contested decision’).

Facts giving rise to the dispute

2 The facts giving rise to the dispute, as set out in paragraphs 1 to 20 of the judgment under appeal, are as follows:

‘1 On 1 July 1988 the Kingdom of Denmark adopted Law No 408 (*Lovtidende* 1997 A, p. 27329), which entered into force on 23 August 1988, establishing a Danish International Register of Shipping (“the DIS register”). That register was in addition to the ordinary Danish register of ships (“the DAS register”). The DIS register is intended to combat the flight from Danish flags to flags of third States. Shipowners whose vessels are registered in the DIS register have the right to employ seafarers from non-member countries on those vessels at the salary rates applicable in their country of origin.

2 On the same date the Kingdom of Denmark adopted Laws Nos 361, 362, 363 and 364, which entered into force on 1 January 1989, introducing various fiscal measures relating to seafarers employed on board vessels registered in the DIS register (*Lovtidende* 1988 A, p. 36130, 36230, 36330 and 36430). In particular, those seafarers were exempted from Danish income tax, whereas seafarers employed on board vessels registered in the DAS register were subject to that tax.

3 On 28 August 1998 … 3F … lodged a complaint with the Commission of the European Communities against the Kingdom of Denmark concerning the fiscal measures at issue. [3F] submitted that the fiscal rules applicable to seafarers employed on board vessels registered in the DIS register constituted State aid for the purposes of Article 88 EC and that the aid scheme in question was not compatible with the common market, since it allowed tax exemptions not only to Community seafarers, that is to say, seafarers resident for tax purposes in a Member State, but also to all seafarers including non-Community seafarers, which made it contrary both to the Commission document on financial and fiscal measures concerning shipping operations with ships registered in the Community (document SEC(89) 921 final …) and to the Community guidelines on State aid to maritime transport (OJ 1997 C 205, p. 5 …). [3F] also alleged that the provisions of the double taxation conventions entered into between, first, the Kingdom of Denmark and the Republic of the Philippines and, secondly, the Kingdom of Denmark and the Republic of Singapore also constituted an unlawful aid scheme. It submitted that the Commission should initiate the procedure laid down in Article 88(2) EC and drew attention to the procedure concerning an action for failure to act provided for in Article 232 EC.

4 By letter of 21 October 1998 [3F] drew the Commission’s attention to its obligation to initiate the formal investigation procedure under Article 88(2) EC and stated that, according to its information, the fiscal scheme at issue had not been notified to the Commission.

5 By letter of 6 January 1999 [3F] stated inter alia that it would not bring an action for failure to act before the Court of Justice if the Commission gave it an assurance that it would adopt a decision within two or three months, while reserving the possibility of doing so thereafter.

6 By letter of 4 February 1999 the Commission requested information from the Kingdom of Denmark, in particular as to whether the aid at issue had been paid or was going to be paid.

7 By letter of 18 March 1999 [3F] sent new observations to the Commission in relation to the meaning of “Community seafarers”.

8 On 19 March 1999 a meeting took place between the Commission and the Kingdom of Denmark, at which the Commission expressed its concerns regarding the specific fiscal rules which applied at that time to seafarers.

9 By letter of 13 April 1999 the Kingdom of Denmark replied to the Commission's letter of 4 February 1999, stating inter alia that the tax scheme at issue had been introduced in 1988. It also indicated that it was carrying out an investigation concerning the amendment of the rules for taxing the wages of non-residents. It added that the Commission would be informed as soon as the investigation was completed and the Danish Government had decided whether a draft bill would be presented to the Danish Parliament during the following session.

10 On 4 June 1999 [3F] informed the Commission of the answer of a Danish minister to the Danish Parliament raising the possibility that the DIS scheme might be amended.

11 By letter of 6 December 1999 the Danish Government submitted to the Danish Parliament a draft tax bill amending the DIS scheme.

12 By letter of 10 January 2000 [3F] sent observations concerning the effects of the unamended DIS scheme to the Commission.

13 By letter of 3 April 2000 the Danish Ministry of Taxation informed the Commission of the amendments to the draft bill.

14 A meeting took place on 4 April 2000 between the Commission and the Danish authorities, at the end of which it emerged that a further review would be necessary in the light of the latest amendments to the draft bill.

15 By letter of 6 April 2000 the Kingdom of Denmark stated that the amendments to the draft tax bill introduced following the discussions with the Commission at the meeting of 4 April 2000 would not be submitted to the Danish Parliament until the Commission formally stated that they were not contrary to Community law, and requested a comfort letter from the Commission to that effect as soon as possible.

16 By letters of 18 April and 15 May 2000 [3F] sent observations concerning the amendments to the draft tax bill to the Commission.

17 On 30 November 2000 the Commission sought additional information from the Kingdom of Denmark, in particular concerning fiscal issues. The Kingdom of Denmark responded to that request on 15 January 2001.

18 [3F] sent observations to the Commission by letters of 1 February, 29 June and 5 November 2001.

19 A meeting took place on 27 May 2002 between the Commission and [3F], at which [3F] raised the possibility of bringing an action for failure to act.

…

20 On 13 November 2002 the Commission adopted [the contested decision], in which it decided not to raise any objections to the fiscal measures applied since 1 January 1989 to seafarers employed on board vessels registered in Denmark in either the DAS or the DIS register, since it considered that the arrangements constituted State aid but were compatible with the common market in accordance with Article 87(3)(c) EC.'

Proceedings before the General Court and the Court of Justice

3 By application lodged at the Registry of the Court of First Instance (now 'the General Court') on 30 January 2003, 3F sought the annulment of the contested decision.

4 By separate document lodged at the Registry of the General Court on 17 March 2003, the Commission raised a plea of inadmissibility under Article 114 of the Rules of Procedure of the General Court, asking the General Court to dismiss the action as manifestly inadmissible.

5 By order of 23 April 2007 in Case T-30/03 *SID* v *Commission*, the General Court dismissed the action as inadmissible.

6 By application lodged at the Registry of the Court of Justice on 9 July 2007, 3F brought an appeal pursuant to Article 56 of the Statute of the Court of Justice against that order.

7 By judgment of 9 July 2009 in Case C-319/07 P *3F* v *Commission* [2009] ECR I-5963, the Court of Justice set aside the order of the General Court in *SID* v *Commission* in so far as it did not address 3F's arguments relating, first, to its competitive position in relation to other trade unions in the negotiation of collective agreements applicable to seafarers and, second, to the social aspects of the fiscal measures in relation to seafarers employed on board vessels registered in the DIS register. The Court of Justice then rejected the plea of inadmissibility raised by the Commission before the General Court. Finally, it remitted the case to the General Court for it to rule on 3F's claim for the annulment of the contested decision.

The judgment under appeal

8 3F, which withdrew at the hearing before the General Court two of the three pleas in law relied upon in its application, maintained, in support of its action for annulment, the plea alleging infringement of Article 88(2) EC and of the principle of good administration. It submitted in this regard that serious difficulties arose in the present instance which should have led the Commission to initiate the formal investigation procedure under Article 88(2) EC; those serious difficulties were apparent from the length of the preliminary examination procedure and the circumstances of that procedure.

9 So far as concerns, in the first place, the length of the preliminary examination procedure, the General Court stated in paragraph 59 of the judgment under appeal, after noting that in the case in point more than four years had elapsed between receipt of the complaint and the contested decision, that the Commission maintained, in order to explain that length, 'that the complaint was voluminous, that it attempted to address all of its aspects, including the issue of the bilateral tax agreements, and that the behaviour of [3F], which sent ten letters to the Commission, contributed to the extension of the preliminary examination procedure'.

10 In paragraphs 60 to 67 of the judgment under appeal, the General Court, after noting the various exchanges and meetings which took place following the complaint between the Commission and, as the case may be, 3F or the Kingdom of Denmark regarding, inter alia, the meaning of 'Community seafarers', the Kingdom of Denmark's responses to the Commission's supplementary questions and the possibility of the DIS scheme being amended by the Danish legislature, found that those exchanges had contributed to the extension of the length of the preliminary examination and that they explained, to a large extent, the length of that examination in this case. It held that the Commission was entitled to consider it necessary to examine all the matters of fact and law thereby brought to its attention and to make further enquiries of the Kingdom of Denmark, including in relation to the question of the bilateral tax treaties.

11 In those circumstances, the General Court held as follows in paragraphs 68 to 72 of the judgment under appeal:

'68 … even if, considered as a whole, the duration of the preliminary examination can be regarded as exceeding the time usually required for a preliminary examination, that duration is justified to a large extent by the circumstances and context of the procedure.

69 However, as [3F] notes in its reply, the question in this case is not whether or not the duration of the preliminary examination was reasonable but whether there were serious difficulties.

70 While the length of the preliminary examination can constitute an indication of the existence of serious difficulties, it does not of itself suffice to show the existence of such difficulties.

71 In particular, the mere fact that discussions took place between the Commission and the Member State concerned during the preliminary examination stage and that, in that context, the Commission asked for additional information about the measures submitted for its review cannot in itself be regarded as evidence that the Commission was confronted with serious difficulties of assessment (see [Case T-46/97 *SIC* v *Commission* [2000] ECR II-2125], paragraph 89 and the case-law cited).

72 Moreover, it is only if it is reinforced by other factors that the passage of time, even if that time considerably exceeds the time usually required for a preliminary examination under Article 88(3) EC, may lead to the conclusion that the Commission encountered serious difficulties of assessment necessitating initiation of the procedure under Article 88(2) EC (see, to that effect, [Case T-95/03 *Asociación de Estaciones de Servicio de Madrid and Federación Catalana de Estaciones de Servicio* v *Commission* [2006] ECR II-4739], paragraph 135 and the case-law cited).'

12 So far as concerns, in the second place, the other arguments relied upon by 3F, concerning the circumstances of the preliminary examination procedure, the General Court, first, ruled on the argument that the amendments made to the DIS scheme by the draft bill sent by the Kingdom of Denmark appeared to be a complicating factor in the file, even though the contested decision did not rule on those amendments. It held, at the end of paragraphs 74 to 82 of the judgment under appeal, that 3F had not proven that those amendments showed the existence of serious difficulties as to the assessment of the compatibility of the DIS scheme with the common market, in particular in relation to the meaning of 'Community seafarers'. After reiterating that those legislative amendments had admittedly been a cause of delay in the context of the preliminary examination of the complaint, the General Court stated that the action taken in this regard by the Commission vis-à-vis the Danish authorities fell within its margin of discretion with reference to determining whether those amendments raised serious difficulties, without in itself establishing that the Commission encountered such difficulties in this case.

13 Second, with regard to 3F's argument that the Commission did not give any clear response on the meaning of 'Community seafarers' before the adoption of the contested decision, the General Court held, in paragraphs 84 and 85 of the judgment under appeal, that 'the mere fact that no formal position was taken before the contested decision was adopted does not imply that the Commission encountered serious difficulties' as to the assessment of the compatibility of the DIS scheme with the common market, since 'the preliminary examination phase does not require an exchange of views and arguments with the complainant' and 'the Commission is not bound to state its position in this regard to the applicant before the adoption of the contested decision'.

14 Third, 3F's argument that the necessity of initiating a formal investigation procedure was confirmed by the Commission decisions concerning the French and Swedish tax schemes, decisions which at least implicitly raised the same question, was rejected by the General Court in paragraphs 87 and 88 of the judgment under appeal. It pointed out that the French and Swedish schemes were different from the Danish scheme at issue, and that the circumstances surrounding the preliminary examination stage in the case in point differed greatly from those in the French and Swedish cases since those schemes had been notified to the Commission and it was essentially a question of renewing the scheme already in force in Sweden and extending the French scheme.

15 In paragraph 89 of the judgment under appeal, the General Court accordingly held as follows:

'It is apparent from the foregoing that none of the factors raised by [3F] allow the conclusion that, at the end of the preliminary examination procedure, the Commission encountered serious difficulties in this case, requiring the initiation of a formal investigation procedure.'

16 In those circumstances, after stating, in paragraph 94 of the judgment under appeal, that 'it follows from all of the foregoing that [3F] has not shown that the Commission was confronted with serious difficulties of assessment in classifying the measures at issue with regard to the concept of aid and establishing their compatibility with the common market', the General Court, in paragraphs 95 and 96 of the judgment, concluded that the plea alleging infringement of Article 88(2) EC and of the principle of good administration was unfounded and therefore dismissed the action in its entirety.

Forms of order sought before the Court of Justice

17 3F claims that the Court should:

– set aside the judgment under appeal;

– give final judgment in the matter pursuant to Article 61 of the Statute of the Court of Justice;

– order the Commission to pay the costs.

18 The Commission and the Kingdom of Denmark request the Court to dismiss the appeal and order 3F to pay the costs.

The appeal

19 In support of its appeal, 3F puts forward three pleas in law. By its first plea, it contends that the General Court erred in law in its interpretation and application of the case-law relating to the assessment of the length of a preliminary examination under Article 88(3) TFEU. The second plea alleges an error of law in the interpretation and application of the case-law on the meaning of 'serious difficulties' and on the determination of whether such difficulties exist. Finally, in its third plea 3F submits that the General Court erred in law by failing to respond to the plea relating to infringement of the principle of good administration or, in the alternative, by interpreting and applying the case-law on that principle incorrectly.

The first plea

Arguments of the parties

20 By its first plea, 3F contends that the General Court erred in law in not requiring that the Commission show the existence of exceptional circumstances capable of justifying the extraordinarily long duration of the preliminary examination under Article 88(3) EC.

21 According to 3F, it follows from the case-law relating to assessment of the duration of that examination, in particular from the judgment in Case T-95/96 *Gestevisión Telecinco* v *Commission* [1998] ECR II-3407, that a preliminary examination of extraordinary length requires that the Commission show exceptional circumstances justifying such a period. The General Court disregarded that case-law in concluding, in paragraph 68 of the judgment under appeal, that the duration of the preliminary investigation in the present case was justified, without having found that the factors, mentioned in paragraph 59 of that judgment, upon which the Commission relied in order to explain the length of that examination represented such exceptional circumstances.

22 The Commission submits that the fact that the length of the preliminary examination considerably exceeds what is normally required for an initial examination does not in itself suffice to show the existence of serious difficulties. The General Court was therefore right to hold, in paragraph 72 of the judgment under appeal, that it is only if it is reinforced by other factors that the passage of a period of time that seems excessive may lead to the conclusion that there were such difficulties. In so doing, the General Court did not disregard its case-law in the slightest. In order to determine whether the Commission encountered serious difficulties, the General Court consistently examines, when the duration of the preliminary

examination considerably exceeds what is normally required for an initial examination, whether that duration may be regarded as reasonable in the light of the particular circumstances of each case (see, inter alia, Case T-167/04 *Asklepios Kliniken* v *Commission* [2007] ECR II-2379, paragraph 81). This is also the test applied in *Gestevisión Telecinco* v *Commission*. It is in this light that the General Court rightly concluded, in paragraphs 58 to 68 of the judgment under appeal, that the particular circumstances of the present case explain, to a large extent, the duration of the preliminary examination.

23 The Kingdom of Denmark submits that the considerable amount of time taken by the Commission to examine the case before deciding not to initiate a formal investigation procedure was partly due to the fact that 3F repeatedly presented new information to the Commission. In any event, in the present instance there is nothing to suggest that the Commission, after thoroughly examining the DIS scheme for four years, was in doubt as to the scheme's compatibility with the common market when it adopted the contested decision.

Findings of the Court

24 In examining the present plea, it should be noted first of all that Article 4 of Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article [88] of the EC Treaty (OJ 1999 L 83, p. 1) provides for a stage at which the aid measures notified undergo a preliminary examination, the purpose of which is to enable the Commission to form an initial view as to whether that aid is compatible with the common market. On completion of that stage, the Commission is to make a finding either that the measure does not constitute aid or that it falls within the scope of Article 87(1) EC. In the latter case, it may be that the measure does not raise doubts as to its compatibility with the common market; on the other hand, it is also possible that the measure may raise such doubts (judgment of 24 May 2011 in Case C-83/09 P *Commission* v *Kronoply and Kronotex*, not yet published in the ECR, paragraph 43; order of 9 June 2011 in Case C-451/10 P *TF1* v *Commission*, paragraph 47; judgment of 22 September 2011 in Case C-148/09 P *Belgium* v *Deutsche Post and DHL International*, not yet published in the ECR, paragraph 53; and judgment of 27 October 2011 in Case C-47/10 P *Austria* v *Scheucher-Fleisch and Others*, not yet published in the ECR, paragraph 40).

25 Where the Commission, after the preliminary examination, finds that no doubts are raised as to the compatibility with the common market of a notified measure in so far as it falls within the scope of Article 87(1) EC, it is to adopt a decision not to raise objections under Article 4(3) of Regulation No 659/1999 (*Commission* v *Kronoply and Kronotex*, paragraph 44; *TF1* v *Commission*, paragraph 48; and *Austria* v *Scheucher-Fleisch and Others*, paragraph 41).

26 Where the Commission adopts such a decision, it declares not only that the measure is compatible with the common market, but also – by implication – that it refuses to initiate the formal investigation procedure laid down in Article 88(2) EC and Article 6(1) of Regulation No 659/1999 (*Commission* v *Kronoply and Kronotex*, paragraph 45, and *Austria* v *Scheucher-Fleisch and Others*, paragraph 42).

27 If, following the preliminary examination, it finds that the measure notified raises doubts as to its compatibility with the common market, the Commission is required to adopt, on the basis of Article 4(4) of Regulation No 659/1999, a decision initiating the formal investigation procedure under Article 88(2) EC and Article 6(1) of that regulation (*Commission* v *Kronoply and Kronotex*, paragraph 46; *TF1* v *Commission*, paragraph 50; and *Belgium* v *Deutsche Post and DHL International*, paragraph 77).

28 According to settled case-law, the procedure under Article 88(2) EC is essential whenever the Commission has serious difficulties in determining whether aid is compatible with the common market. The Commission may therefore restrict itself to the preliminary examination under Article 88(3) EC when taking a decision in favour of aid only if it is able to satisfy itself after an initial examination that the aid is compatible with the common market (see Case C-431/07 P *Bouygues and Bouygues Télécom* v *Commission* [2009] ECR I-2665, paragraph 61 and the case-law cited, and *Austria* v *Scheucher-Fleisch and Others*, paragraph 70).

29 In the present instance, the contested decision is a decision founded on Article 4(3) of Regulation No 659/199 not to raise objections. The legality of that decision therefore depends on whether objectively doubts were raised as to the compatibility of the aid in question with the common market.

30 Where an applicant seeks the annulment of a decision not to raise objections, he must prove the existence of doubts as to the aid's compatibility (*Commission* v *Kronoply and Kronotex*, paragraph 59).

31 That proof may be furnished by reference to a body of consistent evidence: the question whether or not a doubt exists requires investigation of both the circumstances in which the decision not to raise objections was adopted and its content, comparing the assessments upon which the Commission relied in that decision with the information available to it when it ruled on the compatibility of the aid in question with the common market (see, to that effect, Case C-198/91 *Cook* v *Commission* [1993] ECR I-2487, paragraphs 30 and 31; *Bouygues and Bouygues Télécom* v *Commission*, paragraph 63; *TF1* v *Commission*, paragraph 52; and *Austria* v *Scheucher-Fleisch and Others*, paragraphs 71 and 72).

32 It follows that, while the length of the preliminary examination procedure can constitute an indication that the Commission may have had doubts regarding the compatibility of the aid in question with the common market, its length cannot of itself lead to the conclusion that the Commission should have initiated the formal investigation procedure (see, to that effect, Case 84/82 *Germany* v *Commission* [1984] ECR 1451, paragraphs 14 to 17, and *Belgium* v *Deutsche Post and DHL International*, paragraph 81).

33 By the present plea, 3F complains that the General Court concluded, in paragraph 68 of the judgment under appeal, that the duration of the preliminary examination stage in this case, although it exceeded the time usually required for a preliminary examination, was justified to a large extent by the circumstances and context of the procedure, without having found that those factors represented exceptional circumstances.

34 However, notwithstanding what it concluded in paragraph 68 of the judgment under appeal, the General Court held in paragraph 69 of that judgment that the question in the case in point was, as 3F stated, not whether the duration of the preliminary examination was reasonable but whether there were serious difficulties such as to raise doubts regarding the compatibility of the aid. With regard to the latter question, the General Court held, in paragraph 70 of the judgment, that while the length of the preliminary examination did not of itself suffice to show the existence of serious difficulties, it could nevertheless constitute an indication of the existence of such difficulties.

35 The General Court stated in this regard, in paragraph 72 of the judgment under appeal, that it is only if it is reinforced by other factors that the passage of time, even if that time considerably exceeds the time usually required for a preliminary examination under Article 88(3) EC, may lead to the conclusion that the Commission encountered serious difficulties. Consequently, the General Court examined, in paragraphs 73 to 89 of the judgment under appeal, whether the other factors relied upon by 3F relating to the circumstances of the preliminary examination procedure were such as to reinforce that indication of serious difficulties, before concluding, in paragraph 94 of the judgment, that 'it follows from all of the foregoing that [3F] has not shown that the Commission was confronted with serious difficulties'.

36 It is therefore apparent that, contrary to what 3F presupposes in the present plea, the General Court did not draw any factual or legal inference from the finding made in paragraph 68 of the judgment under appeal concerning the duration of the preliminary examination stage being justified in the light of the circumstances and context of the procedure, but, on the contrary, examined whether the indication of the existence of doubts resulting from that stage's duration, which prima facie was excessive in the present instance, was reinforced by other factors.

37 Consequently, the first plea must be dismissed as ineffective.

The second plea

Arguments of the parties

38 By its second plea, 3F contends that the General Court erred in law in its interpretation and application of the case-law on the meaning of ‘serious difficulties’ and on the determination of whether such difficulties exist.

39 By the first part of this plea, 3F complains that the General Court found, in paragraph 68 of the judgment under appeal, that the duration of the preliminary examination was justified, even if, considered as a whole, it could be regarded as exceeding the time usually required for a preliminary examination. First, contrary to what was held in paragraph 60 of that judgment, it is clear from the case-law, laid down inter alia in *Asociación de Estaciones de Servicio de Madrid and Federación Catalana de Estaciones de Servicio* v *Commission*, paragraphs 123 and 124, that the content of the initial complaint cannot justify a duration of over four years. Second, if, in accordance with the judgment in Case C-367/95 P *Commission* v *Sytraval and Brink’s France* [1998] ECR I-1719, paragraphs 58 and 59, the Commission is not required, as the General Court observes in paragraph 84 of the judgment under appeal, to conduct an exchange of views and arguments with the complainant during the preliminary examination phase, the fact that it did so cannot justify its taking an unreasonably long time to conduct the preliminary examination procedure.

40 3F further submits that the fact, noted by the General Court in paragraph 70 of the judgment under appeal, that the length of the preliminary examination does not of itself suffice to show the existence of serious difficulties cannot mean that the passage of time may be considered in isolation from the circumstances of the examination procedure and the content of the contested measure. The General Court has itself stated, in Case T-388/03 *Deutsche Post and DHL International* v *Commission* [2009] ECR II-199, paragraph 106, that where the procedure conducted by the Commission considerably exceeds what is normally required for an initial examination carried out pursuant to the provisions of Article 88(3) EC, that circumstance constitutes probative evidence of the existence of serious difficulties.

41 By the second part of its second plea, 3F alleges that the General Court erred in law by examining separately, in paragraphs 74 to 88 of the judgment under appeal, the specific arguments advanced by 3F in this connection, without carrying out an overall assessment of all the circumstances relating to the preliminary examination stage. As is clear from the case-law of the General Court cited in paragraph 72 of the judgment under appeal, all the factors, including the circumstances and the length of the procedure, must be taken into account, which the General Court conspicuously failed to do. Moreover, when all those relevant factors are taken into account, the weight to be given to the length of the preliminary examination will be proportionate to that length. It will therefore be proportionately greater where the duration significantly exceeds the period normally required for a preliminary examination.

42 The Commission submits on the first part of this plea that, as regards the content of the complaint, 3F fails to take into account that, in determining whether the duration of the preliminary examination stage is reasonable, account must be had of the particular circumstances of each case. Furthermore, 3F’s reasoning derived from the judgment in *Commission* v *Sytraval and Brink’s France* fails to take account of the fact that, in particular, the Commission’s power to engage in a dialogue with the Member State concerned or third parties in an endeavour to overcome, at the preliminary examination stage, any difficulties encountered presupposes that the Commission may bring its position in line with the results of the dialogue it engaged in, without that alignment having to be interpreted, *a priori*, as establishing the existence of serious difficulties.

43 In respect of the contention that the General Court erroneously considered the duration of the proceedings in isolation from the circumstances of the examination procedure and the content of the contested measure, the Commission observes that *Deutsche Post and DHL International* v *Commission* concerned a notified aid scheme, whereas the present case concerns a non-notified scheme, for which, according to Case C-39/94 *SFEI and Others* [1996] ECR I-3547, paragraph 48, the Commission is not required to carry out an initial investigation within a specified period of time. In any event, in *Deutsche Post and DHL International* v *Commission* the General Court did not hold that the length of the procedure may in and of itself indicate the existence of serious difficulties.

44 So far as concerns the second part of the second plea, the Commission disputes the contention that the General Court failed to take account of all the factors, including the circumstances and the length of the procedure, in order to ascertain whether the Commission had been confronted with serious difficulties. It was only after having considered the factors explaining the length of the preliminary examination stage, in paragraphs 57 to 72 of the judgment under appeal, and all of the arguments advanced by 3F in relation to the circumstances of that preliminary examination procedure, in paragraphs 73 to 88 of the judgment, that the General Court concluded, in paragraph 89 of the judgment, that none of the factors raised by 3F allowed the conclusion that, at the end of the preliminary examination stage, the Commission encountered serious difficulties. The contention that the weight to be given to the length of the preliminary examination in the analysis of whether serious difficulties exist should be proportionate to that length has no basis in the case-law.

45 The Kingdom of Denmark states that, since the DIS scheme was in conformity with the Commission's relevant guidelines, there could not be any doubt as to the compatibility of that scheme. 3F could therefore legitimately expect the Commission not to initiate a formal examination procedure.

Findings of the Court

46 For the reasons already set out in paragraphs 33 to 36 of the present judgment, it is necessary at the outset to reject the first part of the second plea as ineffective in so far as it seeks to contest the finding made by the General Court in paragraph 68 of the judgment under appeal that the duration of the preliminary examination stage is justified.

47 As to the remainder, in so far as 3F seeks, by the first part of the second plea, to complain that the General Court examined the duration of the preliminary examination stage in isolation from the other circumstances of the contested decision's adoption and from the content of the contested decision, it need merely be stated that, as already follows from paragraph 35 of the present judgment, 3F's line of argument is founded on an incorrect reading of the judgment under appeal. It is clear from paragraphs 70 to 89 of that judgment that it was only after determining whether the indication of the existence of doubts resulting from the duration of the preliminary examination was reinforced by other factors relating to the circumstances that had surrounded the adoption of the contested decision that the General Court concluded, in paragraph 94 of the judgment, that 3F had not shown that the Commission was confronted with serious difficulties. Furthermore, having failed to advance before the General Court any argument relating to the content of the contested decision, 3F cannot complain that the General Court did not take that matter into account, since, as noted in paragraph 30 of the present judgment, it is for the applicant to prove the existence of serious difficulties such as to raise doubts.

48 Consequently, the first part of the second plea must be rejected as partly ineffective and partly unfounded.

49 The second part of this plea must be rejected as inadmissible in so far as 3F complains that the General Court examined separately each of the specific arguments advanced by it concerning the aforesaid circumstances.

50 3F merely contends that the General Court should have carried out an overall assessment of those matters and does not set out in the slightest in what respect – inasmuch as it found, in its definitive assessment of the facts in paragraphs 73 to 89 of the judgment under appeal, that, in the circumstances of the present case, none of those matters taken individually enabled the existence of doubts regarding the compatibility of the aid in question to be established – the General Court is alleged to have erred in law by not carrying out an overall assessment of that kind.

51 However, according to settled case-law, it follows from the second subparagraph of Article 256(1) TFEU, the first paragraph of Article 58 of the Statute of the Court of Justice and Articles 168(1)(d) and 169(2) of the Rules of Procedure of the Court of Justice that an appeal must indicate precisely the contested elements of the judgment which the appellant seeks to have set aside and also the legal arguments specifically advanced in support of the appeal (see, in particular, Case C-352/98 P *Bergaderm and Goupil* v

Commission [2000] ECR I-5291, paragraph 34, and Case C-240/03 P *Comunità montana della Valnerina* v *Commission* [2006] ECR I-731, paragraph 105 and the case-law cited).

52 This requirement is not satisfied by a plea which complains that the General Court reached a certain conclusion without specifying the legal basis on which it ought to have reached a different one (Case C-257/98 P *Lucaccioni* v *Commission* [1999] ECR I-5251, paragraph 62, and order of 26 January 2005 in Case C-153/04 P *Euroagri* v *Commission*, paragraph 38).

53 In so far as, by the second part of the second plea, 3F complains that the General Court did not give the duration of the preliminary examination stage a weight proportionate to its length, it must be acknowledged that the period of more than four years in the present instance between the lodging of 3F's complaint and the Commission's decision of approval significantly exceeds the time usually required for an initial examination at the preliminary examination stage. However, the fact remains that, in the present instance, the General Court held, in its definitive assessment of the facts, that the other factors advanced by 3F concerning the circumstances of the contested decision's adoption were not such as to reinforce the indication of the existence of doubts which could result from the – prima facie excessive – duration of that stage. It should also be noted that in its action before the General Court 3F did not derive any argument from the content of the contested decision.

54 As pointed out in paragraph 32 of the present judgment, the duration of the preliminary examination stage, contrary to what 3F suggests in this part of the second plea, cannot, whatever its length, demonstrate of itself the existence of doubts regarding the compatibility of the aid in question with the common market.

55 In those circumstances, even if greater weight were required to be accorded to the duration of the preliminary examination stage where, as in the present case, it significantly exceeds the period normally required for a preliminary examination, the General Court did not err in law by not giving such weight to that matter.

56 Therefore, the second part of the second plea must be rejected as partly inadmissible and partly unfounded.

57 Consequently, the second plea must be dismissed.

The third plea

Arguments of the parties

58 By its third plea, 3F complains that the General Court erred in law by failing to respond to the plea relating to infringement of the principle of good administration. The General Court is obliged to respond to all pleas raised by an applicant. However, paragraphs 57 to 85 of the judgment under appeal do not mention that principle, but relate solely to infringement of Article 88(2) EC.

59 In the alternative, 3F submits that the General Court committed a number of errors of interpretation of the principle of good administration in paragraphs 53 to 94 of the judgment under appeal. First, for the reasons given in the context of the first and second pleas, the General Court was wrong in implicitly considering that the Commission's examination in this case was diligent. Second, the General Court erred in law in that it failed to take into account that an administrative procedure of unreasonable duration infringes the general principle of good administration. The effect of such an infringement is to prejudice the rights of potentially interested third parties to comment, rights which would have been guaranteed had the Commission initiated a formal investigation procedure. Third, the General Court erred in law in not recognising that, in the circumstances described, in particular the length of the investigation, the Commission had de facto carried out a formal investigation but without respecting the rights of third parties within its framework.

60 The Commission submits that, whatever the merits of the third plea, it follows from the case-law that, even if the need to conduct administrative procedures within a reasonable period is a general principle of European Union law, applicable in the context of an investigation procedure in respect of State aid and compliance with which is enforced by the European Union judicature, the mere adoption of a decision after the expiry of such a period is not in itself sufficient to render unlawful a decision taken by the Commission at the conclusion of an initial examination conducted under Article 88(3) EC.

61 In any event, the Commission considers that 3F's argument before the General Court concerning the principle of good administration was not clear and precise.

62 Furthermore, so far as concerns the purported errors of interpretation of the principle of good administration, the Commission refers, in relation to the first alleged error, to the arguments set out by it in response to the first two pleas. In the case of the second alleged error, the Commission recalls that the mere adoption of a decision after the expiry of a reasonable period is not in itself sufficient to render it unlawful. Finally, as regards the third alleged error, the Commission submits that the length of the preliminary investigation can be explained, to a considerable extent, by the actions of 3F itself.

Findings of the Court

63 According to settled case-law, the obligation to state reasons owed by the General Court under Article 36 of the Statute of the Court of Justice, which applies to the General Court by virtue of the first paragraph of Article 53 of the Statute, and Article 81 of the Rules of Procedure of the General Court requires it to disclose clearly and unequivocally the reasoning followed by it, in such a way as to enable the persons concerned to ascertain the reasons for the decision taken and the Court of Justice to exercise its power of review (see, inter alia, Case C-280/08 P *Deutsche Telekom* v *Commission* [2010] ECR I-9555, paragraphs 135 and 136 and the case-law cited).

64 However, the requirement that the General Court give reasons for its decisions cannot be interpreted as meaning that it is obliged to respond in detail to every single argument advanced by the applicant, particularly if the argument was not sufficiently clear and precise (see, inter alia, Joined Cases C-120/06 P and C-121/06 P *FIAMM and Others* v *Council and Commission* [2008] ECR I-6513, paragraph 91 and the case-law cited).

65 In this connection, it is to be recalled that it follows from the first paragraph of Article 21 of the Statute of the Court of Justice read in conjunction with Article 44(1)(c) of the Rules of Procedure of the General Court that the application initiating proceedings must contain, inter alia, a summary of the pleas in law on which it is based.

66 In the present instance, it is apparent from 3F's pleadings before the General Court that the line of argument put forward by it at first instance concerning infringement of the principle of good administration was not supported at all by separate considerations, but was linked exclusively to the line of argument concerning the alleged infringement of Article 88(2) EC.

67 Thus, although, in the application initiating proceedings, the title of the first plea mentions the principle of good administration, paragraph 42 of the application, which concludes the line of argument concerning that plea, merely states that, 'by failing to open the Article 88(2) [EC] procedure the Commission infringed that [provision] as applied by the case-law and the principle of good administration', without explaining precisely in what respect the failure to open the formal investigation procedure constitutes an infringement of that principle.

68 Likewise, in paragraph 15 of its reply before the General Court, 3F merely states, in respect of that principle, that the issue is whether, 'having regard to the complexity of the issues, the time spent on these issues and the fact as the Commission now reveals other cases involved the same "important question of principle", the Commission should have opened a formal investigation in which all Member States and interested parties could submit comments'.

69 Furthermore, as is apparent from paragraph 69 of the judgment under appeal, in the same paragraph of the reply 3F itself stated that the question as to whether the duration of the preliminary examination was reasonable was not raised in the present case.

70 Accordingly, since 3F did not set out in its action before the General Court any specific line of argument concerning infringement of the principle of good administration that was separate from the line of argument relating to infringement of Article 88(2) EC, the General Court cannot be reproached for having dismissed the plea alleging infringement of the principle of good administration without stating specific reasons in the judgment under appeal in that regard.

71 Also, in so far as, by its arguments set out in the alternative, 3F now seeks to put forward separate and specific grounds to demonstrate that the Commission infringed the principle of good administration, essentially alleging that the duration of the preliminary examination stage was unreasonable, it is to be recalled that, according to Article 170(1) of the Rules of Procedure of the Court of Justice, the subject-matter of the proceedings before the General Court may not be changed in the appeal. The Court of Justice's jurisdiction in an appeal is confined to a review of the findings of law on the pleas argued before the General Court. A party may not, therefore, put forward for the first time before the Court of Justice a plea which it could have raised before the General Court but has not raised, since to do so would be to allow it to bring before the Court of Justice, whose jurisdiction in appeals is limited, a case of wider ambit than that which came before the General Court (see judgment of 29 September 2011 in Case C-520/09 P *Arkema* v *Commission*, not yet published in the ECR, paragraph 64 and the case-law cited).

72 As to the remainder, in so far as, by these arguments advanced in the alternative, 3F alleges that the Commission infringed the principle of good administration because the formal investigation procedure was not initiated, suffice it to state that 3F merely repeats, without identifying the passages of the judgment under appeal that are supposedly wrong in law, the arguments put forward before the General Court.

73 According to settled case-law, an appeal which merely repeats or reproduces verbatim the pleas in law and arguments submitted to the General Court, including those based on facts expressly rejected by that Court, does not satisfy the requirements to state reasons under the second subparagraph of Article 256(1) TFEU, the first paragraph of Article 58 of the Statute of the Court of Justice and Articles 168(1)(d) and 169(2) of the Rules of Procedure of the Court of Justice, requirements which are recalled in paragraph 51 of the present judgment. Such an appeal amounts in reality to no more than a request for re-examination of the application submitted to the General Court, which the Court of Justice does not have jurisdiction to undertake (see, inter alia, *Bergaderm and Goupil* v *Commission*, paragraph 35, and *Comunità montana della Valnerina* v *Commission*, paragraph 106 and the case-law cited).

74 Consequently, the third plea must be dismissed as partly inadmissible and partly unfounded.

75 Having regard to all the foregoing considerations, the appeal must be dismissed in its entirety.

Costs

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

77 Under Article 138(1) of those Rules, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the Commission has applied for costs and 3F has been unsuccessful, the latter must be ordered to pay the costs of the present case.

78 Under Article 140(1) of those Rules, Member States which have intervened in the proceedings are to bear their own costs. The Kingdom of Denmark must therefore be ordered to bear its own costs.

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

1. **Dismisses the appeal;**

2. **Orders Falles Fagligt Forbund (3F) to pay the costs;**

3. **Orders the Kingdom of Denmark to bear its own costs.**

[Signatures]

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* Language of the case: English.