Reports of Cases

OPINION OF ADVOCATE GENERAL
KOKOTT
delivered on 21 March 2013 [1]

Case C-274/12 P

Telefónica SA
v

European Commission

(Appeal — State aid — Decision 2011/5/EC — Spanish legislation on corporation tax — Standing of natural and legal persons to institute proceedings under the fourth paragraph of Article 263 TFEU — Regulatory acts which do not entail implementing measures — Individual concern of the actual beneficiary of a national aid scheme who is not subject to any obligation to repay the aid)

I – Introduction

1. By the Treaty of Lisbon the Member States extended the right of individuals to institute proceedings against acts of the European Union. Under the fourth paragraph of Article 263 TFEU, natural and legal persons may now also institute proceedings 'against a regulatory act which is of direct concern to them and does not entail implementing measures'. This appeal presents a first opportunity to clarify the circumstances in which this new right to institute proceedings is applicable in the case of Commission decisions on aid.

2. In addition, it is once again necessary to elaborate upon the Court of Justice's *Plaumann* formula, soon celebrating its 50th anniversary, which relates to the criterion of individual concern for the conventional right to institute proceedings under the fourth paragraph of Article 263 TFEU. The present appeal involves a special set of circumstances in this regard as an actual beneficiary of a national tax scheme is objecting to a negative decision on aid by the Commission even though it is afforded the protection of legitimate expectations and may retain the advantages of the tax scheme.

II – Background to the dispute

3. Article 12(5) of the Spanish Law on corporation tax, as amended on 5 March 2004 ('the aid scheme'), provided that, under certain conditions, 'goodwill' may be formed upon the acquisition of a shareholding in a *foreign* company and written off against tax for up to 20 years following the acquisition. The value to be taken resulted from the difference between the acquisition costs for the shareholding and the *pro-rata* market value of the assets of the business in which a shareholding was acquired. The deductions concerned led to a reduction in the tax liability of the acquiring company.

1 — Original language: German.

4. Since the Commission classified that scheme as State aid on the ground that it could not be applied in the case of the acquisition of a shareholding in a *domestic* company and was therefore selective, it initiated the formal investigation procedure under Article 88(2) EC. The decision to initiate the procedure was published in the Official Journal on 21 December 2007.

5. On conclusion of the procedure the Commission adopted Decision 2011/5/EC[2] ('the contested decision'), Article 1 of which reads inter alia as follows:

'1. The aid scheme … is incompatible with the common market as regards aid granted to beneficiaries in respect of intra-Community acquisitions.

2. None the less, tax reductions enjoyed by the beneficiaries … fulfilling the relevant conditions of the aid scheme by 21 December 2007 … can continue to apply for the entire amortisation period established by the aid scheme.

…'

6. Article 4(1) of the contested decision orders the Kingdom of Spain to recover the aid, so long as the conditions set out in Article 1(2) of the decision are not fulfilled. Under Article 6(2) of the decision the Kingdom of Spain is to keep the Commission informed 'of the progress of the national measures taken to implement this Decision'.

7. Telefónica SA had had recourse to the aid scheme for two shareholding acquisitions, in each instance before the date mentioned in Article 1(2) of the contested decision. By its action which it none the less brought against the Commission on 21 May 2010, it claimed that Article 1(1) of the contested decision should be annulled.

8. By order of 21 March 2012 ('the order under appeal'), served on Telefónica SA on 23 March 2012, the Court dismissed the action in Case T-228/10 as inadmissible. According to the grounds of the order, the contested decision is not of individual concern to Telefónica SA within the meaning of the second limb of the fourth paragraph of Article 263 TFEU, nor does it constitute a regulatory act which does not entail implementing measures for the purposes of the third limb of that provision.

III – Procedure before the Court of Justice

9. On 1 June 2012 Telefónica SA ('the appellant') brought the present appeal against the order of the General Court and claims that the Court of Justice should:

— set aside the order under appeal;

— declare the action in Case T-228/10 admissible and refer the case back to the General Court for it to give judgment on its substance;

— order the Commission to bear the costs of the proceedings at both instances.

10. The Commission contends that the Court of Justice should:

— dismiss the appeal;

— order the applicant before the General Court to pay the entirety of the costs.

2 — Commission Decision of 28 October 2009 on the tax amortisation of financial goodwill for foreign shareholding acquisitions C-45/07 (ex NN 51/07, ex CP 9/07) implemented by Spain (OJ 2011 L 7, p. 48).

11. The appeal was examined before the Court of Justice on the basis of the written documents and, on 4 February 2013, at a hearing.

IV – Appraisal

12. Citing three grounds, the appellant complains that the General Court has infringed EU law.

13. The first ground of appeal concerns the right to effective judicial protection and the second and third grounds concern standing to institute proceedings under the fourth paragraph of Article 263 TFEU. While the second ground relates to the general right to institute proceedings against acts adopted inter alia by the Commission, the third ground relates to the particular right to institute proceedings against regulatory acts. Since the more specific case takes precedence over the general case, I shall be examining the grounds of appeal in reverse order.

A – *Particular standing to institute proceedings in the case of regulatory acts (third ground of appeal)*

14. By its third ground of appeal the appellant adopts the view that the General Court has misconstrued the legal requirements governing standing to institute proceedings under the third limb of the fourth paragraph of Article 263 TFEU. That limb allows actions against regulatory acts which are of direct concern to the applicant and do not entail implementing measures.

15. In paragraphs 43 to 45 of the order under appeal the General Court states in this regard that the issue whether the contested decision constitutes a regulatory act can remain undecided since it in any case entails implementing measures. Standing to institute proceedings pursuant to the third limb of the fourth paragraph of Article 263 TFEU is, according to the General Court, therefore precluded from the outset.

16. Since the Court of Justice can, where appropriate, also make a substitution of grounds,[3] I consider it appropriate to examine below not only whether the General Court has correctly interpreted the criterion concerning implementing measures but also to look at all the conditions governing standing to institute proceedings pursuant to the third limb of the fourth paragraph of Article 263 TFEU.

1. Regulatory act

17. In order for the appellant to have been able to derive standing to institute proceedings from the third limb of the fourth paragraph of Article 263 TFEU, the Commission's contested decision would have to constitute a regulatory act.

18. As I have already explained elsewhere, all acts of general application, except legislative acts within the meaning of Article 289(3) TFEU, fall within the classification of regulatory acts.[4] A decision[5] as referred to in the fourth paragraph of Article 288 TFEU may also be included in this classification, especially where it does not specify the persons to whom it is addressed.[6]

19. The contested decision, which was adopted when the fourth paragraph of Article 249 EC was still in force, is not a legislative act as it was not adopted in a legislative procedure.

3 — See Joined Cases C-71/09 P, C-73/09 P and C-76/09 P *Comitato 'Venezia vuole vivere'* v *Commission* [2011] ECR I-4727, paragraph 118 and the case-law cited.

4 — See my Opinion in Case C-583/11 P *Inuit Tapiriit Kanatami and Others* v *Parliament and Council* [2013] ECR, point 30 et seq.

5 — This footnote is not relevant to the English version of this Opinion.

6 — See my Opinion in *Inuit Tapiriit Kanatami and Others* v *Parliament and Council,* cited in footnote 4, points 50 to 52.

20. It therefore remains to be assessed whether it is of general application.

21. According to the definition normally used in the case-law, a measure is of general application if it applies to objectively determined situations and produces legal effects with regard to categories of persons envisaged in a general and abstract manner. [7]

22. Support for the view that the contested decision does not meet those conditions may be derived in the first place from the fact that it specifies only one person to which it is addressed, namely the Kingdom of Spain pursuant to Article 7 thereof. The Commission takes the view that a decision of this nature cannot be of general application because it is binding only upon the person to whom it is addressed.

23. First it must be made clear that the binding force of an act must not be equated with its general application. After all, both the second paragraph of Article 249 EC and the second paragraph of Article 288 TFEU make a distinction, with regard to regulations, between their general application and the extent to which they are binding.

24. The Commission's view is certainly supported by the fact that the Court of Justice has repeatedly held with regard to the second paragraph of Article 173 of the EEC Treaty that the criterion for distinguishing between a measure of a legislative nature and a decision within the meaning of Article 189 of the EEC Treaty must be sought in the general application or otherwise of the measure in question. [8] The Court of Justice specifically regarded the distinguishing criterion of a decision as being the fact that it does *not* have general application. [9]

25. However, decisions which — like the decision at issue here — are addressed to one or more Member State display a special feature inasmuch as every Member State is also the embodiment of its national legal order. Decisions addressed to a Member State are, moreover, binding on all the organs of the Member State including the courts of that State. [10] Even though they have only one addressee, decisions addressed to a Member State may therefore shape a national legal order and accordingly have general application. This is also apparent from the case-law according to which persons affected may invoke provisions of a decision addressed to a Member State only. [11] It is no surprise, therefore, that the Court of Justice has also attributed general application in particular cases to such decisions. [12]

7 — See Case 6/68 *Zuckerfabrik Watenstedt* v *Council* [1968] ECR 409, 415; Case 101/76 *Koninklijke Scholten Honig* v *Council and Commission* [1977] ECR 797, paragraphs 20 to 22; Joined Cases 789/79 and 790/79 *Calpak and Società Emiliana Lavorazione Frutta* v *Commission* [1980] ECR 1949, paragraph 9; the order in Case C-352/99 P *Eridania and Others* v *Council* [2001] ECR I-5037, paragraph 42; and the order in Case C-503/07 P *Saint-Gobain Glass Deutschland* v *Commission* [2008] ECR I-2217, paragraph 71. See, similarly, also Case C-263/02 P *Commission* v *Jégo-Quéré* [2004] ECR I-3425, paragraph 43, and Case C-221/09 *AJD Tuna* [2011] ECR I-1655, paragraph 51.

8 — See Joined Cases 16/62 and 17/62 *Confédération nationale des producteurs de fruits et légumes and Others* v *Council* [1962] ECR 471, 478; the order in Case 117/86 *UFADE* v *Council and Commission* [1986] ECR 3255, paragraph 9; and the order in Case C-168/93 *Gibraltar and Gibraltar Development* v *Council* [1993] ECR I-4009, paragraph 11. See also *AJD Tuna*, cited in footnote 7, paragraphs 50 and 51.

9 — See *Koninklijke Scholten Honig* v *Council and Commission*, cited in footnote 7, paragraphs 8 to 11.

10 — Case 249/85 *Albako Margarinefabrik* [1987] ECR 2345, paragraph 17.

11 — See Case C-156/91 *Hansa Fleisch Ernst Mundt* [1992] ECR I-5567, paragraphs 12 and 13.

12 — See Case C-80/06 *Carp* [2007] ECR I-4473, paragraph 21, and *Saint-Gobain Glass Deutschland* v *Commission*, cited in footnote 7, paragraph 71; see also Case T-262/10 *Microban International and Microban (Europe)* v *Commission* [2011] ECR II-7697, paragraphs 23 and 24, and the order in Case T-381/11 *Eurofer* v *Commission* [2012] ECR, paragraph 43.

26. Furthermore, it is settled case-law that a Commission decision, such as that at issue here, by which an aid scheme is prohibited is, as regards the potential beneficiaries of the scheme, a measure of general application which covers objectively determined situations and entails legal effects for a class of persons envisaged in a general and abstract manner.[13] The Commission decision is thus in the nature of a measure 'of general application' in respect of the potential beneficiaries of an aid scheme.[14]

27. Although the prohibition of an aid scheme is, accordingly, addressed to the Member State concerned only, the national legal order itself is simultaneously modified by that prohibition. The aid scheme may no longer be applied by any of the State authorities in the light of the Commission decision. This also gives rise to legal effects for all persons falling within the scope of the aid scheme. Thus, provided that the aid scheme itself is applicable to objectively determined situations and entails legal effects for categories of persons envisaged in a general and abstract manner, the same is also true of the Commission decision prohibiting the scheme.

28. The Spanish corporation tax scheme which was prohibited in part in this case by the contested decision was applicable to objectively determined situations involving the intra-Community acquisition of shareholdings and was intended for the generally and abstractly envisaged category constituted by taxpayers. General application is accordingly attributable to the contested decision at least in so far it declares that the aid scheme is in part incompatible with the common market.

29. It is only in that regard that the appellant contested that decision. Its action was therefore directed against a regulatory act within the meaning of the third limb of the fourth paragraph of Article 263 TFEU.

2. Act which does not entail implementing measures

30. A further prerequisite for standing to institute proceedings under the third limb of the fourth paragraph of Article 263 TFEU is that the contested act must not entail any implementing measures.

31. In paragraphs 43 to 45 of the order under appeal the General Court took the view that the above condition was not fulfilled. It was indeed apparent just from Article 6(2) of the contested decision that implementing measures were required to effect the recovery of the aid granted. It added that the declaration that the aid scheme was incompatible with the common market was itself also in need of implementation, in particular by way of refusal to allow recourse to the tax advantages of that scheme.

32. The appellant contends in response to this that the declaration that an aid scheme is incompatible with the common market has direct effect and does not call for implementing measures. It argues that in the order under appeal the General Court erred in law in proceeding on the premiss that the decision entails implementing measures just because it requires such measures with a view to recovering the aid granted. Recovery, it maintains, is ancillary to the prohibition of the aid scheme by the declaration that it is incompatible with the common market, that declaration being the principal object of the decision.

33. In the light of those considerations, it must first be stated that the assessment whether the contested act entails implementing measures must admittedly be carried out by reference to the subject-matter of the action. The action is concerned solely with the declaration pursuant to Article 1(1) of the contested decision that the aid scheme is incompatible in part with the common

13 — See Joined Cases 67/85, 68/85 and 70/85 *Kwekerij van der Kooy and Others* v *Commission* [1988] ECR 219, paragraph 15; Joined Cases C-15/98 and C-105/99 *Italy and Sardegna Lines* v *Commission* [2000] ECR I-8855, paragraph 33; Case C-298/00 P *Italy* v *Commission* [2004] ECR I-4087, paragraph 37; and Case C-519/07 P *Commission* v *Koninklijke FrieslandCampina* [2009] ECR I-8495, paragraph 53. See, similarly, *Comitato 'Venezia vuole vivere'* v *Commission*, cited in footnote 3, paragraph 64.

14 — See, to this effect, *Italy* v *Commission*, cited in footnote 13, paragraph 39.

market; it is not concerned with the recovery of the aid, as ordered in Article 4(1) of the decision. Consequently, it need only be ascertained below whether the declaration that the aid scheme is incompatible in part with the common market entails implementing measures for the purposes of the third limb of the fourth paragraph of Article 263 TFEU.

34. Nevertheless, it cannot be ruled out from the outset that the recovery of aid constitutes a measure implementing the declaration of its incompatibility with the common market. This depends on how the condition for standing to institute proceedings to be examined here is to be understood.

a) Wording

35. In the light of the wording of the third limb of the fourth paragraph of Article 263 TFEU, acquiring an understanding of that condition is no easy task.

36. It could first of all be assumed, following the approach adopted by the parties to this dispute, that implementing measures within the meaning of the fourth paragraph of Article 263 TFEU refer to the application of the legal act to the individual case only. That assumption is challenged, however, by the fact that the term 'implementing measures' is also used in the first sentence of the fourth paragraph of Article 311 TFEU and refers in that provision to regulations which, pursuant to the first sentence of the second paragraph of Article 288 TFEU, are specifically to have general application. A further variant of meaning is present in the French version of the TFEU, which uses the term 'mesures d'exécution' additionally in the second sentence of the fourth paragraph of Article 299 TFEU, in the sense of enforcement measures, or in other words the *actual* implementation of a legal act.

37. The picture becomes even more unclear in relation to when a regulatory act 'entails' such an implementing measure. The respective German and English [15] wording of the fourth paragraph of Article 263 TFEU describes a logical or chronological *sequence* in that the legal act leads to (subsequent) implementing measures. However, when applied to individual cases a legal act always results in implementing measures, whether they are of a legal or of a practical nature as in the case of its enforcement. Only a legal act with no field of application at all would on that basis never entail measures for its implementation.

38. Moreover, the French [16] wording of the fourth paragraph of Article 263 TFEU can also be so construed that the legal act may not *contain* any implementing measures. Comparable German phrasing can be found in the legislative history. [17] However, it would be barely comprehensible if, on that basis, specifically a legal act which already contains implementing measures and thus does not need any more could not be contested.

b) Legislative history

39. Against that background the meaning of the criterion regarding implementing measures can be determined only by reference to the drafting history of the third limb of the fourth paragraph of Article 263 TFEU.

15 — The German and English versions of the fourth paragraph of Article 263 TFEU read: '… gegen Rechtsakte mit Verordnungscharakter, die … keine Durchführungsmaßnahmen nach sich ziehen …' and '… against a regulatory act which … does not entail implementing measures'.

16 — The French version of the fourth paragraph of Article 263 TFEU reads: '… contre les actes réglementaires … qui ne comportent pas de mesures d'exécution'.

17 — Secretariat of the European Convention, Final Report of the discussion circle on the Court of Justice of 25 March 2003 (Document CONV 636/03, paragraph 21).

40. As I have already explained in detail in a different context, the third limb of the fourth paragraph of Article 263 TFEU dates from the draft Treaty establishing a Constitution for Europe adopted by the European Convention.[18] The addition of 'implementing measures' was intended to ensure that the extension of the right to institute proceedings was restricted to cases where an individual 'must first infringe the law before he can have access to a court'.[19] That idea had already been mentioned by Advocate General Jacobs in *Unión de Pequeños Agricultores* v *Council*. To his mind, an individual who can challenge the validity of an act of the European Union before the national courts only by infringing the rules laid down by that act and relying on the invalidity of that act as a defence in criminal or civil proceedings directed against him is not afforded an adequate means of judicial protection.[20]

41. In the light of that acknowledged objective[21] of the third limb of the fourth paragraph of Article 263 TFEU, the requirement concerning implementing measures of a regulatory act is to be construed as meaning that the act — as the parties to these proceedings likewise concur — produces its effects directly in respect of the individual without any *need* for implementing measures.[22] Such focus on the need for implementing measures fulfils the spirit and purpose of the right to institute proceedings: direct legal protection is also required only if the regulatory act itself produces definitive legal effects for the individual.

42. In that regard, a distinction must be drawn between abstract and specific legal effects of a legal act. As already shown, a legal act of general application by definition produces legal effects with regard to categories of persons envisaged in a general and abstract manner.[23] Such abstract legal effects which arise by virtue of the applicability of a legal rule cannot, however, lead to the assumption that a legal act does not require further implementing measures. Otherwise, the additional requirement that a regulatory act may not entail implementing measures would no longer have any significance whatsoever. The legal effects to be determined for this purpose must therefore be so specific that they require no further tailoring to the individual persons concerned. In other words the regulatory act itself must determine in a definitive manner its legal effects for each individual.

c) Necessity of implementing measures for the contested decision

43. While the parties seem to be united on an abstract level, they are, however, at odds over whether the decision at issue here still requires implementing measures.

44. According to the Commission, implementing measures are necessary in respect of the contested decision since it is binding only on the person to which it is addressed, namely the Kingdom of Spain. It submits that this is so in particular as regards the recovery of the aid, which calls for further legal acts on the part of Spain.

45. On the other hand, the appellant argues that the contested decision produces direct legal effects in several respects. These do not concern the Kingdom of Spain alone. The prohibition of the aid scheme contained in Article 1(1) of the contested decision, and which applies directly, prevents also the actual and potential beneficiaries directly from having further recourse to the aid scheme.

18 — See my Opinion in *Inuit Tapiriit Kanatami and Others* v *Parliament and Council*, cited in footnote 4, points 39, 40 and 44.

19 — Secretariat of the European Convention, Final Report of the discussion circle on the Court of Justice, cited in footnote 17, paragraph 21.

20 — Opinion of Advocate General Jacobs in Case C-50/00 P *Unión de Pequeños Agricultores* v *Council* [2002] ECR I-6677, point 43.

21 — See the order in Case T-379/11 *Hüttenwerke Krupp Mannesmann and Others* v *Commission* [2012] ECR, paragraph 52, and *Eurofer* v *Commission*, cited in footnote 12, paragraph 60.

22 — See likewise *Microban International and Microban (Europe)* v *Commission*, cited in footnote 12, paragraph 34, but restricted to implementing measures of the Member States.

23 — See point 21 above.

46. It must first be stated, contrary to the statement of reasons for the contested decision and to the Commission's view, that recovery of the aid is not an implementing measure necessary for declaring in Article 1(1) of the contested decision that the aid scheme is incompatible in part with the common market. That declaration is admittedly a necessary — or 'logical' [24] — condition for the recovery of the aid. However, as Article 14(1) of Regulation (EC) No 659/1999 [25] and the appellant's situation demonstrate, recovery is not a mandatory consequence of the declaration of incompatibility; it is, on the contrary, based on a separate Commission decision. The order contained in Article 4(1) of the contested decision, under which Spain must recover certain aid, is thus an autonomous part of the decision and the requirement of its implementation is of no relevance to the subject-matter of this action in the absence of any challenge.

47. Therefore, as regards the appellant's standing to institute proceedings, the single determining factor is whether the declaration that the aid scheme is incompatible in part with the common market in itself requires implementing measures.

48. Although the appellant's argument that this declaration gives rise to direct specific legal effects is correct, this is primarily the case only vis-à-vis the Member State to which the decision is addressed. The Commission rightly points out in this regard that this decision is not binding on other persons, in accordance with the fourth paragraph of Article 249 EC.

49. As has been seen, the relevant national legal order is also modified as a result of the decision addressed to the Member State only. [26] The fact that the aid scheme is inapplicable also gives rise to legal effects for the persons caught by its provisions. Therefore, the necessity of implementing measures must also be reviewed in the light of these effects.

50. It must be stated in this connection that the necessary specific and definitive legal effect in respect of the beneficiaries of the aid scheme does not exist. Article 1(1) of the contested decision does not go so far as to specify the repercussions that the inapplicability of the aid scheme has on a particular taxpayer. Those repercussions do not arise until a tax notice is issued, since the inapplicability of the aid scheme itself does not give rise to a prohibition or an order for taxpayers. Furthermore, the consequences of the inapplicability of the aid scheme as regards the conclusion of the tax notice are not the same for every person covered by that scheme. Above all, a shareholding has to have been acquired in the first place in a given tax period. Then, the acquisition's specific repercussions will differ for every person concerned in an abstract manner, depending on the level of the goodwill to be established under the aid scheme and the amount of the profit or loss also to be established.

51. With regard to taxpayers, therefore, it is necessary to tailor the legal effects of the inapplicability of the aid scheme by means of a tax notice. The tax notice is accordingly an implementing measure which Article 1(1) of the contested decision 'entails' within the meaning of the fourth paragraph of Article 263 TFEU.

52. It also cannot make any difference in this regard whether an implementing measure of the European Union or — as in this case — of a Member State is involved. The European Union's system of legal protection, like its system of administration, is based on collaboration between authorities of the European Union and Member States.

24 — See Case C-331/09 *Commission* v *Poland* [2011] ECR I-2933, paragraph 54 and the case-law cited.

25 — Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 93 of the EC Treaty (OJ 1999 L 83, p. 1).

26 — See points 25 and 27 above.

53. Nor is the partial inapplicability of the aid scheme laid down by Spanish corporation tax legislation a prohibition which taxpayers might infringe with the result that penalties are imposed on them. Technically, the inapplicability results in the removal of the possibility of recourse to a tax advantage. It is unclear why it should not be possible and reasonable for taxpayers to claim amortisation under the aid scheme in their tax declaration and to institute proceedings before a national court against a tax notice rejecting such a claim. The national court can in that case indirectly examine the legality of Article 1(1) of the contested decision and, where necessary, refer the matter of its validity to the Court of Justice in accordance with Article 267 TFEU.

54. The fact that the appellant dispensed with seeking the benefit of the aid scheme because of a lack of planning certainty cannot be significant in this regard either. It is true that the appellant states that, following the cut-off date relating to legitimate expectations under Article 1(2) of the contested decision, it has on precautionary grounds already structured two shareholding acquisitions in such a manner that the aid scheme in any case did not apply, with the result that any indirect examination in that respect would be entirely impossible. However, that consequence arises only from the appellant's assessment of the probability that the contested decision is valid and from the action it has taken as a result, not, however, from the inability to bring proceedings directly before the General Court. Even if such proceedings had been possible, the appellant still would not have had legal certainty with regard to its shareholding acquisitions.

55. Thus the General Court in conclusion was correct in holding in paragraph 44 of the order under appeal that refusal of the tax advantage provided for in the aid scheme constitutes an implementing measure in respect of the contested decision.

56. Article 1(1) of the contested decision therefore entails implementing measures within the meaning of the fourth paragraph of Article 263 TFEU. The appellant's action consequently was not directed against a regulatory act which does not entail implementing measures.

3. Interim conclusion

57. The appellant therefore had no standing to institute proceedings pursuant to the third limb of the fourth paragraph of Article 263 TFEU, since Article 1(1) of the contested decision, although a regulatory act, does indeed entail implementing measures. The third ground of appeal is therefore unfounded.

4. Direct concern

58. If the Court of Justice were to come to a different conclusion in this regard, it would still be necessary, in considering whether the appellant has standing to institute proceedings under the third limb of the fourth paragraph of Article 263 TFEU, to examine whether Article 1(1) of the contested decision is of direct concern to it.

59. Since there is no reason for interpreting the criterion of direct concern any differently here than in the second limb,[27] it should be stated that, according to settled case-law, an applicant must be considered to be directly concerned if, first, the contested measure of the European Union directly affects his legal situation and, secondly, it leaves no discretion to its addressees, who are entrusted with the task of implementing it, such implementation being purely automatic and resulting from EU rules alone without the application of other intermediate rules.[28]

27 — See my Opinion in *Inuit Tapiriit Kanatami and Others* v *Parliament and Council*, cited in footnote 4, points 68 and 69.

28 — See Joined Cases C-463/10 P and C-475/10 P *Deutsche Post and Germany* v *Commission* [2011] ECR I-9639, paragraph 66 and the case-law cited.

60. The second condition is based on the assumption that the contested legal act still requires implementation. However, that is specifically not so in the case of an act which does not entail implementing measures. Such acts always operate automatically and their legal effects ensue from EU rules only.

61. Therefore, the only remaining matter of relevance in considering the third limb of the fourth paragraph of Article 263 TFEU is whether the contested act directly affects the applicant's legal situation. Here reference to the actual applicant comes into play. Indeed, the first two requirements refer only to the contested act, paying no consideration to the applicant's situation. If that remained so, any person could institute proceedings against a regulatory act which does not entail implementing measures, irrespective of whether that person actually falls within the scope of that act. The requirement that the applicant must be directly concerned therefore serves here, as in the context of the second limb of the fourth paragraph of Article 263 TFEU, to rule out the *actio popularis*.

62. However, if the applicant falls within the scope of such an act, it automatically affects that applicant directly. This is so in the case of the appellant if it falls within the scope of the provisions of the aid scheme rendered inapplicable under Article 1(1) of the contested decision. Since it is liable for payment of corporation tax in the Kingdom of Spain, it would also be directly concerned if the Court of Justice were in this respect to regard the decision as a regulatory act which does not entail implementing measures.

B – *General standing to institute proceedings against any acts (second ground of appeal)*

63. By its second ground of appeal, the appellant complains that the General Court erred in law in its application of the case-law regarding the admissibility of actions against decisions on State aid under the *second* limb of the fourth paragraph of Article 263 TFEU. Under that limb, any person may institute proceedings against any act of the Commission which, although not addressed to that person, is of direct and individual concern to it.

64. In the order under appeal the General Court did not consider the appellant to be individually concerned by the contested decision. In paragraphs 23 to 26 it explained that a Commission decision prohibiting an aid scheme is of individual concern to a company only where the company is an actual beneficiary of that scheme and the Commission has ordered the recovery of the aid. It accepted that the appellant is an actual beneficiary of the aid scheme, but it enjoys protection of legitimate expectations in that regard under Article 1(2) of the contested decision and the recovery of the aid is of absolutely no concern to it.

65. It is settled case-law that a person other than that to whom a decision is addressed may claim to be individually concerned only if that decision affects it by reason of certain attributes which are peculiar to it or by reason of circumstances in which it is differentiated from all other persons and, by virtue of these factors, distinguishes it individually just as in the case of the person addressed by such a decision.[29] As I have already explained elsewhere, this case-law must continue to be observed in relation to standing to institute proceedings under the newly drafted fourth paragraph of Article 263 TFEU.[30]

29 — See, inter alia, Case 25/62 *Plaumann* v *Commission* [1963] ECR 95; Case C-78/03 P *Commission* v *Aktionsgemeinschaft Recht und Eigentum* [2005] ECR I-10737, paragraph 33; and *Deutsche Post and Germany* v *Commission*, cited in footnote 28, paragraph 71.

30 — See my Opinion in *Inuit Tapiriit Kanatami and Others* v *Parliament and Council*, cited in footnote 4, points 89 and 90.

66. The Court has acknowledged that the actual beneficiaries of individual aid, granted on the basis of an aid scheme, of which the Commission has ordered the recovery are individually distinguished in this way. [31] It has stated in particular on this matter that the order for recovery exposes the beneficiaries of the aid scheme to the risk that the advantages which they have received will be recovered, and thus affects their legal position. Moreover, the eventuality that, subsequently, the advantages declared illegal may not be recovered from their recipients does not exclude the latter from being regarded as individually concerned. [32]

67. The appellant considers that this case-law applies to its situation. Although, under Article 1(2) of the contested decision, it is not required to pay back the aid received, it too is exposed to the risk of repayment. That risk, it explains, arises, first, from the fact that a competitor has brought an action against that provision before the General Court. [33] Second, proceedings may be brought at national level by third parties in the basis of the declaration that the aid scheme is incompatible in part with the common market.

68. In the Commission's view, whatever occurs after the contested decision was adopted is of no relevance to assessing whether or not the applicant is individually concerned. This is true, it argues, in particular of any decisions by the General Court relating to the contested decision.

69. First of all, regard must be had to the subject-matter of this action also when assessing the second limb of the fourth paragraph of Article 263 TFEU. By its action the appellant challenged Article 1(1) of the contested decision only, a provision declaring the aid scheme incompatible in part with the common market. That provision would therefore have to be of individual concern to the appellant.

70. Without regard to the order to recover the aid, which is not the subject-matter of the action, Article 1(1) of the contested decision principally affects the appellant only by ensuring that it cannot benefit in future from the aid scheme. As consistently held, however, an undertaking cannot, in principle, contest a Commission decision prohibiting 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. [34] The appellant cannot, therefore, be individually concerned as a potential beneficiary of the aid scheme. Nor does actual enjoyment of the benefit in the past set it apart from the category of persons who may no longer in future have recourse to the benefit.

71. In so far, however, as the appellant, as an actual beneficiary, asserts the risk of recovery of the advantages under the aid scheme which it has already gained, it must be observed that a risk of that nature must in any event ensue from the contested decision itself. The case-law cited by the appellant, which focuses on the mere risk of recovery, also concerned such a risk. In that case-law, it was unclear from the Commission decision whether in the individual case the aid was unlawful and therefore had to be recovered. [35]

72. According to the decision at issue in this case, however, the appellant without doubt is not required to make any repayment. A risk arises, therefore, not by virtue of the contested decision but only if the contested decision has to be amended at the instigation of a third party. The appellant may, as appropriate, object to such a new decision, without that being precluded by the binding force of judicial decisions in other proceedings.

31 — *Comitato 'Venezia vuole vivere'* v *Commission*, cited in footnote 3, paragraph 53; see also *Italy and Sardegna Lines* v *Commission*, cited in footnote 13, paragraph 34, and *Italy* v *Commission*, cited in footnote 13, paragraph 39.

32 — *Comitato 'Venezia vuole vivere'* v *Commission*, cited in footnote 3, paragraph 56.

33 — See Case T-207/10 *Deutsche Telekom* v *Commission*.

34 — See *Italy and Sardegna Lines* v *Commission*, cited in footnote 13, paragraph 33 and the case-law cited.

35 — See the Opinion of Advocate General Trstenjak in *Comitato 'Venezia vuole vivere'* v *Commission*, cited in footnote 3, points 71 to 78.

73. The declaration in the contested decision that the aid scheme is incompatible in part with the common market also does not lead, by virtue of any proceedings brought at national level by third parties, to a risk that the advantages gained will be lost. In that regard the Commission has correctly pointed out that the national courts are bound by the contested decision and the grant of protection of legitimate expectations contained in that decision. The protection of legitimate expectations under Article 1(2) of the contested decision also applies as regards further claims to which the appellant imagines itself to be exposed.

74. Consequently, the General Court was correct in holding in the order under appeal that the appellant is not individually concerned, for the purposes of the second limb of the fourth paragraph of Article 263 TFEU, by Article 1(1) of the contested decision. The second ground of appeal is therefore likewise unfounded.

C – *Infringement of the right to effective judicial protection (first ground of appeal)*

75. Finally, by its first ground of appeal the appellant also alleges that its right to effective judicial protection has been infringed by the order under appeal. It states that that right ensues from Articles 6 and 13 of the European Convention for the Protection of Human Rights and Fundamental Freedoms ('the ECHR') and from Article 47 of the Charter of Fundamental Rights of the European Union ('the Charter').

76. The General Court held in this regard, in paragraph 38 of the order under appeal, that the applicant was not prevented from proposing that the national court, in the course of proceedings before it, make a reference for a preliminary ruling under Article 267 TFEU, thereby putting in issue, if necessary, the validity of the contested decision.

77. The appellant, by contrast, does not consider this to be an effective approach since it does not guarantee its access to the European Union judicature. In its submission, first, it is unclear whether legal proceedings at national level can arise at all.[36] Secondly, the preliminary ruling approach is not equivalent to an action under Article 263 TFEU because of the uncertainty that a reference will be made and the duration of, and arrangements governing, proceedings for a preliminary ruling.

78. In my Opinion in *Inuit Tapiriit Kanatami and Others* v *Parliament and Council*, I have already explained at length that the right to an effective remedy under Article 47 of the Charter, having regard to Articles 6 and 13 of the ECHR, does not require a direct legal remedy against legislative acts.[37] The same is true of the decision of general application in dispute here. The system of judicial protection established by the Treaties, based on the European Union judicature and the national courts, offers effective judicial protection here too in the form of indirect challenges.[38]

79. In relation to the right to an effective remedy, it would admittedly be insufficient if an individual first had to act unlawfully and be exposed to a subsequent penalty in order to have the legality of a legal act reviewed in the context of an action contesting the penalty.[39] A situation of this kind is not, however, apparent in this case.[40]

80. Consequently, since the order under appeal does not infringe either Article 47 of the Charter or Articles 6 and 13 of the ECHR, the first ground of appeal is also unfounded.

36 — See, in this regard, point 54 above.

37 — See point 106 et seq. of the Opinion, cited in footnote 4.

38 — See, in this regard, my Opinion in *Inuit Tapiriit Kanatami and Others* v *Parliament and Council*, cited in footnote 4, point 115 et seq.

39 — See my Opinion in *Inuit Tapiriit Kanatami and Others* v *Parliament and Council*, cited in footnote 4, points 118 and 119.

40 — See, in this regard, point 53 above.

D – *Interest in bringing proceedings*

81. Since, therefore, all three of the appellant's grounds of appeal are unfounded, the appeal must be dismissed as unfounded. However, if the Court of Justice were to acknowledge a right to institute proceedings under the second or third limb of the fourth paragraph of Article 263 TFEU, the appellant's interest in bringing proceedings would still have to be examined.

82. In the proceedings before the General Court the Commission founded its plea of inadmissibility also on the applicant's lack of interest in bringing proceedings. The General Court left that matter open in paragraph 46 of the order under appeal.

83. In the context of the present proceedings the Commission again invokes the absence, in relation to the action, of an interest in bringing proceedings and requests that the Court of Justice uphold the order, if necessary, by making a substitution of the grounds.

84. The appellant by contrast submits that it has a legal interest in having Article 1(1) of the contested decision annulled. First, that would eliminate the risk of its suffering disadvantages resulting from the declaration that the aid scheme is incompatible with the common market in the event of protection of its legitimate expectations being withdrawn. Second, it might in future derive benefit again from the aid scheme. Although the Kingdom of Spain has in the meantime abolished that scheme in the light of the contested decision, the annulment of Article 1(1) of that decision would make it possible for it to be reintroduced or for damages to be claimed against the Spanish State.

85. An action is admissible only if the applicant has an interest in bringing proceedings in the light of the purpose of the action. This presupposes that the action must be liable, if successful, to procure an advantage to the party bringing it. [41]

86. To my mind, excessive requirements should not be imposed on the establishing of such an advantage, in particular where the strict conditions of the second or third limb of the fourth paragraph of Article 263 TFEU are already met, which is assumed to be the case in this examination in the alternative. The requirement of an interest in bringing proceedings is intended to protect all parties to proceedings against the bringing of an action which cannot be beneficial to the applicant. However, that is not the case here.

87. It is true that I do not detect any advantage as regards the shareholding acquisitions already completed, for which the appellant is afforded protection of legitimate expectations under Article 1(2) of the contested decision. In that regard, its legal position would not change if the contested Article 1(1) were annulled. [42] Matters would however be different if the Court of Justice were to acknowledge standing to institute proceedings only on the basis of the second limb of the fourth paragraph of Article 263 TFEU on the ground that the appellant is exposed to the risk of repayment of the aid by virtue of the contested decision.

88. In any event, the appellant's action could have created an advantage inasmuch as, if Article 1(1) of the contested decision were annulled, the prohibition of application of the aid scheme, which is favourable to the appellant, would no longer be laid down in the Spanish legal order.

41 — See Case C-362/05 P *Wunenburger* v *Commission* [2007] ECR I-4333, paragraph 42, and the order of 5 March 2009 in Case C-183/08 P *Commission* v *Provincia di Imperia*, paragraph 19.

42 — See, in contrast, Joined Cases T-425/04, T-444/04, T-450/04 and T-456/04 *France and Others* v *Commission* [2010] ECR II-2099, paragraphs 122 and 123.

89. The appellant would accordingly be acknowledged as having an interest in bringing its action. If the Court of Justice were therefore to affirm the appellant's right to bring proceedings under the fourth paragraph of Article 263 TFEU, the action would have been admissible. The order under appeal could not therefore be upheld by substitution of the grounds on the basis that the appellant would not have had an interest in bringing proceedings. Instead the appeal would be well founded and the order under appeal would have to be set aside.

E – *Summary*

90. Since, certainly to my mind, all the appellant's grounds of appeal are unfounded, the appeal must be dismissed as requested by the Commission.

V – Costs

91. Under Article 184(2) of the Rules of Procedure, the Court is to make a decision as to the costs where the appeal is unfounded. In view of the Commission's application as to costs, the appellant, as the unsuccessful party, is therefore to be ordered to pay the costs in accordance with Article 138(1), in conjunction with Article 184(1), of the Rules of Procedure.

VI – Conclusion

92. In the light of the foregoing considerations, I propose that the Court should:(1)

dismiss the appeal;(2)

order the appellant to pay the costs.