Reports of Cases

OPINION OF ADVOCATE GENERAL
WATHELET
delivered on 29 May 2013[1]

Case C-133/12 P

Stichting Woonlinie,
Stichting Allee Wonen,
Woningstichting Volksbelang,
Stichting WoonInvest,
Stichting Woonstede
v

European Commission

(Appeal — Scheme of aid granted by the Kingdom of the Netherlands in favour of social housing corporations — Decision giving binding force to commitments made by the Netherlands authorities with a view to complying with EU law — Decision declaring the scheme to be compatible with the common market — Fourth paragraph of Article 263 TFEU — Concept of a 'regulatory act which is of direct concern to [a natural or legal person] and does not entail implementing measures')

I – Introduction

1. This case involves an appeal lodged by the housing corporations (*woningcorporaties*; hereinafter 'wocos') Stichting Woonlinie, Stichting Allee Wonen, Woningstichting Volksbelang, Stichting WoonInvest and Stichting Woonstede against the order of the General Court of the European Union delivered on 16 December 2011 in Case T-202/10 *Stichting Woonlinie and Others* v *Commission* ('the order under appeal').

2. By the order under appeal, the General Court dismissed as inadmissible the appellants' action seeking annulment of Commission Decision C(2009) 9963 final of 15 December 2009 relating to State aid E 2/2005 and N 642/2009 — The Netherlands — Existing and special project aid to housing corporations ('the contested decision'). The General Court held that the contested decision, in so far as it related to existing aid scheme E 2/2005 (the only part of the decision being challenged by the appellants), concerned the appellants in the same way as any other economic operator who was or might be in the same circumstances, and that their status as wocos, defined by reference to objective criteria, was therefore not, in itself, sufficient to establish that they were individually concerned.

3. In the order under appeal, the General Court thus confined itself to examining the requirement of individual concern under the fourth paragraph of former Article 230 EC. The entry into force of the Treaty of Lisbon (prior to the contested decision) opened up a third possibility for natural or legal persons seeking to bring an action for annulment. The fourth paragraph, *in fine*, of Article 263 TFEU enables such persons to bring proceedings for the annulment of regulatory acts which are of direct concern to them and do not entail implementing measures.

1 — Original language: French.

4. In this Opinion, inasmuch as the admissibility of an action brought under Article 263 TFEU is a matter of public policy, I will propose that the Court examine the applicability of the fourth paragraph, *in fine*, of Article 263 TFEU to the present case. I will also suggest that the General Court erred in law in failing to carry out such an analysis. I will then invite the Court to give a definitive ruling on that issue, to declare that the action is admissible and to refer the case back to the General Court in relation to the remainder, so that it can decide on the merits. [2]

II – Background to the dispute

5. The appellants are wocos established in the Netherlands. They are not-for-profit bodies whose mission is to acquire, build and rent out dwellings aimed mainly at underprivileged individuals and socially disadvantaged groups. Wocos also engage in other activities, such as the construction and lease of apartments with higher rents, the construction of apartments for sale, as well as the construction and lease of public-purpose buildings.

6. In 2002, the Netherlands authorities notified the European Commission of the general State-aid scheme for wocos. The Netherlands authorities withdrew their notification after the Commission found that the funding measures for wocos could be classified as existing aid.

7. On 14 July 2005, however, the Commission sent a letter to the Netherlands authorities under Article 17 of Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article [88 EC] (OJ 1999 L 83, p. 1), expressing doubts as to the compatibility of aid measure E 2/2005 with the common market. In its letter, the Commission first pointed out that the Netherlands authorities had to redefine the public-service mission entrusted to wocos, so that social housing would be earmarked for a clearly defined target group of underprivileged individuals or socially disadvantaged groups. It added that all of the commercial activities of wocos had to be pursued on market terms and that they could not receive State aid. Lastly, the Commission stated that the offer of social housing had to be adapted to the requirements of underprivileged individuals or socially disadvantaged groups.

8. After that letter had been sent, the Commission and the Netherlands authorities commenced negotiations in order to bring the aid scheme in question into line with Article 106(2) TFEU.

9. On 16 April 2007, the Vereniging van Institutionele Beleggers in Vastgoed, Nederland (association of institutional property investors of the Kingdom of the Netherlands) lodged a complaint with the Commission concerning the aid scheme for wocos. In June 2009, Vesteda Groep BV became a party to that complaint.

10. By letter of 3 December 2009, the Netherlands authorities undertook to modify the general State-aid scheme for wocos and sent several proposals to the Commission in accordance with those commitments.

11. On that basis, they adopted new rules which were the subject of a new ministerial decree and a new housing law, which were scheduled to come into force on 1 January 2010 and 1 January 2011, respectively.

2 — For a case in which the Court has proceeded in this fashion, see the judgment in Joined Cases C-463/10 P and C-475/10 P *Deutsche Post and Germany* v *Commission* [2011] ECR I-9639, paragraphs 77 to 82.

12. As regards the compatibility of the new system for financing wocos as proposed by the Netherlands authorities, the Commission concluded — in recital 72 to the contested decision — that 'the aid for the provision of social housing, i.e. the activity of construction and renting out dwellings to individuals including the building and maintenance of ancillary infrastructure … is compatible under Article 106(2) TFEU'. Consequently, the Commission accepted the commitments given by the Netherlands authorities and adopted the contested decision.

III – The procedure before the General Court and the order under appeal

13. By application lodged at the Registry of the General Court on 29 April 2010, the appellants brought an action under Article 263 TFEU seeking annulment of the contested decision in so far as it relates to aid measure E 2/2005.

14. The appellants put forward a number of pleas in law in support of their application. However, the Commission challenged the admissibility of their action, arguing that the appellants were not individually concerned by the decision for the purposes of Article 263 TFEU. The General Court therefore decided that it was first necessary to rule on that issue.

15. The General Court found that the appellants were not the persons to whom the contested decision was addressed, in so far as it relates to aid measure E 2/2005. In that connection, it first pointed to the settled case-law according to which an undertaking is not entitled to 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 or of being a potential beneficiary of that scheme. Second, it considered that the same held true for an action seeking the annulment of a decision by which the Commission, taking formal notice of the commitments made by the national authorities, finds the aid scheme in question, as amended, to be compatible with the common market.

16. In this case, the General Court held (in paragraphs 29 and 30 of the order under appeal) that woco status was conferred on the basis of objective criteria likely to be met by an indeterminate number of operators. It also pointed out (in paragraph 31 of that order) that wocos could only be potential beneficiaries of the aid measures, since the Commission's examination 'constituted a preliminary review' of the aid scheme as amended in the light of the commitments made by the national authorities.

17. The General Court concluded that their status as wocos did not, by itself, make it possible for those operators to be classified as being individually concerned by the contested decision in so far as it relates to aid measure E 2/2005 and dismissed the action as inadmissible.

IV – The appeal

18. The appellants brought the present appeal by notice of appeal lodged at the Court Registry on 9 March 2012. They ask the Court to set aside the order under appeal, in whole or in part, and to refer the case back to the General Court. They also seek to have costs awarded against the Commission.

19. The appellants put forward two grounds in support of their appeal:

— by their first ground of appeal, the appellants submit that the order under appeal is vitiated by an error of law, by an inaccurate appraisal of the relevant facts and by a failure to provide sufficient grounds, since it makes the admissibility of the action conditional on whether or not the appellants are actual or potential beneficiaries of the existing measures; and

— by their second ground of appeal, the appellants claim that the General Court erred in law by finding that they did not belong to a closed circle of existing wocos benefiting under aid measure E 2/2005.

20. In their reply to the questions put by the Court, the appellants state that, if they cannot be classified as being individually concerned by the contested decision, they can nevertheless seek to have that decision annulled as it is a regulatory act which is of direct concern to them and does not entail implementing measures.

A – *Applicability of the fourth paragraph, in fine, of Article 263 TFEU*

21. In its examination of the admissibility of the action, the General Court confined itself to finding that the appellants were not the addressees of the contested decision and were not individually concerned by it.

22. I note that the General Court did not examine whether the contested decision was a regulatory act which was of direct concern to the appellants and which did not entail implementing measures. In other words, the General Court failed to carry out an analysis of the fourth paragraph, *in fine*, of Article 263 TFEU in so far as it introduces a new remedy.

23. Although the appellants did not themselves raise the issue before the General Court (or even in their appeal), it touches on the admissibility of an action brought under Article 263 TFEU and is a matter of public policy. On that basis, the Court must examine that issue of its own motion,[3] the parties having been invited to submit their views thereon during the hearing which took place on 17 April 2013.

1. The third remedy under the fourth paragraph, *in fine*, of Article 263 TFEU

24. The fourth paragraph of Article 263 TFEU provides that '[a]ny natural or legal person may, under the conditions laid down in the first and second paragraphs, institute proceedings against an act addressed to that person or which is of direct and individual concern to them, *and against a regulatory act which is of direct concern to them and does not entail implementing measures*'.[4]

25. Accordingly, individuals can now bring an action for annulment without having to prove that they are individually concerned, on condition, however, that the act in question is a regulatory act of direct concern to them and does not entail implementing measures.

a) A regulatory act

26. According to the General Court's order in Case T-18/10 *Inuit Tapiriit Kanatami and Others* v *Parliament and Council* [2011] ECR II-5599, not all acts of general application can be classified as 'regulatory acts' within the meaning of Article 263 TFEU. The same can also be said of legislative acts.

27. Taking that finding as a starting point, and in so far as the Treaty of Lisbon used a purely procedural criterion to define legislative acts in Article 289(3) TFEU,[5] the General Court has limited regulatory acts to acts of general application which are not adopted by legislative procedure.

3 — See, inter alia, Case C-362/06 P *Sahlstedt and Others* v *Commission* [2009] ECR I-2903, paragraph 22.

4 — Emphasis added.

5 — Article 289(3) TFEU provides '[l]egal acts adopted by legislative procedure shall constitute legislative acts'.

28. An appeal has been brought against that order of the General Court.[6] Although the Court of Justice has not yet delivered its ruling, Advocate General Kokott confirmed the General Court's interpretation in her Opinion.[7]

29. Whilst I may agree with a number of the historical and textual arguments put forward by Advocate General Kokott, I do not think it can be inferred from the use of the term 'legislative acts', in the first paragraph of Article 263 TFEU, that the term 'regulatory act', in the fourth paragraph of that article, has a different meaning in the context of acts of general application. The opposite of a legislative act is not necessarily a regulatory act, but rather an implementing act, which is the term used expressly in Article 291 TFEU.[8]

30. Furthermore, the FEU Treaty does not use the word 'regulatory' to designate acts which are not legislative acts, but instead refers to 'non-legislative acts' in Article 297(2) TFEU.

31. On any view, that approach — far from being universally supported by legal schools of thought — does not seem to me to address the concerns which led to the amendment of Article 230 EC. The most striking paradox in this regard undoubtedly lies in the fact that if the restrictive approach proposed by the General Court were to be followed, the case of *Unión de Pequeños Agricultores* v *Council*[9] would again have the consequence of rendering the appeal inadmissible, even though that case led to the reform.

32. Moreover, it can no longer be contended that a reference for a preliminary ruling is an adequate mechanism to safeguard effective judicial protection, contrary to the views of some authors who support such a restrictive approach. If that were the case, there would have been no need to amend Article 230 EC, the difficulties with which will, by definition, continue to exist if legislative acts are regarded as being excluded from the fourth paragraph of Article 263 TFEU.

33. However, some quarters claim that the second subparagraph of Article 19(1) TEU fills the existing lacunae. That is not at all the case. That article merely gives formal expression to a principle established, on the same terms, by the Court itself in *Unión de Pequeños Agricultores* v *Council*.[10] Thus, the second subparagraph of Article 19(1) TEU did not add anything to the existing law. Once again, had that been the case, the amendment to former Article 230 EC would have served no purpose.

34. In my view, the duty of sincere cooperation cannot extend to requiring Member States to create access to national courts when no State measure is at issue. It is also surprising to note that, among those who rely on the second subparagraph of Article 19(1) TEU to impose on States the obligation to ensure that individuals enjoy effective judicial protection, some of them have no qualms about relying on the absence of domestic remedies against State legislative acts in most Member States to justify the same absence at EU level. Is there not a paradox in viewing as normal the fact that the Treaty does not permit individuals to take legal action against EU legislative acts on the ground that most States do not allow such action to be taken against their own laws, whilst requiring those States to provide for that possibility, albeit indirectly, in relation to European Union acts?

6 — Case C-583/11 P *Inuit Tapiriit Kanatami and Others* v *Parliament and Council*, at present pending before the Court.

7 — Opinion delivered by Advocate General Kokott on 17 January 2013 in the appeal lodged against the order in *Inuit Tapiriit Kanatami and Others* v *Parliament and Council*.

8 — Article 291(1) TFEU provides 'Member States shall adopt all measures of national law necessary to implement legally binding Union acts'. Article 291(2) TFEU provides that '[w]here uniform conditions for implementing legally binding Union acts are needed, those acts shall confer implementing powers on the Commission, or, in duly justified specific cases, … on the Council'. In any event, Article 291(4) TFEU requires '[t]he word "implementing" [to be] inserted in the title of implementing acts'.

9 — Case C-50/00 P *Unión de Pequeños Agricultores* v *Council* [2002] ECR I-6677.

10 — In paragraph 41 of that judgment, the Court states:

> 'Thus it is for the Member States to establish a system of legal remedies and procedures which ensure respect for the right to effective judicial protection.'

35. In addition, it is not reasonable in my view to consider that judicial protection would become effective because it would be theoretically possible, for an individual, to raise the question of the applicability of an EU legislative act to his personal circumstances before his national authorities, in the hope of receiving an answer that he could challenge before a court which could, in turn, trigger the preliminary-ruling procedure. How can one not doubt the real effectiveness of such theoretical constructs, built on the existence of an act the sole rationale of which is to be open to challenge and would thus appear to be entirely artificial? What, moreover, would happen if the national authorities failed to answer?

36. It should be noted that the Court has held that effective judicial protection is not guaranteed when an individual is forced to break the law in order to persuade the competent national authority to adopt an implementing act, resulting in that person having to defend himself before a court which could refer a question for a preliminary ruling. [11] Why should the outcome be any different in circumstances where the national authority is not required, as a rule, to adopt an act?

37. For those reasons, an interpretation of the fourth paragraph, *in fine*, of Article 263 TFEU which excludes legislative acts is, in my view, too narrow and fails to address the reasons which led to the amendment of the fourth paragraph of Article 230 EC.

38. That finding consequently leads me to prefer a different interpretation of the concept of regulatory act within the meaning of the fourth paragraph, *in fine*, of Article 263 TFEU. In my view, regulatory acts should be construed as being acts of general application, whether legislative or not.

b) Which is of direct concern to the applicant

39. Whilst the requirement of individual concern does not appear in the third type of action for annulment, the requirement of direct concern is retained. Its meaning hardly appears to be problematic: the concept of direct interest is the same in the second and third situations covered by the fourth paragraph of Article 263 TFEU. [12]

40. Therefore, according to the settled case-law on the fourth paragraph of Article 263 TFEU, a natural or legal person is directly concerned by a European Union act if it 'affect[s] directly the legal situation of the individual and leave no discretion to its addressees, who are entrusted with the task of implementing it, such implementation being purely automatic and resulting from Community rules without the application of other intermediate rules'. [13]

41. The Court has also had the opportunity to point out in this regard that the absence of leeway on the part of Member States eliminates the apparent absence of a direct link between a European Union act and an individual. In other words, in order to preclude a finding of direct concern, the discretion of the author of the intermediate measure intended to implement the European Union act cannot be purely formal. It must be the source of the applicant's legal concern. [14]

11 — Case C-432/05 *Unibet* [2007] ECR I-2271, paragraph 64.

12 — This is the interpretation of the General Court. See, in this regard, Case T-262/10 *Microban International and Microban (Europe)* v *Commission* [2011] ECR II-7697, paragraph 32. This is also the view supported by Advocate General Kokott in *Inuit Tapiriit Kanatami and Others* v *Parliament and Council*, point 69, and in Case C-274/12 P *Telefónica* v *Commission* point 59, at present pending before the Court. In legal literature, see, inter alia, Albors-Llorens, A., 'Sealing the fate of private parties in annulment proceedings? The General Court and the new standing test in Article 263(4) TFEU', *The Cambridge Law Journal*, 2012, vol. 71, pp. 52 to 55, and Werkmeister, C., Pötters, St., and Traut, J., 'Regulatory Acts within Article 263(4) TFEU — A dissonant Extension of Locus Standi for Private Applicants', *Cambridge yearbook of European legal studies*, vol. 13, 2010-2011, pp. 311 to 332, especially p. 329.

13 — Case C-125/06 P *Commission* v *Infront WM* [2008] ECR I-1451, paragraph 47.

14 — For an application of the principle, see, for example, Case C-519/07 P *Commission v Koninklijke FrieslandCampina* [2009] I-8495, paragraphs 48 and 49.

c) Which does not entail implementing measures

42. What now remains, therefore, is to establish the scope of the last limb of the fourth paragraph of Article 263 TFEU, that is to say, the absence of implementing measures. Is this a third condition or a simple explanation of direct concern?

43. The Court of Justice has not yet ruled on this matter. The General Court, for its part, has held that a Commission decision finding aid to be unlawful and ordering its recovery 'cannot be described as an act not entailing implementing measures [since] Article 6(2) of the contested decision refers to the existence of "national measures taken to implement [it] until recovery of the aid granted under the scheme [at issue] has been completed". The very existence of those recovery measures, which constitute implementing measures, justifies the contested decision's being regarded as an act entailing implementing measures. Such measures may be challenged before a national court by persons to whom they are addressed'. [15]

44. In that case, the General Court therefore denied the applicant company the right to bring an action for annulment on the basis of the extension provided for by the Treaty of Lisbon, on the ground that there were necessarily national implementing measures.

45. In my view, such an interpretation overly restricts the effects of the addition to former Article 230 EC brought about by the fourth paragraph of Article 263 TFEU, as it is always possible to envisage a national measure implementing a European Union regulatory act, such as publication, notification, confirmation or reminder. Following the General Court's interpretation, straightforward formalities of that kind, which may be unforeseeable or optional, should rule out application of that article.

46. Such an approach also seems to me to be at odds with the objective pursued by those who drafted the Treaty. As Advocate General Kokott pointed out in *Telefónica* v *Commission*, '[t]he addition of the words "without entailing implementing measures" aims to restrict the extension of a private individual's right to institute proceedings to those cases in which the individual "must first infringe the law before he can have access to a court"'. [16]

47. I again take the same view as Advocate General Kokott where she states that 'the condition concerning the absence of measures implementing a regulatory act must be construed as meaning that the act … produces its effects directly for individuals, without requiring implementing measures'. [17] That definition is identical to the definition of direct concern. [18]

48. I am therefore of the view that the term 'implementing measures' used in the fourth paragraph, *in fine*, of Article 263 TFEU should be excluded from the domestic sphere in order to limit such measures to EU law or, at the very least, that measures adopted by national authorities without the exercise of discretion should be excluded from that concept. As explained above, the absence of leeway on the part of Member States eliminates the apparent absence of a direct link between a European Union act and an individual.

15 — Judgment of 8 March 2012 in Case T-221/10 *Iberdrola v Commission*, paragraph 46. See also the order of 21 March 2012 in Case T-228/10 *Telefónica* v *Commission*, paragraph 42. An appeal against that order is currently pending (Case C-274/12 P).

16 — Point 40.

17 — *Ibidem*, point 41.

18 — See the definition of direct concern given by Advocate General Kokott in point 59 of her Opinion in *Telefónica* v *Commission*.

49. To conclude, I consider that the condition linked to the absence of implementing measures is simply a repetition of direct concern. [19]

50. To my mind, this interpretation is even more relevant in the area of State aid, where, in accordance with settled case-law, the cancellation of unlawful aid through recovery is the logical consequence of a finding that it is unlawful. [20] The only defence available to a Member State in infringement proceedings brought by the Commission under Article 108(2) TFEU is to plead that it was absolutely impossible for it properly to implement the decision at issue. [21] Therefore, the recovery measures taken by Member States are nothing more than necessary accessories, in a sense, to the contested decision.

51. The proposed interpretation also has the advantage of concentrating all legal proceedings concerning State aid before the courts of the European Union, which strikes me as beneficial in two respects. Firstly, by removing the issue of individual concern and thus enabling potential recipients of aid or the competitors of an undertaking in receipt of aid to challenge the Commission's decision directly before the Court, legal certainty is enhanced. This eliminates the uncertainty associated with the *TWD Textilwerke Deggendorf* case-law, in which the Court held that the question of individual concern had to be resolved at the outset, failing which a plea of inadmissibility could be raised against a subsequent reference for a preliminary ruling. [22] Secondly, the proposed approach removes the need to initiate national proceedings in order to reach the Court by means of a question referred for a preliminary ruling. In other words, it authorises proceedings which are more direct and, therefore, more efficient, more rapid and more economical.

52. Finally, I wonder — in a more general sense — about the usefulness of drawing a distinction between the condition of direct concern and the absence of implementing measures. How can an individual be directly concerned by a European Union act if that act requires an actual implementing measure, whether European or domestic, when, according to the Court's settled case-law, in order for an individual to be directly concerned, the European Union act must 'affect directly the legal situation of the individual …, [its] implementation being purely automatic and resulting from Community rules without the application of other intermediate rules'? [23]

2. Application to the present case

53. The contested decision is a decision of the Commission declaring two aid schemes (an existing aid scheme and a new aid scheme) to be compatible with Article 106(2) TFEU and with the common market.

54. In the part of the contested decision forming the subject-matter of the action, the Commission examined the compatibility of aid measure E 2/2005 concerning the system for financing wocos, as amended following the commitments given by the Netherlands authorities.

19 — See the definition of direct interest in point 40 of the present Opinion. In this connection, see Creus, A., 'Commentaire des décisions du Tribunal dans les affaires T-18/10 *Inuit* et T-262/10 *Microban*', *Cahiers de droit européen*, 2011, p. 659, especially p. 677, as well as Peers, S., and Costa, M., 'Judicial review of EU Acts after the Treaty of Lisbon; Order of 6 September 2011, Case T-18/10 *Inuit Tapiriit Kanatami and Others* v *Commission* & Judgment of 25 October 2011, Case T-262/10 *Microban* v *Commission*', *European Constitutional Law Review*, 2012, vol. 8, pp. 82 to 104, especially p. 96.

20 — See, inter alia, Case C-331/09 *Commission* v *Poland* [2011] ECR I-2933, paragraph 54.

21 — See, inter alia, Case C-304/09 *Commission* v *Italy* [2010] ECR I-13903, paragraph 35.

22 — Case C-188/92 *TWD Textilwerke Deggendorf* [1994] ECR I-833. In paragraph 17 of that judgment, the Court held that '[i]t follows from the … requirements of legal certainty that it is not possible for a recipient of aid, forming the subject-matter of a Commission decision adopted on the basis of Article 93 of the Treaty, who could have challenged that decision and who allowed the mandatory time-limit laid down in this regard by the third paragraph of Article 173 of the Treaty to expire, to call in question the lawfulness of that decision before the national courts in an action brought against the measures taken by the national authorities for implementing that decision'.

23 — *Commission* v *Infront WM*, paragraph 47 and the case-law cited.

55. It is thus necessary to determine whether that act, which the Commission addressed to the Kingdom of the Netherlands, (a) is a regulatory act, and (b) directly concerns the appellants, without any implementing measures.

a) Is the contested decision a regulatory act?

56. Although it is common ground that the contested decision was adopted following a non-legislative procedure, the Commission denies that the act is of general application. Since the act was addressed to the Kingdom of the Netherlands alone, its application, the Commission submits, can be only of an individual nature.

57. The issue of the scope of a decision addressed to a single Member State was recently the subject of an in-depth and well-founded analysis by Advocate General Kokott in *Telefónica* v *Commission*.[24]

58. I share her view as to the distinctive nature of this type of decision, inasmuch as Member States also embody a national legal system and the decisions addressed to them are binding on all of their national authorities. Advocate General Kokott thus points out that '[d]ecisions addressed to a Member State, even if there is only one addressee, can thus shape a national legal system and thereby have general application'.[25]

59. In certain cases, the Court has also already recognised that this type of decision has general application,[26] particularly in the area of State aid. According to settled case-law, to which the General Court also referred in the order under appeal, a Commission decision which prohibits an aid scheme is considered, for the potential beneficiaries of the aid scheme, to be a measure of general application which applies to objectively determined situations and entails legal effects for a class of persons envisaged in a general and abstract manner. Accordingly, the decision of the Commission is a measure of 'general application' for the potential beneficiaries of an aid scheme.[27] That is the very reason why such beneficiaries are not generally considered to be individually concerned. In the present case, I take the view that the same reasoning can be applied to a decision adopted by the Commission under Article 19(1) of Regulation No 659/1999 in which it takes formal notice of the commitments made by the national authorities and finds the amendments to an existing aid scheme to be compatible with the common market.

60. In so far as the amended aid scheme is intended to apply to objectively determined situations and entails legal effects for a class of persons envisaged in a general and abstract manner, the same is true of the Commission decision authorising that scheme. Unlike the Commission, I cannot see why a distinction should be drawn in this regard between decisions authorising an aid scheme and those prohibiting one.

61. Consequently, regardless of whether the concept of a regulatory act is construed broadly or narrowly, the contested decision, as a measure of general application adopted in accordance with a non-legislative procedure, satisfies the first condition laid down in the fourth paragraph, *in fine*, of Article 263 TFEU.

24 — *Ibidem*, points 21 to 29.

25 — *Ibidem*, point 25.

26 — See Case C-80/06 *Carp* [2007] ECR I-4473, paragraph 21, and the order in Case C-503/07 P *Saint-Gobain Glass Deutschland* v *Commission* [2008] ECR I-2217, paragraph 71.

27 — See, inter alia, Case C-298/00 P *Italy* v *Commission* [2004] ECR I-4087, paragraph 37.

b) Are the appellants directly concerned, without any implementing measures?

62. In its reply to the written question, the Commission submits that implementing measures are necessary to give effect to the contested decision. The Commission refers not only to the ministerial decree and the law mentioned in recital 41 to the contested decision, but also to a temporary regulation dated 3 November 2010 on services of general economic interest provided by approved housing corporations (published in the *Nederlandse Staatscourant* No 17515 on 8 November 2010).

63. The existence of implementing measures cannot be denied. They form an integral part of the procedure relating to existing aid schemes provided for in Regulation No 659/1999. Article 19(1) of that regulation expressly provides that, where the Member State accepts the measures proposed by the Commission, that Member State is to inform the Commission thereof. The Commission records that finding and the Member State is then 'bound by its acceptance to implement the appropriate measures'.

64. However, as I have explained above, the condition relating to the absence of implementing measures is, in my view, simply a repetition of direct concern and, in order to preclude a finding of direct concern, the discretion of the authority that has to adopt the intermediate measure cannot be purely formal.

65. Since the contested decision was based on Article 19(1) of Regulation No 659/1999, it leaves no discretion to the Kingdom of the Netherlands.

66. It follows from that provision that the amendments making the scheme compatible with EU law were prompted by the Commission and given binding force by it.

67. According to Article 19(1) of Regulation No 659/1999, '[w]here the Member State concerned accepts the proposed measures and informs the Commission thereof, the Commission shall record that finding and inform the Member State thereof. The Member State shall be bound by its acceptance to implement the appropriate measures'.

68. The binding nature of a decision based on Article 19(1) of Regulation No 659/1999 was also confirmed by the Court in the judgment in Case C-242/00 *Germany* v *Commission* [2002] ECR I-5603.

69. In that case, the Court pointed out that the Commission could, in the exercise of the powers conferred on it by Articles 87 EC and 88 EC (now Articles 107 TFEU and 108 TFEU), adopt guidelines designed to indicate how it intended, under those articles, to exercise its discretion as regards new aid or existing systems of aid. When they were based on Article 88(1) EC (now Article 108(1) TFEU), those guidelines constituted one element of the regular and periodic cooperation under which the Commission, in conjunction with the Member States, kept existing systems of aid under constant review and proposed to them any appropriate measures required by the progressive development or the functioning of the common market. The Court added that '[i]n so far as these proposals for appropriate measures are accepted by a Member State, they are binding on that Member State …' [28] and found that 'the Community legislature in its turn adopted the principles laid down by the case-law … by setting out, in Council Regulation (EC) No 659/1999, … Article 19(1)'. [29]

70. Pursuant to that provision, the amendments making the scheme compatible with EU law are given binding force only as a result of their acceptance by the Commission. In recital 74 to the contested decision, the Commission expressly stated that it 'accept[ed] the commitments made by the Dutch authorities' and that '[i]n accordance with Article 19 of … [Regulation No 659/1999], [it] record[ed] the commitments by means of the present decision and thereby render[ed] the implementation of the appropriate measures binding'. This statement is repeated in the operative part of the decision (recital 108).

71. The Commission also submitted that the Kingdom of the Netherlands retained a degree of discretion following the adoption of the contested decision in so far as it remained free to withdraw definitively the aid scheme in question. I do not agree because, given the fact that the Kingdom of the Netherlands proposed the amendments to the Commission, which were then rendered binding by the contested decision, the possibility that that Member State might decide not to maintain the aid scheme was purely theoretical. On the contrary, there was no doubt as to the intention of the Netherlands authorities to apply the decision. [30]

72. Furthermore, contrary to what the Commission claims, the appellants state in their reply to the written questions that there is no measure which they could challenge before a national court. That point was emphatically repeated during the hearing, namely, that no remedy lies under national law for an individual against a binding measure of general application, such as Article 4 of the temporary regulation of 3 November 2010 on services of general economic interest provided by approved housing corporations.

73. In addition, the obligation to allocate 90% of the available housing to persons whose income falls below a specific threshold, as referred to in Article 4 of the abovementioned national regulation, does not require any other decision. On the contrary, an infringement of that rule would alone be capable of triggering a response from the authorities, such as a refusal to grant the aid in question. In that connection, I do not concur with the Commission's argument that there must be a risk of criminal proceedings in order for the case to come within the ambit of *Unibet*. Regardless of the penalty incurred, that approach does not, in any event, satisfy the requirement of effective judicial protection.

28 — Case C-242/00 *Germany* v *Commission*, paragraph 28.

29 — *Ibidem*, paragraph 29. The General Court has recently applied that case-law:
'the Court rejects the approach essentially advocated by the Commission, which consists, on the basis of a literal reading of Article 19(1), taken in isolation, in maintaining that it takes no decision in the case of a procedure for review of an existing aid leading to acceptance by the Member State of the appropriate measures proposed … As regards the binding legal effects of the contested decision [taken by the Commission on the basis of Article 19(1), *in fine*, of Regulation No 659/1999], suffice it to observe that, under [that article], a Member State which, at the time of the publication provided for in Article 26(1) of Regulation No 659/1999, has necessarily accepted the appropriate measures is "bound … to implement" those measures' (Case T-354/05 *TF1* v *Commission* [2009] ECR II-471, paragraphs 68 and 73 and the case-law cited.)

30 — For a similar assessment by the Court concerning an application for protective measures lodged by the French Republic (import quotas), see Case 11/82 *Piraiki-Patraiki and Others* v *Commission* [1985] ECR 207, paragraph 9.

74. Accordingly, I am of the opinion that denying the right to bring legal proceedings for annulment of the contested decision deprives the appellants of judicial protection.

75. I therefore take the view that the contested decision is of direct concern to the appellants and does not entail implementing measures within the meaning of the fourth paragraph, *in fine*, of Article 263 TFEU inasmuch as that decision directly affects the legal situation of the appellants and leaves no discretion to the addressee charged with implementation of the decision, that is to say, the Kingdom of the Netherlands.

76. The conditions laid down in the fourth paragraph, *in fine*, of Article 263 TFEU are thus met and the General Court ought therefore to have admitted the appellants' action pursuant to that provision. By dismissing the action as inadmissible, the General Court, in my view, erred in law.

B – *The first and second grounds of appeal concerning the need to be individually concerned by the contested act*

77. If the Court finds that the conditions laid down in the fourth paragraph, *in fine*, of Article 263 TFEU were not satisfied, it would then be necessary to examine the grounds relied on by the appellants against the contested decision in so far as it concerns aid measure E 2/2005.

78. The two grounds of appeal concern the application to this case, by the General Court, of the requirement that the appellants be 'individually concerned' by the contested decision. I shall analyse them together.

1. Concept

79. The requirement of individual concern in the context of an action for annulment is, without a doubt, one of the most difficult concepts to define. Since *Plaumann* v *Commission*, the case-law has been consistent in holding that '[p]ersons other than those to whom a decision is addressed may only claim to be individually concerned if that decision affects them by reason of certain attributes which are peculiar to them or by reason of circumstances in which they are differentiated from all other persons and by virtue of these factors distinguishes them individually just as in the case of the person addressed'. [31]

80. However, the scope of the principle has been diluted. Thus, the fact that a provision is, by its nature and scope, a provision of general application in so far as it applies to all of the traders concerned does not of itself preclude it from being of concern to some of them individually. That would be the case 'where the decision affects a group of persons who were identified or identifiable when that measure was adopted *by reason of criteria specific* to the members of the group[.] [T]hose persons may be individually concerned by that measure inasmuch as they form part of a limited class of economic operators'. [32] For the Court of Justice, 'that can be the case particularly when the decision alters rights acquired by the individual prior to its adoption'. [33]

31 — Case 25/62 *Plaumann* v *Commission* [1963] ECR 95, at p. 197, 223. More recently, see *Commission* v *Infront WM*, paragraph 70, and *Sahlstedt and Others* v *Commission*, paragraph 26.

32 — *Sahlstedt and Others* v *Commission*, paragraph 30, emphasis added. See also Joined Cases C-182/03 and C-217/03 *Belgium and Forum 187 v Commission* [2006] ECR I-5479, paragraph 60. In Case 100/74 *CAM* v *EEC* [1975] ECR 1393, paragraph 18, the Court held that the contested act affected 'a fixed number of traders identified *by reason of the individual course of action*' which they had pursued or were regarded as having pursued (emphasis added).

33 — *Commission* v *Infront WM*, paragraph 72 and the case-law cited.

81. Conversely, that would not be the case 'where it is established that the application [of a measure to persons whose number or identity may be determined more or less precisely] takes effect *by virtue of an objective* legal or factual situation defined in the measure in question'. [34]

2. Assessment

82. It thus follows from that case-law that the concept of individual concern, as provided for in Article 263 TFEU, depends on whether the criterion enabling the group members to be identified is of an individual or, on the contrary, objective nature.

83. In the order under appeal, the General Court found that the appellants were not individually concerned on the ground that woco status was conferred on the basis of objective criteria which were liable to be satisfied by an indeterminate number of operators as potential beneficiaries of aid measure E 2/2005 targeted by the contested decision.

84. The General Court correctly pointed out, in paragraph 29 of the order under appeal, that 'woco status is conferred in accordance with objective criteria. Thus, … woco status is granted under an approval system provided for in Article 70(1) of the 1901 Law on housing (*Woningwet*). Such approval is granted by royal decree to institutions which satisfy specific objective conditions: they must have the legal form of an association or foundation; they must not operate for profit; they must have the sole purpose of pursuing an activity in the field of social housing; and they must use their assets in the interests of social housing. Wocos are therefore a class of persons envisaged in a general and abstract manner'.

85. Accordingly, the General Court acted correctly in taking the view that the appellants were concerned by the contested decision, in so far as it concerns aid measure E 2/2005, in the same way as any other economic operator who is, or may be, in the same circumstances.

86. I therefore take the view that the first ground of appeal relied on by the appellants is unfounded.

87. By contrast, I am more circumspect with regard to the General Court's appraisal of the existence (or not) of a closed circle of institutions the number of which is identified or identifiable. Those considerations form the subject-matter of the second ground of appeal.

88. According to the General Court, the case-law relied on by the appellants could not be applied to the proceedings in this case as, in *Belgium and Forum 187* v *Commission* and in *Piraiki-Patraiki and Others* v *Commission*, the applicants belonged to a group which could no longer be increased following the adoption of the decisions in question.

89. As I have noted earlier, [35] the Court has held that a group of persons could be individually concerned by an act if they were 'identified or identifiable when that measure was adopted by reason of criteria specific to the members of the group …'. [36]

90. That case-law was applied in *Piraiki-Patraiki and Others v Commission* and in *Belgium and Forum 187* v *Commission*. [37] In the latter case, the Court found that Forum 187 had *locus standi* as it represented coordination centres that were individually concerned by the contested act. The act in question was a Commission decision classifying a Belgian tax scheme as existing State aid that was incompatible with EU law. According to the Court, the effect of that act was to limit the duration of

34 — *Sahlstedt and Others* v *Commission*, paragraph 31 and the case-law cited. Emphasis added.

35 — See point 80 of the present Opinion.

36 — *Sahlstedt and Others* v *Commission*, paragraph 30.

37 — See *Piraiki-Patraiki and Others* v *Commission*, paragraph 31, and *Belgium and Forum 187* v *Commission*, paragraph 60.

the authorisation for coordination centres which had been renewed during 2001 and 2002. Those thirty centres were perfectly identifiable when the contested decision had been taken. In addition, the contested decision did not lay down any transitional measures for the benefit of those coordination centres with an authorisation that had expired at the same time as the decision was notified and those with a pending application for authorisation on that date. The Court held that those eight other centres constituted a closed class that was particularly affected by the decision inasmuch as they could no longer obtain a renewal of their authorisation. [38]

91. As in the present case, *Belgium and Forum 187 v Commission* concerned a Commission decision on existing State aid. It is true that the Commission required the scheme to be amended for the future without ordering repayment, whereas the decision contested in the present case finds that the scheme, as amended, is in line with EU law. However, that factual difference does not strike me as conclusive in the assessment as to whether the action is admissible.

92. For the purpose of holding that the action brought by Forum 187 was admissible, the Court took account of the coordination centres whose authorisation had been renewed in 2001 or 2002, as well as those whose application was pending at the time when the Commission decision was notified.

93. Although they appear to be objective, those criteria were regarded by the Court as capable of being individualised, that is, in the words of the Court, 'specific to the members of the group'. In any event, they are not radically different from the criteria applying to the appellants in the present case. When the contested decision was adopted, 410 wocos had been designated by royal decree. The inevitable consequence of the contested decision — in which the Commission approved the draft amendments submitted by the Kingdom of the Netherlands– is that the wocos in question — and they alone — will no longer necessarily receive the same advantages as those obtained under the previous system due to expire (for example, the provision of collateral for loans will disappear). The fact that other wocos may be approved after the adoption of the contested decision is therefore not, in my view, significant. As indicated above, the Court has already described as belonging to a closed class an economic operator affected by a 'decision [which] alters rights acquired by the individual prior to its adoption'. [39]

94. Accordingly, I take the view that the second ground of appeal is well founded, as the General Court erred in law in finding that the appellants did not belong to a closed circle of organisations which were identifiable at the time when the contested decision was taken. On the contrary, the appellants appear to me to be directly [40] and individually concerned by the contested decision.

95. In light of the foregoing considerations, I propose that the Court should find the action brought by the appellants to be admissible and, therefore, set aside the order under appeal. I further propose that the Court should refer the case back to the General Court for it to rule on the merits of the action, and to reserve the costs.

C – *The legal interest of the appellants in bringing proceedings*

96. The legal interest in bringing proceedings corresponds to the interest in securing annulment of the measure taken. Such annulment must, by itself, be capable of having legal consequences for the applicant, [41] that is to say, more specifically, it must be capable of procuring a benefit for the applicant. [42]

38 — See *Belgium and Forum 187* v *Commission*, paragraphs 61 to 63.

39 — *Commission* v *Infront WM*, paragraph 72 and the case-law cited.

40 — See the earlier arguments on direct concern in the context of the examination of the new Article 263 TFEU, fourth paragraph, *in fine*.

41 — Case 53/85 *AKZO Chemie and AKZO Chemie UK* v *Commission* [1986] ECR 1965, paragraph 21.

42 — See, inter alia, Case C-17/07 P *Neirinck* v *Commission*, paragraph 45, and *Deutsche Post and Germany* v *Commission*, paragraph 37.

97. The General Court did not examine that condition in the order under appeal. However, having a legal interest in bringing proceedings is an essential and fundamental prerequisite for any legal action. [43] The absence of such an interest is an absolute bar to proceedings that may be raised by the Court of its own motion. [44] Accordingly, if the Court shares my view on the other possible grounds of inadmissibility, this issue will have to be examined. The parties were invited to submit their views in this regard during the hearing held on 17 April 2013.

98. In the contested decision, the Commission took the view that the Netherlands system for the financing of social housing amounted, even after amendment, to existing State aid. After examining the scope of the amendments submitted by the Netherlands government, the Commission concluded that 'the aid for the provision of social housing, i.e. the activity of construction and renting out dwellings to individuals including the building and maintenance of ancillary infrastructure [was] compatible under Article 106(2) TFEU'. [45]

99. According to the letter sent on 3 December 2009 by the Kingdom of the Netherlands to the Commission, the new rules were to be introduced by means of a ministerial decree and a new housing law, due to come into force on 1 January 2010 and 1 January 2011, respectively. Moreover, the new rules would apply only to future activities.

100. An initial examination of the procedure might therefore suggest that an annulment of the contested decision would not procure any benefit for the appellants, since it could not have the result of repealing the new law and decree adopted by the Netherlands authorities.

101. However, as discussed earlier, it follows from Article 19(1) of Regulation No 659/1999 that the amendments making the scheme compatible with EU law were prompted by the Commission and given binding force by it. In that connection, I would like to refer to the arguments put forward on this issue in the examination of the absence of implementing measures within the meaning of the fourth paragraph, *in fine*, of Article 263 TFEU. [46] I would merely point out that the Commission expressly stated, in recital 74 to the contested decision, that '[t]herefore, the Commission accepts the commitments made by the Dutch authorities' and that '[i]n accordance with Article 19 of … Regulation [No 659/1999], the Commission records the commitment by means of the present decision and thereby renders the implementation of the appropriate measures binding'.

102. I therefore take the view that, in the context of the limited examination of the issue of legal interest in bringing proceedings, the appellants can claim to derive an advantage from the annulment of the contested decision. I think that 'there is no need to satisfy excessive requirements in order to find that [a] benefit exists [as a result of the annulment of the contested act] if the strict conditions laid down in the second or third scenarios in the fourth paragraph of Article 263 TFEU have already been met'. [47] In the present case, if the contested decision were to be set aside, the Kingdom of the Netherlands would be likely to recover a degree of autonomy in the adoption of the measures to be taken to bring the system into line with EU law. The annulment of the contested decision would therefore result in a benefit to the appellants. Accordingly, the appellants have shown that they have a legal interest in bringing proceedings and in having the contested decision annulled in so far as it relates to aid measure E 2/2005.

43 — Order in Case 206/89 R *S.* v *Commission* [1989] ECR 2841, paragraph 8.

44 — Order in Case 108/86 *d.M.* v *Council and ESC* [1987] ECR 3933, paragraph 10.

45 — Recital 72 to the contested decision.

46 — See points 65 to 70 of the present Opinion.

47 — See, in this regard, point 86 of the Opinion of Advocate General Kokott in *Telefónica* v *Commission*.

V – Summary

103. First and foremost, I take the view that the appellants have a legal interest in bringing proceedings for annulment.

104. Secondly, I am of the opinion that the General Court erred in law in failing to examine the applicability of the fourth paragraph, *in fine*, of Article 263 TFEU to the present case. I therefore propose that the Court should allow the appeal.

105. In this regard, it follows from the first paragraph of Article 61 of the Statute of the Court of Justice that, if the appeal is well founded, the Court may itself give final judgment in the matter, where the state of the proceedings so permits, or refer the case back to the General Court for judgment.

106. In the present case, I consider that the Court is in possession of the information necessary to enable it to give final judgment on the issue of admissibility.

107. I note in this connection that the conditions laid down in order to bring an action for annulment on that basis — namely, that there must be a regulatory act which is of direct concern to the appellants and does not entail implementing measures — have been met.

108. If the Court does not share my view, I consider that the General Court erred in law in its assessment of the condition relating to individual concern. That condition has, in my view, been satisfied in respect of the appellants. Accordingly, the General Court ought to have declared the action brought by the appellants to be admissible and, since their second ground of appeal is well founded, their appeal should be allowed.

109. By contrast, I do not think that the Court is in a position to give judgment on the merits of the action lodged by the appellants since the assessment carried out by the General Court deals exclusively with the admissibility of the action and does not address the merits.

110. The case must therefore be referred back to the General Court for a decision on the appellants' pleas that the contested decision, in so far is it relates to aid measure E 2/2005, should be annulled.

VI – Costs

111. As the case is to be referred back to the General Court, the costs relating to the present appeal proceedings must be reserved.

VII – Conclusion

112. In the light of the foregoing considerations, I propose that the Court should:

(1) set aside the order of the General Court of the European Union delivered on 16 December 2011 in Case T-202/10 *Stichting Woonlinie and Others* v *Commission*;

(2) declare the action to be admissible;

(3) refer the case back to the General Court of the European Union for a decision on the merits of the action;

(4) reserve the costs.