



Reports of Cases

JUDGMENT OF THE COURT (Grand Chamber)

19 December 2013*

(Appeal — Action for annulment — Fourth paragraph of Article 263 TFEU — Right to bring an action — Standing to bring proceedings — Natural or legal persons — Act of individual concern to them — Regulatory act not entailing implementing measures — Decision declaring a State aid scheme incompatible with the common market — Right to effective judicial protection)

In Case C-274/12 P,

APPEAL under Article 56 of the Statute of the Court of Justice of the European Union, brought on 1 June 2012,

Telefónica SA, established in Madrid (Spain), represented by J. Ruiz Calzado and J. Domínguez Pérez, abogados, and M. Núñez Müller, Rechtsanwalt,

appellant,

the other party to the proceedings being:

European Commission, represented by P. Němečková and C. Urraca Caviedes, acting as Agents, with an address for service in Luxembourg,

defendant at first instance,

THE COURT (Grand Chamber),

composed of V. Skouris, President, K. Lenaerts, Vice-President, A. Tizzano, R. Silva de Lapuerta, T. von Danwitz, E. Juhász and A. Borg Barthet, Presidents of Chambers, G. Arestis, E. Levits, A. Arabadjiev, A. Prechal, E. Jarašiūnas and C. Vajda (Rapporteur), Judges,

Advocate General: J. Kokott,

Registrar: M. Ferreira, Principal Administrator,

having regard to the written procedure and further to the hearing on 4 February 2013,

after hearing the Opinion of the Advocate General at the sitting on 21 March 2013,

gives the following

* Language of the case: Spanish.

Judgment

- 1 By its appeal, Telefónica SA ('Telefónica') asks the Court to set aside the order of the General Court of the European Union of 21 March 2012 in Case T-228/10 *Telefónica v Commission* ('the order under appeal'), by which the General Court dismissed as inadmissible its action for annulment of Article 1(1) of Commission Decision 2011/5/EC 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; 'the contested decision').

Background to the dispute

- 2 Article 12(5) of Law 43/1995 of 27 December 1995 on corporation tax (BOE No 310 of 28 December 1995, p. 37072) provided that the acquisition of a shareholding in a company not established in Spain could, under certain conditions, result in financial goodwill that was capable of being amortised for up to 20 years, thereby reducing the acquiring company's tax burden ('the scheme at issue').
- 3 The European Commission took the view that the scheme at issue, which did not apply to the acquisition of shareholdings in companies established in Spain, constituted State aid within the meaning of Article 87(1) EC, and it accordingly initiated the formal investigation procedure in accordance with Article 88(2) EC by a decision of 10 October 2007 inviting the Kingdom of Spain and the potential beneficiaries of that scheme to submit their comments.
- 4 On completion of the procedure, the Commission adopted the contested decision.
- 5 Article 1(1) of the contested decision states that the scheme at issue was put into effect in breach of Article 88(3) EC and declares it incompatible with the common market.
- 6 However, the Commission acknowledged that it had, before the initiation of the formal investigation procedure and as a result of statements of two Commissioners to the European Parliament, provided specific, unconditional and consistent assurances of a nature such that the beneficiaries of the scheme at issue could entertain justified hopes that it was lawful, in the sense that it did not fall within the scope of the State aid rules because it was not selective. Accordingly, the Commission concluded that those beneficiaries had a legitimate expectation that no aid would be recovered and it therefore decided that advantages granted by 21 December 2007, the date on which the Commission's decision to initiate the formal investigation procedure was published in the *Official Journal of the European Union*, could be preserved subject to certain conditions.
- 7 That is the reason why Article 1(2) of the contested decision provides that the scheme at issue can continue to apply, on the basis of the principle of the protection of legitimate expectations, to shareholdings acquired by that date.
- 8 Under Article 4(1) of the contested decision, the Kingdom of Spain is to recover the incompatible aid referred to in Article 1(1) thereof from the beneficiaries whose rights in foreign companies, acquired in the context of intra-Community acquisitions, do not fulfil the conditions described in Article 1(2).
- 9 Article 5 of the contested decision provides that recovery of the aid in question is to be immediate and effective and that the Kingdom of Spain is to ensure that that decision is implemented within four months of the date of notification thereof.

- 10 Finally, Article 6 of the contested decision provides that the Kingdom of Spain is required to submit certain information to the Commission and to keep it informed of the progress of the national measures taken to implement that decision. In particular, under Article 6(1)(a) the Kingdom of Spain is required to submit to the Commission the list of beneficiaries that received aid under the scheme at issue. It is undisputed that Telefónica appeared on that list.
- 11 In 2005 and 2006 Telefónica had acquired two shareholdings – in a company established in the Czech Republic and in another company whose seat was in the United Kingdom – with the benefit of the scheme at issue and in both cases those acquisitions took place before the date laid down in Article 1(2) of the contested decision.

Procedure before the General Court and the order under appeal

- 12 In its action against the contested decision, brought on 21 March 2010, Telefónica claimed that Article 1(1) of the contested decision should be annulled.
- 13 By separate document lodged at the Registry of the General Court on 30 September 2010, the Commission raised an objection of inadmissibility under Article 114(1) of the Rules of Procedure of the General Court. It contended that the action was inadmissible on the ground that Telefónica had not shown either that it had a legal interest in bringing proceedings or that it was individually concerned by the contested decision. Telefónica submitted written observations on that objection of inadmissibility.
- 14 By the order under appeal, the General Court dismissed Telefónica's action as inadmissible on the basis of the second of the two pleas of inadmissibility raised by the Commission. The General Court held, in paragraph 41 of the order under appeal, that Telefónica is not individually concerned by the contested decision within the meaning of the fourth paragraph of Article 263 TFEU and, in paragraph 45 of the order, that that decision cannot be classified as an act not entailing implementing measures within the meaning of the final limb of that provision. Consequently, the General Court dismissed Telefónica's action without examining the first plea of inadmissibility, to the effect that Telefónica had no interest in bringing proceedings.

Forms of order sought

- 15 Telefónica claims that the Court should:
- set aside the order under appeal;
 - declare the action for annulment in Case T-228/10 admissible and refer the case back to the General Court for it to give judgment on the substance of the dispute; and
 - order the Commission to pay the costs 'of the proceedings at both instances relating to admissibility'.
- 16 The Commission contends that the appeal should be dismissed and Telefónica ordered to pay the costs.

The appeal

- 17 Telefónica relies on three pleas in law in support of its appeal. First, it complains that the General Court infringed its right to effective judicial protection. Second, it contends that the General Court misinterpreted the fourth paragraph of Article 263 TFEU in holding that it is not individually

concerned by the contested decision. Third, in its submission, the General Court interpreted incorrectly the concept of an act not entailing implementing measures within the meaning of the final limb of that provision.

- 18 The question whether Telefónica's right to effective judicial protection is affected by the order under appeal arises only if the General Court declared its action inadmissible on the basis of a correct interpretation of the fourth paragraph of Article 263 TFEU. Consequently, the first plea relied upon by Telefónica in support of its appeal should not be examined until after its two other pleas, concerning errors of law committed by the General Court in interpreting that provision.
- 19 It is also to be recalled that the fourth paragraph of Article 263 TFEU provides for two situations in which natural or legal persons are accorded standing to institute proceedings against an act not addressed to them. First, such proceedings may be instituted if the act is of direct and individual concern to them. Second, they may bring proceedings against a regulatory act not entailing implementing measures if that act is of direct concern to them.
- 20 If the contested decision were to be regarded as a regulatory act not entailing implementing measures, as Telefónica submits in its third plea, there would be no need for it to show that, as it contends in its second plea, it is individually concerned by that decision. It is accordingly appropriate to examine the third plea first.

The third plea

Arguments of the parties

- 21 Telefónica contends that the General Court erred in law in holding that State aid decisions such as the contested decision entail implementing measures within the meaning of the final limb of the fourth paragraph of Article 263 TFEU.
- 22 Telefónica states that the decision declaring an aid scheme incompatible with the common market has direct effect and does not require implementing measures in that it immediately renders the aid granted unlawful and normally entails an obligation on the Member State concerned to recover the aid. The measures subsequent to such a decision that may be necessary in order to discharge the obligation to recover the aid from certain beneficiaries, as referred to in Article 6(2) of the contested decision and taken into account by the General Court in paragraph 43 of the order under appeal, concern only an ancillary obligation that cannot call into question the direct effect of the articles of the operative part of that decision. In Telefónica's submission, if it were accepted, as the General Court considers, that any measure, however minor it may be, that a Member State is required to adopt in order to give effect to a European Union act constitutes an implementing measure within the meaning of the final limb of the fourth paragraph of Article 263 TFEU, a wide variety of regulatory acts would be automatically excluded from the scope of that provision, contrary to the objective pursued by the European Union legislature of facilitating access to the General Court for persons whose interests are affected by non-legislative acts adopted by the European Union institutions.
- 23 According to the Commission, the General Court did not err in law in concluding that the contested decision cannot be classified as an act not entailing implementing measures.
- 24 As the concept of implementing measures is not defined in the Treaties, it seems logical to interpret it literally, that is to say, to consider that it refers to any legal act necessary for implementation of another legal act. The literal meaning of that concept is equivalent to that adopted by Advocate General Jacobs in point 43 of his Opinion in Case C-50/00 P *Unión de Pequeños Agricultores v Council* [2002] ECR I-6677 in order to point out a possible gap in the European Union's judicial system. According to the Commission, it is apparent from the documents relating to the work of the

European Convention for the drawing up of a Treaty establishing a Constitution for Europe (OJ 2004 C 310, p. 1) that, when the provision which subsequently became the final limb of the fourth paragraph of Article 263 TFEU was drawn up, the founders' intention was to fill that possible gap in the European Union's judicial system. The Commission considers that the relaxing of the conditions relating to standing to bring proceedings thus reflected the intention that individuals should have a direct legal remedy against acts of general application, while, however, restricting that remedy to situations in which it is impossible for those individuals to contest the validity of an implementing act.

- 25 The Commission adds that, where a regulatory act requires an implementing measure, be it a national measure or a measure adopted at European Union level, the judicial protection of individuals is ensured because they can contest the legality of the implementing measure while raising, where appropriate, a plea of illegality relating to the basic regulatory act upon which such a measure is founded. It is therefore unnecessary for them to have standing to challenge the basic act directly.
- 26 As regards the contested decision, there is no doubt that a decision requiring a Member State to recover aid declared incompatible with the common market requires implementing measures. Such a decision is addressed solely to the Member State concerned and cannot give rise to an obligation of direct payment on the beneficiaries. The Commission recalls in this regard that, in accordance with the second sentence of the fourth paragraph of Article 288 TFEU, a decision which specifies those to whom it is addressed is to be binding only on them. It considers that, in order for an obligation to apply to the beneficiaries, it is necessary for the Member State to adopt implementing measures consisting in their being required to refund the aid that has been paid improperly. Furthermore, the contested decision imposes upon the Kingdom of Spain other implementing measures in addition to the obligation to recover aid, such as the obligation to bring the scheme at issue to an end.

Findings of the Court

- 27 As the Advocate General has observed in points 40 and 41 of her Opinion, the concept of a 'regulatory act which ... does not entail implementing measures', within the meaning of the final limb of the fourth paragraph of Article 263 TFEU, is to be interpreted in the light of that provision's objective, which, as is clear from its origin, consists in preventing an individual from being obliged to infringe the law in order to have access to a court. Where a regulatory act directly affects the legal situation of a natural or legal person without requiring implementing measures, that person could be denied effective judicial protection if he did not have a direct legal remedy before the European Union judicature for the purpose of challenging the legality of the regulatory act. In the absence of implementing measures, natural or legal persons, although directly concerned by the act in question, would be able to obtain a judicial review of that act only after having infringed its provisions, by pleading that those provisions are unlawful in proceedings initiated against them before the national courts.
- 28 It should be explained in this regard, first, that where a regulatory act entails implementing measures, judicial review of compliance with the European Union legal order is ensured irrespective of whether those measures are adopted by the European Union or the Member States. Natural or legal persons who are unable, because of the conditions governing admissibility laid down in the fourth paragraph of Article 263 TFEU, to challenge a regulatory act of the European Union directly before the European Union judicature are protected against the application to them of such an act by the ability to challenge the implementing measures which the act entails.
- 29 Where responsibility for the implementation of such acts lies with the institutions, bodies, offices or agencies of the European Union, natural or legal persons are entitled to bring a direct action before the European Union judicature against the implementing acts under the conditions stated in the fourth paragraph of Article 263 TFEU, and to plead in support of that action, pursuant to Article 277 TFEU, the illegality of the basic act at issue. Where that implementation is a matter for the Member

States, those persons may plead the invalidity of the basic act at issue before the national courts and tribunals and cause the latter to request a preliminary ruling from the Court of Justice, pursuant to Article 267 TFEU (Case C-583/11 P *Inuit Tapiriit Kanatami and Others v Parliament and Council* [2013] ECR, paragraph 93).

- 30 Second, as the Advocate General has observed in point 48 of her Opinion, the question whether a regulatory act entails implementing measures should be assessed by reference to the position of the person pleading the right to bring proceedings under the final limb of the fourth paragraph of Article 263 TFEU. It is therefore irrelevant whether the act in question entails implementing measures with regard to other persons.
- 31 Third, in order to determine whether the measure being challenged entails implementing measures, reference should be made exclusively to the subject-matter of the action and, where an applicant seeks only the partial annulment of an act, it is solely any implementing measures which that part of the act may entail that must, as the case may be, be taken into consideration.
- 32 It is in the light of those explanations that the third plea relied upon by Telefónica in support of its appeal should be examined.
- 33 As the Advocate General has observed in point 33 of her Opinion, Telefónica's action was concerned solely with challenging the declaration in Article 1(1) of the contested decision that the scheme at issue is partially incompatible with the common market, and did not criticise the recovery of the aid, ordered in Article 4(1) of that decision, or the other directions issued to the Kingdom of Spain in Article 6(2) thereof.
- 34 First, as the Advocate General has observed in point 48 of her Opinion, the declaration in Article 1(1) of the contested decision that the scheme at issue is partially incompatible with the common market is addressed solely to the Member State to which that decision is addressed, namely the Kingdom of Spain, and therefore the decision is not binding on other persons, in accordance with the fourth paragraph of Article 288 TFEU.
- 35 Second, Article 1(1) of the contested decision is concerned exclusively with declaring the scheme at issue incompatible with the common market. It does not define the specific consequences which that declaration has for each taxpayer. Those consequences will be embodied in administrative documents such as a tax notice, which constitutes as such an implementing measure that Article 1(1) of the contested decision 'entails' within the meaning of the final limb of the fourth paragraph of Article 263 TFEU.
- 36 Consequently, the General Court was correct in holding, in paragraph 44 of the order under appeal, that the measures for giving effect to the decision as to incompatibility – including in particular the measure consisting of rejection of an application for grant of the tax advantage at issue, a rejection which Telefónica will also be able to contest before the national courts – are implementing measures in respect of the contested decision.
- 37 Such a finding in itself justifies rejection of Telefónica's line of argument before the General Court that the contested decision does not entail implementing measures.
- 38 The General Court was therefore correct in holding, in paragraph 45 of the order under appeal, that, irrespective of whether the contested decision is a regulatory act, the conditions governing admissibility laid down in the final limb of the fourth paragraph of Article 263 TFEU are not met in the case in point.
- 39 In the light of all these considerations, the third plea relied upon by Telefónica in support of its appeal should be dismissed.

The second plea

Arguments of the parties

- 40 In Telefónica's submission, the General Court erred in law by reason of its overly restrictive interpretation of the concept of an actual beneficiary of an aid scheme that is the subject of a Commission decision, as is clear in particular from Joined Cases C-71/09 P, C-73/09 P and C-76/09 P *Comitato 'Venezia vuole vivere' and Others v Commission* [2011] ECR I-4727. Telefónica contends that, contrary to what the General Court held in paragraphs 24 and 25 of the order under appeal, the important point is not that a party who has in fact benefited from the aid in question is among those who must certainly repay aid; instead it would suffice for there to be a risk of his interests being seriously affected, as would be the case if he were led to be required to repay the aid.
- 41 Telefónica submits that it is exposed on two counts to the risk of having to repay the aid received notwithstanding the Commission's acknowledgment that it entertained legitimate expectations. First, the exception to the obligation to recover, laid down in Article 1(2) and (3) of the contested decision, is the subject of an action for annulment before the General Court, in Case T-207/10 *Deutsche Telekom v Commission* which is pending before it. If that action were to be successful, Telefónica could be obliged to repay the aid that it has received. Second, the finding in the contested decision that the rules concerning the amortisation of goodwill constituted unlawful aid enables third parties in competition with the beneficiaries of the aid to bring actions at national level in order to obtain compensation for any loss suffered.
- 42 The Commission contends, on the other hand, that the case-law requires two conditions to be met in order for an applicant to be individually concerned in circumstances such as those here. First, the applicant must be an actual recipient of individual aid granted under an aid scheme. Second, he must be obliged to repay the aid in question or, at least, be exposed to the risk of having to repay it. Contrary to Telefónica's assertions, it is not, on the other hand, sufficient that the applicant runs the risk of his interests being, in a more general way, seriously harmed. The Court rejected the proposition that an applicant is individually concerned simply by virtue of being the beneficiary of an aid scheme in Joined Cases 67/85, 68/85 and 70/85 *Kwekerij van der Kooy and Others v Commission* [1988] ECR 219, paragraph 15, and Case C-6/92 *Federmineraria and Others v Commission* [1993] ECR I-6357, paragraphs 11 to 16.
- 43 In the present case, there is in any event no risk of Telefónica having to repay the aid that it has received, or even of its interests being seriously harmed, because it was clear, from when the contested decision was adopted, that it would enjoy the benefit of the principle of the protection of legitimate expectations.

Findings of the Court

- 44 The contested decision is not addressed to Telefónica and, as is clear from paragraphs 34 to 36 of the present judgment, it entails implementing measures.
- 45 Under the fourth paragraph of Article 263 TFEU, natural or legal persons may institute proceedings against an act which is not addressed to them and entails implementing measures only if that act is of direct and individual concern to them.
- 46 As regards the second of those conditions, that is to say, being individually concerned by the act in question, it is settled case-law that persons other than those to whom a decision is addressed may claim to be individually concerned only 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 (Case 25/62 *Plaumann v Commission* [1963] ECR 95, at 107; *Comitato 'Venezia vuole vivere' and Others v Commission*, paragraph 52; and *Inuit Tapiriit Kanatami and Others v Parliament and Council*, paragraph 72).

- 47 As the General Court pointed out in paragraph 28 of the order under appeal, it is also clear from settled case-law that the possibility of determining more or less precisely the number, or even the identity, of the persons to whom a measure applies by no means implies that it must be regarded as being of individual concern to them as long as that measure is applied by virtue of an objective legal or factual situation defined by it (see, to this effect, Case C-451/98 *Antillean Rice Mills v Council* [2001] ECR I-8949, paragraph 52).
- 48 This is so in the case of Article 1(1) of the contested decision, whose annulment Telefónica seeks and in the light of which Telefónica's standing to bring proceedings must therefore be examined. Article 1(1) applies to objectively determined situations and produces legal effects with respect to categories of persons viewed generally and in the abstract. Telefónica therefore cannot claim to be individually distinguished by that provision.
- 49 The sole effect of Article 1(1) of the contested decision is to prevent, in the future, any person from benefiting from the scheme at issue. It is settled case-law that an undertaking cannot, in principle, contest a Commission decision prohibiting an 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 (see Joined Cases C-15/98 and C-105/99 *Italy and Sardegna Lines v Commission* [2000] ECR I-8855, paragraph 33 and the case-law cited).
- 50 Accordingly, the General Court was correct in holding, in paragraph 41 of the judgment under appeal, that Telefónica is not individually concerned, within the meaning of the fourth paragraph of Article 263 TFEU, by Article 1(1) of the contested decision.
- 51 It follows from the foregoing that the second plea relied upon by Telefónica in support of its appeal must also be dismissed.

The first plea

Arguments of the parties

- 52 Telefónica submits that, in dismissing its action as inadmissible, the General Court failed to have regard to its right to effective judicial protection flowing from Articles 6 and 13 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, signed at Rome on 4 November 1950, and from Article 47 of the Charter of Fundamental Rights of the European Union.
- 53 Telefónica argues in particular that it is not possible for it to obtain a judicial review of Article 1(1) of the contested decision by way of preliminary objection, namely by provoking a dispute with the tax authorities and relying on the scheme at issue, even though it no longer forms part of the legislation in force in Spain, in order that the national court with jurisdiction refers to the Court for a preliminary ruling a question as to validity pursuant to subparagraph (b) of the first paragraph of Article 267 TFEU. That would require it to decide to commit an infringement of the law, that is to say, to act deliberately in a manner contrary to the legislation in force. In voluntarily breaching the law, it would not only be acting contrary to the codes of conduct to which it has agreed to adhere, but would also expose itself to a definite risk that the Spanish tax authorities would decide to exercise their power to impose penalties on the basis of a series of provisions of the applicable tax legislation.

- 54 The Commission states that, according to the Court's settled case-law, the FEU Treaty, by Articles 263 TFEU and 277 TFEU, on the one hand, and Article 267 TFEU, on the other, has established a complete system of legal remedies and procedures designed to ensure judicial review of the legality of acts of the institutions, and has entrusted such review to the European Union judicature.
- 55 Telefónica's submission that the General Court should have examined the circumstances in which it would in fact have been possible to seek judicial remedies at national level must moreover be rejected. It is not possible to accept an interpretation of the system of remedies to the effect that a direct action for annulment before the European Union judicature will be available where it can be shown, following an examination by the latter of the particular national procedural rules, that those rules do not allow the individual to bring proceedings to contest the validity of the European Union measure at issue. Such an interpretation would require the European Union judicature to examine and interpret national procedural law. That would go beyond its jurisdiction when reviewing the legality of acts of the European Union institutions. It is in any event not possible for an action for annulment before the European Union judicature to be available to an individual even if it turns out that the national procedural rules permit him to contest the validity of the European Union measure at issue only after he has infringed it.

Findings of the Court

- 56 First of all, it is to be remembered that the European Union is a union based on the rule of law in which the acts of its institutions are subject to review of their compatibility with, in particular, the Treaties, general principles of law and fundamental rights (*Inuit Tapiriit Kanatami and Others v Parliament and Council*, paragraph 91).
- 57 Judicial review of compliance with the European Union legal order is ensured, as can be seen from Article 19(1) TEU, by the Court of Justice and the courts and tribunals of the Member States. To that end, the FEU Treaty has established, by Articles 263 TFEU and 277 TFEU, on the one hand, and Article 267 TFEU, on the other, a complete system of legal remedies and procedures designed to ensure judicial review of the legality of European Union acts, and has entrusted such review to the European Union judicature (*Inuit Tapiriit Kanatami and Others v Parliament and Council*, paragraphs 90 and 92).
- 58 As is clear from paragraphs 34 to 36 of the present judgment, the contested decision entails implementing measures, in the Member State concerned, with regard to Telefónica.
- 59 Consequently, even though Telefónica cannot, because of the conditions governing admissibility laid down in the fourth paragraph of Article 263 TFEU, challenge the contested decision directly before the European Union judicature, it can contend that it is invalid before the national courts and cause the latter to refer questions to the Court of Justice for a preliminary ruling, pursuant to Article 267 TFEU, in particular by bringing before the national courts the administrative act which refuses it amortisation under the regime at issue.
- 60 It follows that the first plea relied upon by Telefónica in support of its appeal must be dismissed.
- 61 Since none of the three pleas raised by Telefónica in support of its appeal can be successful, the appeal must be dismissed in its entirety.

Costs

- ⁶² Under Article 184(2) of the Rules of Procedure of the Court of Justice, where the appeal is unfounded the Court is to make a decision as to the costs. Article 138(1) of those Rules, which applies to appeal proceedings by virtue of Article 184(1) thereof, provides that the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings.
- ⁶³ Since the Commission has applied for costs and Telefónica has been unsuccessful, the latter must be ordered to pay the costs.

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

- 1. Dismisses the appeal;**
- 2. Orders Telefónica SA to pay the costs.**

[Signatures]