Reports of Cases

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

**Case C-132/12 P**

**Stichting Woonpunt,**
**Stichting Havensteder, formerly Stichting Com.wonen,**
**Woningstichting Haag Wonen,**
**Stichting Woonbedrijf SWS Hhvl,**
**v**

**European Commission**

(Appeals — Scheme of aid granted by the Kingdom of the Netherlands to housing corporations — Decision rendering legally binding the commitments made by the Netherlands authorities to comply with Union Law — Planned aid by the Netherlands Authorities to a special project concerning declining urban regions — Decision declaring the scheme compatible with the common market — Fourth paragraph of Article 263 TFEU — Concept of regulatory act which is of direct concern to a natural or legal person and does not entail implementing measures)

## I – Introduction

1. The present case concerns an appeal brought by the housing corporations (woningcorporaties, 'Wocos') Stichting Woonpunt, Stichting Havensteder, formerly Stichting Com.wonen, Woningstichting Haag Wonen and Stichting Woonbedrijf SWS Hhvl, against the order of the General Court of the European Union of 16 December 2011 in Case T-203/10 *Stichting Woonpunt and Others* v *Commission* ('the order under appeal').

2. By the order under appeal, the General Court declared inadmissible their action for annulment of Commission Decision C(2009) 9963 final of 15 December 2009 relating to State aid No 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 that it related to existing State aid E 2/2005, concerned the appellants in the same way as any other economic operator presently or potentially in the same situation and that their mere status as Wocos, defined according to objective criteria, was therefore not sufficient to establish that they were individually concerned. With regard to the part of the contested decision relating to new State aid N 642/2009, the General Court held that annulment was not such as to procure an advantage for the appellants and that they had thus failed to adduce evidence of their interest in bringing an action for annulment of that decision.

1 — Original language: French.

3. In the order under appeal, the General Court therefore limited itself to examining only the conditions governing an interest in bringing proceedings and individual concern as provided for in the fourth paragraph of former Article 230 EC. However, since the entry into force of the Lisbon Treaty (prior to the contested decision), a third possibility has been open to natural or legal persons seeking to bring an action for annulment. Now, the last part of the fourth paragraph of Article 263 TFEU allows them to bring an action for annulment against regulatory acts which are of direct concern to them and do not entail implementing measures.

4. In this Opinion, since the admissibility of an appeal brought on the basis of Article 263 TFEU involves a question of public policy, I shall propose that the Court examine the applicability of the last part of the fourth paragraph of Article 263 TFEU to the present case. I shall also argue that the General Court erred in law by failing to conduct that analysis. I shall next ask the Court to give final judgment on that issue, to declare the action admissible in that it concerns the part of the decision relating to State aid E 2/2005 and to refer the case back to the General Court as to the remainder for a decision on the merits of the action. [2]

## II – Background to the dispute

5. The appellants are Wocos established in the Netherlands. They are not-for-profit organisations whose mission is to acquire, build and let out dwellings mainly for disadvantaged citizens and socially less advantaged groups. Wocos are also engaged in other activities such as construction and renting out apartments of higher value, construction of apartments for sale, and the construction and letting out of buildings in the public interest.

### A – *State aid E 2/2005 (existing aid)*

6. In 2002, the Netherlands authorities notified the European Commission of the general scheme of State aid to Wocos. Since the Commission considered that the financing measures for Wocos could be classified as existing aid, the Netherlands authorities withdrew their notification.

7. However, on 14 July 2005, 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 State aid E 2/2005 with the common market. As a preliminary matter, the Commission pointed out therein that the Netherlands authorities should redefine the public service mission entrusted to Wocos, so that social housing is reserved for a clearly defined target group of disadvantaged persons or socially disadvantaged groups. It added that any commercial activities by Wocos should be carried out under market conditions and should not benefit from State aid. Finally, according to the Commission, the provision of social housing should be adapted to the demand from disadvantaged persons or socially disadvantaged groups.

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

9. On 16 April 2007, the Vereniging van Institutionele Beleggers in Vastgoed, Nederland (Association of Institutional Property Investors in the Kingdom of the Netherlands) filed a complaint with the Commission concerning the aid scheme to Wocos. In June 2009, Vesteda Groep BV joined that complaint.

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

10. By letter of 3 December 2009, the Netherlands authorities made commitments to modify the general State aid scheme for Wocos and forwarded to the Commission several proposals consistent with those commitments.

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

12. With regard to the compatibility of the new financing system for Wocos as proposed by the Netherlands authorities, the Commission concluded, in paragraph 72 of 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'. Accordingly, the Commission accepted the commitments made by the Netherlands authorities and adopted the contested decision.

B – *State aid N 642/2009 (new aid)*

13. On 18 November 2009, the Netherlands authorities notified a new aid scheme for the revival of declining urban regions. Wocos acting in selected regions are the beneficiaries of that new scheme classified as 'special project aid for certain districts'. The scheme was to be applied under the same conditions as those laid down for measures under State aid scheme E 2/2005, as amended following the commitments made by the Netherlands authorities.

14. State aid N 642/2009 was to take the form of direct grants provided by the Centraal Fonds Volkshuisvesting (Central Housing Fund) for specific projects related to the construction and letting out of housing in geographically restricted areas corresponding to the most needy urban communities. It was to be financed by a new tax on Wocos operating outside the sensitive urban areas.

15. In the contested decision, the Commission considered that State aid N 642/2009 was compatible with the common market. It concluded that '[t]he aid for the activity of construction and renting out dwellings to individuals including the construction and maintenance of ancillary infrastructure and construction and renting out of public purpose buildings is compatible under Article 106(2) TFEU'. Accordingly, it decided not to raise any objections to the new measures notified.

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

16. By application lodged at the Registry of the General Court on 30 April 2010, the appellants brought an action for the annulment of the contested decision under Article 263 TFEU.

17. In support of their application, the appellants raised several pleas. However, as the Commission challenged the admissibility of their action, the General Court decided to rule first on that issue.

18. In that regard, the Commission argued, first, that the appellants were not, for the purposes of Article 263 TFEU, individually concerned by the contested decision in so far as it relates to State aid E 2/2005 and, secondly, that they had no interest in bringing proceedings against the part of the contested decision relating to State aid N 642/2009.

19. The General Court found that the appellants were not addressees of the contested decision in so far as it relates to State aid E 2/2005. In that regard, it first recalled the settled case-law that an undertaking cannot 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. The General Court then found that the same was true in the case of an action for annulment of a decision whereby the Commission, taking formal notice of the commitments made by national authorities, declares the aid scheme at issue, as amended, compatible with the common market.

20. In this case, the General Court found, first, in paragraphs 31 and 32 of the order under appeal, that the status of Wocos was granted based on objective criteria which are likely to be satisfied by an indefinite number of operators. It pointed out, secondly, in paragraph 33 of that order, that Wocos could be only potential beneficiaries of the aid measures, since the Commission's examination 'constituted a preliminary examination' of the aid scheme amended following commitments by the national authorities.

21. The General Court concluded from this that the mere status as Wocos did not make it possible to consider those operators as being individually concerned by the contested decision in so far as it relates to State aid E 2/2005.

22. In addition, with regard to the contested decision in that it relates to new State aid N 642/2009 and declares it compatible with the common market, the General Court held, in paragraph 63 of the order under appeal, that the appellants had not adduced evidence to show their interest in bringing proceedings, since the annulment of that part of the decision was not likely to procure any advantage for them.

23. The General Court therefore found the action inadmissible in its entirety.

## IV – The appeal

24. The appellants brought this appeal by an application lodged at the Registry of the Court of Justice on 9 March 2012. They ask the Court to set aside, in whole or in part, the order under appeal and refer the case back to the General Court. They also request that the Commission be ordered to pay the costs.

25. The appellants put forward three pleas in support of their appeal. The first and second pleas relate to the General Court's findings concerning the part of the decision relating to State aid E 2/2005, the third plea to the findings relating to State aid N 642/2009:

— by their first plea, the appellants argue that the order under appeal is vitiated by an error of law, an inaccurate assessment of the relevant facts and a failure to state adequate reasons in that it makes the admissibility of the action dependent on whether they are actual or potential beneficiaries of the existing measures;

— by their second plea, they complain that the General Court erred in law in ruling that they did not belong to a closed group of existing Wocos which were beneficiaries of State aid E 2/2005; and

— by their third plea, they submit, finally, that the General Court erred in law in holding that they had no interest in bringing proceedings against the contested decision in so far as it relates to State aid N 642/2009.

26. In their response to the questions from the Court, the appellants make it clear that if they cannot be regarded as being individually concerned by the contested decision, they can nevertheless seek its annulment because it is a regulatory act which is of direct concern to them and does not entail implementing measures.

A – *The third plea alleging the appellants' interest in bringing proceedings*

27. A legal interest in bringing proceedings is the same as an interest in obtaining the annulment of the measure adopted. That annulment must be of itself capable of having legal consequences for the appellant,[3] that is to say, more specifically, be capable of procuring an advantage for him.[4]

28. In the order under appeal, the General Court expressly ruled on the appellants' interest in bringing proceedings in relation to State aid N 642/2009, the Commission disputing that they had such an interest. The General Court did not, however, examine that condition in connection with the part of the contested decision relating to State aid E 2/2005.

29. An interest in bringing proceedings is an essential and fundamental prerequisite for any legal proceedings.[5] Its absence constitutes an absolute bar to proceeding with a case which may be raised by the Court of its own motion.[6] I therefore consider that it is necessary, in the event that the Court should concur with my conclusions concerning the other possible causes of inadmissibility, to examine the issue in relation to both schemes of contested aid.

1. State aid N 642/2009 and the interest in bringing proceedings

30. Noting that the contested decision declared compatible new aid of which the appellants were potential beneficiaries, the General Court held, in paragraph 63 of the order under appeal, that annulment of the contested decision was not likely to procure an advantage for them and that they had therefore not provided evidence of their interest in bringing proceedings.

31. The appellants argue in the third plea raised in support of their appeal that that assessment by the General Court is vitiated by an error of law. They submit that they have an interest in seeking annulment of the contested decision, because the Commission declared State aid N 642/2009 compatible with the common market only in so far as it was granted under the same conditions as applied to the existing E 2/2005 State aid scheme. The contested decision therefore has adverse legal effects on them, as beneficiaries, since the new aid at issue may be granted only under the exhaustive conditions listed in the contested decision.

32. Three arguments are put forward. First of all, the General Court proceeded, wrongly, on the assumption that the conditions for the application of the N 642/2009 aid scheme were the initiative of the national authorities and not the Commission. Next, the General Court could not conclude that the appellants had no interest in bringing proceedings on the ground that it is not certain that the Commission would have approved the aid scheme in other circumstances. Finally, in those circumstances, the General Court did not act on the appellants' complaint seeking observance of their procedural rights.

33. It should be recalled that it is clear from Article 256 TFEU and the first paragraph of Article 58 of the Statute of the Court of Justice of the European Union that an appeal lies on points of law only. The General Court accordingly has exclusive jurisdiction, first, to find the facts, except where the substantive inaccuracy of its findings is apparent from the documents submitted to it and, second, to assess those facts. When the General Court has found or assessed the facts, the Court of Justice has jurisdiction under Article 256 TFEU only to review the legal characterisation of those facts by the General Court and the legal conclusions it has drawn from them.

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

4 — See, inter alia, judgment of 28 February 2008 in Case C-17/07 P *Neirinck* v *Commission*, paragraph 45, and *Deutsche Post and Germany* v *Commission*, paragraph 37.

5 — Order of 31 July 1989 in Case 206/89 R *S* v *Commission* [1989] ECR 2841, paragraph 8.

6 — Order of 7 October 1987 in Case 108/86 *d.M.* v *Council and ESC* [1987] ECR 3933, paragraph 10.

34. The Court of Justice thus has no jurisdiction to establish the facts or, in principle, to examine the evidence which the General Court accepted in support of those facts. Provided that the evidence has been properly obtained and the general principles of law and the rules of procedure in relation to the burden of proof and the taking of evidence have been observed, it is for the General Court alone to assess the value which should be attached to the evidence produced to it. Save where the clear sense of the evidence has been distorted, that appraisal does not therefore constitute a point of law which is subject as such to review by the Court of Justice. [7]

35. However, in the present case, by claiming that the General Court erred in finding that the conditions for granting State aid N 642/2009 were determined by the Netherlands authorities and not by the Commission, the appellants call into question the assessment by the General Court of the circumstances under which the contested decision was adopted, without, however, claiming a distortion of the facts.

36. In their second argument, the appellants criticise the General Court for basing its decision that there was no interest in bringing proceedings on the fact that it was not certain that the Commission would have approved the aid scheme under other circumstances. The fact remains that that argument is directed against a ground included only for the sake of completeness in the reasoning of the General Court, the rejection of which would not make it possible to confer on the appellants an interest in bringing proceedings. I also consider that the appellants have clearly misread paragraph 59 of the order under appeal. It does not follow from that paragraph that they have no interest in bringing proceedings on the ground that it was not certain that the Commission would have approved the aid scheme in other circumstances which could have been more favourable to them. The General Court simply sought to point out that the appellants could not, in the circumstances of this case, rely on a situation prior to the adoption of the contested decision which was claimed to be more favourable to them, since they did not have, by definition, any established right to obtain new aid which was still at the stage of preliminary examination by the Commission.

37. As to the third argument in support of the third plea, in so far as the contested decision was adopted following a preliminary examination and serves to declare the aid compatible with the common market, the appellants, in their capacity as potential beneficiaries of that new aid, cannot claim that the General Court erred in law by failing to guarantee observance of the procedural rights provided for in Article 6 of Regulation No 659/1999 for the procedure referred to in Article 108(2) TFEU.

38. I consider that following that examination the General Court committed no error of law in its assessment of the appellants' interest in bringing proceedings against the part of the contested decision relating to State aid N 642/2009. Consequently, the third plea must be regarded as being in part manifestly inadmissible and in part manifestly unfounded.

2. State aid E 2/2005 and the interest in bringing proceedings

39. In the contested decision, the Commission considered that the Netherlands system of financing social housing, even amended, was an existing aid scheme. After reviewing the scope of the amendments made by the Netherlands Government, it 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'. [8]

7 — See, inter alia, Case C-413/06 P *Bertelsmann and Sony Corporation of America* v *Impala* [2008] ECR I-4951, paragraph 29 and the case-law cited.

8 — Paragraph 72 of the contested decision.

40. 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 a ministerial decree and a new Law on housing which would enter into force on 1 January 2010 and 1 January 2011 respectively. Furthermore, the new rules would apply only to future activities.

41. An initial examination of the procedure may therefore suggest that annulment of the contested decision would procure no advantage for the appellants, in so far as it cannot have the effect of repealing the new law and decree adopted by the Netherlands authorities.

42. However, it is clear from Article 19(1) of Regulation No 659/1999 that the amendments rendering the scheme compatible with EU law were instigated by the Commission and rendered binding by it.

43. The provision states that '[w]here the Member State concerned accepts the proposed measures and informs the Commission thereof, the Commission is to record that finding and inform the Member State thereof. The Member State shall be bound by its acceptance to implement the appropriate measures'.

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

45. In that case, the Court noted that, in the exercise of the powers conferred on it by Articles 87 EC and 88 EC [now Articles 107 TFEU and 108 TFEU], the Commission could adopt guidelines designed to indicate how it intended, under those articles, to exercise its discretion in regard to new aid or in regard to 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, had to keep under constant review existing systems of aid and propose to them any appropriate measures required by the progressive development or by the functioning of the common market. The Court also 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 …'[9] and found that 'the Community legislature in its turn [had] adopted the principles laid down by the case-law … by setting out, in … Regulation (EC) No 659/1999 … Article 19(1)'.[10]

46. In the present case, I would point out that the Commission expressly stated, in paragraph 74 of 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'.

47. I therefore consider that, in the context of the limited review of the interest in bringing proceedings, the appellants may claim to procure an advantage from the annulment of the contested decision. Indeed, I think 'excessive requirements should not be imposed on the establishing of the advantage [resulting from annulment of the contested measure] where the strict conditions of the second or third limits of the fourth paragraph of Article 263 TFEU are already met.[11] In this case, should the contested decision be annulled, the Kingdom of the Netherlands is likely to regain some

9 — *Germany* v *Commission*, paragraph 28.

10 — – Ibid., paragraph 29. The General Court 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 [adopted by the Commission on the basis of the last part of Article 19(1) 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.

11 — See, in that regard, point 86 of the Opinion of Advocate General Kokott in Case C-274/12 P *Telefónica* v *Commission*, pending before the Court.

independence in adopting measures to make the scheme compatible with EU law. Annulment of the contested decision would thus offer an advantage to the appellants. Under those circumstances, the appellants have established an interest in bringing proceedings and in seeking annulment of the contested decision in that it relates to State aid E 2/2005.

B – *Applicability of the last part of the fourth paragraph of Article 263 TFEU*

48. In its examination of the admissibility of the action in so far as it concerns the part of the contested decision relating to State aid E 2/2005, the General Court merely found that the appellants were not the addressees of the contested decision and were not individually concerned by it. The first two pleas put forward in support of the appeal also relate only to those findings.

49. I would point out that the General Court did not determine whether the contested decision was a regulatory act which was of direct concern to the appellants and did not entail implementing measures. In other words, the General Court failed to carry out an analysis of the last part of the fourth paragraph of Article 263 TFEU in so far as that provision lays down a new ground of action.

50. While it is true that the appellants themselves had not relied on the issue before the General Court (or even in their appeal), it affects the admissibility of an appeal brought on the basis of Article 263 TFEU and involves a question of public policy. On that basis, the Court must examine it of its own motion,[12] the parties having been invited to state their views on that issue at the hearing on 17 April 2013.

1. The third possibility offered by the last part of the fourth paragraph of Article 263 TFEU

51. The fourth paragraph of Article 263 TFEU now 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*'.[13]

52. An individual may therefore now bring an action for annulment without having to provide evidence of an individual interest provided that the act at issue is a regulatory act which is of direct concern to him and does not entail implementing measures.

a) A regulatory act

53. According to the order of the General Court of 6 September 2011 in Case T-18/10 *Inuit Tapiriit Kanatami and Others* v *Parliament and Council* [2011] ECR II-5599, all acts of general application cannot be regarded as 'regulatory acts' for the purposes of Article 263 TFEU. The same is true of legislative acts.

54. On the basis of that observation, and to the extent that the Lisbon Treaty used, in Article 289(3) TFEU, a purely procedural criterion to define legislative acts,[14] the General Court limited regulatory acts to acts of general application which are not adopted by a legislative procedure.

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

13 — Emphasis added.

14 — According to Article 289(3) TFEU: '[l]egal acts adopted by legislative procedure shall constitute legislative acts'.

55. The General Court's order was the subject of an appeal.[15] Although the Court has not yet given its ruling, in her Opinion Advocate General Kokott confirmed the General Court's interpretation.[16]

56. Although I concur with several historical and textual arguments put forward by Advocate General Kokott, I do not consider that it is possible to infer from the use of the term 'legislative acts' in the first paragraph of Article 263 TFEU a contrary meaning within acts of general application to the expression 'regulatory act' in the fourth paragraph of that article. In fact, the opposite of a legislative act is not necessarily a regulatory act but rather an implementing act, the name specifically used in Article 291 TFEU.[17]

57. Moreover, for the purpose of describing acts which are not legislative, the EU Treaty does not use the word regulatory, but refers, in Article 297(2) TFEU, to 'non-legislative acts'.

58. In any event, that interpretation, far from being unanimously supported in the legal literature, does not seem, in my view, to address the concerns which led to the amendment of Article 230 EC. The most emblematic paradox in that regard undoubtedly lies in the fact that, if the restrictive interpretation proposed by the General Court were adopted, *Unión de Pequeños Agricultores* v *Council*[18] would again result in the inadmissibility of the appeal, even though it gave rise to the reform.

59. Moreover, a request for a preliminary ruling cannot always be regarded, as some authors who favour a restrictive interpretation think, as a sufficient mechanism to ensure effective judicial protection. If that were the case, there would have been no reason to amend Article 230 EC, the drawbacks of which would remain by definition if legislative acts were regarded as being excluded from the fourth paragraph of Article 263 TFEU.

60. Some argue, however, that the second subparagraph of Article 19(1) TEU filled the existing gaps. That is not the case. That article is merely the formal embodiment of a principle laid down, using the same words, by the Court itself in its judgment in *Unión de Pequeños Agricultores* v *Council*.[19] The second subparagraph of Article 19(1) TEU therefore added nothing to the existing law. Again, if that were the case, the amendment to the former Article 230 EC was nugatory.

61. Finally, in my opinion, the duty of genuine cooperation cannot extend so far as to require the Member States to create access to national courts where no State measure is at issue. It is also surprising to see that, among those who rely on the second subparagraph of Article 19(1) TEU to impose on the States the obligation to ensure the effective judicial protection of individuals, some do not hesitate to refer, on the other hand, to the absence of national remedies against legislative acts of the States in a majority of Member States to justify such an absence at the level of the European Union. Is there not a paradox in considering that it is reasonable that the Treaty does not allow individuals to bring an action against the legislative acts of the Union on the ground that a majority of States do not allow this against their own laws, while requiring those same States to allow this, albeit indirectly, for acts of the Union?

15 — Case C-583/11 P *Inuit Tapiriit Kanatami and Others* v *Parliament and Council* [2013] ECR.

16 — Opinion delivered by Advocate General Kokott on 17 January 2013 in the appeal brought against the order of the General Court of 6 September 2001 in *Inuit Tapiriit Kanatami and Others* v *Parliament and Council*.

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

18 — Case C-50/00 P [2002] ECR I-6677.

19 — According to the Court: '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' (paragraph 41).

62. It also seems unreasonable to me to consider that judicial protection would become effective because it would be theoretically possible for an individual to challenge his national administration on the applicability of a legislative act of the Union to his personal situation and that while awaiting a response he would be able to bring proceedings before a court which could in turn make a reference for a preliminary ruling. How is it possible not to doubt the genuine effectiveness of such theoretical constructs based on the existence of an act which has no other raison d'être than to be challenged and thus appears to be purely artificial? And what would happen if the national authority refrained from responding?

63. It should be borne in mind that the Court held that effective judicial protection was not guaranteed where an individual had no choice but to infringe the law in order to prompt the national competent authority to adopt an implementing measure which would lead him to have to defend himself before a court which could make a reference for a preliminary ruling.[20] What reasons would justify his acting otherwise when the national authority need not, in principle, adopt any measure?

64. The interpretation of the last part of the fourth paragraph of Article 263 TFEU which excludes legislative acts therefore seems to me too restrictive and does not address the reasons underlying the amendment to the fourth paragraph of Article 230 EC.

65. That finding therefore leads me to favour another interpretation of regulatory act within the meaning of the last part of the fourth paragraph of Article 263 TFEU. In my view, a regulatory act should be interpreted as being an act of general application, whether it be legislative or not.

b) Which is of direct concern to the applicant

66. Although the condition of individual concern is not present in the third type of annulment proceedings, the condition concerning direct concern is retained. Its scope does not seem to raise any difficulty: the concept of direct interest is identical in the second and third situations referred to in the fourth paragraph of Article 263 TFEU.[21]

67. This means, therefore, according to the settled case-law concerning the fourth paragraph of Article 263 TFEU, that a natural or legal person is directly concerned by an act of the European Union if it 'affect[s] directly the legal situation of the individual and leave[s] 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'.[22]

68. The Court has also had the opportunity to clarify in that regard that the absence of discretion on the part of the Member States overturns the apparent absence of a direct link between an act of the Union and the individual. In other words, to prevent direct concern, the discretion of the author of the intermediate act to implement the act of the Union cannot be purely formal. It must be the source of the legal effect on the applicant.[23]

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

21 — Such is the interpretation of the General Court. See, in that regard, Case T-262/10 *Microban International and Microban (Europe)* v *Commission* [2011] ECR I-7697, paragraph 32. That is also the point of view put forward 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. In the legal literature, see, inter alia, Albors-Llorens, Alb., '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. 52-55; Werkmeister, Chr., 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), p. 311-332 in particular p. 329.

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

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

c) Does not entail implementing measures

69. There remains to be determined the scope of the last phrase of the last part of the fourth paragraph of Article 263 TFEU: the absence of implementing measures. Is it a third condition or simply an explanation of direct concern?

70. To date, the Court has not yet had the opportunity to give a ruling. For its part, the General Court has held that a Commission decision declaring aid unlawful and ordering its recovery 'cannot be described as an act not entailing implementing measures [in so far as] 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'. [24]

71. In that case, the General Court therefore refused to allow the appellant to bring proceedings on the basis of the extension provided for by the Lisbon Treaty on the ground that there would necessarily be, according to the General Court, national implementing measures.

72. I consider that such an interpretation excessively reduces the effects of the addition inserted by the former Article 230 EC into the fourth paragraph of Article 263 TFEU, since it is still possible to envisage a national implementing measure for a regulatory act of the Union such as, for example, a publication, notification, confirmation or reminder. However, if the General Court's interpretation were adopted, those simple formalities, which may be unpredictable or optional, ought to preclude application of that article.

73. Such an interpretation also seems to me to be contrary to the objective pursued by the draftsmen of the Treaty. As Advocate General Kokott pointed out in *Telefónica* v *Commission*, '[t]he addition of "implementing measures" to cases was intended to ensure that the extension of the right to institutional proceedings was launched where an individual "must first infringe the law in order then to have access to a court"'. [25]

74. I also share the opinion of Advocate General Kokott that 'the condition concerning the absence of implementing measures for a regulatory act must be understood as meaning that that act … directly affects individuals without requiring implementing measures'. [26] However, that definition is identical to that of direct concern. [27]

75. I am therefore of the opinion that it is appropriate to exclude the expression 'implementing measures' used in the last part of the fourth paragraph of Article 263 TFEU from the national sphere so as to restrict them to EU law or, at least, to exclude from that concept measures adopted by national authorities in the absence of discretion. Indeed, as explained above, a lack of discretion on the part of the Member States overturns the apparent absence of a direct link between an act of the Union and an individual.

24 — Case T-221/10 *Iberdrola* v *Commission* [2012] ECR, paragraph 46. See also order of 21 March 2012 in Case T-228/10 *Telefónica* v *Commission* [2012] ECR, paragraph 42. An appeal is presently pending against that order (Case C-274/12 P).

25 — Paragraph 40.

26 — Ibid., paragraph 41.

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

76. In conclusion, I consider that the condition relating to the absence of implementing measures is merely a repetition of direct concern. [28]

77. That interpretation seems to me particularly relevant in State aid matters, since, in accordance with the settled case-law, recovery of unlawful aid is the logical consequence of the finding that it is unlawful. [29] 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 to properly implement the decision at issue. [30] Recovery measures adopted by the State are thus, in a sense, merely necessary ancillaries to the contested decision.

78. The proposed interpretation also offers the advantage of centralising all disputes relating to State aid before the courts of the European Union. Such centralisation seems to me beneficial in two respects. On the one hand, by removing the issue of individual concern and so allowing potential beneficiaries of aid or competitors of a beneficiary of the aid to challenge the Commission decision directly before the Court, it increases legal certainty. It removes the uncertainty connected with *TWD Textilwerke Deggendorf*, which made it necessary to resolve as a preliminary matter the issue of individual concern, failing which a subsequent reference for a preliminary ruling could be ruled inadmissible. [31] On the other hand, it removes the need to initiate national proceedings in order to bring a matter before the Court by way of a reference for a preliminary ruling. In other words, it allows a more direct, and therefore more effective, faster and more economical procedure.

79. Finally, I question, more generally, whether it is useful to draw a distinction between the condition of direct concern and the stipulation concerning the absence of implementing measures. How can it be imagined that an individual may be affected directly by an act of the European Union if that act needs a genuine implementing measure, whether European or national, when, according to the settled case-law of the Court, in order to be of direct concern to an individual, the act of the European Union must 'affect directly the legal situation of the individual … [, its implementation] resulting from Community rules without the application of other intermediate rules'? [32]

## 3. Application to the present case

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

81. In the contested decision, the Commission first examined the compatibility of State aid E 2/2005, relating to the system for financing Wocos as amended following the commitments made by the Netherlands authorities. It then analysed the new scheme relating to State aid N 642/2009.

82. It is therefore necessary to determine, first, whether that act, which the Commission addressed to the Kingdom of the Netherlands, is a regulatory act and, secondly, whether it is of direct concern to the appellants, without implementing measures.

28 — See the definition of direct interest given in point 67 of this Opinion. See, in that regard, 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, in particular p. 677; 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: 82-104, in particular p. 96.

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

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

31 — Case C-188/92 *TWD Textilwerke Deggendorf* [1994] ECR I-833. In paragraph 17 of that judgment, the Court of Justice 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'.

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

a) Is the contested decision a regulatory act?

83. Although it is true that the contested decision was adopted at the end of a non-legislative procedure, the Commission disputes that the act is of general application. Since it was addressed exclusively to the Kingdom of the Netherlands, it could only be an individual measure.

84. The question of the scope of a decision which is addressed to a Member State has recently been thoroughly and usefully examined by Advocate General Kokott in *Telefónica* v *Commission*. [33]

85. I concur with her view that such a decision is a special measure, in so far as Member States also incorporate a national legal system and decisions addressed to them are binding on all organs of that State. To use the expression of Advocate General Kokott: '[e]ven though they have only a single addressee, decisions addressed to a Member State may thus shape a national legal system and in that way be measures of general application'. [34]

86. The Court itself has also already recognised in some cases that such a decision is of general application, [35] and particularly in the field of State aid. According to the settled case-law, which was also cited by the General Court in the order under appeal, a Commission decision prohibiting an aid scheme is regarded, for potential beneficiaries of the aid scheme, as a measure of general application covering situations which are determined objectively and entails legal effects for a class of persons envisaged in a general and abstract manner. A Commission decision therefore is, for potential beneficiaries of an aid scheme, in the nature of a measure of 'general application'. [36] That is precisely why those beneficiaries are not regarded, in principle, as being individually concerned. In this case, I consider that the same reasoning may be applied to a decision adopted by the Commission on the basis of Article 19(1) of Regulation No 659/1999 whereby it takes formal notice of the commitments made by the national authorities and declares the amendments made to an existing aid scheme compatible with the common market.

87. In so far as the amended aid scheme is intended to cover situations which are determined objectively and entails legal effects for a class of persons envisaged in a general and abstract manner, the same applies to the Commission decision authorising it. Contrary to the view put forward by the Commission, I do not see, in that regard, why it would be necessary to draw a distinction between decisions authorising an aid scheme and those prohibiting one.

88. Accordingly, whether the broad or restrictive interpretation of the concept of regulatory act is adopted, the contested decision, as an act of general application adopted according to a non-legislative procedure, fulfils the first condition laid down by the last part of the fourth paragraph of Article 263 TFEU.

b) Are the appellants directly affected without implementing measures?

89. In its reply to the written question, the Commission considers that implementing measures are necessary to give effect to the contested decision. It has in mind not only the ministerial decree and the law referred to in paragraph 41 of the contested decision, but refers also to a temporary regulation of 3 November 2010 on services of general economic interest provided by approved housing corporations (published in *Nederlandse Staatcourant* No 17515 of 8 November 2010).

33 — Ibid., points 21 to 29.

34 — Ibid., point 25.

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

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

90. The existence of implementing measures cannot be denied. They are inherent in the procedure for existing aid schemes as provided for by Regulation No 659/1999. Article 19(1) expressly states that, where a Member State accepts the measures proposed by the Commission, it is to inform it thereof. The Commission records that finding and the Member State is 'bound by its acceptance to implement the appropriate measures'.

91. However, as I stated previously, I consider that the condition relating to the absence of an implementing measure is only a repetition of direct concern and that, for the latter to be found not to exist, the discretion of the authority which must adopt the implementing measure cannot be purely formal.

92. However, as I have already had the opportunity to point out in the context of the examination of the appellants' interest in bringing proceedings, in so far as the contested decision is based on Article 19(1) of Regulation No 659/1999, it leaves no discretion to the Kingdom of the Netherlands.

93. Under that provision, amendments making the scheme compatible with EU law are rendered binding only by the Commission's acceptance of them. Moreover, the Commission expressly stated, in paragraph 74 of the contested decision, 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 commitment by means of the present decision and thereby render[ed] the implementation of the appropriate measures binding'. The statement is reproduced in the operative part of the decision (in paragraph 108).

94. The Commission raised the idea that the Kingdom of the Netherlands retains discretion after the adoption of the contested decision, in so far as it was still free definitively to abandon the aid scheme in question. I do not believe so, since, in the light of the fact that the Kingdom of the Netherlands proposed to the Commission the amendments which were then rendered binding by the contested decision, the possibility that it might decide not to maintain the aid scheme was entirely theoretical. On the contrary, there could be no doubt as to the intention of the Netherlands authorities to apply the decision.[37]

95. Moreover, contrary to what the Commission asserts, the appellants state in their response to the written questions that there is no measure which they could challenge before a national court. The assertion was repeated categorically at the hearing: in the case of a binding act 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, no remedy is available to an individual in the national legal system.

96. Furthermore, the obligation to allocate 90% of the housing stock to persons whose income does not exceed a certain amount, which is set out in Article 4 of the national regulation referred to above, requires no further decision. On the contrary, only an infringement of that rule would be likely to provoke a reaction by the authority, such as a refusal to grant the aid in question, for example. I must, in that regard, disagree with the Commission's requirement that there must be a risk of criminal proceedings in order for the rule in *Unibet*, cited above, to apply. Whatever the penalty incurred, such an arrangement in no way meets the requirement of effective judicial protection.

97. In those circumstances, refusing to allow an action for annulment to be brought against the contested decision seems to me to entail, for the appellants, a lack of judicial protection.

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

98. I therefore consider that the contested decision is of direct concern to the appellants and does not entail implementing measures for the purposes of the last part of the fourth paragraph of Article 263 TFEU, in so far as it affects directly the legal situation of the appellants and leaves no discretion to its addressee, who is entrusted with the task of implementing it, namely the Kingdom of the Netherlands.

99. Accordingly, I consider that the conditions laid down by the last part of the fourth paragraph of Article 263 TFEU are fulfilled and that the General Court should therefore have upheld the appellants' action on the basis of that provision. By declaring it inadmissible, the General Court committed, in my view, an error of law.

### C – *The first and second pleas concerning the need to be individually concerned by the contested measure*

100. Should the Court hold that the conditions of the last part of the fourth paragraph of Article 263 TFEU were not fulfilled, it would then be necessary to examine the first two pleas relied on by the appellants against the contested decision in that it relates to State aid E 2/2005.

101. Both pleas concern the application to the present case by the General Court of the condition of being 'individually concerned' by the contested decision. I shall analyse these together.

#### 1. Concept

102. The condition of individual concern in the context of an action for annulment is probably one of the concepts which is most difficult to define. Since *Plaumann*, the Court has repeatedly held that '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'. [38]

103. However, the scope of the principle has been limited. Thus the fact that a provision is, by its nature and scope, a provision of general application inasmuch as it applies to all of the economic operators concerned in general, does not of itself prevent that provision from being of individual concern to some. That will 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 … . [Indeed,] those persons may be individually concerned by that measure inasmuch as they form part of a limited class of economic operators'. [39] According to the Court, 'that can be the case particularly when the decision alters rights acquired by the individual prior to its adoption'. [40]

104. Conversely, that will not be the case 'where it is established that that 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 by the measure in question'. [41]

38 — Case 25/62 *Plaumann* v *Commission* [1963] ECR 95, in particular p. 107. More recently, see *Commission* v *Infront WM*, paragraph 70, and *Sahlstedt and Others* v *Commission*, paragraph 26.

39 — *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 had held that the contested measure 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).

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

41 — Ibid., paragraph 31 and the case-law cited. Emphasis added.

2. Assessment

105. It therefore follows from that case-law that individualisation, for the purposes of Article 263 TFEU, depends on the personalisable, or conversely objective, aspect of the criterion allowing the members of the group to be determined.

106. In the order under appeal, the General Court found that the appellants were not individually concerned on the ground that the status of Wocos was granted on the basis of objective criteria which were likely to be satisfied by an indefinite number of operators as potential beneficiaries of State aid E 2/2005 referred to in the contested decision.

107. The General Court correctly points out, in paragraph 31 of the order under appeal, that 'attribution of the status of Wocos satisfies objective criteria. In fact, [...] the status of Wocos is granted by an approval system provided for by Article 70(1) of the Law on housing of 1901 (Woningwet). That approval is granted by royal decree to institutions which satisfy certain objective requirements: having the legal form of an association or foundation; being non-profit making; having the sole purpose of an activity in the field of social housing and using its assets in the interests of social housing. Wocos therefore constitute 'a class of persons envisaged in a general and abstract manner'.

108. In those circumstances, the General Court correctly considered that the appellants were concerned by the contested decision, inasmuch as it relates to State aid E 2/2005, in the same way as any other economic operator who is, presently or potentially, in an identical situation.

109. Accordingly, I consider that the first plea relied on by the appellants is unfounded.

110. I am, however, more circumspect as regards the General Court's assessment concerning the (non)existence of a closed class of institutions whose number is identified or identifiable. Those findings are the subject-matter of the second plea.

111. According to the General Court, the case-law cited by the appellants could not be applied to the present case, since, in *Belgium and Forum 187* v *Commission* and *Piraiki-Patraiki and Others* v *Commission*, the appellants belonged to a group which could not be extended after the adoption of the decisions at issue.

112. As I pointed out above,[42] the Court has held that a group of persons may be individually concerned by a measure where they were 'identified or identifiable when that measure was adopted by reason of criteria specific to the members of the group …'.[43]

113. It is that case-law which was applied in *Piraiki-Patraiki and Others* v *Commission* and *Belgium and Forum 187* v *Commission*.[44] In the latter case, the Court held that the ASBL Forum 187 was entitled to bring proceedings, because it represented the coordination centres individually concerned by the contested measure. The measure in question was a Commission decision classifying a Belgian tax scheme as existing State aid incompatible with EU law. According to the Court, that measure had the effect of limiting the duration of the authorisations of the coordination centres which had been renewed in 2001 and 2002. Those thirty coordination centres were fully identifiable at the time when the contested decision was adopted. Moreover, the contested decision did not lay down any transitional measures for the benefit of the coordination centres with an authorisation which had

42 — See point 103.

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

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

expired at the same time as the contested decision was notified and with a pending application for authorisation on that date. According to the Court, those eight other centres constituted a closed class which is particularly affected by the contested decision, in so far as they could no longer obtain a renewal of their authorisation. [45]

114. As in the present case, it was a Commission decision on existing State aid. It is true that it imposed an amendment to the scheme for the future without ordering recovery, whereas the contested decision considers the scheme, as amended, in compliance with EU law. However, that factual difference does not seem to me decisive in assessing the admissibility of the action.

115. Indeed, in order to rule that the action brought by the ASBL Forum 187 was admissible, the Court took into consideration the coordination centres whose authorisations had been renewed in 2001 or 2002, on the one hand, and those whose applications were pending when the Commission decision was notified, on the other hand.

116. Although they appear to be objective, those criteria were regarded by the Court as personalisable, that is to say, according to the expression used by the Court, specific to the members of the group. In any event, they are not fundamentally different from those affecting the appellants in this case. When the contested decision was adopted, 410 Wocos had been designated by royal decree. The contested decision, whereby the Commission approves the proposed amendments put forward by the Kingdom of the Netherlands, necessarily means that the relevant Wocos, and they alone, will necessarily no longer receive the same benefits as those obtained under the former scheme and due to expire (such as the disappearance of the loan guarantee, for example). The fact that other Wocos may be approved after the contested decision is adopted therefore seems to me not to have a significant effect. As pointed out above, the Court has already decided to regard as belonging to a closed class an economic operator affected by 'a decision [which] alters rights acquired … prior to its adoption'. [46]

117. I therefore consider the second plea well founded, since the General Court erred in law in holding that the appellants were not part of a closed class of identifiable institutions when the contested decision was adopted. On the contrary, they seem to me to be directly [47] and individually concerned by the contested decision.

118. In the light of the above considerations, I propose that the Court should rule the appellants' action admissible and therefore set aside the order under appeal in that it concerns the part of the contested decision relating to State aid E 2/2005. I further invite the Court to refer the case back to the General Court for it to rule on the merits of the action, and to reserve costs.

## V – Summary

### A – *Concerning State aid N 642/2009*

119. In the light of the foregoing considerations, I consider, like the General Court, that the appellants have no standing to bring an action for annulment against the contested decision in that it relates to State aid N 642/2009.

120. Accordingly, I propose that the Court should consider the third plea as, in part, manifestly inadmissible and, in part, manifestly unfounded.

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

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

47 — See considerations above concerning direct concern in the context of the examination of the last part of the fourth paragraph of the new Article 263 TFEU.

B – *Concerning State aid E 2/2005*

121. Primarily, in contrast to State aid N 642/2009, I consider that the appellants have an interest in bringing an action for annulment.

122. Secondly, I consider that the General Court erred in law by failing to examine the applicability of the last part of the fourth paragraph of Article 263 TFEU to the present case. Accordingly, I propose that the Court allow the appeal.

123. In that regard, under the first paragraph of Article 61 of the Statute of the Court, 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.

124. In this case, I consider that the Court has the information necessary to give final judgment on the issue of admissibility.

125. I note in that regard that the conditions laid down for bringing an action for annulment on that basis — that it must be concerned with a regulatory act, which is of direct concern to the appellants and does not entail implementing measures — are fulfilled.

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

127. However, I consider that the Court is not in a position to rule on the merits of the actions brought by the appellants, in so far as the assessments made by the General Court relate exclusively to the admissibility of the action, without considering the merits.

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

## VI – Costs

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

## VII – Conclusion

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

(1) dismiss the appeal in that it relates to the findings of the order of the General Court of the European Union of 16 December 2011 in Case T-203/10 *Stichting Woonpunt and Others* v *Commission* which deal with the part of Commission Decision C(2009) 9963 final of 15 December 2009 relating to State aid No E 2/2005 and N 642/2009 — The Netherlands — Existing and special project aid to housing corporations relating to State aid N 642/2009;

(2) set aside the order of the General Court of 16 December 2011 in *Stichting Woonpunt and Others* v *Commission* in so far as it concerns the part of Decision C(2009) 9963 final relating to State aid E 2/2005;

(3) declare the appeal admissible in that it concerns the part of Decision C(2009) 9963 final relating to State aid E 2/2005;

(4) refer the case back to the General Court of the European Union for a decision on the merits of the action in so far as it concerns the part of contested Decision C(2009) 9963 final relating to State aid E 2/2005;

(5) reserve the decision as to costs.