Reports of Cases

OPINION OF ADVOCATE GENERAL
SZPUNAR
delivered on 27 October 2016[1]

Cases C-414/15 P and C-415/15 P

Stichting Woonlinie,
Woningstichting Volksbelang,
Stichting Woonstede (C-414/15 P)
Stichting Woonpunt,
Woningstichting Haag Wonen,
Stichting Woonbedrijf (C-415/15 P)
v

European Commission

(Appeals — State aid — Article 108 TFEU — Review of existing aid schemes — Netherlands aid scheme for social housing corporations — Regulation (EC) No 659/1999 — Article 19, paragraph 1 — Commission decision rendering the commitments given by a Member State binding — Scope of judicial review)

Introduction

1. By the present appeals, six companies[2] request the Court to set aside the two orders of the General Court of the European Union of 12 May 2015 in *Stichting Woonlinie and Others* v *Commission*[3] and *Stichting Woonpunt and Others* v *Commission*[4] ('the orders under appeal') by which the General Court dismissed their actions for the annulment of Commission Decision C(2009) 9963 final of 15 December 2009 on State aid No E 2/2005 and N 642/2009 — The Netherlands — Existing and special project aid to housing corporations ('the contested decision').

2. The appeals, which have been formulated in identical terms and may therefore be considered together, provide the Court of Justice with an opportunity to outline the parameters of the judicial review of decisions of the European Commission approving commitments given by a Member State in relation to an existing aid scheme.

1 — Original language: French.

2 — Three appellants, Stichting Allee Wonen, Stichting WoonInvest (Case C-414/15 P) and Stichting Havensteder (Case C-415/15 P), have withdrawn their appeals.

3 — T-202/10 RENV, not published, EU:T:2015:287.

4 — T-203/10 RENV, not published, EU:T:2015:286.

Legal framework

3. The procedure for reviewing existing aid schemes is governed by Articles 17 to 19 of Regulation (EC) No 659/1999. [5]

4. Article 17 of Regulation No 659/1999 provides:

'1. The Commission shall obtain from the Member State concerned all necessary information for the review, in cooperation with the Member State, of existing aid schemes pursuant to Article [108(1) TFEU].

2. Where the Commission considers that an existing aid scheme is not, or is no longer, compatible with the common market, it shall inform the Member State concerned of its preliminary view and give the Member State concerned the opportunity to submit its comments within a period of one month. In duly justified cases, the Commission may extend this period.'

5. Article 18 of the regulation provides:

'Where the Commission, in the light of the information submitted by the Member State pursuant to Article 17, concludes that the existing aid scheme is not, or is no longer, compatible with the common market, it shall issue a recommendation proposing appropriate measures to the Member State concerned. The recommendation may propose, in particular:

(a) substantive amendment of the aid scheme, or

(b) introduction of procedural requirements, or

(c) abolition of the aid scheme.'

6. Article 19 of Regulation No 659/1999 provides:

'1. Where the Member State concerned accepts the proposed measures and informs the Commission thereof, the Commission shall record that finding and inform the Member State thereof. The Member State shall be bound by its acceptance to implement the appropriate measures.

2. Where the Member State concerned does not accept the proposed measures and the Commission, having taken into account the arguments of the Member State concerned, still considers that those measures are necessary, it shall initiate proceedings pursuant to Article 4(4). Articles 6, 7 and 9 shall apply *mutatis mutandis*.'

5 — Council Regulation of 22 March 1999 laying down detailed rules for the application of Article [87 EC] (OJ 1999 L 83, p. 1). The new Council Regulation (EU) 2015/1589 of 13 July 2015 laying down detailed rules for the application of Article 108 [TFEU] (JO 2015 L 248, p. 9), which does not apply to the present case *ratione temporis*, contains similar provisions (Articles 21 to 23).

Background to the dispute

The contested decision

7. The circumstances in which the contested decision was adopted, described in paragraphs 1 to 12 and 39 and 40 of the orders under appeal, may be summarised as follows:

8. The applicants are housing corporations (*woningcorporaties*, hereinafter referred to as 'wocos') established in The Netherlands. Wocos are not-for-profit bodies whose mission is to acquire, build and rent out dwellings mainly for underprivileged individuals and socially disadvantaged groups. Wocos also engage in other commercial activities.

9. The Kingdom of the Netherlands operates a system for funding social housing under which aid to wocos is granted.

10. On 14 July 2005, the Commission sent the Netherlands authorities a letter pursuant to Article 17 of Regulation No 659/1999 in which it classified that system as an existing aid scheme and expressed doubts as to its compatibility with the internal market.

11. Following that letter, the Commission and the Netherlands authorities commenced negotiations in order to bring the aid scheme in question into conformity with Article 106(2) TFEU.

12. On the conclusion of these consultations, the Commission proposed, pursuant to Article 18 of Regulation No 659/1999, the following as appropriate measures to ensure the conformity of the aid scheme: (i) limiting social housing to a clearly defined target group of underprivileged individuals or socially disadvantaged groups; (ii) carrying out commercial activities on market terms, with public service activities and commercial activities having separate accounts and being adequately audited; (iii) adapting the supply of social housing to the demand from underprivileged individuals and socially disadvantaged groups.

13. By letter of 3 December 2009, the Netherlands authorities accepted the Commission's proposal of appropriate measures, undertook to reform the system for funding wocos and sent the Commission a draft of the relevant national provisions.

14. On 15 December 2009, the Commission adopted the contested decision pursuant to Article 19 of Regulation No 659/1999.

15. The measures addressed by the decision are: (a) State guaranties for loans for the construction of social housing; State aid from the Central Housing Fund, project-based aid and aid for rationalisation in the form of loans at preferential rates or direct subsidies; (c) the sale by municipal authorities of land at prices below market value; (d) the right to obtain loans from the Bank Nederlandse Gemeenten (Bank of the Netherlands Municipalities).

16. In the contested decision, the Commission classified each of those measures as State aid[6] and concluded that the system for funding wocos constituted existing aid. It stated that the Netherlands authorities had undertaken to alter the system and had submitted a draft of the new rules. Having examined that draft, the Commission had concluded that it was compatible with Article 106(2) TFEU and consequently it took formal note of the commitments given by the Netherlands authorities, in accordance with Article 19(1) of Regulation No 659/1999.

6 — On 30 August 2010, the Commission adopted Decision C(2010) 5841 final, relating to State aid E 2/2005, which amended paragraphs 22 to 24 of the contested decision to the effect that it was not possible to conclude that the measure concerning the right to borrow from the Bank of the Netherlands Municipalities fulfilled all the criteria of State aid.

The procedures before the General Court and the Court of Justice

17. On 29 and 30 April 2010, the appellants brought actions for the annulment of the contested decision.

18. By two orders handed down on 16 December 2011 in *Stichting Woonlinie and Others* v *Commission*[7] and *Stichting Woonpunt and Others* v *Commission*,[8] the General Court dismissed those actions as inadmissible on the ground that the appellants were not individually concerned.

19. The appellants lodged appeals against those orders.

20. By two judgments handed down on 27 February 2014 in *Stichting Woonlinie and Others* v *Commission*[9] and *Stichting Woonpunt and Others* v *Commission*,[10] the Court of Justice set aside the orders.

21. The Court found that the General Court had erred in law by holding that the appellants were not individually concerned by the contested decision (paragraphs 44 to 51 of *Stichting Woonpunt and Others* v *Commission*).

22. Giving a final ruling on the admissibility of the action, the Court held that the appellants did have an interest in bringing proceedings, since the amendment of the aid scheme made the conditions for the exercise of their activities less favourable, while the annulment of the contested decision would have the effect of maintaining the previous conditions (paragraphs 56 and 57 [*Stichting Woonpunt and Others* v *Commission*]). The Court then held that the contested decision directly affected the appellants' legal position in that it rendered the proposals made by the Kingdom of the Netherlands binding, in accordance with Article 19(1) of Regulation No 659/1999 (paragraphs 59 to 61 [*Stichting Woonpunt and Others* v *Commission*]).

23. Having thus found that the appellants had an interest in bringing proceedings against the contested decision and that they were individually and directly concerned by that decision, the Court declared the actions to be admissible and referred the cases back to the General Court for a decision on the merits.

24. The General Court gave its ruling following the referral back in the two orders under appeal.

25. In support of their claims, the appellants had put forward the same eight pleas in law in both actions.

26. In paragraphs 43 to 53 of the orders under appeal, the General Court dismissed the first plea in law, which in substance alleged that measure (c) concerning the sale of land, referred to in point 15 above, had been wrongly classified as State aid. That plea was not taken up in the appeals.

27. In paragraphs 55 to 88 of the orders under appeal, the General Court dismissed as manifestly unfounded the second to seventh pleas in law, which alleged errors of assessment on the Commission's part in its review of the aid scheme at issue.

7 — T-202/10, not published, EU:T:2011:765.

8 — T-203/10, not published, EU:T:2011:766.

9 — C-132/12 P, EU:C:2014:100.

10 — C-133/12 P, EU:C:2014:105.

28. The General Court first of all recalled its case-law[11] according to which the Commission enjoys a broad discretion in this matter, such that the Court's review must be limited to checking that the institution has not committed a manifest error of assessment in considering that the commitments given by the Member State were capable of resolving the competition problems raised by the aid scheme in question.

29. In this connection, the General Court rejected as ineffective the appellants' arguments that the Commission's assessment of the aid scheme prior to the commitments given by the Netherlands authorities had been incomplete. The General Court held that those arguments did not relate to the contested decision, but were in fact directed against the appraisal of the earlier system which the Commission set out in its letter of 14 July 2005, which was therefore not contained in the contested decision and did not fall within the scope of the General Court's review in this instance.

30. The General Court also rejected as manifestly unfounded the appellants' argument that the Commission had exceeded its competence by demanding certain appropriate measures. The Court stated that the appropriate measures proposed by the Commission in the context of its review of the existing aid scheme were no more than proposals and that they had become binding only as a result of their acceptance by the Netherlands authorities.

31. Lastly, in paragraphs 89 to 97 of the orders under appeal, the General Court dismissed the eighth plea in law, alleging an abuse of procedure, as manifestly unfounded and consequently dismissed the actions themselves as manifestly unfounded.

Forms of order sought by the parties

32. The forms of order sought in the two appeals are identical, the appellants requesting the Court of Justice in each case to set aside the orders under appeal, refer the cases back to the General Court and order the Commission to pay the costs.

33. The Commission contends that the appeals should be dismissed and the appellants ordered to pay the costs.

34. In the alternative, in the event that the Court should uphold the appeals, the Commission claims that the orders under appeal should not be set aside in so far as the first plea in law in each case was dismissed at first instance and was not taken up in the appeals. It also submits that it would be appropriate for the cases to be referred back to the General Court.

Assessment of the appeals

35. In support of their appeals, the appellants put forward the same two grounds of appeal in both cases. The first is directed against the reasoning in the orders under appeal according to which the General Court's review in this instance did not extend to assessments which the Commission had made concerning the compatibility of the aid scheme prior to its amendment (paragraphs 56 to 60, 69 to 74, 81, 82 and 86 to 87 of the orders under appeal). The second is directed against the reasoning that the General Court's review did not extend to assessments concerning the appropriate measures which were rendered binding by the contested decision (paragraphs 61 to 66, 78 to 80 and 90 to 95 of the orders under appeal). The General Court's reasoning on both points is, according to the appellants, vitiated by an error of law, an 'incorrect appraisal of the facts' and a failure to state reasons.

11 — Judgment of 11 March 2009 in *TF1* v *Commission* (T-354/05, EU:T:2009:66, paragraphs 188 and 189).

36. Both grounds of appeal take issue with the approach taken by the General Court to its review of Commission decisions adopted pursuant to Article 19(1) of Regulation No 659/1999, and this therefore affords the Court an opportunity to address that matter generally.

Judicial review of decisions adopted pursuant to Article 19(1) of Regulation No 659/1999

Preliminary observations

37. In the field of State aid monitoring, the procedural rules vary according to whether the measure in question is existing aid or new aid. Article 108(1) TFEU confers competence on the Commission to keep existing aid schemes under constant review. By contrast with the monitoring of new aid, this review extends solely to the aid schemes and it is prospective, inasmuch as it will, in appropriate cases, be aimed at the amendment or abolition of a scheme as to the future.

38. Under Articles 17 to 19 of Regulation No 659/1999, the review of existing aid takes place in several stages. First, if the Commission considers that an existing aid regime is not, or is no longer, compatible with the internal market, it will allow the Member State to submit observations (Article 17(2) of the regulation). Secondly, in light of those observations, the Commission may issue a proposal for appropriate measures to the Member State (Article 18 of the regulation).[12] If the Member States accepts the measures proposed, the Commission records that and brings the procedure under Articles 17 to 19 of Regulation No 659/1999 to a close (Article 19(1) of the regulation). If the Member State does not accept, the Commission initiates the formal investigation procedure (Article 19(2) of the regulation).

39. In the case which led to the judgment in *TF1* v *Commission*,[13] the General Court rejected the position advocated by the Commission and held that the act by which the Commission records commitments given by a Member State, in accordance with Article 19(1) of Regulation No 659/1999, is a challengeable decision. The General Court considered that, while the Commission and the Member State may certainly have an exchange regarding the appropriate measures proposed, ultimately it is only when the Commission decides to accept the Member State's commitments as answering its concerns that those commitments become binding and the procedure is brought to a close.

40. That interpretation was confirmed in the judgments in *Stichting Woonpunt and Others* v *Commission*[14] and *Stichting Woonlinie and Others* v *Commission*[15]. Indeed, the Court of Justice held that the contested decision, based on Article 19(1) of Regulation No 659/1999, directly affected the legal position of the appellants, inasmuch as it rendered the commitments given by the Netherlands authorities binding.

12 — The General Court has held that such a proposal is not a challengeable act. See the judgment of 22 October 1996 in *Salt Union* v *Commission* (T-330/94, EU:T:1996:154, paragraph 35) and the order of 14 May 2009 in *US Steel Košice* v *Commission* (T-22/07, not published, paragraph 55).

13 — Judgment of 11 March 2009 (T-354/05, EU:T:2009:66, paragraphs 60 to 81 and, in particular, paragraphs 69 and 70).

14 — Judgment of 27 February 2014 (C-132/12 P, EU:C:2014:100, paragraphs 72 to 74).

15 — Judgment of 27 February 2014 (C-133/12 P, EU:C:2014:105, paragraphs 59 to 61).

41. In the orders under appeal, which were handed down after the cases had been referred back, the General Court followed the Court of Justice's analysis of the admissibility of the actions. Then, on the merits, it decided that most of the pleas and arguments put forward by the appellants were either ineffective or could be immediately rejected for the reason that they challenged assessments that were not contained in the contested decision.[16] Accordingly, the General Court held that the Commission's supposed assessment of the compatibility of the aid scheme with the internal market prior to its amendment did not fall within the scope of the judicial review carried out in this instance.

42. In their appeals, the appellants take issue with the limits on judicial review that were identified in the orders under appeal. They maintain that the adoption of a decision pursuant to Article 19(1) of Regulation no 659/1999 implies that the previous situation was not compatible with the Treaty. According to the appellants, such a decision therefore necessarily entails an assessment of the aid scheme prior to its amendment, in order to establish whether measures are necessary to render the aid scheme compatible with the internal market and, if so, to determine what kind of amending measures they should be.

43. Despite the position which it took in the earlier proceedings,[17] the Commission no longer argues the absence of any act amenable to challenge. It nevertheless maintains that, given the particular nature of the contested decision, judicial review of its content must be limited to the classification of the measures at issue as belonging to an existing aid scheme and to the question whether the commitments given by the Member State concerned are sufficient to render the scheme compatible with the internal market.

44. However, according to the Commission, that review does not extend to the concerns expressed as to the scheme's compatibility prior to its amendment or to the possibility of there being other appropriate measures that would be less onerous for the beneficiaries of the aid scheme. The Commission argues that it does not state a finding on those two aspects, but merely accepts the commitments given by the Member State once it has verified that they are sufficient to render the scheme in question compatible with the internal market.

45. The arguments which the parties have put forward thus reveal a difference of opinion as to whether judicial review extends to the Commission's assessments of the aid scheme's compatibility with the internal market prior to its amendment and of the appropriate measures which are rendered binding by the contested decision.

Judicial review of the Commission's assessments of the compatibility of an aid scheme

46. I would observe that the procedure referred to in Article 17 to 19 of Regulation No 659/1999 is aimed, in appropriate cases, at the amendment or abolition of an existing aid scheme. The decision to initiate the procedure lies with the Commission, and it enjoys considerable discretion in that regard.[18] Nevertheless, initiating the procedure implies, in accordance with Article 17(2) of Regulation No 659/1999, that the scheme in question is considered not to be, or no longer to be, compatible with the internal market.

47. In my opinion, that finding, which is admittedly provisional at the time when the procedure is initiated, becomes final once the Commission brings the procedure to a close by adopting a decision pursuant to Article 19(1) of Regulation No 659/1999. Indeed, by adopting such a decision, the Commission states its finding on the question whether the commitments given by the Member State

16 — See points 28 to 30 of this Opinion.

17 — In Cases C-132/12 P and C-133/12 P.

18 — According to the case-law of the General Court prior to the adoption of Regulation No 659/1999, the initiative lies with the Commission, such that competitors of the beneficiary of the existing aid scheme cannot challenge the Commission's refusal to initiate the procedure. See the judgment of 22 October 1996 in *Salt Union* v *Commission* (T-330/94, EU:T:1996:154, paragraphs 35 and 37).

answer its concerns as to the compatibility of the aid scheme with the internal market. In order to be able to express an opinion on that matter, the Commission must first have defined what its concerns in that regard were. A decision taken under Article 19(1) of Regulation No 659/1999, which renders the amendments to the aid scheme accepted by the Member State binding, is therefore necessarily based on a finding by the Commission that the pre-existing scheme was incompatible with the internal market.

48. While that finding, being merely provisional, cannot be made the subject of judicial review at the time when the procedure is initiated, it must be amenable to review in a legal action challenging the act by which the procedure was brought to an end.

49. Indeed, the case-law of the Court of Justice which restricts the possibility of contesting intermediate acts is founded on the premiss that any unlawfulness of such an act may be relied upon in an action directed against the final decision, for which it represents a preparatory step and that, since that is so, an action brought against the final decision bringing the procedure to a close will ensure adequate legal protection. [19]

50. Correspondingly, in the present cases, if judicial review were definitively excluded in the case of an assessment contained in an intermediary act whereby the Commission takes the position, in accordance with Article 17(2) of Regulation No 659/1999, that an aid scheme is not, or is no longer, compatible with the internal market, that would create a lacuna in the effective legal protection of interested third parties, that is to say, the beneficiaries of the scheme.

51. Moreover, it matters little if the position in question is expressed in a different act from the decision concluding the procedure, that is to say, in a letter sent to the Member State in accordance with Article 17(2) of Regulation No 659/1999. Indeed, since the Commission's final decision merely confirms a position which it expressed earlier, that position may be taken into consideration in the judicial review of the final decision. [20]

52. Equally, the fact, raised by the Commission, that the position in question was not formulated in final terms does not preclude that position from being reviewed by a court. [21]

53. That consideration does, however, have an effect on the scope of the Commission's duty to state reasons and also on the intensity of any judicial review.

54. As regards the duty to state reasons, provided that the finding of an existing aid scheme's incompatibility which the Commission expresses when it initiates the procedure is not disputed by the Member State, it is not incumbent on the Commission to expand on the reasons for that incompatibility in the decision which it adopts under Article 19(1) of Regulation No 659/1999. It may simply confirm its provisional finding. Indeed, it is sufficient if the statement of reasons adequately explains the concerns expressed by the Commission and the amending measures proposed.

19 — See the judgments of 11 November 1981 in *IBM* v *Commission* (60/81, EU:C:1981:264, paragraph 12) of 13 October 2011 in *Deutsche Post and Germany* v *Commission* (C-463/10 P and C-475/10 P, EU:C:2011:656) and the Opinion of Advocate General Bot in those joined cases (C-463/10 P and C-475/10 P, EU:C:2011:445, point 76).

20 — See, to that effect, the judgments of 6 November 2014 in *Italy* v *Commission*, (C-385/13 P, not published, EU:C:2014:2350, paragraph 116) and of 11 June 2015 in *Laboratoires CTRS* v *Commission* (T-452/14, not published, EU:T:2015:373, paragraph 60). See also my Opinion in *Evonik Degussa* v *Commission* (C-162/15 P, EU:C:2016:587, point 79).

21 — I would observe that a decision to initiate the formal investigation procedure may constitute a measure against which proceedings might be brought under Article 263 TFEU if it entails independent legal effects, even where the findings in the decision are not final. See the judgments of 9 October 2001 in *Italy* v *Commission* (C-400/99, EU:C:2001:528, paragraphs 62 and 69) and of 23 October 2002 in *Diputación Foral de Guipúzcoa and Others* v *Commission* (T-269/99, T-271/99 and T-272/99, EU:T:2002:258, paragraphs 38 to 40).

55. As regards the intensity of the judicial review, I would observe that a finding of an aid scheme's incompatibility is not a definitive finding at the time when the procedure is initiated. At that stage it is sufficient for the Commission to demonstrate that there are concerns with the aid scheme's compatibility which justify the proposals for the amendment or abolition of the aid scheme. Given that fact, any judicial review of such a finding, in an action directed against a decision taken under Article 19(1) of Regulation No 659/1999 must, to my mind, be limited. [22]

56. I therefore consider that a Commission's assessments concerning an existing aid scheme's compatibility with the internal market are subject to judicial review in a legal action brought against a decision adopted under Article 19(1) of Regulation No 659/1999. However, having regard to the nature of the procedure at issue, that review is limited to verifying whether the Commission was entitled to find, without making a manifest error, that there were concerns about the aid scheme's compatibility with the internal market such as to warrant the proposal of appropriate measures.

Judicial review of the assessments concerning the appropriate measures

57. By their second ground of appeal, the appellants argue that it is for the Commission to determine whether appropriate measures should be proposed in order to ensure the aid scheme's compatibility with the internal market and, if so, what those appropriate measures should be. They therefore take the position that the Commission's assessment of the need for and scope of appropriate measures is part of the contested decision and must be amenable to judicial review.

58. The Commission maintains, essentially, that it is required to ensure that the commitments given by the Member State are sufficient to render the aid scheme compatible with the internal market and that, as long as the Member State accepts the proposal of appropriate measures, it is not incumbent on it to investigate the possibility of there being other appropriate measures that would be less onerous for the beneficiaries of the aid scheme.

59. The parties' disagreement essentially concerns the question whether, before taking formal note of the commitments given by the Member State, the Commission must not only determine that those commitments are sufficient to ensure the aid scheme's compatibility with the internal market, but must also ensure that they are indispensable and do not go beyond what is necessary. In other words, the parties are disputing whether the Commission is under an obligation to verify the proportionality of the appropriate measures, in particular, with regard to the position of the beneficiaries of the aid scheme.

60. The principle of proportionality, as a general principle of EU law, is a criterion for the lawfulness of any act of the institutions of the Union. [23] The Commission is therefore required to ensure that the legal effects of any decision it takes under Article 19(1) of Regulation No 659/1999 do not infringe that principle.

61. However, in determining the exact content of the obligation that rests on the Commission in this regard, it is important to bear in mind the nature of the procedure under consideration.

22 — I would observe that, if the Court were to carry out a full judicial review, it would be ruling on matters on which the Commission had merely formed a provisional view and on which, being uncontested, the Commission was not required to express a final position. See, concerning an action brought against a decision to initiate the formal investigation procedure, the judgment of 23 October 2009 in *Diputación Foral de Guipúzcoa and Others* v *Commission* (T-269/99, T-271/99 and T-272/99, EU:T:2002:258, paragraphs 48 and 49). See also, to that effect, the judgment of 9 October 2001 in *Italy* v *Commission* (C-400/99, EU:C:2001:528, paragraphs 48 and 54).

23 — See, inter alia, the judgment of 24 May 2007 in *Maatschap Schonewille-Prins* (C-45/05, EU:C:2007:296, paragraph 45).

62. With reference to the implementation of Articles 101 TFEU and 102 TFEU, the Court of Justice has already held that the obligation on the Commission to ensure that the principle of proportionality is observed has a different extent and content, depending on whether it is considered in relation to a decision finding an infringement, taken under Article 7 of Regulation (EC) No 1/2003,[24] or a decision on commitments, taken under Article 9 thereof.

63. As regards decisions on commitments, the Commission's role is merely to verify that the commitments proposed by the undertakings concerned address its competition concerns and that they have not offered less onerous commitments that are also adequate. While the Commission must take the interests of third parties into consideration, judicial review relates solely to the question of whether the Commission's assessment is manifestly incorrect.[25]

64. Similarly, in this instance, the scope of the obligation to ensure observance of the principle of proportionality must be determined with reference to the role that the Commission is asked to play.

65. I consider that the Commission's main role, when adopting a decision under Article 19(1) of Regulation No 659/1999, is to verify that the commitments given by the Member State will ensure the aid scheme's compatibility with the internal market. In that context, the Commission is also required to ensure that the restriction of competition resulting from the aid scheme, as amended, is proportionate to the objectives pursued. On the other hand, it is not incumbent on the Commission to investigate whether there are other appropriate measures that would be less onerous for the Member State concerned and the beneficiaries of the aid scheme.

66. That allocation of roles stems from the particular nature of the procedure referred to in Articles 17 to 19 of Regulation no 659/1999, which is based on consultation between the Commission and the Member State concerned and is aimed at the acceptance of a Member State's commitments.

67. By contrast with a decision adopted by the Commission on the conclusion of a formal State aid investigation procedure, the content of the specific measures recorded in a decision under Article 19(1) of Regulation No 659/1999 is the outcome of a consensus reached by the Commission and the Member State concerned.

68. In the course of the consultations leading to such a consensus, the Commission must ensure that a satisfactory answer is given to its competition concerns. It is for the Member State to ensure that the commitments that are given do not go beyond what is necessary, in so far as both its own interests and any legitimate interests of beneficiaries of the aid scheme are concerned.

69. If, in the course of the consultations with the Member State, the Commission were required to ensure both that the commitments given adequately answered its competition concerns and that they did not go beyond what is necessary to answer those concerns, then its role in those consultations would be similar to its role in the normal decision-making procedure, and that would conflict with the consensual nature of the procedure in question in the present cases.

24 — Council Regulation of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty (OJ 2003 L 1, p. 1).

25 — Judgment of 29 June 2010 in *Commission* v *Alrosa* (C-441/07 P, EU:C:2010:377, paragraphs 38 to 42). Following similar reasoning, the General Court has held that application of the principle of proportionality, in the context of decisions declaring aid compatible with the internal market subject to conditions, varies according to whether the conditions were imposed by the Commission or arise from commitments voluntarily given by the Member State. See the judgments of 8 April 2014 in *ABN Amro Group* v *Commission* (T-319/11, EU:T:2014:186, paragraphs 72 to 82), of 17 July 2014 in *Westfälisch-Lippischer Sparkassen- und Giroverband* v *Commission* (T-457/09, EU:T:2014:683, paragraphs 347 to 351) and of 12 November 2015 in *HSH Investment Holdings Coinvest-C and HSH Investment Holdings FSO* v *Commission* (T-499/12, EU:T:2015:840, paragraphs 108 to 113).

70. I consequently take the view that the Commission is not required, before rendering a Member State's commitments binding by adopting a decision under Article 19(1) of Regulation No 659/1999, to check whether the measures envisaged by those commitments are necessary by examining the possibility of there being other appropriate measures that would be less onerous for the Member State concerned and the beneficiaries of the aid scheme. Judicial review of a decision under Article 19(1) of the regulation does not therefore extend to that aspect.

Assessment of the grounds of appeal in light of the foregoing considerations

The first ground of appeal

71. By their first ground of appeal, which is the same in both cases, the appellants take issue with paragraphs 56 to 60, 69 to 74, 81, 82 and 86 to 87 of the orders under appeal and argue that the General Court erred in law.

72. In the passages of the orders under appeal with which the appellants take issue, the General Court dismissed as ineffective the arguments, put forward in the context of the second to seventh pleas in the applications at first instance, by which the appellants alleged that the Commission's assessment of the aid scheme's compatibility prior to its amendment was incomplete and incorrect. The General Court held that the judicial review to be carried out in this instance did not extend to the Commission's examination of the aid scheme before the commitments were given (paragraphs 59, 73, 82 and 87 of the orders under appeal).

73. As I made clear in point 56 of this Opinion, that reasoning is vitiated by an error of law. Indeed, it was incumbent on the General Court to consider the merits of the appellants' arguments and to verify whether the Commission was entitled to find, without making a manifest error, that there were concerns about the aid scheme's compatibility with the internal market such as to warrant the proposal of appropriate measures

74. It follows that the first ground of appeal is well founded.

The second ground of appeal

75. By their second ground of appeal the appellants take issue with the reasoning in paragraphs 61 to 66, 78 to 80 and 90 to 95 of the orders under appeal, arguing an error of law and a failure to state reasons.

76. In those passages of the orders under appeal, the General Court, examining the second, fourth, sixth and eighth pleas in the applications at first instance, dismissed as manifestly unfounded the appellants' arguments against the Commission's assessments of the measures which were rendered binding by the contested decision.

77. The General Court stated in this connection that the Member State was free to accept or refuse the appropriate measures proposed by the Commission and that it was therefore the acceptance of those measures by the Netherlands authorities that rendered them binding (paragraphs 65 and 79 of the orders under appeal). The General Court also held, on examining the eighth plea in the applications at first instance, that the scope of the measures in question had been defined not by the Commission, but by the Netherlands authorities, in their commitments (paragraph 95 of the orders under appeal).

78. That reasoning seems to me to be open to criticism in that it implies that the Commission plays no role in deciding on the measures envisaged by the commitments given by the Member State and that it is the Member State's acceptance of those measures which renders them binding. I would observe that the Court has already held that it is the Commission's decision recording the commitments of the Member State which produce the binding legal effects of those commitments. [26]

79. Nevertheless, even if the reasoning set out in paragraphs 65, 79 and 95 of the orders under appeal were to be regarded as vitiated by an error of law, it would still be appropriate for the Court to confirm the General Court's conclusion that the appellants' arguments must be dismissed in so far as they dispute the need for and the appropriateness of the measures referred to in the contested decision.

80. Indeed, as I made clear in points 65 to 70 of this Opinion, the Commission's role in this instance is to verify that the commitments given by the Kingdom of the Netherlands will ensure the aid scheme's compatibility with the internal market. It is not, on the other hand, incumbent on the Commission to investigate the possibility of there being other appropriate measures that would be less onerous for the Member State and for the beneficiaries of the aid scheme.

81. It follows that the second ground of appeal should be dismissed.

82. In light of all the foregoing, I propose that the orders under appeal be set aside to the extent that the General Court dismissed as ineffective the arguments formulated in the second to seventh pleas in the applications at first instance, which concern the Commission's assessment of the aid scheme's compatibility with the internal market prior to its amendment.

The consequences of setting aside the orders under appeal

83. Under Article 61 of the Statute of the Court of Justice, if the appeal is well founded, the Court is to quash the decision of the General Court. It 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.

84. I consider that the state of the proceedings is not such as to permit the Court to give judgment. Indeed, examining the merits of the appellants' arguments would lead the Court to rule on points of facts on the basis of evidence that was not considered by the General Court in the orders under appeal, inasmuch as it dismissed the appellants' arguments as ineffective. Moreover, the allegations of fact relating to the substance of the dispute have not been debated before the Court.

Conclusion

85. In light of the foregoing, I propose that the Court of Justice set aside the orders under appeal, refer the cases back to the General Court and reserve the costs.

26 — Judgments of 27 February 2014 in *Stichting Woonpunt and Others* v *Commission* (C-132/12 P, EU:C:2014:100, paragraph 72) and of 27 February 2014 in *Stichting Woonlinie and Others* v *Commission* (C-133/12 P, EU:C:2014:105, paragraph 59).