Reports of Cases

OPINION OF ADVOCATE GENERAL
RANTOS
delivered on 24 February 2022 [1]

Case C-99/21 P

Danske Slagtermestre
v

European Commission

(Appeal – State aid – Article 107(1) TFEU – Contributions scheme for the collection of waste water – Complaint – Decision finding that there is no State aid – Action for annulment – Admissibility – *Locus standi* – Fourth paragraph of Article 263 TFEU – Regulatory act not entailing implementing measures – Direct concern)

I. Introduction

1. By its appeal, Danske Slagtermestre seeks to have set aside the order of the General Court of the European Union of 1 December 2020, *Danske Slagtermestre* v *Commission* (T-486/18, not published, EU:T:2020:576, 'the order under appeal'), by which the General Court dismissed as inadmissible its action for the annulment of European Commission Decision C(2018) 2259 final of 19 April 2018 relating to State aid SA.37433 (2017/FC) – Denmark ('the contested decision'), declaring, after the preliminary examination stage, that the contribution introduced by lov nr. 902/2013 om ændring af lov om betalingsregler for spildevandsforsyningsselskaber m.v. (Betalingsstruktur for vandafledningsbidrag, bemyndigelse til opgørelse af særbidrag for behandling af særlig forurenet spildevand m.v.) (Law No 902/2013 amending the law establishing the rules relating to contributions owed to waste water treatment operators (structure of the contributions for the drainage of waste water, authorising special contributions for the treatment of particularly polluted waste water, etc.)), of 4 July 2013 ('the measure at issue') does not constitute State aid within the meaning of Article 107(1) TFEU.

2. This case provides the Court of Justice with the opportunity to clarify the conditions of admissibility of an action brought by competitors of the beneficiaries of aid measures in the context of the third situation covered by the fourth paragraph of Article 263 TFEU and, more specifically, the concepts of 'direct concern' and 'implementing measures', as interpreted by the Court in the judgment of 6 November 2018, *Scuola Elementare Maria Montessori* v *Commission*, *Commission* v *Scuola Elementare Maria Montessori* and *Commission* v *Ferracci*. [2]

[1] Original language: French.

[2] C-622/16 P to C-624/16 P, EU:C:2018:873; 'the judgment in *Montessori*'.

II. Background to the dispute

3. Danske Slagtermestre is a trade association representing small butcher's shops, slaughterhouses, wholesalers and processing undertakings in Denmark. On 26 September 2013, it lodged a complaint with the Commission on the ground that, by adopting the measure at issue, the Kingdom of Denmark granted State aid in favour of large slaughterhouses in the form of a reduction in the contributions for waste water collection.

4. That measure amended the system of contributions for waste water collection [3] and introduced a degressive 'staircase' model providing for a three-step rate per cubic metre of waste water based on the volume of waste water discharged ('the staircase model'): the first step corresponds to water consumption of up to 500 m^3 per year per property; the second step corresponds to water consumption of between 500 m^3 and 20 000 m^3 per year per property and provides for a charge per cubic metre that is 20% lower than the charge for the first step; and the third step corresponds to water consumption in excess of 20 000 m^3 per year per property and provides for a charge per cubic metre that is 60% lower than the charge for the first step. [4]

5. At the end of the preliminary stage of the procedure, the Commission adopted the contested decision, by which it found that the new charging system introduced by the measure at issue did not constitute State aid within the meaning of Article 107(1) TFEU.

III. Procedure before the General Court and the order under appeal

6. By application lodged at the Registry of the General Court on 15 August 2018, the applicant brought an action based on Article 263 TFEU seeking annulment of the contested decision.

7. By the order under appeal, the General Court declared the action inadmissible on the ground that the applicant lacked standing to bring proceedings either in its own name or as the representative of its members' interests. More specifically, the General Court held that the applicant did not have standing to bring proceedings as an interested party (since it did not rely in its action on an infringement of its procedural rights), or owing to the direct and individual concern of its members.

8. With regard, more specifically, to the admissibility of that action, for the purposes of the third situation covered by the fourth paragraph of Article 263 TFEU, [5] the General Court, whilst recognising that the contested decision constituted a 'regulatory act' within the meaning of that provision (paragraphs 94 to 96 of the order under appeal), held that that decision was not of direct concern to the applicant (paragraphs 97 to 104 of that order), such that the action brought by it was inadmissible, without it being necessary to determine whether the decision entailed implementing measures (paragraph 105 of the order).

[3] Before this law entered into force, Danish legislation provided for a single charge per cubic metre for all water consumers, irrespective of their area of activity, linked to the same waste water treatment plant, regardless of their consumption.

[4] More specifically, under the staircase model, consumers coming under the third step first pay the charge specified for the first step (until their water consumption exceeds 500 m^3), then the charge laid down for the second step (until their consumption exceeds 20 000 m^3) and, finally, they pay their waste water contribution according to the rate provided for under the third step.

[5] This situation concerns an action brought against a regulatory act which is of direct concern to the applicant and does not entail implementing measures.

IV. Procedure before the Court of Justice and forms of order sought

9. On 17 February 2021, Danske Slagtermestre lodged an appeal against the order under appeal. It claims that the Court should set aside that order. [6]

10. The Commission, supported by the Kingdom of Denmark, contends that the Court should dismiss the appeal and order the applicant to pay the costs.

11. The parties also replied in writing to questions put by the Court. The Court decided, pursuant to Article 76(2) of its Rules of Procedure, to give a ruling without a hearing.

V. Analysis

12. In support of its appeal, Danske Slagtermestre relies on five grounds of appeal alleging, in essence, that the General Court misinterpreted and misapplied the condition of 'direct concern', within the meaning of the third situation covered by the fourth paragraph of Article 263 TFEU, as interpreted by the Court of Justice in the judgment in *Montessori*.

13. As a preliminary point, the Commission expresses doubts as to the admissibility of the appeal because the form of order sought by the applicant seeks merely to have the order under appeal set aside, whereas, under Article 170(1) of the Rules of Procedure of the Court of Justice, an appeal is to seek the same form of order, in whole or in part, as that sought at first instance. On the substance, the Commission, supported by the Danish Government, contends, primarily, that the appeal should be dismissed; in the alternative, if the Court of Justice were to consider that the General Court had erred in law as regards the assessment of whether the applicant is directly concerned, it contends that the appeal should be dismissed on the ground that the contested decision is a regulatory act that entails implementing measures, for the purposes of the third situation covered by the fourth paragraph of Article 263 TFEU, by way of a substitution of the grounds stated in the order under appeal.

14. With regard, first of all, to the admissibility of the appeal in terms of Article 170(1) of the Rules of Procedure, it is true that, although the applicant does not expressly seek the same form of order as that sought at first instance, or even that the contested decision be annulled, [7] it appears to me that its heads of claim cannot be regarded as seeking anything other than, in essence, the same result, in order to avoid excessive formalism. [8] I therefore consider the appeal to be admissible.

15. In what follows, I will first examine the five grounds of appeal concerning the General Court's assessment as to direct concern on the part of the applicant (Section A). I will then consider the admissibility of the action at first instance in the event that the Court of Justice, following the reasoning that I propose, rules that the order under appeal must be set aside (Section B), as

6 I note that the applicant does not ask that the action brought at first instance be upheld or that the Commission be ordered to pay the costs at first instance and on appeal.

7 It seeks simply to have the order under appeal set aside, in accordance with Article 169 of the Rules of Procedure.

8 See, to that effect, judgment of 16 July 2020, *Inclusion Alliance for Europe* v *Commission* (C-378/16 P, EU:C:2020:575, paragraphs 57 to 60). Furthermore, since the appeal concerns merely the admissibility of the action, if the appeal is upheld there can be no doubt as to the fact that the form of order sought at first instance vis-à-vis the annulment of the contested decision remains entirely relevant, especially since, in line with my proposals, the action will have to be referred back to the General Court for it to rule on the merits of the action.

regards, first, direct concern on the part of the applicant (Section B.1) and, second, the question of the potential lack of implementing measures, which the General Court did not examine in the order under appeal (Section B.2).

A. The appeal

16. The five grounds of appeal, which should be dealt with together, allege, first, the misapplication of the concept of 'direct concern'; second, that the General Court confused the assessment of direct concern with that of individual concern; third, that the criteria established by the judgment in *Montessori* relating to direct concern are satisfied in the present case; fourth, that the General Court erred in law by taking the view that the applicant had failed to demonstrate that its members were exposed to distorted competition; and, fifth, that the General Court misinterpreted the criteria relating to individual concern, assuming that they are relevant to the assessment of such concern.

1. The criterion of direct concern as interpreted by the case-law of Court

17. First of all, it should be recalled that the fourth paragraph of Article 263 TFEU sets out that any natural or legal person may, under the conditions laid down in the first and second paragraphs of that article, institute proceedings against an act addressed to that person (first situation) or which is of direct and individual concern to them (second situation),[9] and against a regulatory act which is of direct concern to them and does not entail implementing measures (third situation).[10]

18. In addition, since the same wording, 'which is of direct concern to them', appears in the second and third situations provided for in the fourth paragraph of Article 263 TFEU, it has already been held that the concept of 'direct concern' under the third situation cannot be interpreted more restrictively than that concept under the second situation.[11]

19. According to settled case-law of the Court, the condition that a natural or legal person must be directly concerned by the decision against which the action is brought, laid down in the fourth paragraph of Article 263 TFEU, requires two cumulative criteria to be met, namely, first, the contested measure must directly affect the legal situation of the individual and, second, it must leave no discretion to its addressees who are entrusted with the task of implementing it, such implementation being purely automatic and resulting from EU rules alone without the application of other intermediate rules.[12]

20. As regards the rules on State aid, it must be observed that their objective is to preserve competition. So, in that field, the fact that a Commission decision leaves intact all the effects of the national measures which the applicant, in a complaint addressed to that institution, claimed

[9] This situation is essentially identical to that previously provided for in Article 230 EC (and, even earlier, in Article 173 EEC), in accordance with which any natural or legal person may institute proceedings against a decision which, although in the form of a regulation or a decision addressed to another person, is of direct and individual concern to the former.

[10] This third situation was added by the Treaty of Lisbon with a view to broadening the conditions of admissibility of actions for annulment brought by natural and legal persons against all acts of general application, with the exception of legislative acts (see, to that effect, judgment in *Montessori*, paragraphs 26 and 27).

[11] See, to that effect, judgment of 15 July 2021, *Deutsche Lufthansa* v *Commission* (C-453/19 P, EU:C:2021:608, paragraphs 82 to 84).

[12] See judgment in *Montessori*, paragraph 42 and the case-law cited. The same applies where the possibility for its addressees not to give effect to a Union measure is purely theoretical and their intention to act in conformity with it is not in doubt (see judgment of 5 May 1998, *Dreyfus* v *Commission*, C-386/96 P, EU:C:1998:193, paragraph 44).

were not compatible with that objective and placed it in an unfavourable competitive position makes it possible to conclude that the decision directly affects its legal situation, in particular its right under the provisions on State aid of the FEU Treaty not to be subject to competition distorted by the national measures concerned. [13]

21. With respect, more specifically, to the application of the first of the two criteria mentioned in point 19 of this Opinion, the Court has explained that, while it is not for the EU judicature, at the stage of the examination of admissibility, to rule definitively on the competitive relationships between an applicant and the beneficiaries of the national measures assessed in a decision of the Commission on State aid, such as the decision at issue, a direct effect on such an applicant cannot be deduced from the mere potential existence of a competitive relationship. [14]

22. Given that the condition of direct concern requires the contested measure to produce effects directly on the applicant's legal situation, the EU judicature must ascertain whether the applicant has 'adequately explained the reasons why the Commission's decision is liable to place [it] in an unfavourable competitive position and thus to produce effects on [its] legal situation'. [15]

23. It is the application of that criterion, as interpreted by the case-law of the Court, and in particular in the judgment in *Montessori*, that must be examined here.

24. I note, in that regard, that in the case-law prior to the entry into force of the Treaty of Lisbon, the assessment of direct concern for the purposes of the second situation covered by the fourth paragraph of Article 230 EC (now the fourth paragraph of Article 263 TFEU), which was often minimal as compared with the assessment of individual concern, [16] was focused rather on the second criterion of direct concern, namely the lack of discretion on the part of the authorities responsible for implementation, [17] whilst any analysis of the substantive effects of the measure at issue was primarily taken into account from the perspective of individual concern. Following the introduction of the third situation covered by the fourth paragraph of Article 263 TFEU by the Treaty of Lisbon, the EU judicature, when called upon to examine the condition of direct concern on the part of an applicant independently of any considerations as to individual concern in respect of that applicant, has interpreted that criterion more and more rigorously, [18] taking factual elements into account which are very close, in essence, to those which had hitherto formed part of the examination of individual concern. [19]

25. However, despite those developments in the case-law, it cannot in my view be denied that the assessment of direct concern is overwhelmingly related to factors of a legal nature, as is clear from the very wording of the phrase consistently used by the Court, namely the condition that the

13 See judgment in *Montessori*, paragraph 43 and the case-law cited.

14 See judgment in *Montessori*, paragraph 46 and the case-law cited.

15 See judgment in *Montessori*, paragraph 47 and the case-law cited.

16 See, inter alia, judgment of 12 July 1990, *COFAZ* v *Commission* (C-169/84, EU:C:1990:301, paragraph 30).

17 See, inter alia, judgments of 17 January 1985, *Piraiki-Patraiki and Others* v *Commission* (11/82, EU:C:1985:18, paragraphs 7 to 10), and of 12 July 1990, *COFAZ* v *Commission* (C-169/84, EU:C:1990:301, paragraph 30).

18 Although, as made clear by the case-law cited in point 18 of this Opinion, the concept of 'direct concern' under the third situation covered by the fourth paragraph of Article 263 TFEU cannot be interpreted more restrictively than that under the second situation covered by that provision.

19 See, inter alia, Noël, V., and Thomas, S., 'Locus Standi in State Aid Litigation After Montessori', *European State Aid Law Review*, No 4, 2021, p. 528, and Caranta, R., 'Knock, and it shall be opened unto you: Standing for non-privileged applicants after *Montessori*', *Common Market Law Review*, No 58, 2021, pp. 173 and 174. The judgment in *Montessori* itself does not appear to me to escape criticism in that regard, since the words used by the Court in paragraphs 46 and 47 of that judgment to clarify the criteria relating to the condition of direct concern are very similar to those which it itself used in paragraph 28 of the judgment of 12 July 1990, *COFAZ* v *Commission* (C-169/84, EU:C:1990:301) for the purposes of the quite different analysis of individual concern.

contested measure directly affects *the legal situation* of the individual,[20] whereas the assessment of individual concern involves a genuine substantive assessment of the applicant's factual situation, based primarily on economic factors.[21]

2. The General Court's assessment of whether the applicant is directly concerned

26. In the first place, the General Court, while referring to the principles established in the judgment in *Montessori*, recalled that, as far as concerns whether the contested decision directly affects the applicant's legal situation, 'the EU judicature must ascertain whether the applicant *has adequately explained the reasons* why the Commission's decision is liable to place [it] in an unfavourable competitive position and thus to produce effects on [its] legal situation';[22] it then stated, referring to paragraphs 71 to 77 of the order under appeal, that, 'in the present case, the applicant [had] not *demonstrated* that its members, or even some of them, would actually be affected by the measure in question, let alone what the consequences of that measure for their competitive position would be', and concluded that 'the applicant [had] not adequately *established* that the contested decision was liable to place its members in an unfavourable competitive position and that, therefore, that decision directly affected their legal situation, in particular their right not to be subject on the relevant market to competition distorted by the measure'.[23]

27. As the applicant claims, by using the verbs 'demonstrate' and 'establish', the General Court appears to me to have made the condition of direct concern within the meaning of the fourth paragraph of Article 263 TFEU subject to requirements that go beyond those stemming from the interpretation of the Court of Justice of that condition in the judgment in *Montessori*. In that judgment, the Court quite clearly stated that, while a direct effect on an applicant cannot be deduced from the mere potential existence of a competitive relationship,[24] it must ascertain whether the applicant 'has adequately explained' that the 'potential for an unfavourable competitive position' exists.[25] I very much doubt that the application of that principle in the present case means that the applicant was required to 'demonstrate' that some of its members 'would actually be affected by the measure in question' and 'what the consequences of that measure for their competitive position would be'.

28. It thus appears to me that the General Court's assessment is vitiated by an error of law in the light of the interpretation provided by the Court of Justice in the judgment in *Montessori*.

[20] To be precise, I am referring to the first of the two criteria of that condition, the second, the satisfaction of which is not in dispute here, being that the contested measure leaves no discretion to the addressees who are entrusted with its implementation (see points 19 and 23 of this Opinion).

[21] In the case of *Montessori*, Advocate General Wathelet had proposed a clear distinction between direct concern and individual concern based on the fact that the conditions related to the applicant's *legal* situation (the contested measure must directly affect that person's *legal situation*) and to the applicant's *factual* situation (the measure must affect them by reason of *circumstances* in which they are differentiated from all other persons) (Opinion of Advocate General Wathelet in Joined Cases *Scuola Elementare Maria Montessori* v *Commission*, *Commission* v *Scuola Elementare Maria Montessori* and *Commission* v *Ferracci*, C-622/16 P to C-624/16 P, EU:C:2018:229, point 57 and the case-law cited). However, the Court did not establish such a clear distinction in the judgment in *Montessori*.

[22] See paragraph 102 of the order under appeal (emphasis added).

[23] See paragraph 103 of the order under appeal (emphasis added).

[24] See judgment in *Montessori*, paragraph 46.

[25] See judgment in *Montessori*, paragraph 47.

29. In the second place and in any event, in order to avoid simply making an excessively formalistic assessment, it is necessary to determine whether, regardless of the criterion used, the factors to which the General Court refers are nevertheless sufficient to substantiate the conclusion that the applicant has not 'adequately explained the reasons why the Commission's decision is liable to place [it] in an unfavourable competitive position'.

30. As the applicant claims, as far as concerns the assessment as to the lack of *direct concern* on the part of its members in the present case, the General Court, in paragraph 103 of the order under appeal, merely refers to paragraphs 71 to 77 of that order, which are explicitly concerned with the quite different assessment of the lack of *individual concern* on the part of those members. [26]

31. Those paragraphs of the order under appeal are essentially concerned with 'demonstrating a substantial adverse effect on a competitor's position on the market'. However, the criterion of a 'substantial effect on the competitive position' of the applicant, relevant for the purpose of analysing individual concern, is unquestionably different from that of the 'potential existence of an unfavourable competitive situation', which is relevant for the purpose of analysing direct concern. Indeed, according to the settled case-law of the Court cited in paragraph 69 of the order under appeal, *with a view to establishing individual concern*, an undertaking cannot rely solely on its status as a competitor of the undertaking in receipt of aid but must additionally show that its circumstances distinguish it in a similar way to the addressee of the contested decision, [27] whereas, *with a view to establishing direct concern*, such an undertaking need only adequately explain the reasons why the Commission's decision is liable to place it in an unfavourable competitive position and thus to produce effects on its legal situation. [28]

32. It is true, as the Commission contends, that it cannot be ruled out in the present case that the factors upon which the assessment that the applicant's members lacked individual concern was based, or rather some of those factors, might also be relevant with a view to establishing that the applicant had not 'adequately explained the reasons why the Commission's decision is liable to place [it] in an unfavourable competitive position'. However, the General Court did not provide the slightest explanation in that regard.

33. Moreover, it is clear, in my view, that the factors mentioned by the General Court in paragraphs 71 to 77 of the order under appeal cannot support its conclusion that the applicant's members are not directly concerned. [29]

[26] See paragraphs 70 and 78 of the order under appeal. The General Court therefore, in the words of Advocate General Wathelet, 'distort[ed] the condition of direct concern' (Opinion of Advocate General Wathelet in Joined Cases *Scuola Elementare Maria Montessori* v *Commission*, *Commission* v *Scuola Elementare Maria Montessori* and *Commission* v *Ferracci*, C-622/16 P to C-624/16 P, EU:C:2018:229, point 58).

[27] See, inter alia, judgment of 22 December 2008, *British Aggregates* v *Commission* (C-487/06 P, EU:C:2008:757, paragraph 48 and the case-law cited).

[28] See point 22 of this Opinion. It is therefore clear that the two conditions are still different and that the requirements laid down to establish individual concern remain, in principle, substantially different from those of direct concern.

[29] Furthermore, with regard to the failure, noted by the General Court in paragraph 73 of the order under appeal, to demonstrate the knock-on effects of the charges for waste water treatment on the prices that the applicant's members can actually charge to their customers or offer to their suppliers, it is sufficient to observe that the examination of the actual effect of State aid on the applicant's competitive situation is not a relevant criterion for the purposes of assessing the admissibility of an action, since it is not for the EU judicature, at that stage, to rule definitively on the competitive relationships between an applicant and the beneficiaries of aid measures, but rather to determine whether the applicant has adequately explained the reasons why the Commission's decision is *liable to place it in an unfavourable competitive position* (see the case-law cited in points 20 and 21 of this Opinion).

34. First of all, contrary to the conclusions of the General Court set out in paragraphs 71, 72 and 74 of the order under appeal, the assessment of direct concern on the part of the applicant should not be based on concrete figures related to market share, turnover or the revenue of the applicant's members. Nor does that assessment require, contrary to the conclusions of the General Court set out in paragraphs 73 and 75 of the order under appeal, a demonstration of the knock-on effects of the waste water treatment fees on the prices charged by the applicant's members to their clients or offered to their suppliers. [30]

35. Next, in paragraph 76 of the order under appeal, the General Court essentially required a comparative analysis of the disadvantages of the measure in terms of competitiveness with respect to large Danish undertakings and the advantages stemming from the reduction of costs for small and medium-sized Danish undertakings as compared with competing undertakings established in other Member States. While such an analysis could be relevant to establish a distortion of competition, which is one of the constituent elements of the concept of 'State aid' within the meaning of Article 107(1) TFEU, it does not appear to me that such an analysis is necessary to assess direct concern on the part of the applicant's members. [31]

36. Lastly, it is clear, as I have noted in point 31 of this Opinion, that the criterion of a substantial effect on the competitive position of the applicant's members, which is mentioned in paragraphs 77 and 78 of the order under appeal, is typically a criterion related to individual concern. [32]

37. Accordingly, I consider that the General Court erred in law in the assessment of whether the applicant is directly concerned when it essentially grounded the lack of direct concern on the part of its members on the fact that they are not individually concerned.

38. I therefore propose that the first ground of appeal be upheld and, therefore, that the order under appeal be set aside.

B. The action at first instance

39. In accordance with the first paragraph of Article 61 of the Statute of the Court of Justice of the European Union, if a decision of the General Court is set aside, the Court of Justice 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.

40. Although the Court of Justice is unable, at this stage of the proceedings, to rule on the substance of the action brought before the General Court, it does however have the material necessary to give a final ruling on the admissibility of that action against the contested decision. The question of the applicant's standing to bring proceedings for the purposes of the third

[30] Furthermore, the Court has recently held that, having alleged, in essence, that an applicant had not defined the markets on which its competitive position was meant to have been adversely affected, observing that the applicant had provided no information regarding their size and structure and the competitors present on those markets, the General Court had gone beyond the requirements resulting from the case-law related to individual concern (see judgment of 15 July 2021, *Deutsche Lufthansa* v *Commission*, C-453/19 P, EU:C:2021:608, paragraphs 63 and 64). Moreover, such a thorough analysis of the market and of the knock-on effects of the contested measures on the position of traders does not appear to me even to be necessary for the purposes of establishing a distortion of competition, which is one of the constituent elements of the concept of 'State aid' within the meaning of Article 107(1) TFEU.

[31] I wonder, incidentally, if such analysis is similarly unnecessary as regards the condition of individual concern.

[32] It is, however, clear from the settled case-law mentioned in point 21 of this Opinion that, while direct concern cannot be deduced from the mere potential existence of a competitive relationship, an established competitive relationship is sufficient in that regard.

situation foreseen by Article 263 TFEU was the subject of adversarial debate before the General Court and examination of that question does not require the adoption of any additional measure of organisation of procedure or measure of inquiry.

41. It is therefore appropriate to examine first the admissibility of the action at first instance in order, then, if that action proves to be admissible, to refer it back to the General Court so that it can rule on the substance.

42. In the present case, the General Court dismissed the action as inadmissible on the ground that the applicant lacks standing to bring proceedings. In the first place, that was by virtue of the effect on its own interests as an association; in the second place, it was as the representative of its members' interests, as regards their standing to bring proceedings for the purposes, respectively, of each of the situations provided for in the fourth paragraph of Article 263 TFEU.

43. I will begin by examining the admissibility of the action as regards the applicant's standing to bring proceedings as the representative of its members' interests in relation to the third situation provided for in the fourth paragraph of Article 263 TFEU. Since the classification of the contested decision as a 'regulatory act' is not in question and, moreover, has not been contested,[33] I will focus my analysis on whether the applicant is directly concerned (Section B.1) and on the absence of implementing measures (Section B.2).

1. Whether the applicant is directly concerned

44. As a preliminary point, I would observe that, for an individual to be directly affected, the contested measure must, first, directly affect the legal situation of that individual and, second, leave no discretion to its addressees who are entrusted with the task of implementing it, such implementation being purely automatic and resulting from EU rules alone without the application of other intermediate rules.[34]

45. As the second limb of that condition has not been the subject of any real debate in the present case,[35] I will focus my analysis on whether the contested decision directly affects the applicant's legal situation and, more specifically, that of its members.

46. In accordance with the guidance provided in the case-law cited in points 21 and 22 of this Opinion, it is necessary to determine whether the applicant has 'adequately explained the reasons why the contested decision is liable to place [it] in an unfavourable competitive position and thus to produce effects on [its] legal situation'.

47. In paragraph 50 of the judgment in *Montessori*, the Court recognised that the applicants had satisfied those requirements, having submitted their reasons 'with evidence in support and without being contradicted by the Commission on this point'. In the case that gave rise to that judgment, the applicants had argued that their respective establishments were situated in the

[33] Like the decision that formed the subject matter of the judgment in *Montessori*, the contested decision is not concerned with the classification of the measure at issue as incompatible State aid within the meaning of Article 107 TFEU and is therefore of general application, whilst not a legislative act. It therefore constitutes a 'regulatory act' within the meaning of the third situation provided for in the fourth paragraph of Article 263 TFEU (see, to that effect, judgment in *Montessori*, paragraphs 22 to 33).

[34] See point 19 of this Opinion and the case-law cited.

[35] It is settled case-law that a decision declaring that a State measure does not constitute State aid, like the contested decision, produces legal effects purely automatically on the basis of the EU rules alone without the application of other intermediate rules (see, to that effect, judgment in *Montessori*, paragraph 54).

immediate vicinity of entities carrying on similar activities to theirs and which were thus active in the same market for services and the same geographical market, and that those entities were a priori eligible for the contested measures. It therefore appears to me that the Court simply found, in essence, that the applicants had relied on the existence of a competitive relationship with potential beneficiaries of the measure at issue.

48. Those same requirements, which call for a case-by-case assessment, have been interpreted more or less broadly in the subsequent case-law of the General Court. [36]

49. As far as is relevant for the purposes of this assessment, the applicant has submitted, first, that it is a trade association representing small butcher's shops, slaughterhouses, wholesalers and processing undertakings in Denmark; next, that several of its members, by virtue of their activities, are in a competitive relationship with a large undertaking operating in the same field in Denmark (Danish Crown), which is said to have extremely significant market shares (95% and 63% in the slaughter of pigs and heifers respectively); and, finally, that Danish Crown, because of its high volume of waste water, is subject, by virtue of the contested measure, to the contribution provided for in the third step of the staircase model, [37] which entitles it to lower charges than those payable by the applicant's members, who are subject only to the higher contributions provided for in the first two steps of that model.

50. It is admittedly true that the statement of grounds provided by the applicant at first instance is very cursory and, moreover, does not draw a clear distinction between the different conditions for the admissibility of the action. However, taking into account the abovementioned *claims*, which were not duly contested by the Commission or the Kingdom of Denmark in the course of the proceedings, it cannot seriously be disputed that the applicant has adduced relevant information on the basis of which it is highly likely that its members (or at least some of them) are in competition with a company carrying on the same activities on Danish territory that, according to the applicant's claims, may benefit from the contested measures. [38]

51. In those circumstances, since it is not for the EU judicature, at the stage of the examination of admissibility, to rule definitively on the competitive relationships between an applicant and the beneficiaries of the contested measure, [39] the view should be taken, in my opinion, that the applicant has 'adequately explained' that the contested decision, which leaves intact all the effects of the measure at issue, is liable to place its members in an unfavourable competitive position and that, therefore, that decision directly affects their legal situation, in particular their right not to be subject on that market to competition distorted by that measure.

[36] See, with regard to actions declared admissible, judgments of 14 April 2021, *Verband Deutscher Alten- und Behindertenhilfe and CarePool Hannover* v *Commission* (T-69/18, EU:T:2021:189, paragraphs 157 and 158), and of 2 June 2021, *Casa Regina Apostolorum della Pia Società delle Figlie di San Paolo* v *Commission* (T-223/18, not published, EU:T:2021:315, paragraphs 95 to 99), and, with regard to an action declared inadmissible, order of the General Court of 24 September 2019, *Opere Pie d'Onigo* v *Commission* (T-491/17, EU:T:2019:692, paragraphs 31 to 35).

[37] More specifically, it is subject to the third step of that model in so far as its waste water discharge exceeds the volumes covered by the first and second steps (see footnote 4 to this Opinion).

[38] Moreover, I wonder if the General Court did not itself implicitly recognise, in paragraph 77 of the order under appeal, that, at the very least, the applicant's members satisfied the condition of being *competitors of the beneficiary* of the presumed State aid, when it first states that 'if *the applicant did, admittedly, claim that its members were in competition with the large slaughterhouses benefiting from the alleged aid*, it still failed to establish that the alleged aid actually affects its members and their own competitive position on the market concerned', before, in paragraph 78 of that order, concluding that that competitive relationship 'is not sufficient to demonstrate that the competitive position of its members on the market is substantially affected and that they are thus *individually concerned* by the [contested] decision' (emphasis added).

[39] See point 21 of this Opinion.

52. I therefore consider that the measure at issue is of direct concern to the applicant, within the meaning of the third situation provided for in the fourth paragraph of Article 263 TFEU.

2. The absence of implementing measures

53. In the view of the Commission and the Danish Government, there are, in the present case, implementing measures within the meaning of the fourth paragraph of Article 263 TFEU, such that the third situation covered by that provision is not applicable. More specifically, they contend that, under the system established by the measure at issue, the operators of waste water treatment plants set the rate applicable to the three steps of the staircase model each year and the competent local councils approve that rate. Next, every Danish undertaking that discharges waste water receives a notice of assessment concerning payment of the charge payable by it for the treatment of its waste water. The applicant's members could therefore challenge that notice of assessment before a national court, arguing that the scheme in question constitutes unlawful State aid in favour of undertakings that consume large volumes of water.

54. As a preliminary point, I note that, according to settled case-law of the Court, the expression 'does not entail implementing measures' within the meaning of the third limb of the fourth paragraph of Article 263 TFEU must be interpreted in the light of the objective of that provision, which, as is apparent from its drafting history, is to ensure that individuals do not have to break the law in order to have access to a court. Where a regulatory act directly affects the legal situation of a natural or legal person without requiring implementing measures, that person could be denied effective judicial protection if he or she did not have a legal remedy before the EU judicature for the purpose of challenging the lawfulness of the regulatory act. In the absence of implementing measures, a natural or legal person, although directly concerned by the act in question, would be able to obtain judicial review of the act only after having infringed its provisions, by pleading that those provisions are unlawful in proceedings initiated against them before the national court. [40]

55. By contrast, where a regulatory act entails implementing measures, judicial review of compliance with the EU legal order is ensured irrespective of whether those measures were adopted by the European Union or the Member States. Natural or legal persons who are unable, because of the conditions of admissibility in the fourth paragraph of Article 263 TFEU, to challenge an EU regulatory act directly before the EU judicature are protected against the application to them of such an act by the ability to challenge the implementing measures which the act entails. [41]

56. The Court has, moreover, repeatedly held that the question whether a regulatory act entails implementing measures should be assessed by reference to the position of the person pleading the right to bring proceedings under the third limb of the fourth paragraph of Article 263 TFEU.

[40] See judgment in *Montessori*, paragraph 58 and the case-law cited.

[41] See judgment in *Montessori*, paragraph 59 and the case-law cited. Where responsibility for the implementation of such acts lies with the institutions, bodies, offices or agencies of the European Union, natural or legal persons are entitled to bring a direct action before the EU judicature against the implementing acts under the conditions stated in the fourth paragraph of Article 263 TFEU, and to plead in support of that action, pursuant to Article 277 TFEU, the unlawfulness of the basic act concerned. Where that implementation is a matter for the Member States, those persons may plead the invalidity of the basic act concerned before the national courts and cause them to refer questions to the Court for a preliminary ruling under Article 267 TFEU (see judgment in *Montessori*, paragraph 60 and the case-law cited).

It is therefore irrelevant whether the act in question entails implementing measures with regard to other persons. Furthermore, in that assessment, reference should be made exclusively to the subject matter of the action. [42]

57. In addition, the Court has held that, although, for the beneficiaries of an aid scheme, the national provisions establishing the scheme and the measures implementing those provisions, such as a tax notice, constitute implementing measures entailed by a decision declaring the scheme incompatible with the internal market or declaring it compatible with the internal market subject to compliance with commitments entered into by the Member State concerned, [43] that case-law cannot be applied to the situation of the competitors of beneficiaries of a national measure that has been found not to constitute State aid within the meaning of Article 107(1) TFEU, because the situation of such a competitor differs from that of the beneficiaries of aid referred to by that case-law, in that the competitor does not satisfy the conditions laid down by the national measure in question for eligibility for that aid. [44]

58. In the present case, first, a measure has not been adopted by the Commission or other EU institutions to implement the contested decision and, second, the applicant's members do not appear to me to be concerned by national implementing measures.

59. It is true that, in the present case, the applicant's position is, to a certain degree, different from the position that was the subject of the judgment in *Montessori*, in that the applicant's members are themselves concerned by the contested scheme and receive a notice of assessment in the same way as the alleged beneficiary of the State aid. However, the position of those members differs from that of the beneficiaries of the contested measure since they are not entitled to the more advantageous rate provided for in that measure under the third step which, according to their claims, constitutes State aid within the meaning of Article 107(1) TFEU.

60. In those circumstances, it would, in my opinion, be artificial to expect those members to request that that rate be applied to them, despite knowing that they are not entitled to it, solely with a view to contesting the refusal before a national court so as to cause that court to make a reference to the Court of Justice on the validity of the contested decision. [45]

61. In conclusion, I consider that the contested decision is a regulatory act which does not entail any implementing measure as regards the applicant, in terms of the third situation provided for in the fourth paragraph of Article 263 TFEU.

62. I therefore propose that the action at first instance be declared admissible.

[42] See judgment in *Montessori*, paragraph 61 and the case-law cited.

[43] See judgment in *Montessori*, paragraph 63 and the case-law cited.

[44] See judgment in *Montessori*, paragraph 65.

[45] See, inter alia, to that effect, judgments in *Montessori* (paragraphs 65 to 67), and of 28 October 2020, *Associazione GranoSalus* v *Commission* (C-313/19 P, not published, EU:C:2020:869, paragraphs 38 to 42).

C. Referral of the case back to the General Court

63. With regard to whether the contested decision is vitiated by illegality, I would observe that the General Court found the action to be inadmissible without examining the substantive pleas in law raised against that decision. Those pleas necessitate factual assessments for which the Court of Justice does not have jurisdiction. [46]

64. It is therefore my view that the state of the proceedings does not permit judgment to be given on the substance and that, pursuant to the first paragraph of Article 61 of the Statute of the Court of Justice of the European Union, the case should be referred back to the General Court for it to rule on the merits of the action.

VI. Costs

65. Under Article 184(2) of its Rules of Procedure, the Court may make a decision as to the costs where the appeal is well founded and it itself gives final judgment in the case.

66. Pursuant to Article 138(1) of those rules, which applies to the procedure on appeal by virtue of Article 184(1) thereof, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings.

67. Article 140(1) of the Rules, which applies to the procedure on appeal by virtue of Article 184(1) thereof, states that the Member States and institutions which have intervened in the proceedings are to bear their own costs.

68. In the present case, if the Court of Justice decides to refer the case back to the General Court, there will be no need to make a decision as to the costs. [47]

VII. Conclusion

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

– set aside the order of the General Court of the European Union of 1 December 2020, *Danske Slagtermestre* v *Commission* (T-486/18, not published, EU:T:2020:576);

– declare the action at first instance to be admissible;

– refer the case back to the General Court for it to rule on the merits of the action at first instance;

– reserve the decision as to costs.

[46] See, inter alia, judgment of 26 March 2020, *Larko* v *Commission* (C-244/18 P, EU:C:2020:238, paragraph 25 and the case-law cited).

[47] However, if the Court gives final judgment in the case and dismisses the action as inadmissible, it will have to order Danske Slagtermestre to bear, in addition to its own costs, the costs incurred by the European Commission and find that the Kingdom of Denmark will have to bear its own costs.