Reports of Cases

JUDGMENT OF THE GENERAL COURT (Eighth Chamber, Extended Composition)

15 November 2018 *

(State aid – Social housing – Aid scheme for social housing corporations – Existing aid – Commitments of the Member State – Decision declaring the aid compatible with the internal market – Article 17 of Regulation (EC) No 659/1999 – Service of general economic interest – Article 106(2) TFEU – Definition of public-service mission)

In Joined Cases T-202/10 RENV II and T-203/10 RENV II,

Stichting Woonlinie, established in Woudrichem (Netherlands),

Woningstichting Volksbelang, established in Wijk bij Duurstede (Netherlands),

Stichting Woonstede, established in Ede (Netherlands),

represented by L. Hancher, E. Besselink, J. de Kok, Y. de Vries and F. van Orden, lawyers,

applicants in Case T-202/10 RENV II,

Stichting Woonpunt, established in Maastricht (Netherlands),

Woningstichting Haag Wonen, established in The Hague (Netherlands),

Stichting Woonbedrijf SWS.Hhvl, established in Eindhoven (Netherlands),

represented by L. Hancher, E. Besselink, J. de Kok, Y. de Vries and F. van Orden, lawyers,

applicants in Case T-203/10 RENV II,

supported by

Kingdom of Belgium, represented by J.-C. Halleux and L. Van den Broeck, acting as Agents,

intervener,

v

European Commission, represented by S. Noë and P.-J. Loewenthal, acting as Agents,

defendant,

supported by

* Language of the cases: Dutch.

Vereniging van Institutionele Beleggers in Vastgoed, Nederland (IVBN), established in Voorburg (Netherlands), represented by M. Meulenbelt and B. Natens, lawyers,

intervener,

APPLICATION pursuant to Article 263 TFEU seeking the partial 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 GENERAL COURT (Eighth Chamber, Extended Composition),

composed of A.M. Collins, President, M. Kancheva, R. Barents, J. Passer and G. De Baere (Rapporteur), Judges,

Registrar: G. Predonzani, Administrator,

having regard to the written part of the procedure and further to the hearing on 20 June 2018,

gives the following

Judgment

Background to the dispute

1 The applicants, Stichting Woonlinie, Woningstichting Volksbelang, Stichting Woonstede, Stichting Woonpunt, Woningstichting Haag Wonen and Stichting Woonbedrijf SWS.Hhvl, are housing corporations established in the Netherlands (woningcorporaties, 'housing corporations'). Housing corporations are not-for-profit bodies the mission of which is to acquire, build and rent out dwellings aimed essentially at underprivileged individuals and socially disadvantaged groups. Housing corporations also engage in other activities, such as the construction and lease of apartments at higher rents, the construction of apartments for sale, the construction and lease of public-purpose buildings and the construction and lease of commercial premises.

2 On 1 March 2002, pursuant to Article 2 of Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article [108 TFEU] (OJ 1999 L 83, p. 1), the Netherlands authorities notified the European Commission of the general State aid scheme for housing corporations. As the Commission took the view that the funding measures for housing corporations could be classified as existing aid, the Netherlands authorities consequently withdrew their notification.

3 On 14 July 2005, the Commission sent a letter to the Netherlands authorities pursuant to Article 17 of Regulation No 659/1999, in which it classified the general State aid scheme for housing corporations as existing aid (aid measure E 2/2005) and expressed doubts as to whether that aid was compatible with the internal market ('the Article 17 letter').

4 After the Article 17 letter had been sent, the Commission and the Netherlands authorities initiated the cooperation procedure, in accordance with Article 108(1) TFEU, in order to bring the aid scheme into line with Article 106(2) TFEU. In the context of that cooperation, in response to the Article 17 letter, the Netherlands Government, inter alia, sent a letter to the Commission on 6 September 2005.

5 On 16 April 2007, the Vereniging van Institutionele Beleggers in Vastgoed, Nederland (IVBN, Association of Institutional Property Investors in the Netherlands) lodged a complaint with the Commission concerning the aid granted to housing corporations. In June 2009, Vesteda Groep BV became a party to that complaint.

6 By letter of 3 December 2009, the Netherlands authorities proposed to the Commission a number of commitments designed to amend the general State aid scheme for housing corporations.

7 On 15 December 2009, the Commission adopted Decision C(2009) 9963 final 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').

8 First, with regard to the existing aid scheme which is the subject of procedure E 2/2005, the measures contained in the Netherlands' general State aid scheme for housing corporations are as follows:

(a) State guarantees for loans granted by the Guarantee Fund for the Construction of Social Housing;

(b) State aid from the Central Housing Fund, project-based aid or 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.

9 In the contested decision, the Commission classified each of those measures as State aid, within the meaning of Article 107(1) TFEU, and found that the Netherlands financing scheme for social housing constituted existing aid, as that scheme had been established before the EC Treaty entered into force in the Netherlands and subsequent reforms had not brought about any substantial change.

10 The Commission examined the compatibility of aid measure E 2/2005 relating to the financing scheme for housing corporations, as amended further to the commitments made by the Netherlands authorities. It concluded, in paragraph 72 of the contested decision, that the aid for the provision of social housing, that is to say, aid for the activity of the construction and renting-out of dwellings to individuals, including the building and maintenance of ancillary infrastructure, provided for under the conditions specified by those commitments, was compatible with Article 106(2) TFEU. Consequently, the Commission recorded the commitments given by the Netherlands authorities.

11 Secondly, with regard to aid measure N 642/2009, on 18 November 2009, the Netherlands authorities notified a new aid scheme for the regeneration of declining urban areas, classified as 'special project aid for certain districts', of which housing corporations operating in the selected areas were the beneficiaries. That new aid scheme was required to be granted in accordance with the same conditions as those laid down for the measures forming part of the existing aid scheme, as amended further to the commitments made by the Netherlands authorities. The Commission took the view that aid measure N 642/2009 was compatible with the internal market and decided not to raise any objections to the new measures which had been notified.

12 On 30 August 2010, the Commission adopted Decision C(2010) 5841 final, relating to State aid E 2/2005, amending paragraphs 22 to 24 of the contested decision. In that amending decision, the Commission expressed the view that, on the basis of the available evidence, it could not conclude that measure (d) referred to in the contested decision, that is to say, the right to obtain loans from the Bank Nederlandse Gemeenten, met all of the State-aid criteria.

Procedure before the General Court and the Court of Justice

13 By application lodged at the Registry of the General Court on 29 April 2010, Stichting Woonlinie, Woningstichting Volksbelang and Stichting Woonstede brought an action, registered under reference number T-202/10.

14 By application lodged at the Registry of the General Court on 30 April 2010, Stichting Woonpunt, Woningstichting Haag Wonen and Stichting Woonbedrijf SWS.Hhvl brought an action, registered under reference number T-203/10.

15 By documents lodged at the Registry of the General Court on 19 August 2010, IVBN applied for leave to intervene in support of the form of order sought by the Commission in those two cases.

16 In Case T-203/10, by document lodged at the Registry of the General Court on 13 September 2010, the applicants requested that Annexes A.10 and A.16 to the application be kept confidential vis-à-vis IVBN, in the event that it were granted leave to intervene.

17 In Case T-202/10, by document lodged at the Registry of the General Court on 24 September 2010, the applicants requested that Annex A.9 to the application be kept confidential vis-à-vis IVBN, in the event that it were granted leave to intervene.

18 By order of 16 December 2011, *Stichting Woonlinie and Others* v *Commission* (T-202/10, not published, EU:T:2011:765), the General Court dismissed as inadmissible the action seeking partial annulment of the contested decision, in so far as that decision concerned the aid scheme E 2/2005. By judgment of 27 February 2014, *Stichting Woonlinie and Other*s v *Commission* (C-133/12 P, EU:C:2014:105), the Court of Justice set aside that order.

19 By order of 16 December 2011, *Stichting Woonpunt and Others* v *Commission* (T-203/10, not published, EU:T:2011:766), the General Court dismissed as inadmissible the action seeking the annulment of the contested decision. By judgment of 27 February 2014, *Stichting Woonpunt and Others* v *Commission* (C-132/12 P, EU:C:2014:100), the Court of Justice set aside that order in part to the extent to which it declared inadmissible the action for annulment of the contested decision, in so far as that decision concerned the aid scheme E 2/2005, and dismissed the remainder of the appeal.

20 In the judgments of 27 February 2014, *Stichting Woonpunt and Others* v *Commission* (C-132/12 P, EU:C:2014:100), and of 27 February 2014, *Stichting Woonlinie and Others* v *Commission* (C-133/12 P, EU:C:2014:105), the Court of Justice held that the actions brought by the applicants against the contested decision, in so far as that decision concerned the aid scheme E 2/2005, were admissible and referred those cases back to the General Court for a decision on the merits. Finally, the Court of Justice reserved the costs.

21 Cases T-202/10 RENV and T-203/10 RENV were assigned to the Seventh Chamber of the General Court.

22 In accordance with Article 119(1) of the Rules of Procedure of the General Court of 2 May 1991, in each of those cases, the Commission and the applicants lodged their statements of written observations, on 27 March and 15 April 2014 respectively.

23 By documents lodged at the Registry of the General Court on 25 April 2014, the Kingdom of Belgium applied for leave to intervene in Cases T-202/10 RENV and T-203/10 RENV in support of the form of order sought by the applicants. By orders of the President of the Seventh Chamber of the General Court of 2 September 2014, the Kingdom of Belgium was granted leave to intervene, in each of those

cases, in support of the form of order sought by the applicants, and was given permission to submit its observations during the oral procedure, in accordance with Article 116(6) of the Rules of Procedure of 2 May 1991.

24 By orders of 2 September 2014, *Stichting Woonpunt and Others* v *Commission* (T-203/10 RENV, not published, EU:T:2014:792), and of 2 September 2014, *Stichting Woonlinie and Others* v *Commission* (T-202/10 RENV, not published, EU:T:2014:793), IVBN was granted leave to intervene, in each of those cases, in support of the form of order sought by the Commission. As the intervener had not raised any objections to the requests for confidential treatment, a non-confidential version of the applications was notified to it.

25 By letters lodged at the Registry of the General Court on 22 October 2014, IVBN informed the Court that it was waiving its right to lodge a statement in intervention in Cases T-202/10 RENV and T-203/10 RENV.

26 By orders of 12 May 2015, *Stichting Woonpunt and Others* v *Commission* (T-203/10 RENV, not published, EU:T:2015:286), and of 12 May 2015, *Stichting Woonlinie and Others* v *Commission* (T-202/10 RENV, not published, EU:T:2015:287), the General Court dismissed the actions as being manifestly unfounded. Those orders were set aside by judgments of 15 March 2017, *Stichting Woonpunt and Others* v *Commission* (C-415/15 P, EU:C:2017:216), and of 15 March 2017, *Stichting Woonlinie and Others* v *Commission* (C-414/15 P, EU:C:2017:215) respectively, by which the Court of Justice also referred the cases back to the General Court and reserved the costs.

27 Cases T-202/10 RENV II and T-203/10 RENV II were assigned to the Fifth Chamber of the General Court.

28 In accordance with Article 217(1) of the Rules of Procedure of the General Court, in each of those cases, the Commission and the applicants lodged their observations on the remainder of the proceedings, on 22 and 24 May 2017 respectively. The applicants also asked to be allowed to lodge a supplementary statement of written observations, in accordance with Article 217(3) of the Rules of Procedure.

29 In each of those cases, on 26 July 2017, the applicants lodged with the Registry of the General Court a supplementary statement of written observations, and the Commission and IVBN lodged their observations on that supplementary statement on 22 September 2017.

30 By decision of the President of the General Court, the present cases were assigned to a new Judge-Rapporteur, sitting in the Eighth Chamber.

31 Acting on a proposal from the Eighth Chamber of the General Court, the Court decided, pursuant to Article 28 of the Rules of Procedure, to refer the case to a Chamber sitting in extended composition.

32 Acting on a proposal from the Judge-Rapporteur, the Court (Eighth Chamber, Extended Composition) decided to open the oral part of the procedure.

33 By decision of the President of the Eighth Chamber, Extended Composition, of the General Court of 2 May 2018, after hearing the parties, Cases T-202/10 RENV II and T-203/10 RENV II were joined for the purposes of the oral part of the procedure and of the decision closing the proceedings, in accordance with Article 68 of the Rules of Procedure.

34 The parties presented oral argument and answered the questions put to them by the General Court at the hearing on 20 June 2018.

Forms of order sought

35 The applicants, supported by the Kingdom of Belgium, claim that the General Court should:

– annul the contested decision;

– order the Commission to pay the costs.

36 The Commission and IVBN contend that the General Court should:

– dismiss the actions;

– order the applicants to pay the costs.

Law

37 By way of a preliminary point, it should be noted that, in its judgment of 27 February 2014, *Stichting Woonpunt and Others* v *Commission* (C-132/12 P, EU:C:2014:100), the Court of Justice upheld the order of 16 December 2011, *Stichting Woonpunt and Others* v *Commission* (T-203/10, not published, EU:T:2011:766), in so far as it had declared inadmissible the action for annulment brought against the contested decision, inasmuch as that decision concerned aid measure N 642/2009. Therefore, the order of 16 December 2011, *Stichting Woonpunt and Others* v *Commission* (T-203/10, not published, EU:T:2011:766), has become final on that point. Consequently, it is no longer necessary to rule on the pleas in law raised by the applicants with a view to the annulment of the contested decision in so far as it concerns aid measure N 642/2009.

38 It should also be pointed out that, in its judgments of 27 February 2014, *Stichting Woonpunt and Others* v *Commission* (C-132/12 P, EU:C:2014:100), and of 27 February 2014, *Stichting Woonlinie and Others* v *Commission* (C-133/12 P, EU:C:2014:105), the Court of Justice held that the actions brought by the applicants were admissible inasmuch as they sought the annulment of the contested decision in so far as that decision concerned the aid scheme E 2/2005, and referred the cases back to the General Court for a decision on the merits. Consequently, it is no longer necessary to rule on the parties' arguments relating to the admissibility of the applications for annulment of the contested decision in so far as they concern the aid scheme E 2/2005.

39 In support of their actions seeking annulment of the contested decision in so far as it concerns the aid scheme E 2/2005, the applicants raise eight pleas in law. The first plea in law alleges that the Commission erred in law in classifying all the measures as measures forming part of an aid scheme. The second plea in law alleges that the contested decision is based on an incomplete and manifestly incorrect assessment of the relevant national legislation and of the facts. The third plea in law alleges that the Commission carried out an incorrect and negligent assessment in concluding that the renting-out of social housing to persons with 'relatively high incomes' formed part of the public-service mission entrusted to housing corporations. The fourth plea in law alleges that the Commission erred in law and abused its powers in requiring the Netherlands authorities to provide a new definition of 'social housing'. The fifth plea in law alleges that the Commission erred in law in failing to distinguish between the definition of a service of general economic interest (SGEI) and the manner in which it is financed. The sixth plea in law alleges that the Commission, in requiring a specific definition of the SGEI, misinterpreted Commission Decision 2005/842/EC of 28 November 2005 on the application of Article [106](2)[TFEU] to State aid in the form of public-service compensation granted to certain undertakings entrusted with the operation of services of general economic interest (OJ 2005 L 312, p. 67). The seventh plea in law alleges that the Commission made an error of assessment and infringed Article 5 of Decision 2005/842 in failing to find that the means

of financing the SGEI was manifestly inappropriate. The eighth plea in law alleges that the Commission abused the procedure for the assessment of existing aid schemes by imposing, on the basis of that procedure, an exhaustive list of buildings that qualify as 'social property'.

40 By way of a preliminary point, it should be pointed out that, by their second to seventh pleas in law, the applicants challenge, in essence, the content of the Article 17 letter and not the Commission's assessment which appears in the contested decision.

41 However, the Court of Justice held that since the Article 17 letter constituted a first step in the preparation of the decision at issue, the then appellants could not be prevented from invoking the unlawfulness of the assessment contained in that letter in support of their actions against the contested decision (judgments of 15 March 2017, *Stichting Woonlinie and Others* v *Commission*, C-414/15 P, EU:C:2017:215, paragraph 48, and of 15 March 2017, *Stichting Woonpunt and Others* v *Commission*, C-415/15 P, EU:C:2017:216, paragraph 48).

42 Consequently, the General Court will examine all of the pleas in law raised by the applicants.

First plea in law, alleging that the Commission erred in law in classifying all the measures as measures forming part of an aid scheme

43 By way of a preliminary point, it should be noted that, following the adoption of the Commission's amending decision of 30 August 2010, the applicants withdrew, in the reply, their arguments relating to measure (d) referred to in the contested decision, that is to say, the right to obtain loans from the Bank Nederlandse Gemeenten.

44 By their first plea in law, the applicants argue that the Commission wrongly assessed measure (c), relating to the sale by municipal authorities of land at prices below market value ('measure (c)'), as forming part of an aid scheme, that is to say, the Netherlands financing scheme for social housing. They maintain that that measure cannot be classified as part of an existing aid scheme, given that it is not systematic, that it is not provided for by the Netherlands legislation applicable to housing corporations, and that the Commission refers only to complaints concerning individual cases. Contrary to what the Commission maintains, the notification of the Netherlands authorities does not show that agreements on land prices are periodic, or that they systematically involve a sale at a price below the market value.

45 According to the applicants, the Commission has the power, under Article 108(1) TFEU, to subject existing aid schemes to constant review, but it does not have such a power with regard to individual aid. They take the view that the Commission could not review measure (c) under the procedure provided for in Articles 17 to 19 of Regulation No 659/1999, but that it should have reviewed the individual cases referred to in the complaints under the procedure provided for in Article 108(2) TFEU. The Commission, they submit, exceeded its power in including that measure in its review of the compatibility of an aid scheme with the internal market.

46 By this first plea in law, the applicants argue, in essence, that the Commission exceeded its power in assessing measure (c) on the basis of the procedure applicable to existing aid, whereas that measure does not form part of the general State-aid scheme for housing corporations, and that it should have assessed that measure under the procedure applicable to individual aid.

47 With regard to measure (c), it is apparent from the contested decision that the activities of housing corporations include the construction of apartments, public-purpose buildings, commercial premises and other local infrastructure, for lease or sale. The Commission pointed out that housing corporations act as developers and assume, in that regard, responsibility for the whole project from

inception to conclusion. It took the view that, in the context of those activities, housing corporations are in competition with private property developers and that they must, therefore, be regarded as undertakings engaged in an economic activity.

48 The Commission found that measure (c) constituted State aid within the meaning of Article 107 TFEU, on the grounds that it manifestly conferred an advantage on housing corporations, which were relieved of the usual market costs of land acquisition, that it was obviously an act of the State, the land being sold by municipal authorities, which was selective in that it was aimed solely at housing corporations, and that there was a transfer of State resources in the form of lost revenue. Moreover, that measure distorted competition and affected trade between Member States.

49 First, it should be pointed out that, according to Article 1(d) of Regulation No 659/1999, an aid scheme is defined as 'any act on the basis of which, without further implementing measures being required, individual aid awards may be made to undertakings defined within the act in a general and abstract manner and any act on the basis of which aid which is not linked to a specific project may be awarded to one or several undertakings for an indefinite period of time and/or for an indefinite amount'.

50 It follows that the fact that individual aid is provided does not exclude the existence of a scheme on the basis of which that aid is granted. Contrary to what the applicants maintain, the fact that the Commission received complaints relating to individual sales of land at prices below market value does not preclude the existence of an aid scheme pursuant to which that individual aid was granted.

51 Secondly, with regard to the applicants' argument that, because that measure is not provided for by legislation, it cannot form part of an aid scheme, it is sufficient to point out that the requirement of a legislative provision as the basis of an aid scheme does not form part of the definition of an aid scheme within the meaning of Article 1(d) of Regulation No 659/1999.

52 Moreover, it should be pointed out that the applicants' arguments contradict the assessment of the Netherlands authorities, which had taken the view, in their notification to the Commission, that the agreements concluded by numerous municipal authorities in the Netherlands relating to the sale of land to housing corporations at preferential prices constituted a measure which formed part of the financing scheme for housing corporations.

53 In that notification, the Netherlands authorities indicated that, while the sale of land at prices below market value did not come within the scope of the applicable law or regulations, it did appear in the service agreements systematically concluded by municipal authorities with housing corporations. They pointed out that that practice did not comply with the guidance set down by the Commission in its Communication on State aid elements in sales of land and buildings by public authorities (OJ 1997 C 209, p. 3), which allows a classification as State aid to be excluded.

54 The recurrent nature of the practice of the sale by municipal authorities to housing corporations of land at prices below market value is also apparent from the documents produced by the Commission as annexes to the rejoinder. Those documents include circulars of a number of municipal authorities in the Netherlands concerning their policy on the price of land which show that those authorities apply prices below market value for the sale of land for the construction of social housing.

55 Thirdly, the applicants maintain that the Commission should have shown that measure (c) was in existence before the Treaty entered into force, in order to classify it as part of an existing aid scheme.

56 In that regard, it is apparent from a historical study of the policy of public authorities on land for the construction of housing since 1900, provided by the Commission as an annex to the rejoinder, that public authorities were involved as far back as 1952 in fixing the price of land for the construction of social housing by setting a ceiling.

57 Fourthly, the applicants add that the Commission failed to comply with the procedure for existing aid, given that measure (c) was not mentioned in the Article 17 letter, but was mentioned for the first time in the contested decision.

58 Suffice it to recall that measure (c) was included in the notification and was, therefore, regarded by both the Commission and the Netherlands authorities as an aid measure forming part of the financing scheme for housing corporations.

59 In addition, the applicants do not explain what they believe to be the consequences of the fact that measure (c) was not expressly mentioned in the Article 17 letter, in particular taking into account the fact that measure (c) was found to be compatible with the internal market in the contested decision.

60 Consequently, none of the applicants' arguments is such as to call into question the classification of measure (c) as a measure forming part of the aid scheme related to the financing scheme for housing corporations, and none establishes that the Commission exceeded its power in reviewing that measure as part of the existing aid scheme for financing housing corporations.

61 Finally, it should be added that, in the reply, the applicants argue that municipal authorities conclude agreements providing for a reduction in the price of land in exchange for certain commitments with all parties acquiring land, and not just with housing corporations. They add that, if land is intended for the construction of social housing for rental, its residual value is lower. Consequently, in their view, one of the conditions for classification as State aid is not fulfilled.

62 That argument, raised for the first time in the reply, by which the applicants argue that measure (c) does not constitute State aid, is, in essence, a new plea in law, which alleges an infringement of Article 107 TFEU.

63 However, it follows from Article 84(1) of the Rules of Procedure that no new plea in law may be introduced in the course of proceedings, unless it is based on matters of law or of fact which come to light in the course of the procedure or it amplifies a plea put forward previously, whether directly or by implication, in the original application, and is closely connected therewith (see judgment of 22 November 2017, *von Blumenthal and Others* v *EIB*, T-558/16, not published, EU:T:2017:827, paragraph 48 and the case-law cited).

64 Since it was not until the stage of the reply that the applicants raised the plea in law seeking to challenge the classification of measure (c) as State aid, and since that plea in law is not based on matters which came to light after the actions had been brought and does not amplify a plea put forward in the applications, it must be rejected as having been raised out of time and, consequently, inadmissible.

65 In any event, as the Commission points out, the applicants refer in that argument to other measures intended to grant reductions in the price of land to certain purchasers in return for commitments relating to the construction of low-energy housing or to sales to first-time buyers. Those measures and the reference to the residual value of land are distinct from the practice of municipal authorities of selling land to housing corporations at prices below market value.

66 Consequently, the first plea in law must be rejected.

67 For the sake of completeness, the Court questions the applicants' interest in raising this plea in law and in maintaining that the Commission exceeded its power in reviewing the compatibility of measure (c) as part of the general financing scheme for housing corporations. It should be recalled that the applicants are beneficiaries of the existing aid scheme, of which measure (c) forms part, which the Commission declared to be compatible with the internal market under Article 106(2) TFEU. It is

questionable what interest the applicants would have in maintaining that the compatibility of that measure ought to have been assessed on the basis of a different procedure which might have led to a different result, in other words a decision declaring that measure to be incompatible.

Second plea in law, alleging that the contested decision is based on an incomplete and manifestly incorrect assessment of the relevant national legislation and of the facts

68 The applicants submit that the Commission failed to show in the contested decision that there was a manifest error in the Netherlands financing scheme for social housing, and that it therefore abused its powers in initiating the procedure provided for in Article 17 of Regulation No 659/1999 and in requiring appropriate measures.

69 The applicants argue, in particular in their supplementary statement, that according to the case-law of the Court of Justice, the definition of SGEIs by a Member State may be questioned by the Commission only if it shows a manifest error, regard being had to the wide discretion of the Member State. They criticise the Commission for merely stating, in the Article 17 letter, that the possibility of renting out social housing to persons with 'relatively high incomes' should be regarded as a manifest error. The Commission did not examine the relevant Netherlands legislation. In that letter, the Commission simply stated that the SGEI was not defined in a sufficiently clear manner, as it was available to all income groups.

70 According to the applicants, the definition of 'social housing' in the initial Netherlands scheme was clearly limited and did not cover all income groups. The Commission ignored the fact that housing corporations are legally obliged to give priority to a category of persons defined as persons with income which does not allow them to obtain suitable housing independently.

71 They add that the Commission cannot merely assert that the SGEI is not delimited in a sufficiently clear manner, but it must show that that is the case and indicate what measures must be taken by the State in order to render the SGEI compliant with the Treaty. Neither the contested decision nor the Article 17 letter, they argue, shows that the Commission examined the delimitation of the SGEI performed by housing corporations and the Commission appears to be relying solely on the absence of an income ceiling.

72 By way of a preliminary point, it should be recalled, on the one hand, that, according to settled case-law, a State measure regarded as compensation for the services provided by the recipient undertakings in order to discharge public-service obligations, with the result that those undertakings do not enjoy a real financial advantage and the measure thus does not have the effect of placing them in a more favourable competitive position than the undertakings competing with them, is not caught by Article 107(1) TFEU (see judgment of 20 December 2017, *Comunidad Autónoma del País Vasco and Others* v *Commission*, C-66/16 P to C-69/16 P, EU:C:2017:999, paragraph 45 and the case-law cited).

73 However, in order for such compensation to escape classification as State aid in a particular case, the conditions laid down in paragraphs 88 to 93 of the judgment of 24 July 2003, *Altmark Trans and Regierungspräsidium Magdeburg* (C-280/00, EU:C:2003:415), must be satisfied. Thus, first, the recipient undertaking must actually be required to discharge public-service obligations and those obligations must be clearly defined. Secondly, the parameters on the basis of which the compensation is calculated must be established in advance in an objective and transparent manner. Thirdly, the compensation must not exceed what is necessary to cover all or part of the costs incurred in discharging the public-service obligations. Fourthly, the level of compensation needed must be determined on the basis of an analysis of the costs which a typical undertaking, well run and

adequately equipped so as to be able to meet the necessary public-service requirements, would have incurred in discharging those obligations (judgment of 20 December 2017, *Comunidad Autónoma del País Vasco and Others* v *Commission*, C-66/16 P to C-69/16 P, EU:C:2017:999, paragraphs 46 and 47).

74 It follows that a State measure which does not comply with one or more of the conditions laid down in paragraph 73 above is liable to be regarded as State aid within the meaning of Article 107(1) TFEU (judgment of 20 December 2017, *Comunidad Autónoma del País Vasco and Others* v *Commission*, C-66/16 P to C-69/16 P, EU:C:2017:999, paragraph 48; see also, to that effect, judgment of 24 July 2003, *Altmark Trans and Regierungspräsidium Magdeburg*, C-280/00, EU:C:2003:415, paragraph 94).

75 On the other hand, Article 106(2) TFEU provides that undertakings entrusted with the operation of SGEIs are to be subject to the rules contained in the Treaties and, in particular, to the rules on competition, in so far as the application of such rules does not obstruct the performance, in law or in fact, of the particular tasks assigned to them, and that the development of trade must not be affected to such an extent as would be contrary to the interests of the European Union.

76 As regards the relationship between the conditions laid down in the case-law resulting from the judgment of 24 July 2003, *Altmark Trans and Regierungspräsidium Magdeburg* (C-280/00, EU:C:2003:415), and the examination of an aid measure under Article 106(2) TFEU, it follows from the case-law of the Court of Justice that verification of compliance with the conditions laid down in that case-law occurs upstream, that is to say, in the examination of the issue of whether the measure at issue must be characterised as State aid. That issue must be resolved before the issue which consists in examining, where necessary, whether incompatible aid is nevertheless necessary for the performance of the tasks assigned to the recipient of the measure at issue, under Article 106(2) TFEU (judgment of 20 December 2017, *Comunidad Autónoma del País Vasco and Others* v *Commission*, C-66/16 P to C-69/16 P, EU:C:2017:999, paragraph 55; see also, to that effect, judgment of 8 March 2017, *Viasat Broadcasting UK* v *Commission*, C-660/15 P, EU:C:2017:178, paragraph 34).

77 While the conditions laid down in the judgment of 24 July 2003, *Altmark Trans and Regierungspräsidium Magdeburg* (C-280/00, EU:C:2003:415), and those necessary for the application of Article 106(2) TFEU thus generally pursue different objectives, it is nevertheless the case that the first condition laid down in that judgment, according to which the recipient undertaking must actually be required to discharge public-service obligations which must be clearly defined, also applies in the case where the derogation provided for in Article 106(2) TFEU may apply (see judgment of 20 December 2017, *Comunidad Autónoma del País Vasco and Others* v *Commission*, C-66/16 P to C-69/16 P, EU:C:2017:999, paragraph 56 and the case-law cited).

78 Thus, it can be seen, in essence, that both the first condition laid down by the Court of Justice in the judgment of 24 July 2003, *Altmark Trans and Regierungspräsidium Magdeburg* (C-280/00, EU:C:2003:415), and the wording of Article 106(2) TFEU, as such, require that the operator in question be entrusted with an SGEI mission by an act of a public authority and that that act define in clear terms the SGEI obligations in question (see judgment of 12 February 2008, *BUPA and Others* v *Commission*, T-289/03, EU:T:2008:29, paragraph 181 and the case-law cited).

79 In that regard, according to settled case-law, Member States have a wide discretion to define what they regard as an SGEI and, consequently, the definition of such services by a Member State can be questioned by the Commission only in the event of manifest error (see judgments of 12 February 2008, *BUPA and Others* v *Commission*, T-289/03, EU:T:2008:29, paragraph 166 and the case-law cited, and of 1 March 2017, *France* v *Commission*, T-366/13, not published, EU:T:2017:135, paragraph 92 and the case-law cited).

80 However, the power on the part of the Member State to define SGEIs is not unlimited and cannot be exercised arbitrarily for the sole purpose of removing a particular sector from the application of the rules governing competition (judgments of 12 February 2008, *BUPA and Others* v *Commission*, T-289/03, EU:T:2008:29, paragraph 168, and of 1 March 2017, *France* v *Commission*, T-366/13, not published, EU:T:2017:135, paragraph 93).

81 It should be added that, even though the Member State enjoys a wide discretion in determining what it regards as an SGEI, that does not, however, mean that it is not required to show to the requisite legal standard that the scope of an SGEI is necessary and proportionate in relation to a real public-service need. The absence of evidence, provided by the Member State, that those criteria have been met or a failure to comply with those criteria may constitute a manifest error of assessment which the Commission is required to take into consideration (judgment of 1 March 2017, *France* v *Commission*, T-366/13, not published, EU:T:2017:135, paragraph 105).

82 Finally, it should be pointed out that, according to settled case-law, given, on the one hand, the wide discretion enjoyed by a Member State in defining an SGEI mission and the conditions governing its implementation and, on the other, the scope of the control, limited to manifest error, which the Commission is entitled to exercise in that regard, the Court's review of the Commission's assessment in that regard must also observe the same limit and, accordingly, that review must be confined to ascertaining whether the Commission acted correctly in finding or rejecting the existence of a manifest error on the part of the Member State (see judgment of 1 March 2017, *France* v *Commission*, T-366/13, not published, EU:T:2017:135, paragraph 106 and the case-law cited).

83 In addition, in 2005, the Commission adopted the Community framework for State aid in the form of public-service compensation (OJ 2005 C 297, p. 4, 'the 2005 framework'), the purpose of which is to set out the conditions under which such State aid may be found to be compatible with the internal market pursuant to Article 106(2) TFEU. In paragraph 12 of that framework, the Commission noted that responsibility for the operation of the SGEI must be entrusted to the undertaking concerned by way of one or more official acts, the form of which may be determined by each Member State, and that those acts must specify, in particular, the precise nature of the public-service obligations.

84 Decision 2005/842 sets out the conditions under which State aid in the form of public-service compensation granted to certain undertakings entrusted with the operation of SGEIs is to be regarded as compatible and exempt from the requirement of prior notification. Under Article 2(1)(b) thereof, that decision applies to, inter alia, public-service compensation granted to social housing undertakings carrying out activities qualified as SGEIs by the Member State concerned.

85 That decision recalls the requirements laid down by the case-law. Thus, with regard to public-service compensation, recital 7 of that decision states as follows:

'such aid may be declared compatible only if it is granted in order to ensure the provision of services that are services of general economic interest as referred to in Article [106(2) TFEU]. It is clear from the case-law that, with the exception of the sectors in which there are [EU] rules governing the matter, Member States have a wide margin of discretion in the definition of services that could be classified as being services of general economic interest. Thus, with the exception of the sectors in which there are [EU] rules governing the matter, the Commission's task is to ensure that there is no manifest error as regards the definition of services of general economic interest.'

86 In recital 16 of Decision 2005/842, the Commission pointed out, in particular, that undertakings in charge of social housing which are entrusted with tasks involving SGEIs have specific characteristics that need to be taken into consideration. That recital states that 'undertakings in charge of social housing providing housing for disadvantaged citizens or socially less advantaged groups, which due to solvability constraints are unable to obtain housing at market conditions, should benefit from the

exemption from notification provided for in this Decision, even if the amount of compensation they receive exceeds the thresholds laid down in this Decision, if the services performed are qualified as services of general economic interest by the Member States'.

87 In addition, Article 70c(1) of the Woningwet (Netherlands Law on housing of 1901), mentioned by the applicants, provides that the task of housing corporations is to house, as a priority, persons who, by reason of their income or other circumstances, experience difficulty in finding suitable housing. In allocating the dwellings which they manage with a proportionally reduced rent, housing corporations are required to give priority, to the fullest extent possible, to housing applicants who have a particular need for that housing, in light of their income.

88 In the Article 17 letter, with regard to the definition of the SGEI, the Commission expressed its preliminary view and indicated that it had doubts as to whether it could accept the definition of the public service performed by housing corporations which appeared in the Netherlands legislation in so far as that definition was not sufficiently clear and might include manifest errors.

89 In that regard, it noted:

'When renting out dwellings, [housing corporations] are legally obliged to give priority to persons that have difficulties in finding suitable housing (due to low income or other circumstances). However, the housing activities are not restricted to socially disadvantaged persons. In case of excess capacity, the [housing corporations] rent out the dwellings to persons with relatively high incomes, thereby harming commercial competitors who do not benefit from State measures. The possibility [of] rent[ing] out dwellings to higher income groups or businesses should be considered … a manifest error [in the definition] of the public service. The proposed solution of the [Netherlands authorities] [of] restrict[ing] the maximum value of dwellings that can be considered … "social houses" does not solve this problem.'

90 The Commission took the view that, as the public service had a social character, the definition of the housing corporations' activities should, therefore, have a direct link with socially disadvantaged households and not solely with a maximum dwelling value.

91 As the Commission pointed out in the contested decision, it thus indicated to the Netherlands authorities, in the Article 17 letter, by way of a preliminary view, that they had to amend the definition of the public-service mission assigned to housing corporations, so that social housing would be provided to a clearly defined target group of disadvantaged citizens or socially less advantaged groups.

92 It also indicated that 'provision of social housing may qualify as a service of general economic interest if it is restricted to a target group of disadvantaged citizens or socially less advantaged groups, while Member States have a wide margin [of discretion] as regards the size of the target group and the exact modalities of applying the system based on a target group'. It added that 'in [the] "Article 17 letter" … the Commission ha[d] … expressed a preliminary view doubting whether the definition of [the] public service [was] sufficiently clear and [querying] whether there could have been manifest error in defining as social housing the renting out of dwellings to all income groups'.

93 It is thus apparent from the Article 17 letter that, contrary to what the applicants argue, it is in view of the definition of the social housing SGEI which appeared in the Netherlands legislation that the Commission formed the opinion that that definition did not meet the requirement for clarity. The Commission found that the legal obligation to give 'priority to persons who have difficulties in finding suitable housing' did not allow the target group for which social housing was intended to be delimited with a sufficient level of precision.

94 Contrary to what the applicants argue, on the one hand, the Commission did not indicate that the definition of the SGEI was not sufficiently precise by reason of the absence of an income ceiling and, on the other, the legislative provisions relating to the control of housing corporations are not relevant in regard to the question of whether their mission is sufficiently defined in the legislation.

95 Thus, it is apparent from the Article 17 letter that the Commission indicated to the Netherlands authorities that the absence of a precise definition of the mission entrusted to housing corporations constituted a manifest error in the definition of the SGEI.

96 In that regard, it should be recalled that, according to Article 17(2) of Regulation No 659/1999, that letter contains the Commission's preliminary view, on which the national authorities are given the opportunity to submit comments. Thus, as part of the cooperation procedure, the national authorities were able to challenge the Commission's assessment by establishing that the definition of the social housing SGEI was sufficiently precise and did not contain any manifest errors.

97 Pursuant to the case-law cited in paragraph 81 above, it was for the Netherlands authorities to show to the requisite legal standard that the scope of the SGEI assigned to housing corporations was necessary and proportionate in relation to a real public-service need. It was for them, therefore, to show that the definition of the mission assigned to housing corporations was sufficiently precise to meet the aim of the social housing SGEI, which is, according to Decision 2005/842, to provide housing for disadvantaged citizens or socially less advantaged groups, which, due to solvency constraints, are unable to obtain housing at market conditions.

98 Contrary to what the applicants argue, it is apparent from the case-law that the burden of proving that the SGEI is delimited in a sufficiently clear manner lies with the national authorities.

99 It is also apparent from the case-law cited in paragraph 81 above that the lack of proof by the Member State that the criteria have been met is liable to constitute a manifest error of assessment. That applies all the more where, as here, the Netherlands authorities acknowledged that the mission of the SGEI was not sufficiently precise.

100 In its letter of 6 September 2005, in response to the Article 17 letter, the Netherlands Government mentioned 'the Commission's doubt as to the compatibility of the current financing scheme for housing corporations, classified as existing aid, with the internal market, as the definition of the public service is not sufficiently clear and possibly includes manifest errors' and the fact that 'the Netherlands are asked to take the necessary measures to ensure that the definition has a direct link with socially disadvantaged households'. It should be pointed out that the Netherlands Government has not challenged those assessments.

101 By contrast, the Netherlands Government acknowledged that 'housing corporations, which must, indeed, house socially disadvantaged persons as a priority, but not exclusively, c[ould] currently also (admittedly, on a small scale) allocate dwellings for rental to persons/households with high(er) incomes in comparison with that target group' and that 'the renting out [of dwellings] to this non-social target group d[id] not (entirely) take place at market prices'. It thus indicated that 'legislation which, one way or another (administratively and/or in a separate legal form), will draw a distinction between commercial and essential (SGEI) activities in order to limit the support mechanisms to the essential activities remains the guiding principle of the developments outlined at the beginning of this letter, which should address the objections and limit State aid in substance to the allocation of housing to the target group'.

102 Subsequently, the measures proposed by the Netherlands Government in its letter of 3 December 2009 included a definition of the target group of socially disadvantaged households as 'housing applicants with an income not exceeding EUR 33 000'. It also proposed the following:

'The allocation of 90 % of the dwellings of each housing corporation to housing applicants belonging to the target group at the time of allocation shall be guaranteed. The remaining 10 % will be allocated on the basis of objective criteria including an element of social prioritisation. Persons with incomes above the ceiling but who can nevertheless be regarded as being in need of social assistance, such as large families and other categories laid down in the rules, shall have priority.'

103 In that regard, the subsidiary argument raised by the applicants in the reply, to the effect that, by accepting those commitments allowing 10 % of social housing to be rented out free of any income ceiling, the Commission acknowledged that it was not possible to require housing corporations to house disadvantaged citizens exclusively (and not as a priority), must be rejected. That argument is based on an incorrect reading of the Commission's assessment which appears in the Article 17 letter. The Commission did not take the view that the definition of the SGEI contained a manifest error because it did not provide that housing corporations were required to rent out dwellings 'exclusively' to disadvantaged citizens, but that that definition was imprecise because it provided for dwellings to be rented out as a 'priority to persons who have difficulties in finding suitable housing', without defining that target group of disadvantaged citizens.

104 It follows from the foregoing that the Commission showed to the requisite legal standard that there was a manifest error in the definition of the social housing SGEI assigned to housing corporations and that it did not abuse its powers in sending the Article 17 letter.

105 Consequently, the second plea in law must be rejected.

Third plea in law, alleging that the Commission carried out an incorrect and negligent assessment in concluding that the renting-out of social housing to persons with 'relatively high incomes' formed part of the public-service mission entrusted to housing corporations

106 The applicants argue that the Commission breached its obligation to state reasons in failing to define, in the contested decision, the concept of 'relatively high incomes', which played a crucial role in its assessment. They argue that the mere fact that housing corporations carry out ancillary activities alongside their public-service mission, consisting of renting out dwellings to households with 'relatively high incomes', regardless of how the Commission defines that term, did not allow the Commission to conclude that there was a manifest error in the definition of the SGEI. The Commission, they argue, did not show that housing corporations had received financial aid for those ancillary activities.

107 In the reply, the applicants argue that, in the Article 17 letter, the Commission described the manifest error in the definition of the SGEI as being the possibility which housing corporations have of renting out dwellings to households with 'relatively high incomes' and not, as the Commission maintains, as the fact that the initial scheme did not contain sufficient guarantees to prevent housing corporations from using State aid for their ancillary commercial activities. The Commission, they argue, did not sufficiently substantiate, in the contested decision, the concept of 'relatively high incomes', or the fact that the renting-out of dwellings to persons with such incomes forms part of the public-service mission of housing corporations. In any event, the Commission did not substantiate the fact that cross-subsidisation may take place.

108 By way of a preliminary point, it should be pointed out that, in the reply, the applicants indicate that this plea in law refers to a passage appearing in the Article 17 letter which states the following:

'In case of excess capacity, the [housing corporations] rent out the dwellings to persons with relatively high incomes, thereby harming commercial competitors who do not benefit from State measures. The possibility of renting out dwellings to higher income groups or businesses should be considered … a manifest error [in the definition] of the public service.'

109 The contested decision does not contain the expression 'relatively high incomes'. Consequently, the arguments raised as part of the present plea in law refer to the reasoning in the Article 17 letter and the applicants cannot rely on a lack of reasoning in the contested decision in itself in that regard.

110 In addition, it should be noted that the applicants' arguments are based on an incorrect and partial reading of the Article 17 letter.

111 It should be recalled that the Commission found, in the Article 17 letter, that there was a manifest error in the definition of the SGEI in so far as it was not sufficiently precise as it did not cover solely a target group of socially disadvantaged persons. It then pointed out that, in so far as, in case of excess capacity, housing corporations could decide to rent out dwellings to persons outside that target group, there was a risk that the State aid might also assist housing corporations with those activities falling outside the scope of the SGEI.

112 In that regard, in paragraph 39 of the Article 17 letter, the Commission stated the following:

'Moreover, sometimes … [housing corporations] have excess social housing capacity. In that case, they rent out these houses to other parties (i.e. not … socially disadvantaged households). As noted above, the Commission considers that the renting out of dwellings to households that are not socially disadvantaged cannot be considered … a public service.'

113 Contrary to what the applicants maintain, it is clear from the Article 17 letter that the concept of persons with 'relatively high incomes' covers persons who cannot be regarded as socially disadvantaged persons.

114 In that regard, it should be pointed out that it is apparent from the excerpt from the letter of 6 September 2005, cited in paragraph 101 above, that the Netherlands authorities understood the concept of persons with 'relatively high incomes' as covering households with higher incomes than the target group of socially disadvantaged persons.

115 It is also clear from the Article 17 letter that the Commission considered that the renting-out of dwellings to persons with 'relatively high incomes' could not be regarded as coming within the public-service mission of housing corporations.

116 Contrary to what the applicants argue in the application, the Commission did not take the view that the mere fact that housing corporations carry out ancillary commercial activities constituted a manifest error in the definition of the SGEI. What the Commission found is that, as a result of the fact that the SGEI was not precisely delimited, there was a risk that the aid granted to housing corporations might also assist their ancillary activities, which would not, therefore, be carried out on market terms.

117 As can also be seen from paragraph 40 of the contested decision, in order to ensure that the mechanism for financing social housing is compliant with Article 106(2) TFEU, the Commission took the view that social housing should be limited to a target group of disadvantaged citizens or socially

less advantaged groups and that provision should be made for public-service activities and commercial activities to be the subject of separate accounts and adequate controls, in order to guarantee that commercial activities would be carried out on market terms.

118 It follows that the applicants cannot maintain that the Commission had failed to establish that there was a risk of cross-subsidisation.

119 In that regard, by acknowledging, in the letter of 6 September 2005, that the renting-out of dwellings to households with higher incomes in comparison with the target group did not entirely take place at market prices, the Netherlands authorities admitted to the existence of cross-subsidies.

120 In addition, contrary to what the applicants maintain, in the Article 17 letter containing the Commission's preliminary assessment, the Commission was not required to show that housing corporations' ancillary activities were in fact being assisted by State aid or that cross-subsidisation had in fact taken place. It should be recalled that, according to settled case-law, an examination of existing aid can only lead to a decision which produces effects in the future. Therefore, it is only if the Commission considers that the financing system in question presents a risk of overcompensation for the future that it may be prompted to propose appropriate measures (see judgment of 11 March 2009, *TF1* v *Commission*, T-354/05, EU:T:2009:66, paragraph 166 and the case-law cited).

121 Finally, the applicants maintain, in the reply, that housing corporations were already obliged to keep separate accounts by reason of Article 25 B of the Mededingingswet (Netherlands Law on competition).

122 However, it should be pointed out that, in its letter of 6 September 2005, the Netherlands Government mentions the paragraph of the Article 17 letter in which reference is made to the obligation for undertakings to keep separate accounts, without arguing that that obligation already existed in the legislation for housing corporations. Moreover, in the letter of 3 December 2009, among the measures which the Netherlands Government undertook to adopt in order to ensure the compatibility of the aid scheme is the separation for accountancy purposes of social activities (assisted by State aid) and commercial activities (without State aid) in accordance with Commission Directive 80/723/EEC of 25 June 1980 on the transparency of financial relations between Member States and public undertakings as well as on financial transparency within certain undertakings (OJ 1980 L 195, p. 35).

123 Finally, as the Commission points out, in accordance with Article 25 D(1)(b) of the Netherlands Law on competition, the obligation to keep separate accounts, provided for by Article 25 B of that law, does not apply to undertakings entrusted with a social housing SGEI the turnover of which is less than EUR 40 million. The commitments of the Netherlands authorities were designed, therefore, to extend that obligation to all housing corporations.

124 Consequently, the third plea in law must be rejected.

Fourth plea in law, alleging that the Commission erred in law and abused its powers in requiring the Netherlands authorities to provide a new definition of 'social housing', and sixth plea in law, alleging that the Commission, in requiring a specific definition of the SGEI, misinterpreted Decision 2005/842

125 By the fourth plea in law, the applicants argue that among the appropriate measures that the Commission proposed to the Netherlands authorities was a requirement by the Commission that they limit the definition of social housing to a specific group of disadvantaged households. It is apparent from the Article 17 letter, and, in particular, from the reference to the Commission Decision of 3 July 2001 concerning State aid N 209/01 relating to the guarantee of borrowings of the Housing Finance Agency in Ireland (OJ 2002 C 67, p. 33), that the Commission took the view that that limitation could

be carried out only by means of an income limit. Member States, they submit, have a wide discretion to determine the scope of their SGEIs in the field of social housing and the Commission does not have the power to impose a criterion relating to the delimitation of a target group.

126 By the sixth plea in law, the applicants argue that the exemption from notification under Article 108(3) TFEU provided for by Decision 2005/842 applies to social housing, but is not subject to thresholds. In recital 16 of Decision 2005/842, they submit, the concept of social housing is defined solely by reference to 'disadvantaged citizens or socially less advantaged groups', but not by reference to an income limit. The Commission wrongly applied Decision 2005/842 in taking the view that the Netherlands social housing scheme contained a manifest error because it did not contain a specific income limit. According to the applicants, the housing corporations' missions were defined clearly to the requisite degree in the Netherlands legislation.

127 By these two pleas in law, the applicants argue, in essence, that the Commission erred in law, abused its powers and infringed Decision 2005/842 in requiring, in the Article 17 letter, the Netherlands authorities to define the social housing SGEI by reference to a target group determined according to an income limit.

128 By way of a preliminary point, it should be recalled that it is apparent from the examination of the second plea in law, and, in particular, from the case-law cited in paragraphs 79 to 81 above, that, even though Member States have a wide discretion, the Commission can question the definition of an SGEI in the event of manifest error. Since it has been found that the Commission was right to take the view, in the Article 17 letter, that the absence of a sufficiently clear definition of a target group of socially disadvantaged persons constituted a manifest error, it did, therefore, have the power, contrary to what the applicants maintain, to require the Netherlands authorities to limit that definition.

129 In the Article 17 letter, the Commission indicated that the definition of the social housing SGEI had to establish a direct link with disadvantaged households. In that regard, it indicated that the solution proposed by the Netherlands authorities, consisting of reducing the maximum value of the dwellings which could be regarded as 'social houses', did not resolve that problem.

130 It then mentioned its decision of 3 July 2001, concerning State aid N 209/01, by way of illustration of its recent practice in social housing matters. The aid measure which is the subject of that decision consisted of the State guarantee granted to the Housing Finance Agency (HFA, Ireland) in connection with its lending and raising of funds for the social-housing activities carried out by local authorities. It indicated that the HFA's State guarantee could only be granted in favour of persons who satisfied certain criteria, namely that they needed a loan, that their income was below a certain limit and that they were ineligible for a loan from a commercial source. It observed that the social justification for the Irish SGEI status was based on more rigorous criteria than those applied in the Netherlands scheme.

131 It is thus apparent from the Article 17 letter that the Commission mentioned the decision of 3 July 2001 by way of an example of a definition of an SGEI in the field of social housing which refers clearly to social criteria and socially disadvantaged households. Contrary to what the applicants maintain, the Commission did not require the Netherlands authorities to adopt the same criteria, or to take the view that they could define the SGEI only by reference to an income limit.

132 As the applicants themselves point out, the concept of social housing is defined, in recital 16 of Decision 2005/842, by reference to 'disadvantaged citizens or socially less advantaged groups'. In accordance with that decision, in the Article 17 letter, the Commission only required that the definition of housing corporations' activities should have a direct link with socially disadvantaged households.

133 Contrary to what the applicants maintain, the Commission did not take the view in the Article 17 letter that the manifest error in the definition of the SGEI was due to the absence of a specific income limit, but that it was due to the absence of a clear definition of the target group. The Commission merely indicated that a criterion relating to the maximum value of the dwelling was not satisfactory.

134 In addition, it should be recalled that it was the Netherlands authorities themselves that, in the letter of 3 December 2009, proposed a new definition of social housing to the Commission, based on an income ceiling.

135 This is, moreover, confirmed by various documents produced by the Commission as annexes to the rejoinder, including two reports on consultations, the first between the Netherlands Minister for Housing and the Tweede Kamer der Staten-Generaal (Lower House of Parliament, Netherlands), dated 31 August 2006, concerning housing corporations, and the second between the Netherlands Minister for the Interior and the Lower House of Parliament, dated 28 October 2010, concerning aid for housing corporations, in which the Ministers expressly indicated that the income ceiling had not been imposed by the Commission, but had been proposed by the Netherlands.

136 The applicants' argument that, pursuant to the judgment of 22 October 2008, *TV 2/Danmark and Others* v *Commission* (T-309/04, T-317/04, T-329/04 and T-336/04, EU:T:2008:457), Member States can opt for a qualitative definition of the SGEI and cannot be obliged to limit it in quantitative terms, by means of an income ceiling, is, therefore, not relevant.

137 In addition, it should be pointed out that the Commission merely found, in the contested decision, that that new definition of the social housing SGEI satisfied the requirements of Decision 2005/842. That cannot, however, rule out the possibility that the Commission may also have approved a definition of the SGEI proposed by the Netherlands authorities based on a criterion other than an income limit, if that definition was sufficiently clear and established a link with disadvantaged persons.

138 It follows from the foregoing that, as the Commission did not require a definition of the SGEI based on an income ceiling, it did not err in law, abuse its powers or infringe Decision 2005/842.

139 Consequently, the fourth and sixth pleas in law must be rejected.

Fifth plea in law, alleging that the Commission erred in law in failing to distinguish between the definition of an SGEI and the manner in which it is financed

140 The applicants argue that it follows from the judgment of 22 October 2008, *TV 2/Danmark and Others* v *Commission* (T-309/04, T-317/04, T-329/04 and T-336/04, EU:T:2008:457), that it is necessary to distinguish between the definition of an SGEI and the manner in which it is financed. The Commission, in their view, failed to make that distinction and regarded the SGEI as a form of cross-subsidisation of ancillary commercial activities. It took the view that it could preclude the possibility of cross-subsidisation by limiting the definition of the SGEI by means of an income ceiling, with the result that housing corporations could not use the resources made available to them in connection with the SGEI to provide housing to households above that ceiling. The Commission should have assessed the definition of the SGEI independently of the resources made available to housing corporations for the implementation of that SGEI, and then examined whether those resources went beyond what was necessary to ensure the delivery of the SGEI. The Commission, they argue, confused the two questions in seeking to preclude overcompensation by limiting the SGEI.

141 In the first place, it should be recalled that, in paragraph 108 of the judgment of 22 October 2008, *TV 2/Danmark and Others* v *Commission* (T-309/04, T-317/04, T-329/04 and T-336/04, EU:T:2008:457), cited by the applicants, the Court found that an SGEI was defined, *ex hypothesi*, in relation to the general interest which it was designed to satisfy and not in relation to the means of ensuring its provision.

142 In the present case, in the Article 17 letter, the Commission indicated to the Netherlands authorities, first of all, that the definition of the social housing SGEI should be determined in relation to the general interest concerned, that is to say, in relation to social criteria, and have a direct link with socially disadvantaged households. It was only thereafter that the Commission examined the question of the proportionality of the financing of the SGEI and of cross-subsidisation.

143 It follows that, contrary to what the applicants maintain, the Commission did not make the definition of the social housing SGEI dependent on the manner in which it is financed.

144 In the second place, the applicants are wrong to maintain that the Commission could not preclude overcompensation or the possibility of cross-subsidisation by limiting the definition of the SGEI.

145 In order for State aid in the form of public-service compensation to be considered compatible with the internal market, Article 5(1) of Decision 2005/842 provides that the amount of compensation must not exceed what is necessary to cover the costs incurred in discharging the public-service obligations, taking into account the relevant receipts and a reasonable profit on any own capital necessary for discharging those obligations (see also paragraph 14 of the 2005 framework).

146 Article 5(2) of Decision 2005/842 states that the costs to be taken into consideration are to comprise all the costs incurred in the operation of the SGEI and that, where the undertaking also carries out activities falling outside the scope of the SGEI, only the costs associated with the SGEI are to be taken into consideration (see also paragraph 16 of the 2005 framework).

147 In the Article 17 letter, the Commission indicated, inter alia, that, in order to satisfy the proportionality test, it was necessary that the State aid should not exceed the net costs of the public-service mission, taking into account other direct or indirect revenue derived from the public-service mission. The Commission pointed out that it was required, in the present case, to determine, first, whether the costs and revenue associated with the public and non-public service activities could be properly determined and, secondly, whether the financing was proportionate to the net costs.

148 Thus, a clear definition of the SGEI is necessary in order to guarantee compliance with the requirement that aid be proportionate, that is to say, to guarantee that the compensation awarded does not exceed what is necessary to perform the public-service mission.

149 Consequently, by asking the Netherlands authorities to define the social housing SGEI in relation to a target group of socially disadvantaged households, the Commission asked them to determine in clear terms the public-service missions for which the compensation was granted. That precise definition thus made it possible to determine the costs incurred in the delivery of the SGEI and to avoid, on the one hand, cases of overcompensation and, on the other, activities carried out by housing corporations outside the scope of the SGEI being assisted by State aid, in order to avoid cross-subsidisation.

150 Moreover, it should be pointed out, as the Commission has done, that the applicants themselves indicated in the application that the definition of the SGEI was relevant for establishing whether overcompensation was taking place, which might lead to cross-subsidisation.

151 Consequently, the fifth plea in law must be rejected.

Seventh plea in law, alleging that the Commission made an error of assessment and infringed Article 5 of Decision 2005/842 in failing to find that the means of financing the SGEI was manifestly inappropriate

152 The applicants argue that the Commission infringed Article 5 of Decision 2005/842, which provides that the amount of compensation for an SGEI is compatible with the Treaty if it does not exceed what is necessary to cover the costs incurred in discharging the public-service obligations, taking into account the relevant receipts and a reasonable profit for discharging those obligations. In the Article 17 letter, they submit, the Commission did not find that there was any overcompensation, or show that there was a risk of excessive profit which might lead to overcompensation.

153 They argue that the Commission made an error of assessment in failing to examine, in the Article 17 letter, the presence of overcompensation in the initial financing scheme for social housing, in view of the initial definition of the SGEI, before requiring that that scheme be amended. In the Article 17 letter, the Commission could not require that the social housing scheme be amended on the ground that it had been unable to determine, in the absence of sufficient information from the Netherlands authorities, the costs of the SGEI and the amount of the compensation being received by housing corporations.

154 It should be recalled that, according to settled case-law, an examination of existing aid can only lead to measures which produce effects in the future. Therefore, it is only if the Commission considers that the financing system in question presents a risk of overcompensation for the future that it may be prompted to propose appropriate measures (see judgment of 11 March 2009, *TF1* v *Commission*, T-354/05, EU:T:2009:66, paragraph 166 and the case-law cited).

155 In those circumstances, while it is possible that, as part of the constant review of existing aid, an examination as to whether there has been any overcompensation in the past may, depending on the particular circumstances of the case, be relevant to an assessment of the compatibility of that existing aid with the internal market, the fact nevertheless remains that an examination of that kind is not, in itself, absolutely necessary for a proper assessment of the need to propose appropriate measures for the future and for determination of what those measures should be. The risk or otherwise of overcompensation for the future ultimately depends essentially on the specific detailed arrangements of the financing scheme itself, and not on the fact that the scheme has, in practice, led to overcompensation in the past (judgment of 11 March 2009, *TF1* v *Commission*, T-354/05, EU:T:2009:66, paragraph 167).

156 It is apparent from that case-law that, contrary to what the applicants argue, the Commission was not obliged to show that overcompensation was taking place in the initial financing scheme for social housing.

157 In addition, in the Article 17 letter, the Commission stated, with regard to the proportionality of the financing, that, as the Netherlands authorities could not provide information on the extra costs incurred by housing corporations in respect of public-service activities, or on the exact value of the State measures, it was not possible for it to determine whether or not overcompensation of the net costs of the public service was taking place.

158 It also pointed out that, through the commercial leasing of excess social housing capacity which was financed by State aid, housing corporations distorted competition on the real-estate market when they provided dwellings at below market value and invested the resulting profits in other commercial activities.

159 It should be recalled, in this regard, that the Article 17 letter is only the first stage of the procedure, and does not contain a final assessment as to the compatibility of the existing aid. The Netherlands authorities were in a position, in response to that letter, to provide additional information to establish that no overcompensation was taking place and that the initial scheme was compatible with Article 106(2) TFEU.

160 In their letter of 6 September 2005, the Netherlands authorities pointed out that all transactions between housing corporations and their commercial subsidiaries were required to take place on market terms and that, according to the Netherlands Government, it followed that the public resources intended for the social target group could not be used for commercial activities. It is apparent from the excerpt from that letter mentioned in paragraph 101 above that the Netherlands authorities, far from disputing that there was a risk of overcompensation, on the contrary admitted that there was a need to adopt measures, providing, in particular, for an obligation to keep separate accounts, in order to limit the allocation of State aid to activities intended for the target group of disadvantaged persons.

161 Moreover, contrary to what the applicants maintain, it is apparent from the Article 17 letter that a precise definition of the SGEI was not the only measure capable of preventing overcompensation from assisting commercial activities. In order to determine the costs and the revenue linked to the public service and to avoid overcompensation of the SGEI being used to finance the commercial activities of housing corporations, the Commission noted that, pursuant to Directive 80/723, housing corporations should be required to keep separate accounts.

162 In this regard, it should be noted that Article 5(5) of Decision 2005/842 also provides that 'when a company carries out activities falling both inside and outside the scope of [SGEIs], the internal accounts shall show separately the costs and receipts associated with the [SGEI] and those of other services, as well as the parameters for allocating costs and revenues'.

163 In addition, the case-law cited by the applicants, according to which review of the proportionality of the compensation for discharging an SGEI mission, as established by an act of general application, is limited to ascertaining whether the compensation provided for is necessary in order for the SGEI in question to be capable of being performed in economically acceptable conditions (judgment of 12 February 2008, *BUPA and Others* v *Commission*, T-289/03, EU:T:2008:29, paragraph 222), is not relevant in the present case. It is sufficient to recall that the Commission indicated, in the Article 17 letter, that it was not in a position, in the absence of a sufficiently precise definition of the SGEI and in the absence of sufficient information from the Netherlands authorities, to determine the costs and revenue linked to the SGEI and, consequently, to assess the proportionality of the compensation.

164 Consequently, the seventh plea in law must be rejected.

Eighth plea in law, alleging that the Commission abused the procedure for the assessment of existing aid schemes by imposing, on the basis of that procedure, an exhaustive list of buildings that qualified as 'social property'

165 The applicants argue that the Commission abused the procedure relating to existing aid and exceeded its powers in approving an exhaustive list of buildings that qualified as 'social property'. According to the applicants, the Commission could not formulate an assessment the result of which was that projects which did not appear on the list could no longer qualify as 'social property'.

166 They maintain that the Commission does not have the power to give that approval. They point out that the Commission did not make any recommendations with regard to the definition of social property, either in the Article 17 letter or in the proposals for appropriate measures. The Commission, they submit, merely observed that the buildings which appeared on the list had an

obvious social function, without indicating why that function would not apply to other buildings. The Commission did not examine the initial definition of the missions of housing corporations with regard to social property and, consequently, could not decide that that definition contained errors giving rise to the need for a more restrictive definition of those missions.

167 It should be pointed out that, in the contested decision, the Commission found that the activities carried out in the public interest by housing corporations included the construction and renting-out of public-purpose buildings. Housing corporations receive State aid to cover investment costs and rent out those buildings to non-governmental organisations or public bodies, which perform public services or not-for-profit activities, to the exclusion of all commercial activities. The Commission pointed out that the beneficiaries of the State aid are, first, the housing corporations, next, the operators that carry out activities in those buildings and, finally, the citizens using the services provided.

168 In the contested decision, the Commission listed the commitments made by the Netherlands authorities, in their letter of 3 December 2009, relating to the construction and renting-out of public-purpose buildings by housing corporations. Those commitments are described as follows:

'Public-purpose buildings comprise community centres, health centres, women['s] shelters, care homes for the elderly, cultural centres, sport[s] centres[,] etc. These establishments are owned and maintained by [housing corporations] and let out to non-governmental organisations or … public bod[ies]. The following conditions will apply:

(n) Only establishments that truly serve a public purpose and contribute to the liveability of neighbourhoods, for example neighbourhood centres, community centres, youth centres[,] etc[.], qualify for aid. A quasi-exhaustive list [of] establishments that qualify as public-purpose buildings will be defined in an administrative act and is reproduced as an Annex to this decision.

(o) [Housing corporations] will be obliged to rent out these buildings to the tenants at a rent that is lower than the market rent, thereby passing the advantage received by the [housing corporations] to the social organisations operating in the buildings.

…'

169 The Commission found that the list of establishments that could qualify as public-purpose buildings, attached as an annex to the contested decision, showed clearly that all the activities conducted in those establishments were genuinely in the public interest. It noted that, as housing corporations were obliged to apply low rents to their tenants, the advantage conferred on housing corporations was passed on to the tenants, which were either public-service providers or not-for-profit organisations. It observed that the aid targeted narrowly- and well-defined objectives, as shown by the precise list of buildings with a social purpose, and it took the view that all commercial projects were excluded from the aid scheme.

170 It should be pointed out that the list of 'establishments that qualify as public-purpose buildings' which appears as an annex to the contested decision was drawn up by the Netherlands authorities, a fact which the applicants do not dispute.

171 The Commission found that that list, in conjunction with other commitments made by the Netherlands authorities, successfully addressed the concerns, expressed during the procedure, that commercial activities should not be assisted by State aid.

172 Contrary to what the applicants maintain, it was in order to address the Commission's concerns in view of the risk that the aid granted to finance the SGEI was benefiting buildings in which commercial activities were carried out, expressed in the context of the cooperation procedure, that the Netherlands authorities proposed a list of buildings with a social purpose.

173 In that regard, in the letter which he sent, on 12 June 2009, to the President of the Lower House of Parliament, the Netherlands Minister for Housing indicated that the Commission had expressed doubts with regard to the grant of State aid for the construction and renting-out of social property. He stated the following:

'I believe it is important that State aid should remain available in order to construct and rent out social property. To that end, during the consultation with the [Commission], I will describe in more detail the concept of social property in order clearly to distinguish it from property with an essentially commercial use.'

174 It follows from the foregoing that the Commission's assessment, relating to the aid granted to housing corporations for the construction and renting-out of public-purpose buildings, is compliant with the procedure for the review of existing aid provided for by Articles 17 to 19 of Regulation No 659/1999.

175 Finally, with regard to the applicants' argument that the result of the approval of that list is that projects which do not appear on it no longer qualify as social property, suffice it to state that it was not the Commission, but the Netherlands authorities, in their commitments, that determined which establishments could qualify as public-purpose buildings and, consequently, which could not. It was not for the Commission, contrary to what the applicants maintain, to indicate why the social function would not apply to other buildings.

176 Consequently, the eighth plea in law must be rejected.

177 It follows from all of the foregoing that the actions must be dismissed.

Costs

178 In accordance with Article 219 of the Rules of Procedure, in decisions of the General Court given after its decision has been set aside and the case referred back to it, the General Court is to decide on the costs relating to the proceedings instituted before it and to the proceedings on the appeal before the Court of Justice.

179 Given that, in the judgments of 27 February 2014, *Stichting Woonpunt and Others* v *Commission* (C-132/12 P, EU:C:2014:100), of 27 February 2014, *Stichting Woonlinie and Others* v *Commission* (C-133/12 P, EU:C:2014:105), of 15 March 2017, *Stichting Woonlinie and Others* v *Commission* (C-414/15 P, EU:C:2017:215), and of 15 March 2017, *Stichting Woonpunt and Others* v *Commission* (C-415/15 P, EU:C:2017:216), the Court of Justice reserved the costs, it is for the General Court also to decide, in the present judgment, on the costs relating to those appeal proceedings.

180 Under Article 134(1) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the applicants have been unsuccessful, they must be ordered to bear their own costs and to pay those incurred by the Commission and IVBN, in accordance with the forms of order sought by the Commission and IVBN.

181 The Kingdom of Belgium, which has intervened in the dispute, shall bear its own costs pursuant to Article 138(1) of the Rules of Procedure.

On those grounds,

THE GENERAL COURT (Eighth Chamber, Extended Composition)

hereby:

1. **Dismisses the actions;**

2. **Orders Stichting Woonlinie, Woningstichting Volksbelang and Stichting Woonstede to bear their own costs and to pay those incurred by the European Commission in Cases T-202/10, T-202/10 RENV, T-202/10 RENV II, C-133/12 P and C-414/15 P and those incurred by Vereniging van Institutionele Beleggers in Vastgoed, Nederland (IVBN) in Cases T-202/10, T-202/10 RENV and T-202/10 RENV II;**

3. **Orders Stichting Woonpunt, Woningstichting Haag Wonen and Stichting Woonbedrijf SWS.Hhvl to bear their own costs and to pay those incurred by the Commission in Cases T-203/10, T-203/10 RENV, T-203/10 RENV II, C-132/12 P and C-415/15 P and those incurred by IVBN in Cases T-203/10, T-203/10 RENV and T-203/10 RENV II;**

4. **Orders the Kingdom of Belgium to bear its own costs.**

Collins Kancheva Barents

Passer De Baere

Delivered in open court in Luxembourg on 15 November 2018.

[Signatures]