



Reports of Cases

OPINION OF ADVOCATE GENERAL
MENGOZZI
delivered on 17 January 2013¹

Case C-117/10

European Commission

v

Council of the European Union

(State aid — Competence of the Council — Third subparagraph of Article 88(2) EC — Existing aid schemes — Proposal for appropriate measures — Effects — Regulation No 659/1999 — Aid for investment in the purchase of agricultural land in Poland)

1. By its application in the present case, the Commission asks the Court to annul Council Decision 2010/10/EC of 20 November 2009 on the granting of State aid by the authorities of the Republic of Poland for the purchase of agricultural land between 1 January 2010 and 31 December 2013 (the ‘contested decision’).²
2. By three other applications submitted in parallel, the Commission has challenged three other decisions of the Council concerning aid of the same kind granted by the Republic of Lithuania (Case C-111/10), the Republic of Latvia (Case C-118/10) and the Republic of Hungary (Case C-121/10).
3. All of the applications raise the same difficult issue: does a proposal for appropriate measures drawn up by the Commission in the context of the constant review of the systems of aid existing in the Member States, conducted pursuant to Article 88(1) EC (or Article 108(1) TFEU in regard to Cases C-111/10, C-118/10 and C-121/10), constitute a final position of the Commission on the compatibility with the common market of the relevant system, which is capable of blocking the exercise by the Council of the competence conferred on it by the third subparagraph of Article 88(2) EC (or by the third subparagraph of Article 108(2) TFEU) to authorise aid in derogation from Article 87 EC (or Article 107 TFEU) and other applicable provisions, if justified by exceptional circumstances?

I – Legal context

4. Although it was published after the entry into force of the Lisbon Treaty, the contested decision was adopted on the basis of the provisions of the EC Treaty, and it is therefore to those provisions that reference must be made in this Opinion.

¹ — Original language: Italian.

² — OJ 2010 L 4, p. 89.

5. Article 88(1) EC provides:

‘The Commission shall, in cooperation with Member States, keep under constant review all systems of aid existing in those States. It shall propose to the latter any appropriate measures required by the progressive development or by the functioning of the common market.’

6. Article 88(2) EC, third and fourth subparagraphs, provides as follows:

‘On application by a Member State, the Council may, acting unanimously, decide that aid which that State is granting or intends to grant shall be considered to be compatible with the common market, in derogation from the provisions of Article 87 or from the regulations provided for in Article 89, if such a decision is justified by exceptional circumstances. If, as regards the aid in question, the Commission has already initiated the procedure provided for in the first subparagraph of this paragraph, the fact that the State concerned has made its application to the Council shall have the effect of suspending that procedure until the Council has made its attitude known.

If, however, the Council has not made its attitude known within three months of the said application being made, the Commission shall give its decision on the case.’

7. Annex IV, Chapter 4, to the Act of Accession of Poland to the European Union (the ‘2003 Act of Accession’)³ provides, in the section concerning the rules of the EC Treaty on competition, that:

‘Without prejudice to the procedures concerning existing aid provided for in Article 88 of the EC Treaty, aid schemes and individual aid granted to activities linked to the production, processing or marketing of products listed in Annex I to the EC Treaty, with the exception of fisheries products and products derived therefrom, put into effect in a new Member State before the date of accession and still applicable after that date, shall be regarded as existing aid within the meaning of Article 88(1) [EC] subject to the following conditions:

- the aid measures shall be communicated to the Commission within four months of the date of accession. This communication shall include information on the legal basis for each measure. ... The Commission shall publish a list of such aids.

These aid measures shall be regarded as “existing” aid within the meaning of Article 88(1) [EC] until the end of [the] third year from the date of accession.

The new Member States shall, where necessary, amend these aid measures in order to comply with the guidelines applied by the Commission by the end of the third year from the date of accession at the latest. After that date, any aid found to be incompatible with those guidelines shall be considered as new aid.’

3 — Act concerning the Conditions of Accession of the Czech Republic, the Republic of Estonia, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Republic of Hungary, the Republic of Malta, the Republic of Poland, the Republic of Slovenia and the Slovak Republic and the adjustments to the Treaties on which the European Union is founded (OJ 2003 L 236, in particular p. 798).

8. Pursuant to Article 1(b) and (c) of Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 93 of the EC Treaty⁴ (now Article 88 EC), as amended by the 2003 Act of Accession, for the purposes of that regulation:

‘(b) “existing aid” shall mean:

- (i) without prejudice to ... point 3 of Annex IV and the Appendix to Annex IV, to the Act of Accession of [Poland] ..., all aid which existed prior to the entry into force of the Treaty in the respective Member States, that is to say, aid schemes and individual aid which were put into effect before, and are still applicable after, the entry into force of the Treaty;
- (ii) authorised aid, that is to say, aid schemes and individual aid which have been authorised by the Commission or by the Council;

...

(c) “new aid” shall mean all aid, that is to say, aid schemes and individual aid, which is not existing aid, including alterations to existing aid;

...’

9. Articles 17 to 19, which come under Chapter V of Regulation No 659/1999, lay down the procedure regarding existing aid schemes. Article 17, headed ‘Cooperation pursuant to Article [88(1) EC], provides as follows in paragraph 2:

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

10. According to Article 18, headed ‘Proposal for appropriate measures’:

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

- (a) substantive amendment of the aid scheme, or
- (b) introduction of procedural requirements, or
- (c) abolition of the aid scheme.’

11. Finally, Article 19 of Regulation No 659/1999 sets out as follows, in paragraphs 1 and 2, the legal consequences of a proposal for appropriate measures:

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

⁴ — OJ 1999 L 83, p. 1.

2. Where the Member State concerned does not accept the proposed measures and the Commission, having taken into account the arguments of the Member State concerned, still considers that those measures are necessary, it shall initiate proceedings pursuant to Article 4(4).⁵ Articles 6, 7 and 9 shall apply *mutatis mutandis*.’

12. Point 4.1.1.5, fourth indent, of the Community Guidelines for State aid in the agriculture sector (the ‘2000 Agricultural Guidelines’),⁶ which expired on 31 December 2006, lists land purchase among the eligible expenses for investment in agricultural holdings.

13. Point 29 of the Community guidelines for State aid in the agriculture and forestry sector 2007 to 2013 (‘the 2007-2013 Agricultural Guidelines’),⁷ which replaced the 2000 Agricultural Guidelines⁸ with effect from 1 January 2007, provides that:

‘Aid for investment in agricultural holdings shall be declared compatible with Article 87(3)(c) of the Treaty if it fulfils all the conditions of Article 4 of Regulation (EC) No 1857/2006.’⁹

14. Article 4(1) and (8) of Regulation No 1857/2006, to which the abovementioned point 29 of the 2007-2013 Agricultural Guidelines refers, provides as follows:

‘1. Aid for investments in agricultural holdings within the Community for primary production of agricultural products shall be compatible with the common market within the meaning of Article 87(3)(c) [EC] and shall be exempt from the notification requirement of Article 88(3) [EC] if it fulfils the conditions set out in paragraphs 2 to 10 of this Article.

...

8. Aid may be granted for a purchase of land other than land for construction purposes costing up to 10% of the eligible expenses of the investment.’

15. According to point 195 of the 2007-2013 Agricultural Guidelines, which appears in Chapter VIII.E., headed ‘Existing State aid measures in accordance with [the] 2003 Act of Accession’:

‘For the assessment of the aid schemes and individual aids that are regarded as existing aid in accordance with Point 4, Chapter 4 of Annex IV to the 2003 Act of Accession, the Community guidelines for State aid in the agriculture sector applicable on 31 December 2006 will remain applicable until 31 December 2007 without prejudice [to] point 196, provided that such aid complies with those guidelines by 30 April 2007 at the latest.’

16. Points 196 to 198 of the 2007-2013 Agricultural Guidelines, which appear in Chapter VIII.F., headed ‘Proposals for appropriate measures’, are worded as follows:

‘(196) In accordance with Article 88(1) [EC] the Commission proposes that Member States amend their existing aid schemes to conform with these guidelines by 31 December 2007 at the latest, except for existing aid schemes ... for investments concerning land purchase in agricultural holdings, that have to be amended to conform with these guidelines by 31 December 2009.

5 — This is the formal investigation procedure under the first subparagraph of Article 88(2) EC.

6 — OJ 2000 C 28, p. 2.

7 — OJ 2006 C 319, p. 1.

8 — See point 194 of the 2007-2013 Agricultural Guidelines.

9 — Commission Regulation (EC) No 1857/2006 of 15 December 2006 on the application of Articles 87 and 88 of the Treaty to State aid to small and medium-sized enterprises active in the production of agricultural products and amending Regulation (EC) No 70/2001 (OJ 2006 L 358, p. 3).

(197) The Member States are invited to confirm that they accept these proposals for appropriate measures in writing by 28 February 2007 at the latest.

(198) In the event that a Member State fails to confirm its acceptance in writing before that date, the Commission will apply Article 19(2) of Regulation (EC) No 659/1999 and, if necessary, initiate the proceedings referred to in that provision.’

17. In a communication published in the Official Journal of 15 March 2008,¹⁰ the Commission recorded, pursuant to Article 19(1) of Regulation No 659/1999, Poland’s ‘explicit and unconditional agreement’ to the proposal for appropriate measures contained in point 196 of the 2007-2013 Agricultural Guidelines, of which the Polish authorities had notified the Commission in writing on 26 February 2007.

II – Background to the dispute and the contested decision

18. In 2004, in accordance with the procedure set out in Chapter 4 of Annex IV to the 2003 Act of Accession, referred to in point 7 above, Poland communicated to the Commission the measures which it wished to be regarded as existing aid within the meaning of Article 88(1) EC until the end of the third year following accession. The following measures were included: ‘Subsidy to interest on investment credits in farming and agri-food processing industry’ and ‘Sale of property from the Agricultural Property Stock of the Treasury by way of arranging for the repayment in instalments of the amount due with the application of preferential interest rate’.¹¹

19. By letter of 30 May 2005, the Commission invited the Member States to propose simplifications of the State aid rules in the agricultural sector. By letter of June 2006, commenting on the proposed new guidelines, which the Commission had sent to it on 19 May 2006, the Polish Government asked the Commission to allow the aid for investment in the purchase of agricultural land to be retained. By letter of 3 November 2006, the Polish Government requested the Commission to amend the draft version of Regulation No 1857/2006 by deleting Article 4(8) and including the purchase of agricultural land among the eligible expenses for aid to investment listed in Article 4(4). Poland made the same request at the meeting between the Commission and the Member States on 25 October 2006.

20. By letter of 21 April 2009, the Polish authorities requested the Commission to amend point 196 of the 2007-2013 Agricultural Guidelines. The Commission replied by letter of 15 May 2009, explaining that the possibility for the Member States to retain existing aid schemes for investments in agricultural land had been introduced in the guidelines as an exception in response to the request of certain Member States, including Poland, and that there seemed to be no chance of extending that exception further.

21. By letter of 12 June 2009 to the Presidency of the European Union, the Polish authorities requested that aid for the purchase of agricultural land in Poland should be approved on an exceptional basis, for the period between 1 January 2010 and 31 December 2013, pursuant to the third subparagraph of Article 88(2) EC. An equivalent request was sent to the Agriculture and Fisheries Council on 28 September 2009. On various occasions, both during preparatory meetings of the Special Committee on Agriculture and during meetings with the representatives of the Polish Government, the Commission made clear its opposition to the requested measure and proposed alternative solutions.

¹⁰ — OJ 2008 C 70, p. 11.

¹¹ — OJ 2005 C 147 of 17 June 2005, p. 2. In the case of Poland, the descriptions of the measures at issue appear in points 2 and 5.

22. On 20 November 2009, the Council adopted the contested decision unanimously (with seven delegations abstaining). According to Article 1 of the decision:

‘Exceptional aid by the Polish authorities for loans for the purchase of agricultural land, amounting to a maximum of PLN 400 million and granted between 1 January 2010 and 31 December 2013, shall be considered to be compatible with the common market.’

23. The aid declared to be compatible is described in recitals 9 and 10 in the preamble to the contested decision as follows:

- (9) The State aid to be granted amounts to PLN 400 million and should enable 600 000 hectares of agricultural land to be sold, during the period from 2010 to 2013, for the purposes of setting up or expanding agricultural holdings which meet the criteria for family-run holdings, i.e. up to 300 hectares. The scheme should allow for setting up around 24 000 agricultural holdings with an area of not less than the average in the relevant voivodship. The average amount of aid per one holding should be around EUR 4 500. The price of the eligible land should not exceed the average market price in the relevant voivodship. As regards the land owned by the Agricultural Property Stock of the State Treasury, a tender procedure should apply.
- (10) The aid will take the form of subsidising interest payments on loans, i.e. paying the difference between the annual interest rate applied by the bank which is 1.5 times the rediscount rate on bills of exchange rediscounted by the National Bank of Poland and the actual interest rate paid by the borrower which is 2% as a minimum.’

III – Procedure before the Court and forms of order sought

24. By document lodged at the Registry of the Court on 3 March 2010, the Commission brought the action which forms the subject-matter of the present proceedings. By order of 9 August 2010, the Republic of Hungary, the Republic of Lithuania and the Republic of Poland were granted leave to intervene in support of the form of order sought by the Council.

25. The Commission claims that the Court should annul the contested decision and order the Council to pay the costs. The Council asks the Court to dismiss the action as unfounded and order the Commission to pay the costs. Hungary, Poland and Lithuania ask the Court to dismiss the action as unfounded. Poland also supports the form of order sought by the Council in relation to having the Commission ordered to pay the costs.

IV – The application

26. The Commission sets out four pleas in support of its application, based, respectively, on the Council’s lack of competence to adopt the contested decision, misuse of powers, a breach of the principle of sincere cooperation between institutions and a manifest error of assessment. Before I analyse those pleas, I must briefly draw attention to the Court’s case-law concerning the roles of the Commission and of the Council in the procedure for reviewing State aid.

A – The Court’s case-law on the roles of the Commission and of the Council in the procedure for reviewing State aid

27. The Court ruled for the first time on the scope of the third subparagraph of Article 88(2) EC in the context of an action for annulment brought by the Commission against two decisions by which the Council had approved aid for the distillation of certain wines in Italy and France.¹² As far as is relevant for the purposes of the present case, the judgment handed down on that occasion stands out in that the Court implicitly found that the competence of the Council on the basis of the abovementioned Treaty provision remains unaffected in circumstances where, in the context of a decision to initiate the procedure under Article 88(2) EC, the Commission has taken the view that the aid subsequently authorised by the Council was incompatible.

28. The line taken by the Court in circumstances in which the Commission and the Council disagree on the compatibility of the aid at issue was clarified in two subsequent judgments.

29. In the case which resulted in the first of those judgments, which was handed down by the Court sitting in plenary session on 29 June 2004,¹³ the Commission had declared to be incompatible with the common market, on completion of the procedure under Article 88(2) EC, certain aid measures introduced by the Portuguese Republic in the pig-farming sector, and had ordered recovery of the aid. Subsequently, at Portugal’s request, the Council had adopted a decision under the third subparagraph of Article 88(2) EC by which it had declared compatible with the common market aid to the Portuguese pig farmers who were required to repay the abovementioned aid. The Commission disputed the power of the Council to adopt that decision, which, in its view, was tantamount to authorising aid which the Commission itself had previously declared to be incompatible. In its judgment, the Court began by noting that Article 88 EC accords the Commission a central role in determining the compatibility of State aid with the internal market, which involves reviewing existing aid schemes or authorising aid which is to be introduced. The Court then pointed out that it is clear from the very wording of the third subparagraph of Article 88(2) EC that ‘it covers an exceptional case’¹⁴ and that the power conferred on the Council ‘is clearly exceptional in character’.¹⁵ It therefore follows, according to the Court, that ‘where a decision finding an aid incompatible with the common market has been adopted by the Commission, the Council cannot paralyse the effectiveness of that decision by itself declaring the aid compatible with the common market on the basis of the third subparagraph of Article 88(2) EC’.¹⁶ The Court went on to state that ‘[n]or, therefore, can the Council thwart the effectiveness of such a decision by declaring compatible with the common market, in accordance with that provision, an aid designed to compensate the beneficiaries of the unlawful aid declared incompatible with the common market for the repayments they are required to make pursuant to that decision’. The Court considered that interpretation to be in keeping with the principle of legal certainty in so far as it ‘makes it possible to avoid the same State aid being the subject of contrary decisions taken successively by the Commission and the Council’ and to avoid calling into question ‘the definitive nature of an administrative decision which is acquired on the expiry of reasonable time-limits for bringing an action or by the exhaustion of remedies’.¹⁷

12 — Case C-122/94 *Commission v Council* [1996] ECR I-881. The matter had previously been analysed by Advocate General Mayras in his Opinion in Case 70/72 *Commission v Germany* [1973] ECR 834.

13 — Case C-110/02 *Commission v Council* [2004] ECR I-6333.

14 — Paragraph 30; to that effect, in the form of an obiter dictum, see also Case 156/77 *Commission v Belgium* [1978] ECR 1881.

15 — At paragraph 31.

16 — At paragraph 44.

17 — At paragraph 35.

30. The Court confirmed those principles in a judgment handed down on 22 June 2006.¹⁸ At issue in that case was a decision by which the Council authorised the Kingdom of Belgium to grant certain tax exemptions to coordination centres. The tax scheme governing those centres had been the subject of a number of Commission decisions, including a decision of incompatibility adopted in February 2003 on conclusion of the procedure under Article 88(2) EC. In April 2003, the Belgian Government had notified the Commission of certain amendments to the law setting up the coordination centres, and a new formal investigation procedure had been undertaken in that regard. At the same time, Belgium had approached the Council, which adopted, on 16 July 2003, a decision under the third subparagraph of Article 88(2) EC extending the application of the tax scheme to certain coordination centres only. After citing the above judgment in Case C-110/02, the Court found that the measures approved by the Council were the same as those declared to be incompatible by the Commission in its decision of February 2003. Rejecting the arguments of the Council, which maintained that the measures constituted new aid, granted by new legal provisions and allocated to a restricted number of easily identifiable coordination centres, the Court annulled the decision on the ground of lack of competence.

31. It is clear from the precedents cited above, on the one hand, that the powers conferred on the Commission and the Council by Article 88(2) EC are based on the *principle of pre-emption* ‘so that once either institution has decided upon the compatibility of a given aid, the other is thereby pre-empted from reaching a decision with regard to that aid’,¹⁹ and, on the other, that, in the current state of case-law, only a *final position* on the part of the institution which is the first to intervene is regarded as being capable of blocking the competence of the other institution.

B – The first plea, concerning the lack of competence of the Council

32. By its first plea, based on a lack of competence on the part of the Council, the Commission raises two separate complaints. It first claims that the contested decision was adopted outside the three-month deadline laid down by the fourth subparagraph of Article 88(2) EC. It also disputes the actual competence of the Council to act under the third subparagraph of Article 88(2) EC in the circumstances of the present case. Even though that second complaint raises an issue which logically precedes the issue raised in the first complaint, in my analysis, for the sake of convenience, I shall abide by the order used by the Commission in its observations.

1. The first complaint under the first plea, concerning a breach of the deadline laid down by the fourth subparagraph of Article 88(2) EC

33. The Commission considers that the Council is required to exercise the power conferred upon it by the third subparagraph of Article 88(2) EC within a period of three months following the application by the Member State concerned. That time-limit, which, according to the Commission, is justified by the exceptional nature of the competence accorded to the Council, is specifically laid down by the fourth subparagraph of Article 88(2) EC. In the present case, since Poland’s application was made by letter of 12 June 2009, the contested decision, which was adopted on 20 November 2009, falls outside that deadline. The Council responds that the Commission interprets Article 88(2) EC incorrectly, and that it is clear from a reading of the third and fourth subparagraphs of Article 88(2) EC in combination that the three-month deadline applies only if the application by the Member State is made after the Commission has initiated the examination procedure under the second subparagraph of Article 88(2) EC.

¹⁸ — Case C-399/03 *Commission v Council* [2006] ECR I-5629.

¹⁹ — Opinion of Advocate General Jacobs in Case C-110/02, point 20.

34. I consider the Council's proposed interpretation of the third and fourth subparagraphs of Article 88(2) EC to be correct. While it is true that the fact that the three-month deadline is provided for in a separate subparagraph of that article may give the impression that the time-limit is of general application, the terminological consistency between the second sentence of the third subparagraph and the fourth subparagraph ('... the fact that the State concerned has made its application to the Council shall have the effect of suspending that procedure *until the Council has made its attitude known*'),²⁰ as well as the wording of the last part of the last sentence of the fourth subparagraph ('... the Commission shall give its decision'), which appears to presuppose the existence of a procedure which has already been initiated, all seem to me to be factors which argue in favour of the interpretation advanced by the Council.²¹ According to that interpretation, the stipulation of a time-limit on the exercise of the competence conferred upon the Council by the third subparagraph of Article 88(2) EC constitutes an integral part of the system set in place by the Treaty in order to prevent the possibility of conflicting decisions in circumstances in which the Member State's application was made after the procedure under the second subparagraph of Article 88(2) EC had been initiated. From that perspective, the stipulation of a relatively short deadline is designed to compensate for the obligation upon the Commission to suspend the procedure, allowing its rapid resumption if the Council fails to act.

35. The interpretation put forward, which, moreover, implicitly finds support in the Court's case-law,²² leaves open the question of any time-limits applicable to the exercise by the Council of the competence in question in cases other than the case just considered. In that connection, it is legitimate to consider the question of the possible application by analogy of the three-month period provided for by the fourth subparagraph of Article 88(2) EC in circumstances in which the Commission intends to initiate the procedure under the second subparagraph of Article 88(2) EC *after* the Member State concerned has made an application pursuant to the third subparagraph of Article 88(2) EC, and the aid measure at issue is still being reviewed by the Council.²³ However, that is clearly not the case here.

36. The exercise of the Council's competence must, however, be regarded as being subject to the observance of a reasonable time-limit on the basis of the general principles of European Union law. Regardless of any other consideration, in the light of all of the circumstances of the present case, I do not consider that a period of some five months can be regarded as unreasonable, bearing in mind also the exceptional nature of the Council's intervention.

37. On the basis of the considerations set out above, the Commission's first complaint must, in my view, be rejected.

38. In the alternative, should the Court find the three-month period provided for in the fourth subparagraph of Article 88(2) EC to be applicable in the present case, the Council argues that it did in fact give its decision within that deadline. Supported by the Polish Government, it states that it was not formally approached by Poland until 28 September 2009, the date of the letter sent by the Polish authorities to the Agriculture and Fisheries Council. The application to the Council to intervene under the third subparagraph of Article 88(2) EC contained in that letter replaced the identical application set out in the letter of 12 June 2009, which had been withdrawn following an exchange of letters between the Council and the Polish authorities. The Council was consequently unable to take a position on the letter of 12 June 2009, which was neither circulated nor included on the agenda of any of its sessions or of a meeting of one of its preparatory bodies.

20 — Emphasis added.

21 — This view is also supported by the use, in the majority of the language versions of the Treaty, of the conjunction 'however' at the start of the fourth subparagraph of Article 88(2) EC.

22 — Case C-110/02 *Commission v Council*, paragraph 33.

23 — That kind of application presupposes that the Commission is entitled, despite the application made to the Council, to decide to set under way the formal investigation procedure, which would in any event remain suspended pursuant to the third subparagraph of Article 88(2) EC. In that case, the deadline provided for under the fourth subparagraph would run from the date on which the procedure was set under way, coinciding with the date of its suspension.

39. In that regard, it does not appear to me to be disputed or to be open to dispute that, in terms of both the way in which it was headed and its content, the letter of 12 June 2009 was for all purposes an application on the basis of the third subparagraph of Article 88(2) EC. The Council does not deny receiving the letter in question, which was addressed to the president of the Agriculture and Fisheries Council and accompanied by a communication²⁴ from Poland's Permanent Representation to the European Union, but states, without, however, inferring any specific consequence from this, that it received only a copy and not the original.²⁵ However, neither the Council nor the Polish Government submits evidence in support of the contention that the application contained in that letter was withdrawn by the Polish authorities. In those circumstances, I take the view that, assuming it to be applicable in the present case, the three-month period under the fourth subparagraph of Article 88(2) EC must be deemed to have started to run from the application set out in the letter of 12 June 2009 and that, consequently, the contested decision was adopted outside that deadline. Lastly, it is also, in my view, necessary to reject the argument that the Council bases on the fact that only the application of 28 September 2009 was 'processed' in accordance with the decision-making procedure laid down. In fact, any failure or delay on the part of the Council to set under way the internal examination procedures has no effect on the date from which the period under the fourth subparagraph of Article 88(2) EC starts to run, as this coincides with the date on which the application was made.

2. The second complaint under the first plea, concerning the Council's lack of competence to act under the third subparagraph of Article 88(2) EC

40. In the context of this complaint, the Commission claims, in essence, that the proposal for appropriate measures set out in point 196 of the 2007-2013 Agricultural Guidelines, combined with Poland's agreement to that proposal, constitutes a 'decision' by which the Commission declared incompatible with the common market the aid scheme authorised in the contested decision for the whole of the period of validity of those guidelines, that is to say until 31 December 2013.

41. The exchange of views by the parties before the Court essentially raises four questions. The first involves determining whether, as claimed by the Commission, but contradicted by the Council and the intervening Member States, the aid scheme for the purchase of agricultural land notified by Poland in 2004 retained the status of 'existing aid' until 31 December 2009, and could therefore be the subject of the proposal for appropriate measures contained in point 196 of the 2007-2013 Agricultural Guidelines (see section (a) below). The second question concerns the status of the aid scheme authorised in the contested decision and requires, in particular, an assessment as to whether, as the Commission claims, that scheme is the same as the scheme forming the subject-matter of the proposal for appropriate measures contained in point 196 of the 2007-2013 Agricultural Guidelines, or whether, as the Council, supported by the intervening Member States, in fact maintains, it constitutes new and different aid (see section (b) below). The third question concerns the effects of a proposal for appropriate measures which has been accepted by the Member State concerned (see section (c) below). Finally, the fourth question requires a definition of the scope of the proposal for appropriate measures set out in point 196 of the 2007-2013 Agricultural Guidelines and of Poland's acceptance of that proposal (see section (d) below).

24 — That communication is incorrectly dated 16 July 2009.

25 — The communication and the letter were registered by the Council Secretariat on 24 June 2009.

(a) The status of the aid scheme for the purchase of agricultural land implemented by Poland up to 31 December 2009

42. The Commission's argument is based on the premiss that the measures to support investment for the purchase of agricultural land introduced in Poland before its accession to the European Union never ceased to constitute existing aid pursuant to Article 88(1) EC from the date of their notification to the Commission in 2004 up to 31 December 2009. The Council, by contrast, contends that, pursuant to Point 4 of Chapter 4 of Annex IV to the 2003 Act of Accession, the aid schemes notified by Poland in 2004 were able to be considered as existing aid only until the third year following accession. The Council contends that the Commission was not entitled to extend the application of such schemes by means of a proposal for appropriate measures under Article 88(1) EC, as, however, it did in point 196 of the 2007-2013 Agricultural Guidelines. In addition, a proposal of that nature could not have the effect of modifying the provisions of primary law, in the present case the rule laid down in Annex IV to the 2003 Act of Accession.

43. The Council's arguments are not, in my view, persuasive.

44. Point 4 of Chapter 4 of Annex IV to the 2003 Act of Accession provides that the aid measures in the agricultural sector applied in the new Member States and notified to the Commission 'shall be regarded as "existing" aid within the meaning of Article 88(1) [EC] until the end of the third year from the date of accession' and that, after that date, 'any aid found to be incompatible with [the guidelines applied by the Commission] shall be considered as new aid'. It may, conversely, be inferred from that provision that the aid measures compatible with the agricultural guidelines applicable at the end of the period indicated, that is to say, on 30 April 2007, retained their status as existing aid beyond that date.

45. According to point 194 of the 2007-2013 Agricultural Guidelines, the guidelines apply with effect from 1 January 2007. However, point 195 introduced specific arrangements for aid considered as existing aid within the meaning of Point 4 of Chapter 4 of Annex IV to the 2003 Act of Accession, providing that the agricultural guidelines applicable on 31 December 2006, that is to say, the 2000 Agricultural Guidelines, were to remain in force for the purposes of the assessment of such aid until 31 December 2007. Moreover, at point 196 of the 2007-2013 Agricultural Guidelines, the Commission accorded all of the Member States a transitional period of two years, which expired on 31 December 2009, gradually to amend, in order to conform with the new guidelines, the aid schemes for the purchase of agricultural land in their respective legal systems.

46. As set out in point 12 of this Opinion, the 2000 Agricultural Guidelines, which applied until 31 December 2007 to the aid referred to in point 195 of the 2007-2013 Agricultural Guidelines, included the purchase of agricultural land among the expenses eligible for aid for investment in agricultural holdings. It follows that, on expiry of the three-year period laid down by Point 4 of Chapter 4 of Annex IV to the 2003 Act of Accession, on 30 April 2007, the support measures for the purchase of agricultural land notified by Poland in 2004 were in conformity with the guidelines applicable to them at that date²⁶ and, therefore, retained their status as existing aid up to 1 January 2008, the date on which they ceased to be assessed on the basis of the 2000 Agricultural Guidelines. Pursuant to point 196 of the 2007-2013 Agricultural Guidelines, those measures then continued to be classified as existing aid even beyond 31 December 2007.

47. It is clear from the foregoing that the Commission did not act in breach of the procedures laid down in Article 88(1) and (2) EC and that it did not modify provisions of primary law by means of the 2007-2013 Agricultural Guidelines, by extending, as the Council claims, beyond the deadline laid down in Annex IV to the 2003 Act of Accession, the application of aid schemes which, on the expiry of that

26 — The conformity of the abovementioned measures with the 2000 Agricultural Guidelines is disputed by neither the Council nor any of the intervening Member States.

deadline, ought to have been regarded as new aid inasmuch as they failed to comply with the applicable agricultural guidelines. In fact, at point 196 of those guidelines, the Commission merely varied in time the application of the criteria for the assessment of such schemes, *de facto* preventing, in compliance with the abovementioned provision of Annex IV to the 2003 Act of Accession, those schemes from losing the status of existing aid.

48. It must therefore be concluded that, as the Commission argues, the aid schemes for the purchase of agricultural land notified by Poland in 2004 retained their status as existing aid within the meaning of Point 4 of Chapter 4 of Annex IV to the 2003 Act of Accession up to 31 December 2009, the date set in point 196 of the 2007-2013 Agricultural Guidelines for them to be brought into conformity with the guidelines. It follows that those schemes could certainly form the subject-matter of appropriate measures within the meaning of Article 88(1) EC and of Article 18 of Regulation No 659/1999.

(b) The aid scheme authorised in the contested decision

49. The Council, supported by the Polish Government, claims that the support scheme for the purchase of agricultural land approved in the contested decision must in any event be regarded as ‘new aid’ since, on the one hand, it contains a number of features which distinguish it from the scheme on which the Commission took its decision, and, on the other, it lost the status of existing aid with effect from 1 January 2010, as Poland had not modified it by 31 December 2009.

50. In this context, I would begin by pointing out that, contrary to the view which the Council appears to take, the mere fact that the aid forming the subject-matter of the contested decision has to be classified as ‘new’ aid within the meaning of Article 1(c) of Regulation No 659/1999 does not allow of the conclusion that, in adopting that decision, the Council remained within the bounds of the competence conferred upon it by the third subparagraph of Article 88(2) EC. In the abovementioned judgment in Case C-110/02 *Commission v Council*, the Court rejected a similar argument on the part of the Council²⁷ and explained, opting for an approach based on an analysis of the effects of the measures at issue, that the Council’s competence under the third subparagraph of Article 88(2) EC may be excluded not only in regard to an aid measure which has already been declared by the Commission to be incompatible with the common market, but also in regard to a different measure, classifiable as ‘new aid’, if those measures are *linked in such a way that it would be artificial to claim to make a distinction between them*.

51. That said, I would point out that it is common ground among the parties that both the aid scheme approved by the Council and the aid scheme notified by Poland in 2004 and applied as existing aid up to 31 December 2009 consist in subsidies for interest payments on loans for the purchase of agricultural land. I would further point out that a number of passages in the letters of 12 June and 28 September 2009, addressed to the Council by the Polish authorities, refer expressly to the need to ‘extend’ or ‘retain’, until 31 December 2013, the possibility for Poland to grant aid for the purchase of agricultural land,²⁸ or even to ‘continue to apply’ that aid during the period 2010-2013,²⁹ a need in respect of which the Polish authorities had been emphatic as early as in the consultations with a view to the adoption of the 2007-2013 Agricultural Guidelines (see points 19 and 20 above).

27 — The Council, supported by the Portuguese Government, argued that the aid at issue constituted ‘new aid’ because it consisted of a new payment, was provided for by national rules different from the decree-laws which had set in place the aid scheme declared by the Commission to be incompatible, and satisfied requirements governing eligibility for subsidy and terms of payment which differed from those applicable to the aid granted on the basis of that scheme (paragraph 21).

28 — See paragraph 4 of the letter of 12 June 2009 and paragraph 5 of the letter of 28 September 2009.

29 — See paragraph 5 of the letter of 28 September 2009.

52. In response, the Council and the Polish Government merely point out that the scheme approved by the Council: (i) covers a different period of time from the scheme covered by point 196 of the 2007-2013 Agricultural Guidelines; (ii) relates to different beneficiaries; (iii) is established on the basis of a different legal framework; and (iv) was assessed on the basis of circumstances other than those which existed at the time when the 2007-2013 Agricultural Guidelines were adopted.

53. As regards the first of the aspects listed above, I would point out that it does not appear from the documents before the Court, nor has it been maintained by the Council or by the Polish Government, that the aid scheme for the purchase of agricultural land notified by Poland in 2004 was introduced for a fixed period of time. Far from it, the repeated attempts to get the Commission to include in the 2007-2013 Agricultural Guidelines a provision similar to that contained in the earlier guidelines and concerning aid of that nature demonstrate the clear intention of the Polish authorities to maintain the abovementioned scheme in force for the whole of the period covered by the new guidelines, and thus beyond the 31 December 2009 deadline imposed by the Commission. It is not therefore correct to say that the scheme notified by Poland in 2004 had a different temporal scope from that of the scheme forming the subject-matter of the contested decision. I would, furthermore, point out that, in accordance with point 196 of the 2007-2013 Agricultural Guidelines, the existing support schemes for the purchase of agricultural land in the Member States must be applied in conformity with the provisions of those guidelines from 1 January 2010 and until 31 December 2013. Regardless of the effects attributable to a provision of that nature, which I shall consider later, there is no doubt that it relates to aid intended to be granted during the same period of time as that covered by the contested decision. In any event, the Court had the opportunity to hold, in paragraph 36 of its above judgment in Case C-399/03 *Commission v Council*, that the fact that the aid scheme approved by the Council differed in terms of duration from that declared incompatible by the Commission did not necessarily have any bearing on the finding that the Council's decision was at variance with that of the Commission.

54. Similarly without relevance is the contention that the aid scheme forming the subject-matter of the contested decision is designed to benefit persons other than those who submitted an application on the basis of the scheme notified by Poland in 2004. Indeed, in the absence of arguments designed to demonstrate that, under that scheme, aid is granted on the basis of objectively different requirements, the mere fact that such aid may in practice benefit persons other than those already permitted to benefit from it, or indeed persons who were not originally potential beneficiaries but who subsequently gained that status as a result of a change in their factual or legal situation, must be regarded as a normal effect of the application of an aid scheme over time. The same applies in circumstances in which the applicable legislation specifically provides that a person who has already benefited from aid may not submit a further application for aid under the same scheme.³⁰

55. As regards the argument that the aid approved in the contested decision was granted on the basis of a new national legal framework, I would point out, on the basis of my own research, that the regulation of the Council of Ministers of 6 January 2010, which is merely outlined by the Polish Government in its statement in intervention, merely specifies certain provisions of the regulation of the Council of Ministers of 22 January 2009 concerning certain responsibilities of the agency for the restructuring and modernisation of agriculture, in relation to situations in which the aid at issue could not be granted because the contract for the sale of land was concluded between persons who were connected by being related or on the basis of succession. Moreover, that regulation cites the regulation of the Minister for agriculture of 19 June 2007 as the reference legislative framework for the rules governing aid to the agricultural sector.³¹ Consequently, even if the instrument cited by the

30 — That finding is not invalidated by either Article 1(c) of Regulation No 659/1999, on the basis of which 'alterations to existing aid' constitute 'new aid', or the case-law cited by the Council and the Polish Government, in particular Case C-295/97 *Piaggio* [1999] ECR I-3735 and Case C-242/00 *Germany v Commission* [2002] ECR I-5603, in which the Court implicitly recognised the classification as 'new aid' of a list of regions eligible for assistance on the basis of regional aid schemes designed to supplement the scheme already approved by the Commission and thus to amend the territorial and personal scope of the existing aid scheme.

31 — Dz. U. Nr 109, poz. 750.

Polish Government actually introduced, in 2010, a modification to the procedures for allocating aid for the purchase of agricultural land, this is clearly a minor modification which does not undermine the Commission's contention that such aid continues to be granted on the basis of a legislative framework which remains largely unchanged vis-à-vis the framework in force on 31 December 2009.

56. To the extent to which it refers to the factors on the basis of which the Commission and the Council made their assessments, the argument founded on the observation that the contested decision was adopted on the basis of circumstances which did not exist at the time when the 2007-2013 Agricultural Guidelines were adopted seems to me to be manifestly without relevance for the purpose of demonstrating the differences between the schemes on which the Commission and the Council took their decisions.

57. Lastly, as regards the argument that, from 1 January 2010, the aid scheme for the purchase of agricultural land applied in Poland constituted 'new aid', since Poland had not implemented, by 31 December 2009, the appropriate measures proposed in the 2007-2013 Agricultural Guidelines, I would point out that the acquisition of that status has no impact on the scheme as such and, moreover, as set out in point 50 of this Opinion, it is not of itself sufficient to confirm that the Council was competent to adopt the contested decision, in particular in cases such as the present, in which it follows that the Council and the Commission adopted positions on measures which were essentially identical.

58. In the light of the foregoing, it must be concluded that the arguments put forward by the Council and Poland are not capable of calling into question the fact that, as is apparent from an analysis of the documents in the case, the scheme for the purchase of agricultural land in force in Poland – and forming the subject-matter of the proposal for appropriate measures under point 196 of the 2007-2013 Agricultural Guidelines – and the scheme authorised in the contested decision are largely identical.

59. It therefore remains to be established whether the Commission adopted a final position on the compatibility of that scheme with the common market which is capable of blocking the competence of the Council pursuant to the third subparagraph of Article 88(2) EC.

(c) The effects of a proposal for appropriate measures accepted by the Member State concerned

60. The Commission takes the view that point 196 of the 2007-2013 Agricultural Guidelines, combined with the Member States' acceptance of the appropriate measures proposed therein, produces effects equivalent to a group of individual decisions declaring incompatible with the common market, after 31 December 2009, all of the aid schemes for the purchase of agricultural land which fail to conform to those guidelines. The fact that these are not individual decisions does not alter the fact that the Commission in any event defined its position on the compatibility of those schemes, exercising its own power of assessment through the guidelines rather than exercising it in each individual case. In the present case, the decision applicable to the aid schemes for the purchase of agricultural land existing in Poland required Poland to abolish those schemes by 31 December 2009 and not to re-introduce them after that date and until 31 December 2013. It follows, according to the Commission, that, in application of the principles established by the Court in the abovementioned judgments in Case C-110/02 *Commission v Council* and in Case C-399/03 *Commission v Council* (see points 29 and 30 above), the Council did not have the power to adopt a decision authorising Poland to grant such aid afresh.

61. Supported by the Polish Government, the Council responds that, in the present case, in contrast to the cases cited above, the Commission did not adopt a decision on the incompatibility of the aid measures approved in the contested decision. The Court had, moreover, clarified, in the abovementioned judgment in Case C-122/94 *Commission v Council* (see point 27 above), that a mere

opinion of the Commission on the compatibility of aid is not capable of blocking the competence of the Council under the third subparagraph of Article 88(2) EC. According to the Council, the Commission had adopted no position, in the form of either a decision or merely an opinion, on the compatibility of the aid scheme for the purchase of agricultural land applicable in Poland from 1 January 2010 to 31 December 2013. Point 196 of the 2007-2013 Agricultural Guidelines, read in conjunction with point 29 thereof, merely implies that, from 1 January 2010, any aid for the purchase of agricultural land had to be considered as new aid, the compatibility of which had to be assessed on the basis of Articles 87 EC and 88 EC if it was not covered by a derogation under Regulation No 1857/2006.

62. For my part, I would point out that, like the current Article 108 TFEU, Article 88 EC accorded the Commission the general competence to decide on the compatibility of State aid with the common market, whether by reviewing existing aid schemes or by authorising aid to be introduced. In exercising that competence, pursuant to paragraph (1) of that article, the Commission was required, in cooperation with the Member States, to keep all systems of existing aid under constant review.

63. The procedures for that review are outlined in Articles 17 to 19 of Regulation No 659/1999 as follows: where the Commission considers that an existing aid scheme is not, or is no longer, compatible with the internal market, it proposes to the Member State concerned the measures necessary to remedy the problems which have been identified, including the possible abolition of the scheme, and, if the Member State refuses to implement the measures, the Commission, should it still consider this necessary, initiates the formal investigation procedure under Article 88(2) EC.

64. Like the review of any plans to grant or alter aid, provided for in Article 88(3) EC, the constant review of existing aid schemes therefore consists of two phases, the second being merely contingent. However, while in the case of new aid, unless the notification is withdrawn by the Member State concerned, the Commission is required to initiate the formal investigation procedure if it entertains serious doubts as to the compatibility of the notified aid with the common market, or if it is convinced that it is incompatible, in the case of existing aid that procedure is initiated only if, and to the extent to which, the Member State concerned refuses to implement the recommended measures. Acceptance by the Member State concerned in fact gives rise to an obligation incumbent upon it, pursuant to Article 19(1) of Regulation No 659/1999, to implement those measures, without the Commission having to take a binding decision in its regard. In the context of the review of existing aid, the opening of the formal investigation procedure is thus essentially designed to confer binding effect on the finding of incompatibility on the basis of which the Commission recommended the appropriate measures, which in itself lacks binding effect unless the Member State concerned accepts it.³²

65. In the present case, since Poland accepted the proposal for appropriate measures set out in point 196 of the 2007-2013 Agricultural Guidelines, the Commission did not need to initiate the procedure under Article 88(2) EC. It is, however, common ground that the Polish authorities did not implement the measures and instead approached the Council for the purpose of obtaining a decision under the third subparagraph of Article 88(2) EC. In those circumstances, it is therefore necessary to determine the consequences of any breach of the obligation incumbent upon the Member States, pursuant to Article 19(1) of Regulation No 659/1999, to implement the measures recommended by the Commission, to which they themselves have agreed. In particular, it is necessary to establish whether, as the Council and the Polish Government maintain, in such circumstances, the Commission was in any event required to initiate the formal investigation procedure. If the Commission was required to do so, the breach of the obligation under Article 19(1) of Regulation No 659/1999 would be treated as a failure to accept the recommended measures, and the Commission's position could not be regarded as

32 — This does not exclude the possibility that the procedure under Article 88(3) EC may lead the Commission to review its own position in the light, in particular, of the observations submitted by the parties concerned. In the present case, however, the Commission is apparently bound by the 2007-2013 Agricultural Guidelines.

final. The effects of a proposal for appropriate measures which the Member State initially accepted, but then failed to implement, would not therefore be unlike the effects of a decision to open the formal investigation procedure in relation to proposed aid regarded as *prima facie* incompatible with the common market, a decision incapable in itself, according to the Court, of blocking the competence of the Council on the basis of the third subparagraph of Article 88(2) EC.³³ If, however, the Commission was not required to initiate the formal investigation procedure, a proposal for appropriate measures accepted by the Member State would produce the same or similar effects to those produced by a decision of incompatibility adopted on the basis of the first subparagraph of Article 88(2) EC,³⁴ and the case-law cited at points 29 and 30 of this Opinion could therefore be transposed to the present case.

66. The text of Article 19 of Regulation No 659/1999 provides no steer in the direction of either solution. In particular, in so far as it refers generically to cases in which the Member State ‘does not accept the proposed measures’, Article 19(2) does not make it possible to exclude the possibility *a priori* that it also covers situations in which the refusal comes after the Member State initially agreed to the measures. However, the fact that Article 19 is divided into two separate paragraphs, each of which governs a specific situation (where the proposal is accepted, in paragraph (1), and where it is rejected, in paragraph (2)), affords a systematic argument in favour of the view that it is necessary to initiate the formal investigation only if from the outset the Member State and the Commission disagree on the measures to be implemented. Further evidence in support of that solution is to be found in the Court’s case-law. In its judgment in *IJssel-Vliet*,³⁵ citing an earlier judgment, handed down in *CIRFS and Others v Commission*,³⁶ the Court recognised the binding nature in relation to the Netherlands of rules on the granting of aid in the fisheries sector adopted by the Commission on the basis of Article 93(1) EC, which had been drawn up in consultation with that Member State and expressly accepted by it. In arriving at that finding, the Court emphasised in particular the ‘framework of cooperation’ established by the Commission and the Netherlands Government, which involved obligations from which neither could release itself.³⁷

67. Drawing on that case-law, I consider that it is specifically the particular framework of cooperation between the Commission and the Member States, which is sought and in fact required by the Treaty, that constitutes the key to interpreting the whole system for monitoring and reviewing the existing aid schemes. It is actually because of that framework that first the Court and then the legislature recognised the binding nature, in the context of that system, of the act cementing that cooperation. And it is on the basis of that very framework that, in my view, the Commission must be deemed to be entitled to act where a Member State fails to comply with the obligation, which it voluntarily entered into, to implement the measures proposed by the Commission.³⁸ It would not in fact be consistent with the effects attaching to a proposal for appropriate measures accepted by the Member State to which the proposal is addressed to determine that the only remedy available to the

33 — Case C-122/94 *Commission v Council*.

34 — With the result that the Commission could institute proceedings against the State which has failed to meet its obligation pursuant to the second subparagraph of Article 88(2) EC or to Article 226 EC (now Article 258 TFEU).

35 — Case C-311/94 [1996] ECR I-5023; see also the Opinion of Advocate General Lenz delivered on 23 May 1996 [1996] ECR I-5025.

36 — Case C-313/90 [1993] ECR I-1125.

37 — See, in particular, paragraphs 36, 37 and 41; see also, to that effect, Case C-135/93 *Spain v Commission* [1995] ECR I-1651. According to some academic legal writers, despite its undoubted practical advantages, the Court’s case-law on the mandatory effects of proposals for appropriate measures accepted by the Member States raises a number of questions in terms of principles, resulting, in essence, in the introduction into the system of sources of Community law of a new type of act; see, to that effect, for example, M. Waelbroeck, *Les propositions de mesures utiles: une nouvelle source de droit communautaire*, in *Mélanges en hommage à Jean-Victor Louis*, 2003, p. 217. Despite those legitimate questions, as matters stand, that case-law is sufficiently consolidated to render a departure from precedent neither probable nor desirable. As we have seen, it has, moreover, been specifically codified in Regulation No 659/1999.

38 — To that effect, see, as regards the breach of obligations to communicate annual reports on existing aid schemes, laid down in the agricultural guidelines adopted by the Commission and implicitly accepted by the Member State in question, Case C-69/05 *Commission v Luxembourg* [2006] ECR I-7.

Commission in a case of that nature is to initiate the procedure under Article 88(2) EC, as this would, moreover, enable the Member State in question to continue to grant aid on the basis of the existing scheme for the entire duration of the procedure, despite the obligation into which it had previously entered.

68. On the other hand, it is necessary to bear in mind that the proposal for appropriate measures is adopted by the Commission on conclusion of a review of the scheme in question and, pursuant to Article 18 of Regulation No 659/1999, it presupposes that the scheme, as applied by the Member State concerned, has been found to be incompatible with the common market. Where such measures require amendment of certain aspects of the scheme, they represent the corrective which the Commission considers to be necessary to authorise the Member State to continue granting the aid on the basis of the existing scheme. It follows that when, after the appropriate measures have been accepted, the Commission closes the review procedure, it has *formally adopted its position* on the scheme in question. That position is to the effect that the scheme in question is compatible if the Member State concerned implements the proposed measures but it is incompatible if that State does not implement them.³⁹

69. For the reasons set out above, I therefore consider that, if the Member State enters into an obligation to implement the appropriate measures proposed by the Commission, the Commission's position on the compatibility of the aid scheme at issue becomes final and, if there is a failure to comply with that obligation, the scheme must be deemed to be incompatible with the internal market.⁴⁰

70. Establishing that a proposal for appropriate measures that is accepted by the Member State concerned constitutes a final position on the part of the Commission as to the compatibility of the aid at issue further raises the difficult issue of whether the proposal may be challenged under Article 230 EC (now Article 263 TFEU). While the right of persons affected by that position to seek and obtain its annulment appears to follow logically from its nature as an act which produces binding legal effects, we must not fail to bear in mind that those effects arise as a result of the act of a third party (the acceptance by the Member State), over which the Commission has no influence, whereas the only act directly attributable to it (the proposal for appropriate measures) constitutes a recommendation and is, of itself, without binding nature.⁴¹

71. In that regard, I consider that the procedure under Articles 18 and 19 of Regulation No 659/1999 must be viewed as a whole, and in the particular context of the cooperation between the Commission and Member State sought by the Treaty, and, as I stated above, it is on that cooperation that the entire system for reviewing existing aid schemes is based. In the context of that procedure, the proposal for appropriate measures which the Commission addresses to the Member State concerned is not binding on the latter, which remains at liberty to accept by entering into the obligation to implement the measures, or to refuse, laying itself open to a procedure under Article 88(2) EC. However, pursuant to Article 19(1) of Regulation No 659/1999, the Member State's acceptance is declaratory in nature, that is to say that it does not produce effects if the Commission is not informed of it and if the Commission

39 — In other words, the position adopted by the Commission must, in such circumstances, be regarded as producing effects similar to those of a conditional decision within the terms of Article 7(4) of Regulation No 659/1999.

40 — Contrary to the contentions of the Council and the Polish Government, paragraph 35 of the abovementioned judgment in *CIFRS* does not allow us to arrive at a different solution, by furnishing arguments in support of the hypothesis that, if the appropriate measures are not implemented, *the aid scheme in question* becomes new aid, the compatibility of which must be assessed by the Commission by initiating the procedure under Article 88(2) EC. In fact, the measures at issue in the case forming the subject-matter of the judgment in *CIFRS*, to which the Netherlands had given its consent, provided solely for the obligation to notify the aid granted under the existing scheme and not for its amendment.

41 — See Case T-330/94 *Salt Union v Commission* [1996] ECR II-1475, and the Opinion of Advocate General Mischo in Case C-242/00 which resulted in the abovementioned judgment of 18 June 2002 in *Germany v Commission*. Some academic legal writers take the view that persons adversely affected by a proposal for appropriate measures which the Member State has accepted may bring the matter before the national courts only, by challenging the act by which the Member State in question gave its agreement; see, to that effect, M. Waelbroek, p. 221.

does record it and, in turn, informs the Member State thereof.⁴² Ultimately, therefore, the binding nature of the proposal for appropriate measures derives from an act by the Commission.⁴³ In other words, when the Member State concerned accepts, and the Commission records that acceptance and informs the Member State accordingly, the proposal for appropriate measures ceases to constitute a mere recommendation, that is to say an act which is by nature without binding effect⁴⁴ and, consequently, not open to challenge,⁴⁵ and begins to produce effects like those of a decision.⁴⁶ The persons affected by that act (beneficiaries of the aid, their competitors, the territorial bodies which grant the aid and so on) must therefore be placed in the position of being able to institute proceedings under the conditions laid down in the fourth subparagraph of Article 230 EC. That appears to have been the approach taken by the Court in its abovementioned judgment in Case C-242/00,⁴⁷ while the Court of First Instance (now the General Court) recently specifically confirmed that a proposal for appropriate measures accepted by a Member State may be challenged under the fourth subparagraph of Article 230 EC.⁴⁸

72. On the basis of all of the foregoing considerations, I agree with the Commission's contention that a proposal for appropriate measures, which is accepted by the Member State to which it is addressed, constitutes a final position of the Commission on the compatibility of the aid scheme at issue and produces binding legal effects similar to those of a decision. On the basis of the Court's case-law cited in points 29 and 30 of this Opinion, an act of that nature is therefore capable of preventing the adoption of a decision under the third subparagraph of Article 88(2) EC which conflicts with it.

73. it is necessary, at this juncture, to define the scope of both the position on the compatibility of the aid for the purchase of agricultural land, adopted by the Commission in the context of the proposal for appropriate measures contained in point 196 of the 2007-2013 Agricultural Guidelines, and also the scope of the obligations entered into by Poland as a result of its acceptance of that proposal. Determining whether the Council lacked the competence to adopt the contested decision actually turns on the outcome of that two-pronged analysis.

42 — In that connection, I should draw attention to the fact that, pursuant to Article 26 of Regulation No 659/1999, the Commission is to 'publish in the *Official Journal of the European Communities* a summary notice of the decisions which it takes pursuant to ... Article 18 in conjunction with Article 19(1)', and that the summary notice must state that 'a copy of the decision may be obtained in the authentic language version or versions'. On the effects of such publication, see Case T-354/05 *TFI v Commission* [2009] ECR II-471.

43 — In that regard, in *TFI v Commission*, the Court of First Instance points out that that 'it is only where the Commission decides, in the exercise of its exclusive power to assess the compatibility of State aid with the common market, to accept the State's commitments as answering its concerns that the [constant] examination procedure [for existing aids] is brought to an end', paragraph 70.

44 — The fifth subparagraph of Article 249 EC (now the fifth subparagraph of Article 288 TFEU). In certain cases, the Treaty accords to recommendations limited legal effects; see Article 97(2) EC (now Article 117 TFEU). See Joined Cases T-132/96 and T-143/96 *Freistaat Sachsen and Others v Commission*, paragraph 209; the Opinion of Advocate-General Mayras in Case 70/72, p. 834, and the Opinion of Advocate-General Lenz in Case C-313/90.

45 — The first subparagraph of Article 230 EC (now the first subparagraph of Article 263 TFEU). In the judgment in *Salt Union v Commission*, the Court of First Instance (as it then was) ruled out the possibility of challenging the Commission's refusal to propose appropriate measures to a Member State, since the latter is not compelled to accept them.

46 — In Case T-354/05 *TFI v Commission*, the Court of First Instance (now the General Court) defined the procedure under Articles 17, 18 and 19 of Regulation No 659/1999 as a procedure which 'by its very nature, is a decision-making procedure' (see paragraph 69).

47 — In Case C-242/00, the Federal Republic of Germany had brought an action for annulment against the decision by which, according to the applicant, the Commission had deemed certain regional aid schemes to be compatible with the common market only if they related to regions corresponding to a certain percentage of the German population. In the objection by which it disputed the admissibility of the application, the Commission maintained, inter alia, that the decision challenged by the German Government merely confirmed two earlier positions adopted in accordance with the guidelines on regional aid in which it had fixed the ceiling on coverage for regional aid, expressed in terms of population, for the period 2000-2006, and had asked the German Government to adjust its existing aid schemes to bring them into line with the guidelines. In rejecting that line of argument, the Court began by stating that those positions, described in the judgment as 'decisions', had to be construed as forming 'an integral part of the guidelines on regional aid and as having, in themselves, binding force only on condition that they have been accepted by the Member States'. The Court went on to point out that, although they had approved the adjustment proposed by the Commission, the German authorities had made an express reservation on the method of calculating the ceilings. On the basis of that premiss, the Court concluded that the part of the guidelines on regional aid concerning the method of calculating the ceiling on coverage could not be enforced in relation to Germany, with the result that the positions invoked by the Commission could not be regarded as acts which the contested decision – the first decision with binding effect in relation to that Member State – simply confirmed. The Court did not therefore reject *a priori* the possibility that a proposal for appropriate measures accepted by a Member State constitutes an enforceable act, but basically confined itself to ruling it out in that particular case.

48 — *TFI v Commission*, paragraphs 60 to 81.

(a) The scope of the appropriate measures contained in point 196 of the 2007-2013 Agricultural Guidelines and of Poland's acceptance of those measures

74. The 2007-2013 Agricultural Guidelines lay down the criteria which the Commission intends to apply in assessing aid in the agricultural sector for the period between 31 December 2007 and 31 December 2013. As far as investment in agricultural holdings is concerned, point 29 of the guidelines establishes that they will be considered to be compatible with the internal market if they fulfil all of the conditions laid down by Article 4 of Regulation No 1857/2006, paragraph (8) of which provides that '[a]id may be granted for a purchase of land other than land for construction purposes costing up to 10% of the eligible expenses of the investment'. It is therefore correct, as the Commission maintains, that the 2007-2013 Agricultural Guidelines take the approach that aid for investment in the purchase of agricultural land which does not fulfil the requirements of Article 4(8) of Regulation No 1857/2006 is in principle incompatible. However, *in the case of new aid schemes and new individual aid*, that position may not of itself be considered to be final, since the Commission is required, on the basis of point 183 of those guidelines, to establish and declare that the aid is incompatible by means of the review procedure provided for by Article 88 EC. It does not therefore appear correct to state, as the Commission appears to state in some passages of the observations submitted to the Court, that the abovementioned guidelines 'declare' incompatible with the common market, from 31 December 2007 and until 31 December 2013, *all* of the aid for investment in the purchase of agricultural land which does not comply with the guidelines. In that regard, the arguments of the Council that an approach of that nature would imply conferring on the Commission a regulatory power derogating from the procedure provided for by Article 88 EC must be upheld.

75. As regards the support schemes for the purchase of agricultural land which were in *existence* at the date when the 2007-2013 Agricultural Guidelines were adopted, point 196 of the guidelines proposes that the Member States should comply with them by 31 December 2009. Underlying that proposal is the position set out in point 29 of the guidelines, according to which such aid is not compatible with the common market if it does not fulfil the conditions laid down by Article 4(8) of Regulation No 1857/2006. In the present case, it is undisputed that Poland informed the Commission of its agreement to implement the recommended appropriate measures, and the Commission published that agreement, in the form required by Article 26(1) of Regulation No 659/1999, in the following terms:

'In accordance with point 196 of the Community guidelines for State aid in the agriculture and forestry sector 2007 to 2013, Member States must amend their existing aid schemes to conform with the guidelines by 31 December 2007 at the latest, except for existing aid schemes ... for investments concerning land purchase in agricultural holdings that have to be amended to conform with the guidelines by 31 December 2009.

Point 197 of the guidelines states that Member States are invited to confirm that they accept the proposals for appropriate measures in writing by 28 February 2007 at the latest.

Member States were reminded of the need to accept the abovementioned appropriate measures in a letter from the Commission of 29 January 2007.

The following Member States have given their explicit and unconditional agreement to the proposed appropriate measures in writing: ...

Poland: 26 February 2007 ...

Pursuant to Article 19(1) of Regulation (EC) No 659/1999, the Commission hereby takes note of the unconditional and explicit agreement of the abovementioned Member States to the appropriate measures which it has proposed.'

76. Contrary to what the Council maintains, the content and scope of the obligation entered into by Poland on that basis emerge clearly if point 196 of the 2007-2013 Agricultural Guidelines is read in conjunction with point 29 of those guidelines and with Article 4(8) of Regulation No 1857/2006: Poland was required to amend its existing aid schemes for investment in the purchase of agricultural holdings in such a way that, as from 1 January 2010, only aid costing up to 10% of the eligible expenses of the investment could be granted. In other words, by accepting the measures recommended by the Commission at point 196 of the 2007-2013 Agricultural Guidelines, Poland entered into the obligation to amend the aid schemes in force in its own system, by eliminating the possibility of subsidising the purchase of agricultural land over and above the limit laid down in Article 4(8) of Regulation No 1857/2006.

77. By keeping those schemes in force and failing to amend them, Poland breached that obligation.

(a) Conclusions on the Council's competence to adopt the contested decision

78. It follows from all of the foregoing considerations that, by authorising aid measures which are largely the same as the measures which Poland had agreed to abolish, not only has the Council de facto relieved Poland of the obligation which it had entered into vis-à-vis the Commission, thereby justifying the breach of an agreement entered into pursuant to Article 88(1) EC, but it has also adopted a decision which plainly conflicts with the final position adopted by the Commission at point 196 of the 2007-2013 Agricultural Guidelines concerning the compatibility of those measures with the common market.

79. In those circumstances, I propose that the Court should uphold the second claim under the first plea and declare, in accordance with the case-law cited in points 29 and 30 of this Opinion, that the Council lacked competence to adopt the contested decision. In my view, the Commission's application should therefore be upheld and the contested decision annulled. I shall consider the other pleas raised by the Commission in case the Court does not agree with the solution which I have suggested.

C – The second and third pleas, concerning, respectively, a misuse of powers and a breach of the obligation of sincere cooperation

80. By its second plea, the Commission claims in essence that, by authorising aid measures declared to be incompatible with the common market at point 196 of the 2007-2013 Agricultural Guidelines, the Council has used the competence conferred upon it by the third subparagraph of Article 88(2) EC for purposes other than those provided for in the Treaty. According to the Commission, that provision authorises the Council to declare compatible with the common market, in exceptional circumstances, aid which the Commission is not able to authorise, but it does not confer on the Council the power to neutralise the Commission's assessment as to the compatibility of aid where that assessment is contained in an act which has binding force.

81. In that regard, I shall merely point out that this plea is based on the same premiss as the first plea, namely that point 196 of the 2007-2013 Agricultural Guidelines, combined with Poland's acceptance of the appropriate measures set out therein, constitutes a final and binding position of the Commission on the compatibility with the common market of measures largely identical to those forming the subject-matter of the contested decision. Consequently, if, as I have suggested, the Court considers that premiss to be correct, the plea concerning the misuse of powers would be subsumed by the first plea concerning the Council's lack of competence, but if it does not, the second plea would have to be declared to be unfounded for the same reasons for which the first plea was rejected.

82. By the third plea, the Commission claims that, by adopting the contested decision, the Council has relieved Poland of the obligation to cooperate, which is incumbent on it in the context of the constant review of existing aid schemes provided for by Article 88(1) EC, and of the obligation which it had entered into by agreeing to the appropriate measures recommended by the Commission. According to the Commission, in so doing, the Council upset the system of institutional equilibrium laid down by the Treaty, encroaching upon the functions conferred by the Treaty on the Commission. The Council considers that plea to be unfounded and, in its turn, accuses the Commission of breaching the obligation of sincere cooperation on the ground that it failed to evoke the alleged lack of competence of the Council during the meetings of the Agriculture and Fisheries Council at which Poland's application was discussed and suggested to Poland, in a letter of 15 May 2009, that it should approach the Council pursuant to the third subparagraph of Article 88(2) EC.

83. The present plea seems to me to stand alone from the first plea only to the extent that the arguments of the Commission are construed as imputing to the Council a breach of the principle of sincere cooperation because it did not refrain, in the circumstances of the present case, from adopting an act that fell within the competences conferred on it by the Treaty. At first sight, I do not consider that the obligation of sincere cooperation between institutions⁴⁹ or the principle of institutional equilibrium, on the basis of which the interinstitutional dialogue must take place within the European Union's decision-taking system, can require an institution to refrain from exercising, *without exceeding the limits thereof*, a power which it possesses, which is exceptional and derogates from the rules governing the field at issue, in order to permit the institution which enjoys general competence in the field to exercise that competence. In the present case, I consider that the effect of the contrary approach would, in essence, be to identify new limits to the competence of the Council under the third subparagraph of Article 88(2) EC compared with those provided for under the Treaty and clarified by the Court in its case-law.

84. On the other hand, I agree with the Commission that the suggestion which it made to Poland to submit an application under the third subparagraph of Article 88(2) EC, as well as the conduct of its officials pending the procedure before the Council do not represent a breach of the obligation of sincere cooperation and, in any case, cannot be relied upon by the Council as factors justifying the breach of that obligation imputed to it by the Commission.

D – The fourth plea, concerning a manifest error of assessment as to the presence of exceptional circumstances and breach of the Treaty and of the general principles of Community law

85. In the context of the fourth plea, the Commission basically puts forward two heads of complaint. It first claims that the contested decision is flawed by a manifest error of assessment because the circumstances relied upon to justify the authorised aid measures are not exceptional in nature. Second, it claims that those measures are disproportionate to the aims sought, in view in particular of the length of the period for which authorisation was granted.

86. I would first point out that, as the Commission itself notes by reference to the abovementioned judgment in Case C-122/94 *Commission v Council*, the Council, in applying the third subparagraph of Article 88(2) EC, enjoys broad discretion, with the result that, in reviewing the exercise of such a power, the Court must confine itself to examining 'whether it contains a manifest error or constitutes a misuse of power or whether the authority in question did not clearly exceed the bounds of its discretion'.⁵⁰ So far as concerns, more specifically, the Court's review with regard to compliance with

49 — See Article 13(2) TEU and, in case-law, in particular, Case 204/86 *Greece v Council* [1988] ECR 5323 and Case C-65/93 *Parliament v Council* [1995] ECR I-643.

50 — Paragraphs 18 and 19. At paragraph 18, the Court also notes that 'when the implementation by the Council of the Community's agricultural policy necessitates the evaluation of a complex economic situation, the discretion which it has does not apply exclusively to the nature and scope of the measures to be taken but also to some extent to the finding of the basic facts inasmuch as, in particular, it is open to the Council to rely if necessary on general findings'.

the principle of proportionality, in view of the exceptional and derogatory nature of the power in question and the wide discretion which European Union institutions are recognised as having in the context of the common agricultural policy,⁵¹ in particular where they are called on to make assessments of an economic, policy and social nature and to reconcile the different objectives which the Treaty assigns to such policy, I find, as, moreover, already follows from the judgment in Case C-122/94,⁵² that the review by the Court must, in this case, be limited to determining whether the measure approved is manifestly inappropriate in relation to the objective which the Council sought to attain.

87. As far as the concept of ‘exceptional circumstances’ within the meaning of the provision at issue is concerned, I consider to be correct the interpretation given by the Commission, according to which a structural problem, which is not merely conjunctural, cannot, by its very nature, constitute an exceptional circumstance, even if viewed in isolation. To take up the words used by Advocate General Cosmas in his Opinion in the abovementioned Case C-122/94, the concept of exceptional circumstances ‘involves the idea of something extraordinary and unforeseen or at least something not permanent or continuous and of course something other than normal’.

1. The first complaint, concerning a manifest error of assessment as to the existence of exceptional circumstances within the meaning of the third subparagraph of Article 88(2) EC

88. In the context of this complaint, the Commission first argues that the contested decision erroneously presents as exceptional circumstances certain *structural problems of the agricultural sector in Poland*. On that point, I first of all agree with the Commission in considering that the factors to which the Council refers in recital 2 in the preamble to the contested decision concerning the ‘*unfavourable area structure of Polish agricultural holdings*’, ‘*the low level of direct payments that Poland receives following a phasing-in mechanism provided for in the 2003 Act of Accession*’ and ‘*low agricultural incomes*’,⁵³ do not *as such* constitute exceptional circumstances within the meaning of the third subparagraph of Article 88(2) EC. In point of fact, on the one hand, these are elements which merely describe the structure of Poland’s agricultural economy (small size of agricultural holdings, low level of incomes), and, on the other, relate to the application of direct support instruments⁵⁴ envisaged in acts established at the time when Poland acceded to the European Union. The fact that those elements are not conjunctural in character means that they lack the requisite feature of being exceptional in nature.⁵⁵ I am not, however, persuaded that it is possible to reach the same conclusion in relation to the last element mentioned in recital 2 in the preamble to the contested decision, that is to say the ‘*fall in the value of payments to farmers following the 10% decrease in the euro exchange rate*’, which apparently further reduced the income levels of Polish farmers in 2008. The Commission’s contention that the fluctuation in the exchange rates of national currencies against the euro is a normal process affecting all of the Member States which have yet to adopt the euro does not seem to me to be sufficient to exclude the possibility that a fluctuation of that nature may, along with other factors, contribute to creating an exceptionally unfavourable economic situation in a particular

51 — See, most recently, judgment of 26 June 2012 in Case C-335/09 P *Poland v Commission*, paragraphs 71 and 72, concerning the Commission’s implementing powers, and Case T-326/07 *Cheminova and Others v Commission* [2009] ECR II-2685, paragraphs 194 to 196.

52 — Insofar as the Court, at paragraph 18, referring to paragraph 25 of the judgment in Case C-138/79 *Roquette Frères v Council* [1980] ECR 3333, refers in general to the question whether the authority in question ‘did not clearly exceed the bounds of its discretion’.

53 — All emphasis added.

54 — The system of the gradual introduction of direct Community payments, introduced by the 2003 Act of Accession (pp. 369 and 370), was adapted by Decision 2004/281/EC of 22 March 2004 adapting the Act concerning the conditions of accession of the Czech Republic, the Republic of Estonia, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Republic of Hungary, the Republic of Malta, the Republic of Poland, the Republic of Slovenia and the Slovak Republic and the adjustments to the Treaties on which the European Union is founded, following the reform of the common agricultural policy (OJ 2004 L 93, p. 1). That decision was the subject of an action for annulment brought by Poland and rejected by the Court in Case C-273/04 [2007] ECR I-8925. For an overview of the scheme and its operation, see the Opinion delivered by Advocate General Poiares Maduro on 21 June 2007 in that case.

55 — I would, however, point out, along with the Council, that the report at Annex A.11 to the application refers to a 16% fall in agricultural incomes in 2008 compared with 2007.

sector.⁵⁶ Moreover, the fact that a specific situation may affect several Member States at one and the same time, or possibly involve various sectors of the economy, does not prevent it from in any event constituting a relevant circumstance for the purposes of the application of the third subparagraph of Article 88(2) EC.⁵⁷ Similarly, it does not seem possible to me to rule out *a priori* that the factor mentioned in recital 6 in the preamble to the contested decision, namely *the rise in rural unemployment in 2009*, may be of an exceptional nature, particularly bearing in mind that, as the Commission itself points out, the preceding period (2003-2007) actually saw a fall in rural unemployment. Furthermore, as the Council emphasises, it is clear from the statistics attached to the application that there was a particularly significant increase (of 24.6%) in the rural unemployment rate between the third quarter of 2008 and the third quarter of 2009. In that connection, neither the fact that rural unemployment in Poland does not appear to be particularly high compared with the European Union average, nor the contention that this is a phenomenon that is structural in nature seem to me to be decisive.

89. It is more difficult to assess the significance of the factor set out in recital 7 in the preamble to the contested decision, namely the fact that *agricultural land prices in Poland have been rising significantly and continuously since 2007*. In fact, while the figures provided by the Commission reveal a continuing trend for the cost of agricultural land to increase from 2003, this trend appears to be more marked from the period mentioned by the Council (2007), but without reaching levels that can be described as exceptional. The Commission's observation that the increase is contingent on a structural factor in the form of the scarcity of agricultural land and thus of a supply incapable of meeting demand, does not seem to me to be of conclusive significance if it is actually demonstrated that the trend for prices to rise intensified from 2007 onwards.

90. Second, in the context of the present complaint, the Commission argues that the Council erroneously presented as an exceptional circumstance the '*variation in market conditions*'. In that regard, I would point out that as regards, in particular, the increase in the '*prices of agricultural inputs*'⁵⁸ during 2009, mentioned in recital 4 in the preamble to the contested decision, the Commission essentially confines itself to observing that the costs of those inputs rose for all of the Member States. As I have already had occasion to point out, a comment of that nature is not of itself sufficient to prevent a particular circumstance from being exceptional in nature, bearing in mind the particular consequences which it may have produced in a given Member State. As far as the circumstances mentioned in recitals 3 and 5 in the preamble to the contested decision are concerned, that is to say the *recession caused by the economic crisis* and the '*flooding in 11 voivodships (out of a total of 16 voivodships)*',⁵⁹ the Commission itself seems to be saying that these may in theory constitute exceptional circumstances.

91. While the analysis so far indicates that some of the factors cited in the contested decision appear not to be exceptional in nature, this is not, in my view, sufficient to demonstrate the existence of a manifest error of assessment as to the presence of exceptional circumstances justifying the exercise of the power conferred on the Council by the third subparagraph of Article 88(2) EC. The approach advocated by the Commission, involving a separate analysis of each individual factor, does not seem to me to be correct. It is, in fact, clear from the contested decision that the reference to certain factors, in particular those which the Commission describes as 'structural' factors in Poland's agricultural economy, has a part to play in describing the particular backdrop to the authorised measures and in the assessment of the economic and social repercussion of the recession, the main element justifying the adoption of those measures within the scheme of the contested decision.

56 — This seems, moreover, to be the finding of the report 'Five years of Poland in the European Union', a number of extracts from which were annexed by the Commission to its application.

57 — A similar argument by the Commission was rejected at paragraph 22 in Case C-122/94.

58 — Emphasis added.

59 — Emphasis added.

Moreover, it is clear from the abovementioned judgment in Case C-122/94 that, in exercising the competence conferred upon it by the third subparagraph of Article 88(2) EC, the Council may rely upon the *continued existence* or *worsening* of structural problems in a particular sector of the economy for the purpose of assessing the impact on that sector of economic hard times.⁶⁰

92. On the basis of the foregoing, I am inclined to the view, bearing in mind the broad discretion which the Council enjoys in this area, that the Commission has failed to demonstrate the existence of a manifest error of assessment as to the presence of exceptional circumstances capable of justifying the adoption of a decision pursuant to the third subparagraph of Article 88(2) EC.

1. The inappropriate and disproportionate nature of the measures authorised in the contested decision

93. The Commission considers that the measures approved by the Council are not capable of resolving the problems described in the contested decision. In the first place, it contends that those measures are inappropriate to pursue the aim of increasing the size of agricultural holdings, which has not changed significantly over the years, although similar measures were applied in Poland from 1996. According to the Commission, the reason for this is that, instead of encouraging a change in the structure of the ownership of land, the aid in question merely has the effect of increasing the price of agricultural land. For the same reason, the measures approved by the Council are also entirely inappropriate to remedy the situation described in recital 7 in the preamble to the contested decision, namely the significant and continuous increase in agricultural land prices since 2007. The Commission further points out that those measures are not appropriate to pursue the aim of reducing unemployment in rural areas, in so far as they seek to consolidate existing agricultural holdings. Lastly, the Commission fails to see how the authorised aid could remedy the increase in prices and emphasises that, being linked to the grant of loans, it in any event remains inaccessible to the families whose standard of living has seen a catastrophic decline because of the increase of the cost of agricultural inputs.

94. The Commission's arguments are not, in my view, sufficient to prove that the Council *manifestly* exceeded the limits of its power of appraisal in taking the view that the measures in question, which are specifically designed to encourage investment in the purchase of agricultural land, were appropriate to pursue the aim of consolidating the structure of the existing agricultural holdings or of helping unemployed persons to switch to farming (recital 6 in the preamble to the contested decision). Similarly, the contention that those measures constitute the reason for the continuing increase in the cost of agricultural land does not appear to be demonstrated.

95. Second, the Commission points out that, in order to deal with the consequences of the crisis, it adopted, in 2009, a specific communication on a Temporary Community Framework for State aid measures to support access to finance in the current financial and economic crisis⁶¹ (the 'Temporary Community Framework'), on the basis of which, as a result of a number of subsequent amendments,⁶² various forms of State intervention for the benefit of agricultural holdings were authorised, including, in particular, temporary aid in the maximum amount of EUR 15 000 until the end of 2010. The Commission maintains that, by failing to take account of that aid, which was specifically designed to address the problems linked to the crisis, and, in particular, by failing to consider whether that aid made it possible to resolve those problems, the Council infringed the principle of proportionality. The Commission further contends that the Council ought to have taken account of other instruments adopted by the Commission or by the Council itself for the purpose of resolving the problems set out in the contested decision or capable of being used by Poland for that purpose.

60 — At paragraph 21.

61 — OJ 2009 C 83, p. 1.

62 — Communication from the Commission amending the Temporary Community Framework for State aid measures to support access to finance in the current financial and economic crisis (OJ 2009 C 261, p. 2).

96. The Commission's arguments seek to determine whether, and within what limits, the Council is under an obligation to take account of the measures already adopted at European Union level with a view to remedying situations invoked by the requesting Member States as constituting exceptional circumstances. In that regard, it is necessary to point out that the Council exercises the competence under the third subparagraph of Article 88(2) EC in derogation from the provisions of Article 87 EC and the rules under Article 89 EC. Consequently, it may no longer be maintained that, in those circumstances, the Council is bound by the measures which the Commission or the Council itself adopted in accordance with those articles, with the exception, of course, of Commission decisions which are capable of blocking that competence. To claim the contrary would be in open contradiction with the clear wording of the third subparagraph of Article 88(2) EC. At the same time, I do not, however, see that, in assessing whether, in the individual case, circumstances justifying the adoption of a decision on the basis of the provision at issue are present, it is possible to leave entirely out of consideration the legislative and regulatory background of the measures to be authorised, in particular where, in depicting those circumstances, the Council refers to structural – and therefore enduring – aspects of the sector at issue. I therefore consider that, in making its assessment, the Council is at least required to take into account the pre-existing measures *specifically* designed to remedy the situations likely to justify the authorisation of the aid at issue,⁶³ without that requiring the Council to review, or to set out in its decision, all of the rules of law governing the field in question.

97. In this case, it is not clear from the contested decision that the Council considered whether Poland had made use of the possibilities afforded by the Temporary Community Framework or what effects any measures put in place on that basis yielded. I would, however, point out that, although designed to mitigate the economic effects of the crisis, the direct subsidy of a limited amount to which the Commission refers was not specifically designed to encourage investments geared to improving the structure of the agricultural holdings and, in addition, was able to be granted only up to 31 December 2010. In those circumstances, the Council could properly consider, in my view, that a more focused measure which extended further over time could both pursue, possibly in conjunction with other instruments, the aim of mitigating the consequences of the financial crisis, and the difficulties encountered by farmers in accessing credit in particular, and could provide a better response to the structural problems of Poland's agricultural economy. Equally, while, in my view, it was incumbent on the Council to take into consideration, in the contested decision, the measures to combat rural unemployment provided for in the framework of the Community policy for rural development pursuant to Regulation No 1698/2005,⁶⁴ as well as the effects of the aid scheme granted by Poland to compensate for the losses suffered by farmers as a result of the 2009 floods, which, according to the Commission, made it possible to cover 80% of those losses, the Council's failure to do so is not, in my view, sufficient to call into question the legitimacy of that decision, bearing in mind the fact that the decision is based on a range of reasons and on an overall assessment of the sector at issue at a specific time from an economic perspective. It does not, however, seem to me that the Council was under a specific obligation to take account, as the Commission claims, of other aid instruments, such as Regulation No 1535/2007,⁶⁵ which Poland could have used to offset certain expenses incurred by farmers. These are actually subsidies which are not specifically designed to pursue the aims set out in the contested decision. In any event, as the Council emphasises in relation to the latter instruments, the scheme approved in the contested decision is designed to promote investment in the purchase of agricultural land and therefore functions on a different level from those instruments.

98. Finally, the Commission contends that the extension in time of the approved measures, as well as the extension over time of their effects (involving the financing of long-term loans), means that such measures are disproportionate.

63 — To that effect, see also the Opinion of Advocate General Cosmas in Case C-122/94, in particular point 85.

64 — Council Regulation (EC) No 1698/2005 of 20 September 2005 on support for rural development by the European Agricultural Fund for Rural Development (EAFRD) (OJ 2005 L 277, p. 1.).

65 — Commission Regulation (EC) No 1535/2007 of 20 December 2007 on the application of Articles 87 and 88 of the EC Treaty to *de minimis* aid in the sector of agricultural production (OJ 2007 L 337, p. 35).

99. It follows, in my view, from the exceptional nature of the Council's competence under the third subparagraph of Article 88(2) EC that the derogation granted under that provision must be limited in time and granted only for the period strictly necessary to remedy the circumstances invoked as grounds for the decision.⁶⁶ This means that when a decision under the third subparagraph of Article 88(2) EC concerns schemes designed to operate over a relatively long period, as in the present case, it is, in my view, incumbent on the Council to specify the reasons why it considers this necessary in the light of the circumstances cited in support of the declaration of compatibility. In this case, while it is true that the letters sent by the Polish authorities to the Council on 12 June 2009 and 28 September 2009, together with the contested decision, provide only scant indication as to the reasons why it was deemed necessary to authorise the scheme in question for a four-year period, those reasons can be deduced from the context in which the contested decision was taken and from the nature of the measures authorised, the problems that they were intended to help resolve and the objectives pursued. The Council, moreover, provided additional information in its written submissions.

100. As to the substance of the criticism raised by the Commission, this is, in my view, based essentially on the finding that the duration of the derogation granted in the contested decision matched the period of application of the 2007-2013 Agricultural Guidelines, which, according to the Commission, reveals that the Council's choice corresponds more to a desire to paralyse the application of those guidelines than to limit the derogation to the extent strictly necessary for rectifying the imbalances found to exist. While taking note of that temporal convergence, I consider that, given the long-term objectives that the decision is intended to pursue and the repercussions of the economic and financial crisis, which are also likely to be protracted and which are cited as exceptional circumstances in support of that decision, the Commission has failed to show that, by authorising the scheme in question for the period from 1 January 2010 to 31 December 2013, the Council manifestly exceeded the limits of the discretionary power that it enjoys in the exercise of its competence pursuant to the third subparagraph of Article 88(2) EC.

101. On the basis of the foregoing considerations, I consider that the fourth plea in the application must be rejected.

V – Conclusion

102. For the reasons set out in points 40 to 79 above, I propose that the Court should:

- uphold the second claim under the first plea, alleging lack of competence on the part of the Council;
- annul the contested decision;
- order the Council to pay the costs; and
- order the Member States which have intervened in the proceedings to bear their own respective costs.

⁶⁶ — To that effect, see the judgment in Case C-122/94 *Commission v Council*, paragraph 25.