



## Reports of Cases

OPINION OF ADVOCATE GENERAL  
MENGOZZI  
delivered on 17 January 2013<sup>1</sup>

**Case C-121/10**

**European Commission**

**v**

**Council of the European Union**

(State aid — Competence of the Council — Third subparagraph of Article 108(2) TFEU — Existing aid schemes — Proposal for appropriate measures — Effects — Regulation No 659/1999 — Aid for investment in the purchase of agricultural land in Hungary)

1. By the action which forms the subject-matter of the present proceedings, the Commission claims that the Court should annul Council Decision 2009/1017/EU of 22 December 2009 on the granting of State aid by the authorities of the Republic of Hungary for the purchase of agricultural land between 1 January 2010 and 31 December 2013 (the ‘contested decision’).<sup>2</sup>
2. By means of three other applications lodged in parallel, the Commission has contested three other Council decisions relating to aid of the same type granted by the Republic of Lithuania (Case C-111/10), the Republic of Poland (Case C-117/10) and the Republic of Latvia (Case C-118/10).
3. All of the actions raise the same delicate question: does a proposal for appropriate measures drawn up by the Commission in the context of the constant review of aid schemes existing in the Member States carried out in accordance with Article 108(1) TFEU (or Article 88(1) EC as far as Case C-117/10 is concerned) constitute a final position adopted by that institution on the compatibility of the scheme in question with the common market such as to prevent the Council from exercising the power bestowed on it by the third subparagraph of Article 108(2) TFEU (or by the third subparagraph of Article 88(2) EC) to authorise aid in derogation from Article 107 TFEU (or from Article 87 EC) and from other applicable provisions where justified by exceptional circumstances?

### **I – Legislative background**

4. Under Article 108(1) TFEU:

‘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 internal market.’

<sup>1</sup> — Original language: Italian.

<sup>2</sup> — OJ 2009 L 348, p. 55.

5. The third and fourth subparagraphs of Article 108(2) TFEU read 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 107 or from the regulations provided for in Article 109, 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.’

6. For a description of the relevant provisions of Annex IV, Chapter 4, to the Act of Accession of Hungary to the European Union (the ‘2003 Act of Accession’),<sup>3</sup> of Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 93 of the EC Treaty,<sup>4</sup> of the Community guidelines for State aid in the agriculture sector (the ‘2000 Agricultural Guidelines’),<sup>5</sup> and of the Community guidelines for State aid in the agriculture and forestry sector 2007 to 2013 (the ‘2007-2013 Agricultural Guidelines’),<sup>6</sup> I refer the Court to points 5 to 16 of the Opinion which I have delivered today in Case C-117/10, given that the legislative background of the present case essentially corresponds to that of Case C-117/10.

7. In a communication published in the Official Journal of 15 March 2008,<sup>7</sup> the Commission took note, pursuant to Article 19(1) of Regulation No 659/1999, of the ‘explicit and unconditional agreement’ of Hungary to the proposal for appropriate measures set out in point 196 of the 2007-2013 Agricultural Guidelines, which the Hungarian authorities notified to the Commission in writing on 7 February 2007.

## II – Background to the dispute and the contested decision

8. Aid for the purchase of agricultural land was established in Hungary prior to accession to the European Union. The aid was granted under two separate schemes. The first provided for a reduction in interest on loans and a State guarantee for the development of farms, while the second, established in 1999, consisted of direct grants for the consolidation of farm property. Both schemes were notified to the Commission in accordance with the procedure laid down in Point 4 of Chapter 4 of Annex IV to the 2003 Treaty of Accession.<sup>8</sup>

9. On 27 November 2006 the Hungarian authorities notified to the Commission two aid schemes entitled respectively ‘Aid for land purchase in form of subsidised loan’ and ‘Aid for land consolidation’, stating their intention to bring the existing schemes into compliance with the rules on State aid and requesting that they be authorised up to 31 December 2009. The first aid scheme, which no longer carried a State guarantee, was granted for the purchase of agricultural land with a minimum area of 1 hectare and a maximum of 300 hectares. The beneficiaries could obtain subsidised loans for a minimum of HUF 1 million and a maximum of HUF 75 million and for a term of between 5 and 20 years. The reduction in interest was equivalent to 50% of the average yield on 5- and 10-year

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 at p. 798).

4 — OJ 1999 L 83, p. 1.

5 — OJ 2000 C 28, p. 2.

6 — OJ 2006 C 319, p. 1.

7 — OJ 2008 C 70, p. 11.

8 — OJ 2005 C 147, p. 2.

Hungarian Government bonds, increased by 1.75%. The aid under the second scheme, which could not be combined with that granted under the first, was intended to allow farms to expand by purchasing land in the same or adjacent parcels. The aid amounted to up to 20% of the purchase price of the land, subject to a maximum of HUF 3 million.

10. On 22 December 2006 the Commission decided not to raise objections to the two notified schemes (the ‘decisions of 22 December 2006’).<sup>9</sup> In those decisions it reminded the Hungarian authorities of the adoption, on 6 December 2006, of the 2007-2013 Agricultural Guidelines and the proposal for appropriate measures set out in point 196 thereof.

11. By letter of 30 May 2005, the Commission invited the Member States to submit proposals for simplifying the rules on aid in the agricultural sector. A new draft set of guidelines was examined at the meetings of the working group on competitive conditions in agriculture on 23 May 2006, 23 June 2006 and 25 October 2006. At those meetings Hungary asked the Commission to retain the possibility of granting aid for investment in the purchase of agricultural land and to increase the limit laid down in Regulation No 1857/2006 from 10% to 40-50%. That request was reiterated in a letter of 3 November 2006.

12. By letter of 4 November 2009 to the Council, the Hungarian authorities requested that aid for the purchase of agricultural land in Hungary be authorised on an exceptional basis pursuant to the third subparagraph of Article 88(2) EC. A more detailed request in the same vein was submitted on 27 November 2009. On 22 December 2009 the Council adopted the contested decision unanimously (with eight delegations abstaining). Article 1 of that decision states:

‘Exceptional State aid by the Hungarian authorities in the form of interest subsidies and direct grants for the purchase of agricultural land, amounting to a maximum of HUF 4 000 million and allocated between 1 January 2010 and 31 December 2013, shall be considered to be compatible with the internal market’.

13. The aid declared to be compatible is described in the following terms in recital 6 in the preamble of the contested decision:

‘The State aid to be granted amounts to a total of HUF 4 000 million and should benefit approximately 5 000 agricultural producers. It should take the form of:

- an interest subsidy, up to a total of HUF 2 000 million, for loans to private farmers meeting criteria relating to registration, vocational qualification, the fulfilment of good agricultural practices and the requirements of a viable holding, allowing them to take out favourable loans to purchase agricultural land up to an overall farm size limit of 300 hectares. The interest subsidy is operated as a mortgage loan for a maximum amount of HUF 75 million and for a maximum period of 20 years, including a two-year grace period for capital reimbursement, and will be equal to 50% of the average yield of Hungarian government bonds with 5 or 10 years maturity, increased by 1.75%;
- a direct grant, up to a total of HUF 2 000 million, for the purchase of agricultural land, amounting to maximum 20% of the purchase price laid down in the sales contract, with a maximum amount of HUF 3 million per application and a maximum number of two applications annually per beneficiary. The grant may be allocated to a private person who, on the date of purchase, was involved in an agricultural activity as the owner of at least 0.5<sup>10</sup> hectares of plantations or 1

<sup>9</sup> — Decisions No N 795/2006 ‘Aid for land purchase in form of subsidised loan’ and No N 796/2006 ‘Aid for land consolidation’, OJ 2007 C 68, pp. 11 and 12. In the communication published in the OJ the cut-off date for the two schemes is given as to 31 December 2008; however, the text of the decisions does not confirm such a limitation, which is probably due to a material error. Moreover, it is common ground between the parties that the notification contained a request to authorise the schemes up to 31 December 2009.

<sup>10</sup> — On the basis of the Corrigendum published in OJ 2012 L 326, p. 55.

hectare of other agricultural land for a period of at least one year, on a parcel directly adjacent to the purchased land, and who undertakes not to sell the purchased land and to actually use it for the sole purpose of agricultural production during a period of at least five years from the date of payment of the aid. The aid may be granted only if the overall size of the existing and purchased land exceeds 210 Gold Crowns [measurement unit of the quality of agricultural land in Hungary], or 2 hectares in the case of agricultural land used as vineyard or orchard, and if it is not registered as land used for forestry.’

### III – Proceedings before the Court and forms of order sought by the parties

14. By act lodged at the Registry of the Court on 4 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.

15. The Commission claims that the Court should set aside the contested decision and order the Council to pay the costs. The Council asks the Court to dismiss the action as unfounded and to order the Commission to pay the costs. Hungary, Poland and Lithuania contend that the Court should dismiss the action as unfounded. Poland also supports the form of order sought by the Council seeking that the Commission be ordered to pay the costs.

### IV – The action

16. The Commission puts forward four pleas in law in support of its action, alleging respectively lack of competence on the part of the Council to adopt the contested decision, misuse of powers, breach of the principle of sincere cooperation between institutions and a manifest error of assessment.

#### A – *The first plea, relating to lack of competence on the part of the Council*

17. In its first plea, based on a lack of competence on the part of the Council, the Commission maintains essentially that the proposal for appropriate measures set out in point 196 of the 2007-2013 Agricultural Guidelines, together with acceptance of that proposal by Hungary, constitutes a ‘decision’ in which the Commission declared the aid schemes authorised in the contested decision for the entire period to which those guidelines applied, that is to say until 31 December 2013, to be incompatible with the common market. Recalling the judgments in Cases C-110/02<sup>11</sup> and C-399/03,<sup>12</sup> for an analysis of which I refer the Court to points 27 to 31 of the Opinion which I have delivered today in Case C-117/10, the Commission holds that, by virtue of the principle of pre-emption on which, on the basis of those judgments, the criterion of the distribution of the powers attributed to the Commission and the Council by Article 108(2) TFEU rests, the Council was not competent to adopt the contested decision in the matter at issue.

18. The exchange of views between the parties before the Court essentially raises three questions. The first concerns the status of the aid schemes authorised in the contested decision and calls for the Court to assess, in particular, whether, as the Commission claims, those schemes were identical to the ones that were the subject-matter of the proposal for appropriate measures set out in point 196 of the 2007-2013 Agricultural Guidelines or whether, on the other hand, as the Council maintains, they constitute new and different aid (see section 1 below). The second question relates to the effects of a

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

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

proposal for appropriate measures accepted by the Member State concerned (see section 2 below). Lastly, the third question calls for a definition of the scope of the proposal for appropriate measures set out in point 196 of the 2007-2013 Agricultural Guidelines and its acceptance by Hungary (see section 3 below).

#### 1. The aid schemes authorised in the contested decision

19. In my opinion, it is difficult to dispute that the aid schemes approved respectively by the Commission in the decisions of 22 December 2006 and by the Council in the contested decision are substantially the same. Moreover, in the letter of 27 November 2009 to the Council, Hungary expressly asked the latter to approve ‘the extension of two State aid schemes currently in operation’. In those circumstances, the arguments put forward by the Council to illustrate the differences between the schemes, primarily with the aim of maintaining that the schemes approved in the contested decision have a different duration, will benefit different persons and are based on new factual and legal elements, are, in my view, to be rejected for the reasons set out in points 53, 54 and 56 of the Opinion which I have delivered today in Case C-117/10, to which I refer. As to the Council’s assertion that implementation of the schemes authorised in the contested decision will require the adoption of a new legal framework, I note that in its statement in intervention the Hungarian Government makes no mention of any substantial legislative amendment with regard to the schemes, which in fact, on the basis of the statements of that Government, continue to be governed by ministerial decrees of 2007.<sup>13</sup>

20. Moreover, it is common ground that the aid schemes declared to be compatible with the internal market in the contested decision constitute ‘new aid’ within the meaning of Article 1(c) of Regulation 659/1999, since the schemes notified by Hungary in 2006 and authorised in the decisions of 22 December 2006 were intended to apply only until 31 December 2009. Although, as a matter of principle, it is evident from the case-law cited in point 17 of this Opinion that such a classification is not of itself decisive for excluding the competence of the Council under the third subparagraph of Article 108(2) TFEU (see, to that effect, point 50 of the Opinion delivered today in Case C-117/10), in the present case it is nevertheless of significant importance, as will be seen below. In that context it is sufficient to point out that the extension of the schemes approved by the Commission in 2006 beyond 31 December 2009 should have required a new notification and the adoption of a new position by the Commission on their compatibility, since those schemes did not comply with Regulation No 1857/2006.

#### 2. The effects of a proposal for appropriate measures that has been accepted by the Member State involved

21. For the reasons set out in points 62 to 72 of the Opinion delivered today in Case C-117/10, to which I refer, I take the view that a proposal for appropriate measures that has been accepted by the Member State to which it is addressed constitutes *the adoption of a final position* by the Commission on the compatibility of the aid scheme in question and has *binding legal effects similar to those of a decision*. In my view, such an act may therefore, on the basis of the case-law of the Court cited in point 17 of this Opinion, stand in the way of the adoption of decisions under the third subparagraph of Article 108(2) TFEU that conflict with it.

<sup>13</sup> — Decree of the Minister for Agriculture and Rural Development 99/2007 on aid for the purchase of agricultural land with a view to land consolidation (Magyar Közlöny 2007/112) and Decree of the Minister for Agriculture and Rural Development 17/2007 on the interest subsidy for land improvement loans (Magyar Közlöny 2007/34). See also the letter of 27 November 2009 from the Hungarian authorities to the Council.

22. That said, it is necessary to define the scope not only of the position on 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 but also of the obligations assumed by Hungary in accepting that proposal. Any finding that the Council was not competent to adopt the contested decision depends on the outcome of this dual examination.

3. The scope of the appropriate measures set out in point 196 of the 2007-2013 Agricultural Guidelines and their acceptance by Hungary

23. In point 74 of the Opinion delivered today in Case C-117/10 I observed that, although the 2007-2013 Agricultural Guidelines adopt a position to the effect that aid for investment in the purchase of agricultural land that does not conform with Article 4(8) of Regulation No 1857/2006 is incompatible as a matter of principle, that position cannot of itself be considered final because, on the basis of point 183 of those guidelines, the Commission is required to ascertain and declare that each individual aid or aid scheme to be established is incompatible using the verification procedure provided for in Article 108 TFEU. On that ground, I dismissed the Commission's argument – which is repeated in the action in the present proceedings – that the 2007-2013 Agricultural Guidelines 'declare' all aid for investment involving the purchase of agricultural land not conforming with the guidelines, and hence including such aid that has not yet been established, to be incompatible with the internal market from 31 December 2007 to 31 December 2013. As the Council observed – correctly, in my view – endorsing such an argument would mean granting the Commission regulatory powers in derogation from the procedures laid down in Article 108 TFEU.

24. In that context, by reason of the joint effect of the proposal for appropriate measures set out in point 196 of the 2007-2013 Agricultural Guidelines and the obligation assumed by the Member State involved, in the abovementioned Opinion I held that the position adopted by the Commission with regard to aid schemes for the purchase of agricultural land existing in that Member State was final and could preclude the competence of the Council under the third subparagraph of Article 108(2) EC (see points 75 and 76).

25. The circumstances of the present case are different, however, and do not permit the same conclusion to be drawn. Although Hungary notified in writing its 'explicit and unconditional'<sup>14</sup> agreement to the measures proposed by the Commission in point 196 of the 2007-2013 Agricultural Guidelines, thereby assuming, like the other Member States that notified their agreement, an obligation to alter its schemes for assisting the purchase of agricultural land by 31 December 2009, the schemes in question ceased to apply on that date. It follows that in real terms Hungary was not bound to make any alteration and that the obligation that it had assumed in fact lapsed at the very time when a failure to comply with that obligation would have begun.

26. In those circumstances the contested decision did not legitimise the breach of an agreement made under the third subparagraph of Article 108(1) TFEU, nor did it conflict with a final position adopted by the Commission, since, as noted above, that position relates solely to the schemes mentioned in point 196 of the 2007-2013 Agricultural Guidelines, that is to say, in the case of Hungary, to schemes intended to apply only up to 31 December 2009. It would be possible to reach a different conclusion only by asserting that Hungary accepted the 2007-2013 Agricultural Guidelines in their entirety, thereby assuming an obligation not to establish schemes to assist the purchase of agricultural land that did not comply with those guidelines for the entire period between 31 December 2009 and 31 December 2013. However, such an assertion, which appears in some passages of the Commission's written submissions, would not only be at odds with the scope of the agreement notified by Hungary to the Commission, which the notice published in the Official Journal of 15 March 2008 shows to

<sup>14</sup> — See the communication published in OJ C 70 of 15 March 2008.

have covered only the appropriate measures set out in point 196 of those guidelines, but would also authorise *de facto* the application of the mechanism provided for in Article 108(1) TFEU and governed by Articles 18 and 19 of Regulation No 659/1999 beyond the sphere for which it was designed, namely the constant review of existing aid schemes.

27. Finally, although there can be no doubt that, as the Commission rightly states, the 2007-2013 Agricultural Guidelines include a position adopted by the Commission to the effect that aid for investment in the purchase of agricultural land that does not meet the conditions laid down in Regulation No 1857/2006 is incompatible with the internal market, such a position cannot, however, be considered capable of impeding the competence of the Council under the third subparagraph of Article 108(2) TFEU without amending the case-law cited in point 17 of this Opinion, on the basis of which only a final position can have such an effect. While perhaps seeming excessively formalistic, the approach that I propose that the Court should follow in the present case therefore appears to be the only one which is compatible with the interpretation provided by the Court in that case-law with regard to the criteria for the distribution of the powers attributed to the Commission and to the Council by Article 108(2) TFEU.

#### 4. Conclusions on the competence of the Council to adopt the contested decision

28. On the basis of the foregoing considerations, I propose that the Court should reject the first plea of the Commission's action alleging lack of competence on the part of the Council.

#### *B – The second and third pleas, alleging respectively misuse of powers and breach of the obligation of sincere cooperation*

29. By its second plea the Commission alleges essentially that, by authorising the aid measures declared to be incompatible with the common market in point 196 of the 2007-2013 Agricultural Guidelines, the Council used the competence bestowed on it by the third subparagraph of Article 108(2) TFEU for purposes other than those laid down in the Treaty. That provision, in the Commission's view, permits the Council, in exceptional circumstances, to declare aid that the Commission would not be able to authorise to be compatible with the common market but it does not give it the power to invalidate the Commission's assessment as to the compatibility of an aid contained in an act which has binding legal effects.

30. In this regard I agree with the premise on which the plea in question is based, that is to say, that point 196 of the 2007-2013 Agricultural Guidelines, together with Hungary's acceptance of the appropriate measures set out therein, constitutes the Commission's final and binding position on the compatibility with the common market of measures that are essentially identical to those that are the subject of the contested decision. However, it is clear from the circumstances of the present case that that position, which related to schemes that had lapsed on 31 December 2009, along with Hungary's obligation to amend them, could not have effects beyond that date.

31. I therefore take the view that the second plea, alleging misuse of powers, must also be rejected.

32. By its third plea the Commission claims that, by adopting the contested decision, the Council relieved Hungary of the duty to cooperate in the constant review of existing aid schemes laid down in Article 108(1) TFEU and of the obligation which it had assumed by accepting the appropriate measures recommended by the Commission. It maintains that the Council had thereby upset the institutional balance established by the Treaty by interfering with the competence that the latter conferred on the Commission.

33. In my opinion, this plea must also be rejected. It is based on the premise that the contested decision interfered with the obligation which Hungary had assumed towards the Commission to amend the existing schemes of assistance for the purchase of land in order to bring them into compliance with the 2007-2013 Agricultural Guidelines. Since that obligation lapsed on 31 December 2009, the date on which the schemes in question expired, the inference of which the Commission complains is not demonstrated, irrespective of any other consideration.

*C – The fourth plea, alleging a manifest error of assessment as to the existence of exceptional circumstances and breach of the Treaty and of the general principles of European Union law*

34. In its fourth plea the Commission essentially raises two complaints, which I shall examine separately below. First, it claims that the contested decision is vitiated by a manifest error of assessment because the circumstances relied upon to justify the authorised aid measures are not exceptional. Secondly, the Commission maintains that the measures are disproportionate to the aims pursued, especially in view of the duration of the authorisation granted.

35. With regard in general to the concept of ‘exceptional circumstances’ within the meaning of the third subparagraph of Article 108(2) TFEU, the nature and extent of the Council’s discretionary power in exercising the competence bestowed upon it by that article and the limits of the Court’s review of decisions adopted under that provision permit me to refer the Court to the considerations set out in points 86 and 87 of the Opinion delivered today in Case C-117/10.

1. The first complaint, alleging a manifest error of assessment as to the existence of exceptional circumstances within the meaning of the third subparagraph of Article 108(2) TFEU

36. The Commission claims, first of all, that the contested decision wrongly presents certain *structural problems of the agricultural sector in Hungary* as exceptional circumstances. It refers in particular to the second recital in the preamble to that decision, which mentions the ‘unfavourable land use structure’ as a result of the land privatisation process which Hungary launched at the beginning of the 1990s and which has led ‘in many cases ... to fragmented or undivided joint ownership’. The Commission further maintains that the Council wrongly presented ‘*changes in market conditions*’ as exceptional circumstances and, in particular, the increase in production costs and low profitability of agricultural production, mentioned in the fifth recital in the preamble to the contested decision. Finally, as regards the factors mentioned in the third recital in the preamble to the contested decision – that is to say ‘farmers’ lack of capital’, ‘high interest rates on commercial loans for the purchase of agricultural land’ and ‘the tightening up of the banks’ criteria for the granting of loans to farmers’, as well as the risk that ‘speculative land purchase by economic operators not engaged in agricultural activity who have easier access to capital [might] increase’, mentioned in the fourth recital, the increase in the unemployment rate and the decline in Hungary’s gross domestic product between 2008 and 2009 in the agriculture, forestry and fisheries sector, mentioned in the fifth recital, the Commission observes that the first is structural in nature while the others, being consequences of the economic crisis, are not independent of the general situation raised in the third and fourth recitals in the preamble to the contested decision.

37. In this regard I would point out first of all that in my view the Commission is correct in asserting that the factor mentioned in the second recital in the preamble to the contested decision, namely the ‘unfavourable land use structure’, does not *of itself* constitute an exceptional circumstance within the meaning of the third subparagraph of Article 108(2) TFEU since it is not cyclical but structural, a fact that is not contested by either the Council or Hungary.

38. However, contrary to the applicant's claim, in the economy of the contested decision that factor – as well as the 'poor economic viability of agricultural holdings' in Hungary, also mentioned in the second recital – is not presented as an exceptional circumstance but rather, indeed, as a structural characteristic of the Hungarian agricultural economy, reference to which serves above all as a benchmark for assessing the economic and social repercussions of the recession, the main factor justifying the authorised measures according to the wording of the third and fifth recitals in the preamble to that decision. The same may be said of farmers' lack of capital, the structural nature of which the Commission merely raises without providing proof.

39. On the other hand, it is clear from the judgment in Case C-122/94 *Commission v Council* that, in the exercise of its powers under the third subparagraph of Article 108(2) TFEU, the Council may base its decisions on the *persistence* or *worsening* of structural problems in a particular sector of the economy for the purpose of assessing the effects of an unfavourable cyclical situation on that sector.<sup>15</sup>

40. As regards the Commission's argument that all Member States were affected by the rise in unemployment, the increase in input costs and the fall in profitability in the agricultural sector as well as by the economic crisis itself, I would point out that, on the basis of case-law, the fact that a particular situation may affect several Member States simultaneously or may involve various sectors of the economy does not mean that it may not nevertheless constitute a relevant circumstance for the purpose of applying the third subparagraph of Article 108(2) TFEU,<sup>16</sup> even taking account of the particular consequences that it may have produced in a given Member State. Moreover, the Commission does not rule out the possibility that a general economic crisis, which is the main factor on which the Council based the contested decision, may, in abstract terms, constitute an exceptional circumstance.

41. On the basis of the foregoing, I consider that the Commission has not demonstrated that a manifest error of assessment was made as to the existence of circumstances justifying the adoption of a decision under the third subparagraph of Article 108(2) TFEU.

## 2. The inadequate and disproportionate nature of the measures authorised in the contested decision

42. The Commission states first of all that the measures to support the purchase of land do not resolve the problem raised in the second recital in the preamble to the contested decision, that is to say the 'unfavourable land use structure'. It asserts that, in their letter of 27 November 2009 to the Council, the Hungarian authorities themselves expressed doubts about the effectiveness of the measures in that regard and that the data annexed to that letter show that the size of farms did not change significantly between 2005 and 2007, despite the aid granted under the two schemes implemented in Hungary. In this connection I observe first that, although the 'fragmented or undivided joined ownership of agricultural land' is a structural factor which the Council used in the contested decision to describe the situation of the agricultural sector in Hungary, improvement of the structure of the sector is not stated expressly as an independent objective of that decision. In any case, even if, in the light of the data on which the Commission bases its argument, it were held that only a small increase in the average size of Hungarian farms can be attributed to the operation of the schemes to support purchases of agricultural land established in Hungary, this would not, in my view, be sufficient of itself to demonstrate that the Council *manifestly* overstepped the limits of its power of assessment by maintaining that the measures approved in the contested decision were appropriate to pursue, in particular, the objectives mentioned in the fifth recital in the preamble to that decision, that is to say to 'help save the livelihood of numerous farming families in the current crisis by creating the enabling conditions for reducing production costs and improving profitability of agricultural production, thus halting the increase in poverty and unemployment in rural areas'. Equally, I do not hold that the mere

15 — Case C-122/94 *Commission v Council* [1996] ECR I-881, paragraph 21.

16 — A similar argument put forward by the Commission was dismissed at paragraph 22, in Case C-122/94 *Commission v Council*.

fact that factors such as high interest rates on commercial loans for the purchase of agricultural land and the tightening up of the criteria applied by banks for the granting of loans to farmers were noted when the application of the schemes to support investment in the purchase of agricultural land was authorised on the basis of the transitional scheme provided for in the 2007-2013 Agricultural Guidelines is sufficient, in the absence of proof, to demonstrate that those schemes were manifestly inadequate for pursuing the objective of improving farmers' prospects of access to such loans.

43. Secondly, the Commission states that in 2009, in order to deal with the consequences of the crisis, it adopted a specific communication setting out a temporary Community framework for State aid measures to support access to finance in the current financial and economic crisis<sup>17</sup> (the 'Temporary Community Framework'), on the basis of which, as a result of subsequent amendments,<sup>18</sup> various types of measure by Member States to assist farms were authorised, including, in particular, temporary aid amounting to a maximum of EUR 15 000 up to the end of 2010. The Commission considers that the Council infringed the principle of proportionality by not taking account of such aid, which is specifically intended to remedy problems connected with the crisis and, in particular, by failing to examine whether the aid in question had helped to remedy such problems. Furthermore, the Commission maintains that the Council should have taken account of other measures adopted by the Commission or by the Council itself aimed at remedying the problems indicated in the contested decision or capable of being used by Hungary for that purpose. Lastly, as regards the risk, mentioned in the fourth recital in the preamble to the contested decision, that speculative land purchase by economic operators not engaged in agricultural activity who have easier access to capital might increase, the Commission claims that the Council failed to take into account the provisions of the 2003 Act of Accession which granted Hungary a transitional period of seven years, with the possibility of a further three-year extension, during which measures restricting the purchase of agricultural land by non-residents were authorised.<sup>19</sup>

44. The Commission's arguments make it necessary to assess whether, and within what limits, the Council is bound to take account of measures already adopted at European Union level to remedy the situations relied upon by the applicant Member State as exceptional circumstances. In this regard, basing my assessment on the considerations set out in point 96 of the Opinion delivered today in Case C-117/10, to which I refer, I hold that the Council has a duty, when carrying out an assessment under the third subparagraph of Article 108(2) TFEU, at least to take into consideration existing measures aimed *specifically* at overcoming situations capable of justifying the authorisation of the aid at issue,<sup>20</sup> without this imposing a duty on the Council to examine, or indicate in its decision, the set of legal rules governing the matter in question.

45. In the present case it is not evident from the contested decision that the Council examined whether Hungary had used the opportunities offered by the Temporary Community Framework and what effects any measures taken on that basis had produced.<sup>21</sup> However, I note two points with regard to the small direct subsidy to which the Commission refers; first, while its purpose was to mitigate the economic impact of the crisis, it was not specifically intended to encourage investment to improve the structure of farms, and secondly it could be granted only until 31 December 2010, as in fact Hungary pointed out in the letter of 27 November 2009 to the Council. In those circumstances, the Council was, in my opinion, right to take the view that a more targeted measure with a longer timeframe could serve to pursue, possibly in conjunction with other instruments, the objective of palliating the consequences of the financial crisis, and in particular the difficulty for farmers to gain access to credit,

17 — OJ 2009 C 83, p. 1.

18 — 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).

19 — See Annex X to the 2003 Act of Accession, point 3, 'Free movement of capital', No 2.

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

21 — I note, however, that in the letter of 27 November 2009 to the Council the Hungarian authorities set out the reasons why they considered that the Temporary Community Framework was inadequate to deal with the difficulties created by the economic and financial crisis.

and could better address the structural problems of the Hungarian agricultural economy. Equally, although in my opinion the Council had a duty to take into consideration, in the contested decision, the actions to combat rural unemployment provided for under the Community's rural development policy in accordance with Regulation No 1698/2005,<sup>22</sup> that omission is not, in my opinion, sufficient of itself to call into question the lawfulness of that decision, given that the decision is based on a multitude of reasons and on an overall assessment of the state of the sector in question in a particular economic situation. It does not appear to me, however, that the Council had the specific obligation alleged by the Commission to take account of Regulation No 1535/2007,<sup>23</sup> as that regulation is not aimed specifically at pursuing the objectives stated in the decision. In any case, the scheme approved in the contested decision is aimed at encouraging investment in the purchase of agricultural land, and therefore operates at a level different to that of that regulation. As to the provisions of the 2003 Act of Accession authorising Hungary to maintain restrictions on the purchase of agricultural land by non-residents for a transitional period, the Council notes correctly that those provisions cannot prevent speculation by Hungarian nationals or by nationals of other Member States of the European Union who are established in Hungary.

46. Lastly, the Commission states that the extension of the period of validity of the approved measures and the lengthening of the duration of their effects (since they concern the financing of long-term loans) make the measures disproportionate of themselves.

47. It follows, in my opinion, from the exceptional nature of the Council's competence under the third subparagraph of Article 108(2) TFEU that the derogation granted under that provision should be limited in duration and granted only for the period strictly necessary for remedying the circumstances adduced as the reason for the decision.<sup>24</sup> This means that where a decision under the third subparagraph of Article 108(2) TFEU concerns aid schemes to be applied for a relatively long period, as in the case in point, the Council is under an obligation to indicate why it considers this to be necessary in the light of the circumstances adduced to support the declaration of compatibility. In the present case, although the letter of 27 November 2009 from the Hungarian authorities to the Council and the contested decision provide only scant indication as to the reasons why it was deemed necessary to authorise the aid in question for a period of four years, 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. Moreover, the Council provided additional information in its written submissions.

48. As to the substance of the criticism raised by the Commission, I note that this is 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 applicant, reveals that the Council's decision accords more with a desire to paralyse the application of those guidelines than to limit the derogation to the extent strictly necessary for rectifying the situation of imbalance found to exist. While taking note of that temporal match, 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 to justify the decision, the Commission has failed to show that, by authorising the aid 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 108(2) TFEU.

22 — 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).

23 — 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).

24 — To that effect, see Case C-122/94 *Commission v Council*, paragraph 25.

**V – Conclusion**

49. On the basis of the foregoing considerations, I propose that the Court should:

- dismiss the action;
- order the Commission to pay the costs; and
- order the intervening Member States to bear their own respective costs.