



## Reports of Cases

### JUDGMENT OF THE COURT (Grand Chamber)

4 December 2013 \*

(Action for annulment — State aid — Article 108(1) and (2) TFEU — Aid granted by the Republic of Lithuania for the purchase of agricultural land — Competence of the Council of the European Union — Existing aid scheme — Appropriate measures — Two indissolubly connected aid schemes — Change of circumstances — Exceptional circumstances — Economic crisis — Manifest error of assessment — Principle of proportionality)

In Case C-111/10,

ACTION for annulment under Article 263 TFEU, brought on 26 February 2010,

**European Commission**, represented by V. Di Bucci, L. Flynn, B. Stromsky and A. Stobiecka-Kuik, acting as Agents, with an address for service in Luxembourg,

applicant,

v

**Council of the European Union**, represented by É. Sitbon and F. Florindo Gijón, acting as Agents,

defendant,

supported by:

**Republic of Lithuania**, represented by D. Kriauciūnas and L. Liubertaitė, acting as Agents,

**Hungary**, represented by G. Koós, M. Fehér and K. Szíjjártó, acting as Agents,

**Republic of Poland**, represented by M. Szpunar, acting as Agent,

interveners,

THE COURT (Grand Chamber),

composed of V. Skouris, President, K. Lenaerts, Vice-President, A. Tizzano, R. Silva de Lapuerta, L. Bay Larsen (Rapporteur), E. Juhász, A. Borg Barthet, C.G. Fernlund, J.L. da Cruz Vilaça, Presidents of Chambers, A. Rosas, G. Arestis, J. Malenovský, A. Prechal, E. Jarašiūnas and C. Vajda, Judges,

Advocate General: P. Mengozzi,

Registrar: A. Calot Escobar,

\* Language of the case: English.

having regard to the written procedure,

after hearing the Opinion of the Advocate General at the sitting on 17 January 2013,

gives the following

### **Judgment**

- 1 By its action, the European Commission requests the Court to annul Council Decision 2009/983/EU of 16 December 2009 on the granting of a State aid by the authorities of the Republic of Lithuania for the purchase of agricultural land between 1 January 2010 and 31 December 2013 (OJ 2009 L 338, p. 93) ('the contested decision').

### **Legal context**

*Regulation (EC) No 659/1999*

- 2 Article 1 of Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article [108 TFEU] (OJ 1999 L 83, p. 1) provides:

'For the purpose of this Regulation:

...

- (b) "existing aid" shall mean:

...

- (ii) authorised aid, that is to say, aid schemes and individual aid which have been authorised by the Commission or by the Council [of the European Union];

...

- (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;

...'

- 3 Article 17(2) of Regulation No 659/1999 provides:

'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. ...'

- 4 Article 18 of Regulation No 659/1999 provides:

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

- 5 Under Article 19(1) of Regulation No 659/1999:

‘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.’

*Regulation (EC) No 1857/2006*

- 6 Article 4 of Commission Regulation (EC) No 1857/2006 of 15 December 2006 on the application of Articles [107 TFEU] and [108 TFEU] 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) provides:

‘1. Aid for investments in agricultural holdings within the [European Union] for primary production of agricultural products, shall be compatible with the common market within the meaning of Article [107(3)(c) TFEU] and shall be exempt from the notification requirement of [Article 108(3) TFEU] 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.

...’

*Regulation (EC) No 1535/2007*

- 7 Article 3(1) of Commission Regulation (EC) No 1535/2007 of 20 December 2007 on the application of Articles [107 TFEU] and [108 TFEU] to *de minimis* aid in the sector of agricultural production (OJ 2007 L 337, p. 35) provides:

‘Aid measures shall be deemed not to meet all the criteria of Article [107(1) TFEU] and shall therefore not fall under the notification requirement of Article [108(3) TFEU] where they fulfil the conditions laid down in paragraphs 2 to 7 of this Article.’

*The agricultural guidelines*

- 8 Point 29 of the Community guidelines for State aid in the agriculture and forestry sector 2007 to 2013 (OJ 2006 C 319, p. 1) (‘the agricultural guidelines’) states:

‘Aid for investment in agricultural holdings shall be declared compatible with Article [107(3)(c) TFEU] if it fulfils all the conditions of Article 4 of Regulation (EC) No 1857/2006. ...’

- 9 Under the heading ‘Proposals for appropriate measures’, point 196 of the agricultural guidelines states:

‘In accordance with Article [108(1) TFEU] 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.’

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

- 11 Point 198 of the agricultural guidelines is worded as follows:

‘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.’

*The temporary framework*

- 12 Point 4.2.2 of the temporary Community framework for State aid measures to support access to finance in the current financial and economic crisis, laid down in the Commission Communication of 17 December 2008 (OJ 2009 C 83, p. 1), as amended by the Commission Communication published in the *Official Journal of the European Union* of 31 October 2009 (OJ 2009 C 261, p. 2) (‘the temporary framework’) stipulates that, in view of the economic situation, it is considered necessary to temporarily allow the granting of a limited amount of aid under certain conditions.
- 13 Point 4.2.2(h) of the temporary framework stipulates, inter alia, that ‘[w]here the aid is granted to undertakings active in the primary production of agricultural products ..., the cash grant (or gross grant equivalent) does not exceed EUR 15 000 per undertaking’.
- 14 Point 7 of the temporary framework states, inter alia, that ‘[t]his Communication ... will not be applied after 31 December 2010’.

**Background to the dispute**

- 15 By letter of 25 February 2005, the Republic of Lithuania notified the Commission, on the basis of Article 88(3) EC, of an aid measure entitled ‘Support for acquisition of land’. That measure was intended to replace an existing aid scheme and was to apply until 2010. It took the form of investment aid for farmers who intended to acquire State-owned agricultural land.
- 16 Considering that aid to be compatible with Article 87(3)(c) EC, the Commission, by decision of 22 November 2006 (OJ 2006 C 317, p. 6) (‘the decision of 22 November 2006’), decided not to raise any objection. That decision stipulated that the duration of the aid scheme concerned was to be from the date of approval ‘till 2010’.
- 17 In paragraph 196 of the agricultural guidelines, the Commission proposed that Member States amend their existing aid schemes for the purchase of agricultural land to conform to those guidelines by 31 December 2009 at the latest.
- 18 On 22 March 2007, the Republic of Lithuania communicated its acceptance of the proposals for appropriate measures contained in point 196 of those guidelines. As provided for in Article 19(1) of Regulation No 659/1999, the Commission recorded that agreement by a communication published in the *Official Journal of the European Union* (OJ 2008 C 70, p. 11).
- 19 On 23 November 2009, the Republic of Lithuania requested the Council, on the basis of Article 88(2) EC, to prolong the existing aid scheme for the purchase of agricultural land until 31 December 2013.

20 By the contested decision, the Council agreed to that request on the basis of the third subparagraph of Article 108(2) TFEU. Article 1 of that decision is worded as follows:

‘Exceptional State aid by the Lithuanian authorities for loans for the purchase of State-owned agricultural land, amounting to a maximum of LTL [Lithuanian litai] 55 million and granted between 1 January 2010 and 31 December 2013, shall be considered to be compatible with the internal market.’

21 The Council’s reasoning for the decision refers, inter alia, in recitals 2 to 4 in the preamble thereto, to the unfavourable area structure of Lithuanian agricultural holdings, low agricultural incomes, the very significant decline in the price of agricultural products brought about by the economic and financial crisis and the high level of interest rates for loans for the purchase of agricultural land. It also referred to the fact that Lithuanian farmers have little capital of their own.

22 According to Articles 9 and 10 of the contested decision:

‘(9) The Commission has not at this stage initiated any procedure nor taken a position on the nature and compatibility of the aid.

(10) Exceptional circumstances therefore exist, making it possible to consider such aid, by way of derogation and to the extent strictly necessary to finish land reform successfully and to improve the structure of farms and the efficiency of farming in Lithuania, to be compatible with the internal market.’

### **Procedure before the Court and the form of order sought by the parties**

23 The Commission claims that the Court of Justice should:

- annul the contested decision; and
- order the Council to pay the costs.

24 The Council contends that the Court should:

- dismiss the application as unfounded; and
- order the Commission to pay the costs.

25 By order of the President of the Court of 9 August 2010, the Republic of Lithuania, Hungary and the Republic of Poland were given leave to intervene in support of the form of order sought by the Council.

### **The action**

26 The Commission relies on four pleas in law in support of its action, respectively alleging lack of competence of the Council, misuse of powers, breach of the obligation of sincere cooperation, manifest error of assessment as to the presence of exceptional circumstances and breach of the principle of proportionality.

*The first plea in law, alleging that the Council lacked competence*

Arguments of the parties

- 27 By its first plea in law, the Commission claims that the Council that the Council lacked the competence to adopt the contested decision.
- 28 According to the Commission, it is settled case-law that the power of the Council under the third subparagraph of Article 108(2) TFEU is exceptional in character and that the Council does not therefore enjoy the competence to contradict a Commission decision finding an aid to be incompatible with the internal market or to attempt to circumvent such a decision.
- 29 The Commission takes the view that it adopted, in point 196 of the agricultural guidelines, a final position on the compatibility with the internal market of the aid scheme introduced by the Republic of Lithuania for the purchase of agricultural land. The fact that that position was adopted in the form of agricultural guidelines is of no consequence since the judicature of the European Union has held that a Member State which accepts guidelines is bound to apply them.
- 30 In the present case, the Republic of Lithuania notified its acceptance of the proposals for appropriate measures contained in point 196 of the agricultural guidelines. It was therefore bound, in the Commission's view, to end the aforementioned aid schemes by 31 December 2009 at the latest and not to reintroduce them before 31 December 2013. Consequently, by authorising that same aid scheme as from 1 January 2010, the Council thwarted the effectiveness of the Commission decision, thereby exceeding its competence.
- 31 The Council submits, on the contrary, that the aid scheme authorised by the contested decision constitutes a new aid scheme, distinct from that approved by the Commission by the decision of 22 November 2006, *inter alia* because it is based on new elements of law and of fact. The Commission never therefore assessed the compatibility of the aid scheme authorised by the contested decision with the internal market.
- 32 The Council adds that point 196 of the agricultural guidelines is not applicable to the aid scheme approved by it, since the appropriate measures provided for under Article 108(1) TFEU apply only to existing aid.
- 33 In its reply, the Commission submits that the differences referred to by the Council between the existing aid scheme and the aid scheme authorised by the contested decision are not relevant because those schemes are so indissolubly linked that it is largely artificial to claim to make a distinction between those schemes for the purposes of applying Article 108(2) TFEU.
- 34 The Republic of Lithuania, Hungary and the Republic of Poland share, in essence, the analysis of the Council.

Findings of the Court

- 35 In order to assess whether the Commission's first plea in law in support of its action is well founded, it must be established whether the Council had the power, under the third subparagraph of Article 108(2) TFEU, to hold compatible with the internal market the aid scheme covered by the contested decision, when the Republic of Lithuania had accepted the appropriate measures proposed under point 196 of the agricultural guidelines.



- 36 Under the third subparagraph of Article 108(2) TFEU, the Council, on application by a Member State, may, acting unanimously, decide that aid which that State is granting or intends to grant is to be considered to be compatible with the internal market, in derogation from the provisions of Article 107 TFEU or from the regulations provided for in Article 109 TFEU, if such a decision is justified by exceptional circumstances.
- 37 A Member State may therefore, in well-defined cases, notify an aid not to the Commission, which would have ruled within the framework set out in Article 108(3) TFEU, but to the Council, which will rule within the framework set out in the third subparagraph of Article 108(2) TFEU, in derogation from the provisions of Article 107 TFEU or from the regulations provided for in Article 109 TFEU.
- 38 The Court has already had the opportunity to clarify certain aspects of the interpretation of that provision.
- 39 Thus, it first held, after recalling the central role which the FEU Treaty reserves for the Commission in determining whether aid is incompatible with the internal market, that the third subparagraph of Article 108(2) TFEU covers an exceptional and specific case, meaning that the power conferred upon the Council by that provision is clearly exceptional in character (see, to that effect, Case C-110/02 *Commission v Council* [2004] ECR I-6333, paragraphs 29 to 31) and, accordingly, that the third subparagraph of Article 108(2) TFEU must necessarily be interpreted strictly (see, by analogy, Case C-510/08 *Mattner* [2010] ECR I-3553, paragraph 32, and Case C-419/11 *Česká spořitelna* [2013] ECR, paragraph 26).
- 40 Second, with regard to the provisions in the third and fourth subparagraphs of Article 108(2) TFEU, whereby, on the one hand, an application to the Council by a Member State suspends the examination in progress at the Commission for a period of three months and, on the other, in the absence of a decision by the Council within that period, the Commission is to give a ruling, the Court has held that those provisions must be interpreted as meaning that, where that period has expired, the Council is no longer competent to adopt a decision under that third subparagraph in relation to the aid concerned (see, to that effect, Case C-110/02 *Commission v Council*, paragraph 32).
- 41 The Court has held, in that regard, that the enactment of a temporal limitation of that kind on the Council's competence also shows that, if the Member State concerned has not made an application to the Council under the third subparagraph of Article 108(2) TFEU before the Commission declares the aid in question incompatible with the internal market and thereby closes the procedure referred to in the first subparagraph of Article 108(2) TFEU, the Council is no longer authorised to exercise the exceptional power conferred upon it by the third subparagraph of Article 108(2) TFEU in order to declare such aid compatible with the internal market (Case C-110/02 *Commission v Council*, paragraph 33, and Case C-399/03 *Commission v Council* [2006] ECR I-5629, paragraph 24).
- 42 The Court has observed, in that context, that that interpretation makes it possible to avoid the taking of decisions the operative parts of which might prove contradictory and contributes accordingly to legal certainty by preserving 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 (see, to that effect, Case C-110/02 *Commission v Council*, paragraphs 32 and 35, and Case C-399/03 *Commission v Council*, paragraph 25).
- 43 Finally, the Court has also ruled on whether the fact that the Council does not have the power to rule on the compatibility with the internal market of an aid on which the Commission has already definitively ruled implies that the Council also lacks the power to rule on an aid measure whose aim is to allocate to beneficiaries of the illegal aid previously declared incompatible by a Commission decision an amount designed to compensate for the repayments which those beneficiaries are obliged to make pursuant to that decision.

- 44 In that regard, the Court has consistently held that to hold that a Member State may grant to beneficiaries of such unlawful aid new aid in an amount equivalent to that of the unlawful aid, intended to neutralise the impact of the repayments which the beneficiaries are obliged to make pursuant to that decision, would clearly amount to thwarting the effectiveness of decisions taken by the Commission under Articles 107 TFEU and 108 TFEU (Case C-110/02 *Commission v Council*, paragraph 43, and Case C-399/03 *Commission v Council*, paragraph 27).
- 45 The Court has thus held that the Council, which may not counter a decision of the Commission finding aid incompatible with the internal market by itself declaring that aid compatible with that market, is also not permitted to thwart the effectiveness of such a decision by declaring compatible with the internal market, in accordance with the third subparagraph of Article 108(2) TFEU, an aid designed to compensate the beneficiaries of the unlawful aid declared incompatible with the internal market for the repayments they are required to make pursuant to that decision (see, to that effect, Case C-110/02 *Commission v Council*, paragraphs 44 and 45, and Case C-399/03 *Commission v Council*, paragraph 28).
- 46 It follows from that case-law that, for the purposes of the application of Article 108(2) TFEU, the respective powers of the Council and the Commission are allocated in such a way that, first, the primary competence to act lies with the Commission, the Council having power to act only in exceptional circumstances. Second, the Council's competence, which enables it to derogate, in its decision, from certain Treaty provisions on State aid, must be exercised within a specific time frame. Third, as soon as the Commission or the Council has adopted a final ruling on the compatibility of the aid in question, the other of those two institutions may no longer adopt a contrary decision.
- 47 That interpretation seeks to maintain the coherence and effectiveness of European Union action, first by ruling out contradictory decisions and second by ensuring that a decision of one European Union institution which has become final cannot be contradicted by that of another institution outwith any time frame, including the period laid down in the sixth paragraph of Article 263 TFEU, and in breach of the principle of legal certainty.
- 48 The considerations underlying that interpretation also make clear that it does not matter whether the Council decision relates to an existing aid or to new aid. As is apparent from the Court's case-law, the effectiveness of a Commission decision is undermined not only where the Council adopts a decision declaring compatible with the internal market an aid on which the Commission has already ruled but also where the aid which is the subject of the Council decision aims to compensate the beneficiaries of the unlawful aid declared incompatible with the internal market for the repayments they are required to make pursuant to the decision of the Commission. In such circumstances, the second aid is so indissolubly linked to that previously found by the Commission to be incompatible with the internal market that it appears largely artificial to claim to make a distinction between those aids for the purposes of applying Article 108(2) TFEU (see, to that effect, Case C-110/02 *Commission v Council*, paragraphs 45 and 46).
- 49 In the present case, it must therefore be examined whether the aid declared compatible with the internal market by the Council must, irrespective of whether it is existing or new aid, be considered to be aid on which the Commission has already definitively ruled.
- 50 In that regard, according to settled case-law, the Commission may, in the exercise of the powers conferred on it by Articles 107 TFEU and 108 TFEU, adopt guidelines to indicate how it intends, under those articles, to exercise its discretion in regard to new aid or in regard to existing systems of aid (Case C-242/00 *Germany v Commission* [2002] ECR I-5603, paragraph 27).
- 51 When they are based on Article 108(1) TFEU, those guidelines constitute one element of the regular and periodic cooperation under which the Commission, in conjunction with the Member States, must keep under constant review existing systems of aid and propose to them any appropriate measures



required by the progressive development or by the functioning of the common market (see, to that effect, Case C-311/94 *IJssel-Vliet* [1996] ECR I-5023, paragraphs 36 and 37, and Case C-288/96 *Germany v Commission* [2000] ECR I-8237, paragraph 64). To the extent that those proposals for appropriate measures are accepted by a Member State, they are binding upon that State (see, to that effect, *IJssel-Vliet*, paragraphs 42 and 43, and Case C-288/96 *Germany v Commission*, paragraph 65), which must, as Article 19(1) of Regulation No 659/1999 states, implement them.

- 52 In the present case, on 22 March 2007, the Republic of Lithuania communicated its acceptance of the proposals for appropriate measures contained in point 196 of the agricultural guidelines.
- 53 Those appropriate measures consist, inter alia, in an amendment of the existing aid schemes for investments concerning land purchase in agricultural holdings in order to make those schemes conform to those guidelines by 31 December 2009 at the latest.
- 54 It follows that, in accordance with Article 108(1) TFEU, the appropriate measures proposed by the Commission in point 196 of the agricultural guidelines concern only existing aid schemes.
- 55 The scheme authorised by the contested decision is a new aid scheme.
- 56 Thus, the aid scheme referred to in paragraph 15 above could, under Article 1(b)(ii) of Regulation No 659/1999, be considered as an existing aid scheme only for the period during which it had been authorised by the decision of 22 November 2006, that is to say until 31 December 2009.
- 57 Thus, given that, according to Article 1(c) of Regulation No 659/1999, any aid scheme which is not an existing aid scheme is a new aid scheme and that the aid scheme authorised by the contested decision was applicable from 1 January 2010, the latter was necessarily a new aid scheme.
- 58 The fact that that scheme is simply an extension of the scheme which expired on 31 December 2009, assuming that be proved, is not decisive because the extension of an existing aid scheme creates a new aid which is distinct from the scheme which was extended (see, to that effect, Case C-138/09 *Todaro Nunziatina & C.* [2010] ECR I-4561, paragraphs 46 and 47).
- 59 The obligations on the Republic of Lithuania following its acceptance of the proposals for appropriate measures do not therefore relate to the scheme regarded as compatible with the internal market by the contested decision, which is a new aid scheme and which is not to be mistaken for an existing aid scheme covered by the appropriate measures accepted by that Member State.
- 60 The Council cannot however rely on the mere fact that the aid scheme is a new one in order to reassess a situation in respect of which the Commission has already made a final assessment, thereby contradicting that assessment. The Council does not therefore have power to decide that a new aid scheme must be regarded as compatible with the internal market where it is so indissolubly linked to an existing aid scheme that a Member State has undertaken to modify or abolish, in the framework of Article 108 (1) TFEU, that it appears largely artificial to claim to make a distinction between those two schemes for the purposes of applying Article 108(2) TFEU (see, by analogy, Case C-110/02 *Commission v Council*, paragraph 46).
- 61 However, that is not so in the instant case.
- 62 In that regard, a significant period of time elapsed between the Commission's assessment and that made by the Council, the contested decision having been adopted almost three years after the proposals for the appropriate measures in question.

- 63 In addition, that decision is specifically based on the occurrence of new circumstances, considered to be exceptional by the Council, which could not be taken into account by the Commission in its assessment of the compatibility with the internal market of the existing aid scheme for the purchase of agricultural land implemented by the Republic of Lithuania.
- 64 Thus, while the agricultural guidelines were adopted in 2006, the contested decision largely refers to the effects on Lithuanian agriculture in 2008 and 2009 of the economic and financial crisis. The Council refers inter alia to the very significant fall in the price of agricultural products which occurred in 2009 and the high level of interest rates for loans for the purchase of agricultural land recorded in 2008 and 2009.
- 65 The position adopted by the Commission, in support of its proposal for appropriate measures, in relation to the compatibility with the internal market of the aid scheme referred to in paragraph 15 of this judgment, could be based only on the assessment it made in the light of the economic data in its possession in 2006 of the consequences which the application of that scheme could have for the progressive development or the functioning of the internal market.
- 66 Owing to the substantial change in circumstances referred to in paragraph 64 above, the assessment by the Commission of that aid scheme cannot therefore be considered as prejudicing the assessment which would have been carried out of an aid scheme, containing similar measures, but which would have fallen to be implemented in economic circumstances radically different from those which the Commission took into account in its assessment. It follows that the compatibility with the internal market of the new aid scheme which was the subject of an application addressed to the Council by the Republic of Lithuania under the third subparagraph of Article 108(2) TFEU must be evaluated following an individual assessment distinct from that of the scheme referred to in paragraph 15 above, which takes into consideration the relevant economic circumstances at the time when the aid is granted (see, to that effect, Case C-261/89 *Italy v Commission* [1991] ECR I-4437, paragraph 21, and Case C-459/10 P *Freistaat Sachsen and Land Sachsen-Anhalt v Commission* [2011] ECR I-109, paragraph 48).
- 67 Thus, the situation at issue in the present case can be distinguished from that which the Court examined in its judgments in Cases C-110/02 *Commission v Council* and C-399/03 *Commission v Council*.
- 68 In contrast to the Council decisions annulled in those two judgments, the contested decision is, in the present case, indeed based on new factors resulting from a substantial change in circumstances which occurred between the time when the Commission examined the existing aid scheme applied in the Republic of Lithuania and the time when the Council assessed the new aid scheme which was the subject of the application that Member State had addressed to it.
- 69 Consequently, the factors which justified a finding that the Council lacked competence in the two judgments mentioned in paragraph 67 above are not present in this case.
- 70 Besides, recognition of the competence of the Council cannot justify circumvention of the appropriate measures accepted by the Member States.
- 71 First, the Council has power to authorise a new aid scheme similar to an existing aid scheme which a Member State was obliged to amend or eliminate, following acceptance of proposals for appropriate measures, only where, after those proposals, new circumstances have arisen.
- 72 Second, the power granted to the Council under the third subparagraph of Article 108(2) TFEU applies only within the limits indicated by that provision, namely where exceptional circumstances exist (see, to that effect, Case C-122/94 *Commission v Council* [1996] ECR I-881, paragraph 13).

- 73 Finally, with regard to the Commission's argument that the Council is not competent to authorise aid contrary to the policy set out in the agricultural guidelines, it should be observed that, of those guidelines, only the proposals for appropriate measures in point 196 which have been accepted by the Member States are capable of amounting to the adoption of a final position of the Commission on the compatibility of an aid scheme with the internal market.
- 74 Only those proposals for appropriate measures are submitted to the Member States for their approval, as point 197 of the agricultural guidelines makes clear, whereas the other stipulations of those guidelines are merely general policy rules to be followed by the Commission (see, to that effect, Case C-382/99 *Netherlands v Commission* [2002] ECR I-5163, paragraph 24 and the case-law cited), without binding the Member States. *A fortiori* they cannot bind the Council in so far as the third subparagraph of Article 108(2) TFEU gives it the power to derogate, in exceptional circumstances, from the provisions of Article 107 TFEU or from the regulations provided for in Article 109 TFEU.
- 75 It follows from point 196 of those guidelines that, in so far as the existing aid schemes for the purchase of agricultural land are concerned, the Member States undertook only to amend those schemes to conform to those guidelines or, failing amendment, to eliminate them, by 31 December 2009 at the latest.
- 76 By contrast, it follows from the considerations in paragraphs 60 to 69 above that the Member States, by accepting the proposals for appropriate measures contained in point 196 of the agricultural guidelines, are not deprived of any right to seek authorisation to reintroduce similar or identical schemes throughout the period of application of those guidelines.
- 77 It follows that the first plea in law relied on by the Commission, alleging the Council's lack of competence, is unfounded and must be rejected.

*The second plea in law, alleging a misuse of powers*

Arguments of the parties

- 78 By its second plea in law, the Commission submits that the Council misused its power by seeking to cancel the effects of the assessment which the Commission had made of the aid scheme for the purchase of agricultural land introduced by the Republic of Lithuania.
- 79 The Council contends that it did not seek, when adopting the contested decision, to cancel the effects of an assessment by the Commission, given that the Commission had not adopted any decision declaring the aid scheme authorised by the contested decision incompatible with the internal market. The objective pursued by the Council sought in reality to assist Lithuanian farmers affected by the economic and financial crisis to purchase agricultural land.

Findings of the Court

- 80 As the Court has repeatedly held, an act is vitiated by misuse of powers only if it appears, on the basis of objective, relevant and consistent evidence, to have been taken with the exclusive or main purpose of achieving an end other than that stated or evading a procedure specifically prescribed by the Treaty for dealing with the circumstances of the case (see, to that effect, *inter alia*, Case C-48/96 P *Windpark Groothusen v Commission* [1998] ECR I-2873, paragraph 52, and Case C-310/04 *Spain v Council* [2006] ECR I-7285, paragraph 69).
- 81 It is clear that the Commission has not furnished such evidence.

- 82 With regard to the objectives pursued by the Council when adopting the contested decision, nothing in the file before the Court makes it possible to assert that the Council pursued an exclusive or main purpose other than that of assisting Lithuanian farmers to purchase agricultural land more easily in order to complete land reform and to improve the structure of farms and the efficiency of agriculture in Lithuania.
- 83 With regard to the Commission's argument that it follows from the sequence of events and from correspondence exchanged that the contested decision sought to undermine the position it had adopted, the Council was entitled to consider that the Commission had not adopted a position on the compatibility of the aid scheme in question, as stated in recital 9 in the preamble to the contested decision.
- 84 Thus, the second plea in law of the action, alleging a misuse of powers, must be rejected as unfounded.

*The third plea in law, alleging a breach of the principle of sincere cooperation*

Arguments of the parties

- 85 By its third plea in law, the Commission submits that the contested decision was adopted in breach of the principle of sincere cooperation between the institutions in so far as, by adopting that decision, the Council relieved the Republic of Lithuania of the obligation of cooperation with the Commission, to which that Member State is subject under Article 108(1) TFEU.
- 86 By authorising the extension of an existing aid scheme which the Republic of Lithuania had undertaken to abolish, it is alleged that the Council undermined the results of the dialogue previously held between the Commission and that Member State.
- 87 The Council takes the view that it is not bound by the obligation of cooperation based on Article 108(1) TFEU. In addition, it reaffirms that the Republic of Lithuania did not make any commitment concerning the aid scheme approved by the contested decision.

Findings of the Court

- 88 Article 108(1) TFEU imposes on the Commission and the Member States a duty of regular and periodic cooperation under which the Commission, in conjunction with the Member States, must keep under constant review existing aid schemes and propose to them any appropriate measures required by the progressive development or by the functioning of the internal market (see, to that effect, Case C-242/00 *Germany v Commission*, paragraph 28 and the case-law cited).
- 89 In that regard, it follows from paragraph 69 above that the Republic of Lithuania did not make any specific commitment concerning the aid scheme authorised by the contested decision. Thus, that decision cannot be regarded as having relieved the Republic of Lithuania of a specific obligation of cooperation in so far as it has not in any way undermined the results of the previous dialogue between the Commission and that Member State.
- 90 In the light of those considerations, the third plea in law of the Commission, alleging a breach of the principle of sincere cooperation, must be rejected as unfounded.

*The fourth plea in law, alleging a manifest error of assessment and a breach of the principle of proportionality*

- 91 By the first part of its fourth plea in law, the Commission argues that the Council committed a manifest error of assessment by considering that there were exceptional circumstances which justified the authorised measures. In the second part of that plea, the Commission claims that the contested decision infringes the principle of proportionality in so far as the measures in question are not suitable to attain the objectives pursued by that decision and are not restricted to the minimum necessary to attain those objectives.

The first part of the fourth plea in law, alleging a manifest error as to the presence of exceptional circumstances

– Arguments of the parties

- 92 The Commission takes the view that circumstances can be considered as exceptional, within the meaning of the third subparagraph of Article 108(2) TFEU, only if they were not foreseeable before they occurred and only if, in the present case, they particularly affect the Republic of Lithuania. Thus, that could not be the case for a pre-existing structural hindrance or a problem faced by the majority of Member States.
- 93 The Commission considers that the small size of agricultural holdings in Lithuania is a long-standing structural problem of the Lithuanian agrarian economy. Equally, there is no evidence to indicate that Lithuanian farmers' lack of capital is other than a structural problem which can, by definition, not be regarded as exceptional.
- 94 Furthermore, while acknowledging that the economic crisis can be an exceptional circumstance, the Commission nevertheless considers that that crisis can justify the contested decision only if the crisis interacted with the pre-existing structural problems in such a way as to give rise to the exceptional circumstances in Lithuania, which the Council has not proved. The Commission also argues that the effect of that crisis on the level of interest rates and on the fall in agricultural incomes in Lithuania is not exceptional in the light of the context of the European Union as a whole.
- 95 The Council is of the opinion that the definition of the concept of exceptional circumstances proposed by the Commission is too narrow in the light of the case-law since such circumstances need only be unforeseen and may affect other Member States or sectors other than agriculture.
- 96 In the present case, there were exceptional circumstances consisting in extraordinary events relating to the economic crisis, which had serious repercussions on Lithuanian farmers and which, therefore, further aggravated the existing structural problems of Lithuanian agricultural holdings. Thus, the very significant reduction in agricultural incomes caused by the fall in prices and the high level of interest rates caused by the crisis, more marked in Lithuania than in other Member States, made it extremely difficult, or even impossible, for Lithuanian farmers to purchase agricultural land.

– Findings of the Court

- 97 According to the case-law of the Court, in the application of the third subparagraph of Article 108(2) TFEU the Council enjoys wide discretion, the exercise of which involves complex economic and social assessments which must be made in a European Union context. In that context, judicial review of the manner in which that discretion is exercised is confined to establishing that the rules of procedure and the rules relating to the duty to give reasons have been complied with and to verifying the accuracy of the facts relied on and ascertaining that there has been no error of law, manifest error in the



assessment of the facts or misuse of powers (see, to that effect, Case C-122/94 *Commission v Council*, paragraphs 18 and 19, and, by analogy, Case C-333/07 *Régie Networks* [2008] ECR I-10807, paragraph 78).

- 98 In the light of its unusual and unforeseeable character and the extent of the effects of the economic and financial crisis on Lithuanian agriculture, the Council cannot be regarded as having made a manifest error of assessment by considering that those effects constituted exceptional circumstances within the meaning of the third subparagraph of Article 108(2) TFEU. The Commission moreover acknowledged in its reply that the occurrence of that crisis could amount to such an exceptional circumstance.
- 99 The fact that the economic and financial crisis also gave rise to considerable effects in other Member States is not decisive, in so far as that fact does not affect the exceptional character of the effects of that crisis on the development of the economic situation of Lithuanian farmers and on the land reform undertaken in Lithuania.
- 100 Equally, to hold that low agricultural incomes, the restricted area of agricultural holdings or farmers' lack of capital are structural problems in Lithuania does not make it possible to establish that the Council committed a manifest error of assessment by considering that the very significant reduction in agricultural incomes caused by the fall in prices and the high level of interest rates as a result of the crisis led to a significant deterioration in the situation of Lithuanian farmers, thereby jeopardising land reform and precluding, therefore, the resolution of those structural problems (see, by analogy, Case C-122/94 *Commission v Council*, paragraph 21).
- 101 It follows that the first part of the fourth plea in law must be rejected as unfounded.

The second part of the fourth plea in law, alleging a breach of the principle of proportionality

– Arguments of the parties

- 102 According to the Commission, the Council breached the principle of proportionality when adopting the contested decision.
- 103 The Commission considers that the aid scheme in question is not capable of attaining the objectives stated in that decision. Thus, despite the existence of an aid scheme for the purchase of agricultural land, the average size of an agricultural holding in Lithuania has altered only slightly over recent years. It is not established that the aid scheme authorised by the contested decision is capable of obtaining better results, when the previous aid scheme did not make it possible to tackle the high interest rates recorded in 2008 and 2009. The aid for the purchase of agricultural land contributes in reality to an increase in the price of agricultural land rather than to changing the structure of ownership of that land.
- 104 Furthermore, compliance with the principle of proportionality requires, according to the Commission, that the measures in force which can address the needs which the Council regards as exceptional circumstances be fully taken into account. The contested decision does not take any account of the measures previously authorised by the Commission or permitted under its guidelines or its block exemptions. In particular, the temporary framework permits Member States to grant aid to farmers. Equally, recourse can be had to the *de minimis* aid authorised under Regulation No 1535/2007.
- 105 Finally, the Commission submits that the measures authorised by the contested decision are not restricted to the minimum necessary because their duration goes beyond the date fixed by the Commission in the temporary framework for the use of State aid specifically designed to address the effects of the economic crisis.



- 106 The Council states that, with regard to observance of the principle of proportionality, the lawfulness of measures adopted on the basis of the third subparagraph of Article 108(2) TFEU can be affected only if those measures are manifestly inappropriate in the light of the objective which the Council is seeking to pursue.
- 107 The Council considers that the Commission has failed to prove that the evaluation of complex economic facts carried out by the Council was affected by manifest error. The Council takes the view, inter alia, that the aid scheme for the purchase of agricultural land applied by the Republic of Lithuania led to an improvement in the area structure of Lithuanian agricultural holdings. The Council also contends that the Commission has failed to show that such an aid scheme contributes to an increase in agricultural prices. Furthermore, it considers that the increase in the area of agricultural holdings permits an improvement in competitiveness and in the income of the farmers concerned.
- 108 Also, the Council takes the view that it was not bound to take into account measures already approved by the Commission in so far as the power conferred upon it by the third subparagraph of Article 108(2) TFEU is precisely intended to allow it to approve State aid which the Commission would have been legally unable to approve, as in the present case. Moreover, the aid scheme authorised by the contested decision is not covered by the temporary framework.
- 109 With regard to the duration of that aid scheme, it does not in the Council's view have to be limited to the period covered by the temporary framework and it corresponds to the estimated time needed to complete the privatisation process of agricultural land in Lithuania and to reduce the effects of the crisis.

– Findings of the Court

- 110 With regard to compliance with the principle of proportionality, it follows from the considerations in paragraph 97 above that the lawfulness of a measure adopted under the third subparagraph of Article 108(2) TFEU can be affected only if the measure is manifestly inappropriate, having regard to the objective which the Council is seeking to pursue (see, by analogy, Case C-343/09 *Afton Chemical* [2010] ECR I-7027, paragraph 46, and Case C-59/11 *Association Kokopelli* [2012] ECR, paragraph 39).
- 111 It follows that it must be determined whether the authorisation of the aid scheme covered by the contested decision is manifestly inappropriate for the purposes of attaining the objectives stated in recital 10 in the preamble to that decision of finishing land reform successfully and improving the structure of farms and the efficiency of farming in Lithuania.
- 112 It is common ground that those objectives may be achieved only by increasing the area of agricultural holdings, which requires that Lithuanian farmers buy agricultural land. It is not disputed that those farmers' low incomes and their difficulty in obtaining loans hinder purchases of that sort. Thus, it does not seem manifestly inappropriate for the attainment of the objectives sought by the adoption of the contested measure to authorise the aid scheme in question, which seeks to compensate for those problems and the worsening thereof as a consequence of the economic and financial crisis by proposing either a reduction in the sales price of the agricultural land or an interest subsidy on loans for the purchase of such land.
- 113 In those circumstances, the fact that the earlier aid scheme for the purchase of agricultural land did not result in a marked and continuous increase in the area of Lithuanian agricultural holdings is not such as to prove that the contested decision is manifestly inappropriate for the purposes of attaining its objectives as set out in paragraph 111 of this judgment.

- 114 The slight increase in the average area of those holdings is not sufficient to prove that the aid scheme authorised by the Council is manifestly ineffective, in so far as that slight increase may result from circumstances unlikely to persist for the whole period covered by the contested decision. That finding may, as the Republic of Lithuania seeks to point out, be explained by the peculiarities of the rules governing the restitution of land, a process which is not to be confused with the acquisition of land by contract which the aid scheme authorised by the contested decision seeks to promote. In addition, it should be noted that the contested decision seeks not only to improve the structure of farms but also to complete land reform in Lithuania successfully. The attainment of the latter objective cannot be evaluated only on the basis of changes in the area of agricultural holdings.
- 115 With regard to the Commission's argument that the aid schemes for the purchase of agricultural land contribute to an increase in the price of agricultural land rather than to changing the structure of ownership of that land, that assertion is not substantiated sufficiently so as to make it possible to establish that the Council chose a measure that was manifestly inappropriate in the light of the objective it pursued.
- 116 In addition, it should be established whether the authorisation of the aid scheme in question does not go manifestly beyond what is necessary in order to attain the objectives sought by the contested decision. The Commission claims that the Council failed to take sufficient account of the possibilities offered by other instruments for contributing to the attainment of those objectives.
- 117 In view of the extent of the discretion enjoyed by the Council in this case, the contested decision cannot be regarded as breaching the principle of proportionality only because it would have been possible for the Republic of Lithuania to pursue the objectives referred to in paragraph 111 above by means of another type of aid scheme. It is settled case-law that, when assessing whether a decision taken on the basis of discretionary power such as that enjoyed by the Council under the third subparagraph of Article 108(2) TFEU complies with the principle of proportionality, what must be ascertained by the Court is not whether the adopted decision was the only measure possible or the best measure possible, but only whether it was manifestly disproportionate (see, by analogy, Case C-33/08 *Agrana Zucker* [2009] ECR I-5035, paragraph 33 and the case-law cited).
- 118 However, as stated by the Advocate General in point 46 of his Opinion, the broad discretion which the Council enjoys does not relieve it of the obligation to take into consideration, in its assessment, the pre-existing measures specifically aimed at overcoming the exceptional circumstances which it relied on to justify the authorisation of the aid scheme in question.
- 119 In that regard, Regulation No 1535/2007 seeks to exempt aid of a low value from the notification requirement under Article 108(3) TFEU and cannot therefore be regarded as specifically aimed at overcoming the effects of the economic and financial crisis on Lithuanian farmers.
- 120 By contrast, it is true that the temporary framework was established in order to support the access of undertakings to financing in the context of the economic and financial crisis. Nevertheless, the aid foreseen by that framework has a general function of support for investment and is not therefore specifically designed to facilitate the purchase of agricultural land. In addition, on the date when the contested decision was adopted, point 7 of the temporary framework provided that it was not to apply after 31 December 2010. Thus, the Council's decision to authorise an aid scheme specifically designed to ensure the completion of land reform and an increase in the area of agricultural holdings in Lithuania over a longer period cannot be considered as going manifestly beyond what is necessary to attain the objective pursued by the contested decision.
- 121 With regard, finally, to the duration of the aid scheme authorised by the contested decision, it follows from the very logic of the third subparagraph of Article 108(2) TFEU that the Council cannot be bound by any temporal limitation laid down in a Commission communication. In addition, in the light of the time it takes to complete the land reform and the duration of the effects of the economic

and financial crisis, it cannot be held that the Council opted for a measure which was manifestly disproportionate when authorising the aid scheme at issue for the period from 1 January 2010 to 31 December 2013.

122 Therefore, the second part of the fourth plea in law relied on by the Commission must be rejected as unfounded.

123 It follows that that fourth plea in law must be rejected in its entirety.

124 As none of the pleas put forward by the Commission has been upheld, the action must be dismissed.

### **Costs**

125 Under Article 138(1) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the Council has applied for costs to be awarded against the Commission and the latter has been unsuccessful, the Commission must be ordered to pay the costs.

126 In accordance with Article 140(1) of the Rules of Procedure, the Republic of Lithuania, Hungary and the Republic of Poland must bear their own costs.

On those grounds, the Court (Grand Chamber) hereby:

- 1. Dismisses the action;**
- 2. Orders the European Commission to pay the costs;**
- 3. Orders the Republic of Lithuania, Hungary and the Republic of Poland to bear their own costs.**

[Signatures]