

OPINION OF ADVOCATE
GENERAL BOT

delivered on 12 May 2009¹

1. The present case should enable the Court of Justice to clarify the Community judiciary's obligations deriving from the rule that the parties should be heard where the Court raises an issue of public policy of its own motion.

common market exemptions from excise duties on mineral oils which had been granted by the Council of the European Union on a proposal from the Commission several years earlier in accordance with the relevant directives concerning excise duty.

2. This case is an appeal brought by the Commission of the European Communities against the judgment of the Court of First Instance of the European Communities of 12 December 2007 in *Ireland and Others v Commission*,² in which that court annulled Commission Decision 2006/323/EC of 7 December 2005 concerning the exemption from excise duty on mineral oils used as fuel for alumina production in Gardanne, in the Shannon-region and in Sardinia respectively implemented by France, Ireland and Italy.³

4. In that decision, it considered that those exemptions constituted not existing aid but new aid, which should therefore, in principle, be recovered from the recipients. The Commission conceded, however, that the Council decisions authorising them had given rise to a legitimate expectation that they conformed with the rules of the common market. It therefore ordered recovery of the aid only as from the date of publication in the *Official Journal of the European Communities* of the notice of commencement of the formal procedure for examination of those exemptions in the light of the State aid rules.

3. In the contested decision, the Commission classified as State aid incompatible with the

5. Actions for annulment of the contested decision were brought by Ireland, the French

1 — Original language: French.

2 — Joined Cases T-50/06, T-56/06, T-60/06, T-62/06 and T-69/06 ('the judgment under appeal').

3 — OJ 2006 L 199, p. 12 ('the contested decision').

Republic and the Italian Republic, and by two companies, Eurallumina SpA⁴ and Aughinish Alumina Ltd.⁵

6. In the judgment under appeal, the Court of First Instance raised of its own motion the plea that the contested decision was vitiated by an inadequate statement of reasons, in that it stated, without supplying any explanation, that the exemptions in question did not constitute existing aid within the meaning of Article 1(b)(v) of Council Regulation (EC) No 659/1999.⁶

7. It annulled the contested decision on the basis of that plea, without first seeking the parties' observations regarding it.

8. The Commission, in support of its claim that the judgment under appeal should be set aside, relies on several pleas. It submits, first, that the Court was not entitled to raise the issue in question of its own motion and, second, that it infringed the rule that the parties should be heard. It also asks the Court of Justice to hold that the judgment under appeal incorrectly stated that the contested decision was vitiated by a breach of the obligation to state reasons with regard to the non-application of Article 1(b)(v) of Regulation No 659/1999.

9. I shall suggest that the Court of Justice hold that the Court of First Instance was perfectly entitled to raise that issue of its own motion but that it was required, in accordance with the rule that the parties should be heard, to obtain the parties' observations regarding it. From this, I shall infer that disregard of that requirement justifies the judgment under appeal being set aside.

10. I shall also suggest that the Court of Justice hold that the contested decision is not vitiated by an inadequate statement of reasons regarding the non-application of Article 1(b)(v) of Regulation No 659/1999 and that it refer the case back to the Court of First Instance for examination of the pleas put forward by the three Member States and the two companies seeking annulment of that decision.

I — Legal background

A — *The directives concerning excise duties on mineral oils*

11. Excise duties on mineral oils have been the subject of several directives, namely Council Directive 92/81/EEC of 19 October 1992 on the harmonisation of the structures of excise duties on mineral oils,⁷ Council Dir-

4 — 'Eurallumina'.

5 — 'Aughinish Alumina'.

6 — Regulation of 22 March 1999 laying down detailed rules for the application of Article [88 EC] (OJ 1999 L 83, p. 1).

7 — OJ 1992 L 316, p. 12.

ective 92/82/EEC of 19 October 1992 on the approximation of the rates of excise duties on mineral oils,⁸ and Council Directive 2003/96/EC of 27 October 2003 restructuring the Community framework for the taxation of energy products and electricity,⁹ which repealed Directives 92/81 and 92/82 with effect from 31 December 2003.

the Member States, subject to prior review by the Council, to continue to apply until 31 December 2006 the reduced rates or exemptions listed in Annex II thereto, which mentions the exemptions from excise duties on heavy fuel oil used as a fuel in the production of alumina in the Gardanne and Shannon regions and Sardinia.

12. Article 8(4) of Directive 92/81 enabled the Council, on a proposal from the Commission, to authorise any Member State to introduce exemptions or reductions of excise duty other than those provided for in that directive.

B — *The rules governing State aid*

1. The EC Treaty

14. Article 87(1) EC provides:

13. Directive 2003/96 provided, in the second indent of Article 2(4)(b), that it was not to apply to dual-use energy products, that is to say those intended to be used both as heating fuel and for purposes other than as motor fuel and heating fuel. Thus, since 31 December 2003, the date from which that directive applied, there is no longer a minimum rate of excise duty on heavy fuel oil used as a fuel in the production of alumina. In addition, Article 18(1) of Directive 2003/96 authorised

‘Save as otherwise provided in this Treaty, any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between Member States, be incompatible with the common market.’

⁸ — OJ 1992 L 316, p. 19.

⁹ — OJ 2003 L 283, p. 51.

15. Article 88 EC provides:

compatible with the common market having regard to Article 87, it shall without delay initiate the procedure provided for in paragraph 2. The Member State concerned shall not put its proposed measures into effect until this procedure has resulted in a final decision.'

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

2. Regulation No 659/1999

2. If, after giving notice to the parties concerned to submit their comments, the Commission finds that aid granted by a State or through State resources is not compatible with the common market having regard to Article 87, or that such aid is being misused, it shall decide that the State concerned shall abolish or alter such aid within a period of time to be determined by the Commission.

16. Under Article 1(b) of Regulation No 659/1999, the concept of 'existing aid' covers:

' ...

...

3. The Commission shall be informed, in sufficient time to enable it to submit its comments, of any plans to grant or alter aid. If it considers that any such plan is not

(v) aid which is deemed to be an existing aid because it can be established that at the time it was put into effect it did not constitute an aid, and subsequently became an aid due to the evolution of the common market and without having been altered by the Member State. Where certain measures become aid following the liberalisation of an activity by Community law, such measures shall not be considered as existing aid after the date fixed for liberalisation.'

II — Background to the dispute

17. Ireland, since 1983, the Italian Republic, since 1993, and the French Republic, since 1997, have exempted from excise duty mineral oils used for the production of alumina in the Shannon region, Sardinia and the Gardanne region respectively.

18. Those exemptions were authorised respectively by Council Decision 92/510/EEC,¹⁰ Council Decision 93/697/EC¹¹ and Council Decision 97/425/EC.¹² Those authorisations were extended by the Council on several occasions and, most recently, by Decision 2001/224/EC,¹³ until 31 December 2006.

19. In recital 5 to Decision 2001/224, it was stated that the decision was to be without prejudice to the outcome of any procedures relating to distortions of the operation of the

single market that might be undertaken, in particular under Articles 87 EC and 88 EC, and that it did not override the requirement for Member States to notify instances of potential State aid to the Commission under Article 88 EC.

20. By three decisions of 30 October 2001, published in the *Official Journal of the European Communities* on 2 February 2002,¹⁴ the Commission initiated the procedure provided for in Article 88(2) EC regarding each of the exemptions at issue. On completion of that procedure, the Commission adopted the contested decision.

21. In that decision, the Commission considered that the exemptions granted before 1 January 2004, the date from which Directive 2003/96 applied, constituted State aid within the meaning of Article 87(1) EC.

22. It indicated that they should be regarded as new aid and not existing aid. The Commission based that assessment in particular on the fact that the exemptions in question did not exist before the entry into force of the Treaty in the Member States concerned, that

10 — Decision of 19 October 1992 authorising Member States to continue to apply to certain mineral oils when used for specific purposes, existing reduced rates of excise duty or exemptions from excise duty, in accordance with the procedure provided for in Article 8(4) of Directive 92/81/EEC (OJ 1992 L 316, p. 16).

11 — Decision of 13 December 1993 authorising certain Member States to apply or to continue to apply to certain mineral oils, when used for specific purposes, reduced rates of excise duty or exemptions from excise duty, in accordance with the procedure provided for in Article 8(4) of Directive 92/81/EEC (OJ 1993 L 321, p. 29).

12 — Decision of 30 June 1997 authorising Member States to apply and to continue to apply to certain mineral oils, when used for specific purposes, existing reduced rates of excise duty or exemptions from excise duty, in accordance with the procedure provided for in Directive 92/81/EEC (OJ 1997 L 182, p. 22).

13 — Decision of 12 March 2001 concerning reduced rates of excise duty and exemptions from such duty on certain mineral oils when used for specific purposes (OJ 2001 L 84, p. 23).

14 — OJ 2002 C 30, pp. 17, 21 and 25.

they had never been authorised by the Council or itself on the basis of the State aid rules and that Article 4(6) of Regulation No 659/1999 was not applicable.¹⁵

exemptions granted until 31 December 2003 had to be recovered. It pointed out that Member States are required to recover unlawful aid declared incompatible with the common market, unless to do so would be contrary to a general principle of Community law, such as the principle of the protection of legitimate expectations or the principle of legal certainty.

23. In point 69 of the statement of reasons for the contested decision, the Commission stated that Article 1(b)(v) of Regulation No 659/1999 was not applicable to the present case.

24. It went on to explain the extent to which the aid in question was incompatible with the common market.

27. The Commission took the view that, in the light of the exemption decisions and the fact that those decisions, including Decision 2001/224, had been adopted on the basis of its own proposals, the beneficiaries of the exemptions at issue were entitled to claim a legitimate expectation that those exemptions were in conformity with Community law in general, but that applied only until 2 February 2002, the date of publication in the *Official Journal of the European Communities* of the decisions initiating the procedure provided for in Article 88(2) EC.

25. As regards the exemptions granted from 1 January 2004, it decided to initiate the formal investigation procedure provided for in Article 88(2) EC.

26. Finally, the Commission examined the extent to which the aid represented by the

28. In the operative part of the contested decision, it is stated that the exemptions granted until 31 December 2003 constitute State aid within the meaning of Article 87(1) EC, that the aid granted between 3 February 2002 and 31 December 2003 is incompatible with the common market to the extent to which the beneficiaries have not paid a duty of at least EUR 13.01 per 1 000 kg of heavy fuel oil and that such incompatible aid should be recovered by the three Member States concerned.

¹⁵ — That provision states that aid is deemed to have been authorised where it has been notified to the Commission and the Commission has not taken a decision within a period of two months.

III — The procedure before the Court of First Instance and the judgment under appeal

29. By applications lodged at the Registry of the Court of First Instance on 16, 17 and 23 February 2006, Ireland, the French Republic, the Italian Republic, Eurallumina and Aughinish Alumina brought actions for total or partial annulment of the contested decision. The various cases were joined for the purposes of the oral procedure, and then for the purposes of the judgment.

30. According to the judgment under appeal, the applicants essentially put forward 23 pleas in law, alleging, in particular, the wrongful classification of the exemptions in question as new aid, whereas they constituted existing aid, breach of the principles of the protection of legitimate expectations, legal certainty, observance of a reasonable time-limit, the presumption of validity, the principle *lex specialis derogat legi generali*, and the principles of effectiveness and sound administration. Also alleged were breaches of Article 87 EC and of the obligation to state reasons with regard to the application of that article.

31. In paragraph 46 of the judgment under appeal, the Court of First Instance stated that it considered it appropriate to raise of its own motion the issue of an inadequate statement of reasons for the contested decision regarding the non-application of Article 1(b)(v) of Regulation No 659/1999.

32. After pointing out that a lack or inadequacy of a statement of reasons is a matter of public policy which should be raised by the Community judicature of its own motion, and referring to the case-law on the scope of the obligation to state the reasons for a Community act, it stated that the Commission, in the contested decision, had considered whether the exemptions at issue constituted new aid or existing aid and had asserted that Article 1(b)(v) of Regulation No 659/1999 was not applicable to the case, without giving the reasons for such inapplicability.

33. In paragraphs 56 to 62 of the judgment under appeal, the Court of First Instance considered that the following particular circumstances were such as to require the Commission to give specific reasons for not applying that provision.

34. First, in a number of decisions authorising the exemptions in question, it is indicated that the Commission recognises that those exemptions do not entail any distortion of competition and there is nothing to support the view that the scope of the concept of distortion of competition in fiscal matters might differ from its scope in the field of State aid. It is also indicated in a number of those decisions that the Commission will regularly review the exemptions in question in order to ensure that they are compatible with the operation of the internal market and other objectives of the Treaty.

35. Second, in point 97 in the statement of reasons for the contested decision, the Commission accepted that those authorisation decisions, adopted on the basis of its own proposals, might have given the impression that the exemptions in question could not be classified as State aid when they were put into effect. The fact that that paragraph appears in the part of the statement of reasons relating to the recovery of the aid cannot, according to the Court of First Instance, restrict its scope regarding the classification of the exemptions in question as State aid.

36. Third, the exemptions in question were authorised and extended by the Council on a proposal from the Commission and, with the exception of Decision 2001/224, none mentioned any possible conflict with the State aid rules. In point 96 of the statement of reasons for the contested decision, the Commission states that the interested parties would not expect the Commission to submit proposals to the Council which were incompatible with Treaty provisions.

37. The Court of First Instance inferred from those circumstances that the Commission had infringed its obligation to state reasons under Article 253 EC in relation to the failure to apply Article 1(b)(v) of Regulation No 659/1999 to this case.

38. It annulled the contested decision and ordered the Commission to pay the costs.

IV — The appeal

39. The Commission asks the Court to set aside the judgment under appeal, to refer the cases back to the Court of First Instance and to reserve the costs.

40. Ireland, the French Republic, the Italian Republic, Eurallumina and Aughinish Alumina ask the Court to dismiss the appeal and order the Commission to pay the costs.

41. In the alternative, Eurallumina asks the Court, in the event of its upholding the Commission's sixth ground of appeal, to the effect that the Court of First Instance was not entitled to annul the contested decision to the extent to which the latter extended the formal investigation procedure to the exemptions for the period after 1 January 2004, to set aside the judgment under appeal only with respect to that extension.

42. In support of its claim that the judgment under appeal should be set aside and the cases should be referred back to the Court of First Instance, the Commission puts forward six pleas.

43. The first plea seeks to establish that the Court of First Instance exceeded its jurisdiction by raising of its own motion the issue of an inadequate statement of reasons for the contested decision. The second plea alleges breach of the rule that the parties should be heard and breach of the rights of the defence. The third plea seeks to prove that the question whether the aid in question falls within Article 1(b)(v) of Regulation No 659/1999 was not open to examination. The fourth and fifth pleas seek to establish that the Court of First Instance erred in law by holding that the contested decision was vitiated by a breach of the obligation to state reasons regarding the non-application of Article 1(b)(v) of Regulation No 659/1999. Finally, in its sixth plea, the Commission claims that the Court of First Instance was not entitled to annul the contested decision to the extent to which it extends the formal investigation procedure to exemptions post-dating 31 December 2003.

44. Before I examine those pleas, it should be borne in mind that, in paragraph 46 of the judgment under appeal, the Court of First Instance stated that it had considered it appropriate to raise of its own motion the issue of an inadequate statement of reasons for the contested decision regarding the non-application of Article 1(b)(v) of Regulation No 659/1999.

45. At the hearing, it was confirmed that, although the applicants before the Court of First Instance indeed challenged the classification as new aid adopted by the Commission in the contested decision and thus contended that the exemptions in question should be classified as existing aid, they did not at any

time base their arguments on the provisions of Article 1(b)(v) of Regulation No 659/1999.¹⁶

46. It must therefore be taken as established, for the purposes of the reasoning to be set out below, first, that the parties did not argue before the Court of First Instance that the exemptions at issue should be classified as existing aid under Article 1(b)(v) of Regulation No 659/1999 and, second, that the issue raised of its own motion by the Court of First Instance, concerning breach of the obligation to state reasons regarding the non-application of that provision, was not discussed by the parties.

A — *The first plea*

1. Arguments of the parties

47. The appellant's first plea formally alleges lack of jurisdiction of the Court of First

¹⁶ — Ireland and Aughinish Alumina maintained that the exemptions in question constituted existing aid under, first, Article 1(b)(iii) of Regulation No 659/1999 by reason of the lack of a Commission decision within two months following notification of the aid, and second, the combined provisions of Articles 1(b)(iv) and 15(3) of the same regulation, on the ground that the exemptions had existed for more than 10 years and, finally, on the ground that those exemptions reflected legally binding commitments given by Ireland before its accession to the European Community. The Italian Republic relied on Article 1(b)(ii) of Regulation No 659/1999, on the basis that those exemptions had been duly authorised by the Council.

Instance, procedural irregularities adversely affecting the appellant's interests, breach of the principle that the subject-matter of an action is delimited by the parties, infringement of the combined provisions of Articles 230 EC and 253 EC and of Article 21 of the Statute of the Court of Justice and of Articles 44(1) and 48(2) of the Rules of Procedure of the Court of First Instance.

48. This plea is divided into two parts.

49. With regard to the first part, the Commission claims that, by raising of its own motion the issue of an inadequate statement of reasons for the contested decision, the Court of First Instance went beyond the bounds of the dispute as defined by the parties and thus exceeded its jurisdiction, infringed the principle that the subject-matter of an action is delimited by the parties, ruled *ultra petita* and committed a procedural irregularity adversely affecting the Commission's interests.

50. It states that, having regard to the obligations of the national court in implementing Community law, as set out in the judgments in *van Schijndel and van Veen*¹⁷ and in *van der Weerd and Others*,¹⁸ the Court of First Instance was not entitled to raise that issue of its own motion because it was entirely unconnected with the 23 pleas put forward by the parties. The parties did not at any stage

argue that Article 1(b)(v) of Regulation No 659/1999 might be relevant.

51. Above all, the issue raised by the Court of First Instance is unconnected with the facts recorded in the files of the five joined cases, which did not refer to any matter capable of giving the impression that the exemptions in question did not constitute aid when they were granted and that they became aid subsequently as a result of evolution of the common market.

52. In the second part of the plea, the Commission maintains that the issue raised by the Court of First Instance of its own motion in fact relates to the substantive legality of the contested decision and not to the statement of the reasons on which it is based, the statement of reasons insisted upon by the Court of First Instance not being necessary to enable interested parties to ascertain the justification for the contested decision or to enable the Court to carry out its review. The Court of First Instance thus infringed the rules concerning the role of the Community judicature with respect to the examination of the reasoning of contested measures, as set down in the case-law, in particular in *Commission v Sytraval and Brink's France*,¹⁹ in which the Court drew a clear distinction between pleas challenging the formal legality of the contested measure, which the Community judicature must, if appropriate, raise of its own motion, and pleas concerning substantive legality, which may be examined only if they have been raised by the parties.

17 — Joined Cases C-430/93 and C-431/93 [1995] ECR I-4705.

18 — Joined Cases C-222/05 to C-225/05 [2007] ECR I-4233.

19 — Case C-367/95 P [1998] ECR I-1719.

53. The Commission maintains that the Court of First Instance, by raising that issue, which relates, in fact, to the substance of the contested decision, also infringed the rules concerning the obligation to set out pleas in law in the application, as laid down in Article 21 of the Statute of the Court of Justice and Articles 44(1) and 48(2) of the Rules of Procedure of the Court of First Instance.

54. The respondents do not accept that argument.

2. Assessment

55. Like the respondents, I am of the opinion that the complaints made by the Commission in its first plea are unfounded.

56. First, as far as the first part of the plea is concerned, the power of the Community judicature to raise on its own motion a matter such as that raised of its own motion by the Court of First Instance cannot be determined in the light of the judgments in *van Schijndel and van Veen* or *van der Weerd and Others*, referred to by the Commission.

57. Those judgments concern the relationship between the procedural autonomy of the Member States and the principles of equivalence and effectiveness. They relate to the question whether a national court, depending on whether or not its national law provides for the possibility of raising matters of internal law of its own motion, must on its own initiative raise the question of the application of Community law by virtue of those principles. Those judgments clarify, in particular, the extent to which the principle of effectiveness requires the national court to raise of its own motion a matter of Community law where its procedural law does not enable it to raise of its own motion a plea of domestic law. It is in that context that it was held in *van der Weerd and Others* that the national court is not required to raise of its own motion the application of Community law where the parties, in the course of the procedure, have themselves had an opportunity to raise such a plea.

58. That limit on the scope of the principle of effectiveness cannot be transposed to this case, which is concerned with assessing the powers of the Community judicature. Those powers derive from autonomous rules, which derive either from rules governing procedure before the Community Courts or from the case-law.

59. Admittedly, as the Commission has rightly pointed out, it is also apparent from those rules, in particular Article 21 of the Statute of the Court of Justice and Article 44(1) of the Rules of Procedure of the Court of First Instance, that the dispute is to be determined and circumscribed by the

parties. It follows that the Community judicature may not grant relief beyond that sought by the parties. It must also, in principle, rule on the parties' claims within the legal and factual framework set out by them.

60. Accordingly, the role of the Community judicature is not passive and cannot be limited to assessing the merits of the positions taken by each of the parties to the dispute in strict adherence to the pleas and arguments put forward by the parties. The Community judicature does not merely act as a referee between the parties. It must also, under Article 220 EC, ensure compliance with Community law.

61. The rules on procedure before each Community Court, and also the case-law, have thus identified several sets of circumstances in which the Community judicature, in order to fulfil its task as an arbiter of legality, has the power to raise an issue of law of its own motion.

62. Under the Rules of Procedure, it may of its own motion raise its own manifest lack of jurisdiction to take cognisance of an action or the manifest inadmissibility of an action or, if appropriate, the fact that the action is manifestly lacking any foundation in law.²⁰ It may therefore raise of its own motion matters constituting an absolute bar to proceeding

with an action,²¹ that is to say infringements of essential conditions for the admissibility of an action, such as observance of time-limits for bringing proceedings,²² the existence of a challengeable act²³ and *locus standi*.²⁴

63. It is also incumbent on the Court, under the case-law, to raise of its own motion a failure to comply with a rule of the Community legal order where that rule appears sufficiently important to be classified as a matter of public policy. Thus, it has been accepted that the Community judicature should raise of its own motion the *res judicata* rule²⁵ and the lack of powers of the originator of the act.²⁶ It must also raise of its own motion any infringement of essential procedural requirements, that is to say irregularities which affect the form of the measure or the procedure followed and adversely affect the rights of third parties or persons concerned by that measure or are liable to have an influence on the content of that measure,²⁷ such as, for example, the absence of due authentication²⁸ or lack of notification.²⁹

20 — Article 92(1) of the Rules of Procedure of the Court of Justice, Article 111 of the Rules of Procedure of the Court of First Instance and Article 76 of the Rules of Procedure of the Civil Service Tribunal.

21 — See Article 92(2) of the Rules of Procedure of the Court of Justice, Article 113 of the Rules of Procedure of the Court of First Instance and Article 77 of the Rules of Procedure of the Civil Service Tribunal.

22 — Case C-154/99 P *Politi v European Training Foundation* [2000] ECR I-5019, paragraph 15 and the case-law there cited.

23 — Order of 14 January 1992 in Case C-130/91 *ISAE/VP and Interdata v Commission* [1992] ECR I-69, paragraph 11.

24 — Case C-298/00 P *Italy v Commission* [2004] ECR I-4087, paragraph 35, and Case C-417/04 P *Regione Siciliana v Commission* [2006] ECR I-3881, paragraph 36.

25 — Joined Cases C-442/03 P and C-471/03 P P & O *European Ferries (Vizcaya) and Diputación Foral de Vizcaya v Commission* [2006] ECR I-4845, paragraph 45.

26 — Case C-210/98 P *Salzgitter v Commission* [2000] ECR I-5843, paragraph 56.

27 — This definition has been taken from Rideau J., 'Recours en annulation', *Jurisclasser*, 2008, volume 331, paragraph 24.

28 — Joined Cases C-287/95 P and C-288/95 P *Commission v Solvay* [2000] ECR I-2391, paragraph 55.

29 — Case C-227/92 P *Hoechst v Commission* [1999] ECR I-4443, paragraph 72.

64. In those various cases, the defect which vitiates the contested measure is sufficiently serious to justify an adverse finding by the Community judicature, even though it was not raised by the applicant. In other words, where the contested Community measure infringes the principle of *res judicata* or was adopted by an authority lacking powers to do so or derives from breach of an essential procedural requirement, it is of little importance whether that measure is also vitiated by defects referred to by the applicant in support of his claim for annulment. Defence of the Community legal order allows and, in appropriate cases, requires the Court, as the arbiter of legality, to find that the measure in question is vitiated by a defect which, in any event, calls for its annulment.

65. According to settled case-law, the lack of a statement of reasons amounts to a breach of essential procedural requirements and constitutes a matter of public policy which must be raised by the Community judicature of its own motion.³⁰

66. The obligation thus identified would be deprived of any useful effect if the power of the Community judicature to raise one of the abovementioned issues of its own motion were made conditional upon a connection between it and the pleas and arguments put forward by the parties. Indeed, compliance with such a condition would run counter to the very purpose of that power to raise matters

of the Court's own motion, the purpose of which is precisely to make up for an omission by the parties where a rule of public policy has been infringed.

67. The Community judicature, dealing with an application for annulment, cannot therefore be criticised for going beyond the bounds of the dispute, exceeding its jurisdiction, ruling *ultra petita* and infringing its Rules of Procedure where it raises of its own motion a matter of that kind, which relates precisely to the lawfulness of the measure whose annulment is sought.

68. Similarly, the Commission has no basis for claiming that, in the judgment under appeal, the Court of First Instance exceeded the bounds of the dispute on the ground that the issue raised of its own motion was unconnected with the facts set out by the parties.

69. It is not apparent how, by raising of its own motion the issue of breach of the obligation to state reasons, the Court of First Instance could be going beyond the bounds of the dispute when the requirement to state reasons applies to all Community acts, in accordance with Article 253 EC. Moreover, that argument has even less basis, given that Article 1(b)(v) of Regulation No 659/1999 is expressly referred to in the contested decision.

³⁰ — Case C-265/97 P *VBA v Florimex and Others* [2000] ECR I-2061, paragraph 114.

70. This analysis does not prejudice the question whether the Court of First Instance was right to consider that the contested decision was vitiated by an inadequate statement of reasons regarding the non-application of Article 1(b)(v) of Regulation No 659/1999. I would merely point out at this stage of the analysis that, by raising that issue of its own motion, the Court of First Instance was performing its task as an arbiter of legality. That is why the Commission's argument that the documents submitted to the Court of First Instance do not disclose any circumstance capable of giving rise to the impression that Article 1(b)(v) of Regulation No 659/1999 was applicable relates, in my opinion, to the question whether or not the contested decision was vitiated by an inadequate statement of reasons regarding the non-application of that provision. That argument cannot call in question the power of the Court of First Instance to raise that issue of its own motion.

71. The complaints made by the Commission in the first part of the plea in question are, therefore, in my opinion unfounded.

72. Second, contrary to what the Commission contends in the second part of this plea, the Court of First Instance did not, on the pretext of dealing with an inadequate statement of reasons, raise of its own motion a matter relating to the substantive legality of the contested decision.

73. Admittedly, it has been held on several occasions that, whilst the absence or inadequacy of a statement of reasons constitutes a matter of public policy which must be raised by the Community judicature, infringement of a rule of law concerning application of the Treaty, within the meaning of Article 230 EC, can be examined by the Community judicature only if it is raised by the applicant.³¹ The Court of Justice has thus taken the view that the Court of First Instance erred in law when, purporting to be dealing with a breach of the requirement to state reasons, it criticised the institution from which the act emanated of in fact having committed an error of assessment.³² However, the judgment under appeal in this case does not merit such a criticism.

74. It is clear from the case-law, and in particular the judgment in *Commission v Sytraval and Brink's France*, that a plea alleging an inadequate statement of reasons is available not only where the contested measure lacks any statement of reasons whatsoever but also where that statement is defective on a point which might have a decisive impact on the conclusion reached by the Community institution in that act.

75. Thus, in that case, the Court of First Instance had annulled a Commission decision rejecting a complaint from the Chambre

31 — See *Commission v Sytraval and Brink's France* (paragraph 67); *VBA v Florimex and Others* (paragraph 114); and also Joined Cases C-172/01 P, C-175/01 P, C-176/01 P and C-180/01 P *International Power and Others v NALOO* [2003] ECR I-11421, paragraph 145.

32 — See *Commission v Sytraval and Brink's France* (paragraphs 68 to 72); *VBA v Florimex and Others* (paragraphs 111 to 115); and *International Power and Others v NALOO* (paragraph 144).

syndicale nationale des entreprises de transport de fonds et valeurs (Sytraval) and Brink's France SARL asserting that aid granted by the French Republic to Sécuri-post SA constituted State aid. The Court of Justice held that the Court of First Instance had been right to conclude that the decision in question was vitiated by an inadequate statement of reasons, first because the Commission had failed to respond to a charge expressly made in the complaint concerning the total or partial assumption by the State of responsibility for the remuneration of Sécuri-post SA's personnel, even though that charge was not of a merely secondary nature.

76. The Court of Justice also held that the Court of First Instance's assessment was well founded, in the second place, regarding the complainants' charge that Sécuri-post SA paid no contributions to the unemployment insurance funds for seconded officials, to which the Commission responded simply by saying that 'no contributions need to be made to unemployment insurance funds in respect of the employment of officials on secondment, since their employment is guaranteed by their status as officials'.

77. Conversely, the Court of Justice considered that the Court of First Instance, purporting to be dealing with an alleged inadequacy of a statement of reasons, had criticised the Commission for a manifest error of assessment and thus called in question the substantive legality of the decision in question by concluding, for example, that the fact that a

loan of FRF 15 000 000 by the holding company of the subsidiary companies of La Poste to Sécuri-post SA constituted a commercial transaction was not in itself sufficient to show that it did not amount to State aid, since such a transaction may be effected at a rate which represents a special advantage, so that the Commission should have considered whether the rate charged was in line with the market rate.³³

78. Although, in the light of the last two examples, the boundary between an inadequate statement of reasons and an error of assessment may sometimes appear difficult to identify precisely, the fact nevertheless remains that the issue raised by the Court of First Instance of its own motion in the judgment under appeal was not a digression and relates clearly, in my opinion, to the reasoning of the contested decision.

79. In fact, let us not forget that the Court of First Instance considered that the contested decision was vitiated by an inadequate statement of reasons, in that it is stated, in point 69 of the statement of reasons, without any explanation being provided, that Article 1(b)(v) of Regulation No 659/1999 is not applicable to this case. The Court of First Instance was therefore unable to address the merits of the reasons for which the Commission considered that provision to be inapplicable, because those reasons were not stated.

33 — *Commission v Sytraval and Brink's France* (paragraph 70).

80. Once again, this analysis does not prejudge the answer to the question whether the Commission should have set out the reasons for which Article 1(b)(v) of Regulation No 659/1999 was not applicable to this case or, in other words, whether the contested decision provides in this regard an inadequate statement of reasons such as to justify its annulment. That issue, which is the subject of the fourth and fifth pleas in this appeal, will be examined below. It must in my opinion be clearly distinguished from the issue examined in relation to the first plea, which concerns the scope of the Community judiciary's power to raise of its own motion a legal issue, such as that concerning breach of the obligation to state reasons.

81. At this stage of the analysis, I consider it important to confirm that the Court of First Instance, as arbiter of the legality of the contested decision, in fact had the necessary power to raise such an issue of its own motion, by virtue of the case-law according to which it should raise of its own motion any plea alleging infringement of essential procedural requirements.

82. I therefore suggest that the Court reject the first plea as unfounded.

B — *The second plea*

1. Arguments of the parties

83. The Commission claims that the issue raised by the Court of First Instance of its own motion was not discussed or even touched upon in the written and oral procedure before that Court. It maintains that the Court thus infringed the rule that the parties should be heard, which is a general principle applicable to proceedings before the Community judiciary and is upheld in Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms signed at Rome on 4 November 1950 ('the ECHR').

84. The respondents maintain in essence that, under Article 62 of the Rules of Procedure of the Court of First Instance, that Court has a discretion to order reopening of the procedure and that it follows from that article and from Article 113 of those rules that the obligation to hear the parties before raising an issue of its own motion applies only in relation to pleas leading to an action being declared inadmissible or a ruling that there is no need to adjudicate. They also maintain that Article 6 of the ECHR does not apply to legal persons governed by public law, such as the Commission. If that is not the case, they contend that the scope of the rule that the parties should be heard must be adapted to reflect the parties to the proceedings and the nature of the case.

85. The respondents submit that that principle was complied with in this case, in that the judgment under appeal is not based on documents or facts of which the Commission was unaware.

86. They also maintain that the Community's interests were not affected. First, the Commission's rights were not flouted: the Commission was not declared to be subject to any civil or criminal liability. Also, the inadequate statement of reasons could not be remedied after the event, so that reopening of the procedure would not have enabled the Commission to put forward arguments to persuade the Court not to raise that issue of its own motion.

2. Assessment

87. I unreservedly accept the Commission's position.

88. Whilst, as I indicated earlier, the Court of First Instance was perfectly competent to raise such a matter of its own motion, it nevertheless seems to me to be essential to state that its power to do so could be validly exercised only in compliance with the rule that the parties should be heard.

89. The Court of Justice has upheld the importance of that rule and its very wide scope in the Community legal order. Thus, according to settled case-law, it is a fundamental principle,³⁴ which must be respected even if there are no specific rules, in any proceedings which may result in a decision of a Community institution perceptibly affecting a person's interests.³⁵

90. The rule that the parties should be heard consequently applies before the Community judicature. Moreover, its purpose is to benefit all the parties to proceedings, both private persons and Member States³⁶ or the institutions. According to the following statement in *SNUPAT v High Authority*,³⁷ 'it would infringe a basic principle of law to base a judicial decision on facts and documents of which the parties themselves, or one of them, have not been able to take cognisance and in relation to which they have not therefore been able to formulate an opinion'.

91. That statement shows that the rule that the parties should be heard is inherent in the concept of a State governed by the rule of law and implies that there should be prior discussion of any matter on which a court dealing with a case is to base its decision, whatever the nature of the parties to those proceedings. Community institutions, the

34 — Case C-413/06 P *Bertelsmann and Sony Corporation of America v Impala* [2008] ECR I-4951, paragraph 61.

35 — Case 85/76 *Hoffmann-La Roche v Commission* [1979] ECR 461, paragraph 9, and Case C-315/99 P *Ismeri Europa v Court of Auditors* [2001] ECR I-5281, paragraph 28.

36 — See, in particular, Case C-287/02 *Spain v Commission* [2005] ECR I-5093, paragraph 37.

37 — Joined Cases 42/59 and 49/59 [1961] ECR 53, 84.

legality of whose acts is subject to review by the Community judicature and which, in that context, are parties to proceedings, must therefore also benefit from that rule, under the same conditions as the other persons referred to in Article 230 EC, regardless of whether or not they are entitled to allege an infringement of Article 6 of the ECHR before the European Court of Human Rights.

92. According to the case-law, the rule that the parties should be heard implies that every party to proceedings is entitled, first, to be apprised of the elements on which the Court is to base its decision and, second, to be able to discuss them.³⁸ That case-law is consistent with the interpretation of the right to adversarial proceedings given by the European Court of Human Rights, according to which that right falls within the concept of a 'fair hearing' referred to in Article 6 of the ECHR.³⁹

93. The rule that the parties should be heard does not merely confer on each party to proceedings the right to be apprised of and discuss the documents produced and observations made to the Court by the other party. It also implies a right to be apprised of and discuss matters raised by the Court of its own

motion, on which the Court intends basing its decision.

94. The Court of Justice has clearly recognised the existence of that right where the Court of First Instance bases its decision on facts and documents of which the parties had been unable to take cognisance.⁴⁰ On the other hand, unless I am mistaken, it does not seem that it has done so to date in a case in which the Community judicature envisaged deciding the case on the basis of a public policy issue raised of its own motion.

95. The obligation to observe the rule that the parties should be heard in such circumstances applies, in my view, in the same way.

96. As the Commission observed in its written submissions, that obligation can be very clearly inferred from the case-law of the European Court of Human Rights. According to that court, the courts themselves must observe the rule that the parties should be

38 — See, to that effect, Case C-480/99 P *Plant and Others v Commission and South Wales Small Mines* [2002] ECR I-265, paragraphs 25 to 34, and Case C-450/06 *Varec* [2008] ECR I-581, paragraph 47.

39 — See, in particular, the judgment of the European Court of Human Rights in the case of *Nideröst-Huber v. Switzerland*, 18 February 1997, *Reports of Judgments and Decisions* 1997-I, p. 108, paragraph 24.

40 — See *Plant and Others v Commission and South Wales Small Mines* (paragraphs 25 to 34). The Court held that the Court of First Instance had infringed the rule that the parties should be heard by basing its decision as to the inadmissibility of the applicants' application on matters arising in a joined case, of which the applicants were unable to apprise themselves. See also Case C-78/03 P *Commission v Aktionsgemeinschaft Recht und Eigentum* [2005] ECR I-10737, paragraphs 44 to 50, in which the Court held to be well founded the complaint made by the Commission that the Court of First Instance had wrongly reclassified the applicants' application as being intended to safeguard its procedural rights under Article 88(2) EC and, by so doing, had not enabled that institution to reply to the plea alleging breach of such procedural rights.

heard, in particular where they dismiss an appeal or decide a case on the basis of an issue raised of their own motion.⁴¹

97. Moreover, in the light of the objectives pursued by application of the rule that the parties should be heard, I see no difference between a situation of the kind dealt with in the judgment in *Plant and Others v Commission and South Wales Small Mines*, in which a court seeks to base its decision on facts or documents that have not been discussed by the parties, and a case in which it raises of its own motion a plea strictly confined to matters of law.

98. Indeed, the rule that the parties should be heard can be seen as having two objectives. The first is to provide information for the Court. The requirement that all matters liable to have an impact on the decision to be given in the case should be available for discussion by the parties thus enables the Court to give judgment on an entirely impartial basis and with full knowledge of all matters of fact and law.

99. The second aim is to underpin the confidence which subjects of law must be able to have in the judicial process. That confidence implies that the parties should have been guaranteed an opportunity to express themselves on all the matters on which the Court based its decision.

41 — See in particular the judgments of the European Court of Human Rights in the cases of *Clinique des Acacias and Others v. France*, 13 October 2005, paragraph 38, and *Prikyan and Angelova v. Bulgaria*, 16 February 2006, paragraph 42.

100. These considerations are just as valid where the Community judicature raises of its own motion a matter of pure law. Thus, an outcome to a case based on the application of a legal rule in a dispute, even one concerning public policy, necessarily derives from an assessment by the Court, which can only be enhanced and supported or, as the case may be, undermined by the observations of the parties. Similarly, for the unsuccessful party, the lack of any opportunity to put forward his observations on the rule of law which places him in the wrong, even if it is a rule of public policy, may legitimately give him the impression, because he has been unable to defend himself, that the Court was in an alliance with the opposite party.

101. It is true, as the respondents emphasise, that the rule that the parties should be heard is not absolute and may be subject to derogations.

102. Thus, so far as concerns the documents and information produced to the Court, it must be accepted that their disclosure may be subject to restrictions where that is justified by the protection of fundamental rights or an important public interest, such as the protection of business secrets.⁴² Similarly, the Community judicature, by virtue of its Rules

42 — In *Varec* (paragraphs 47, 50 and 51), the Court of Justice held that, in proceedings brought against a decision taken by a contracting authority for the award of a public contract, the rule that the parties should be heard in relation to all the information concerning the procedure for the award of the contract in question must be balanced against the right of other economic operators to protection of their confidential information and business secrets. See, to the same effect, Article 116(2) of the Rules of Procedure of the Court of First Instance, which provides that the President of the Court may prevent the disclosure to interveners of documents in the file which must be kept confidential.

of Procedure, is entitled to make interlocutory orders in proceedings for interim relief 'even before the observations of the opposite party have been submitted'.⁴³ Finally, the Community judicature may, by issuing an order and without first hearing the applicant, dismiss an action where it is clear that it has no jurisdiction to take cognisance of it or the action is manifestly inadmissible or manifestly lacking any foundation in law.⁴⁴

103. However, the above cases must in my opinion be regarded as exceptions to a principle. They all involve very specific situations in which there is a legitimate reason for derogating from the rule that the parties should be heard. In the first two cases, it was a question of protecting an important public interest, against which the rule must be balanced, or of guaranteeing the effectiveness of the measure granted in response to an application for interim relief.

104. Finally, so far as concerns orders made in cases of lack of jurisdiction, inadmissibility or manifest lack of any foundation in law, the derogation from the rule that the parties should be heard, although more debatable, can nevertheless be explained by the fact that the need to reject the application is so obvious that it is beyond dispute. In other words, it could be conceded that the dismissal of such

an action derives not from an assessment of the case by the Court but from a mere finding that one of those grounds exists.

105. It follows that Article 113 of the Rules of Procedure of the Court of First Instance cannot be interpreted as meaning that the Community judicature, where it raises an issue of its own motion, should respect the rule that the parties should be heard only in the cases referred to in that provision, that is to say when it raises an absolute bar to proceeding with the case or finds that the application has become devoid of purpose.

106. In the light of the foregoing considerations, that article must in my view be understood as meaning that it upholds the Community judicature's powers to raise matters of its own motion and not that it limits the scope of the rule that the parties should be heard. Quite the contrary: by expressly providing that the parties must be heard, that article fully confirms the importance of that fundamental principle where the Court raises a matter of its own motion. It must be construed as a specific application of the fundamental rule that the parties should be heard.

107. The Community judicature must therefore respect that principle when it envisages giving a decision on the basis of a public policy matter raised of its own motion. To that end, it is under a responsibility to open that issue to

43 — Article 84(2) of the Rules of Procedure of the Court of Justice, Article 105(2) of the Rules of Procedure of the Court of First Instance, and Article 104(3) of the Rules of Procedure of the Civil Service Tribunal.

44 — Article 92(1) of the Rules of Procedure of the Court of Justice, Article 111 of the Rules of Procedure of the Court of First Instance and Article 76 of the Rules of Procedure of the Civil Service Tribunal.

discussion by the parties, if need be by reopening the procedure.

108. It is undisputed that, in the present case, the Court of First Instance failed to have regard to that obligation.

109. The respondents nevertheless deny that the rule that the parties should be heard was infringed because, as the inadequate statement of reasons could not be remedied, reopening of the procedure would not have enabled the Commission to put forward arguments prompting the Court not to uphold the plea which it had itself raised. The Commission's interests were therefore not affected.

110. Admittedly, the rule that the parties should be heard is connected with the right to a fair hearing and it is conceded that that right must not be applied in a purely formalistic manner. According to well-established case-law, it is important, for a breach of a party's right to a fair hearing to be established and give rise to the annulment of a Community act, that the interests of that party have been adversely affected.⁴⁵

111. However, in view of the objectives pursued by the rule that the parties should be heard and the value of that principle within the Community legal order, it would be very difficult, where the Court of its own motion raises a public policy issue on which it envisages basing its decision and which is not a matter for an order as to lack of jurisdiction or manifest inadmissibility, to say that the interests of the parties have not been affected. It must be borne in mind, in that regard, that Article 113 of the Rules of Procedure of the Court of First Instance requires the Court to hear the parties concerning any absolute bar to proceeding with the case raised of the Court's own motion, without imposing any restriction in that respect.

112. It follows that even if, in the Court's view, the solution to the dispute appears so clear that the observations of the parties would have no impact on it, the parties nevertheless have the right to be informed of that issue in advance and to submit their observations on it.

113. Moreover, in the present case, the possibility cannot be ruled out that application of the rule that the parties should be heard could have had an impact on the Court's decision.

114. Indeed, it is of little importance, at this stage of the analysis, that an inadequate statement of reasons for a Community act is

⁴⁵ — See, as an example of the application of that case-law, the judgment in Case C-199/99 P *Corus UK v Commission* [2003] ECR I-11177, paragraphs 19 to 25.

a defect which, in principle, cannot be remedied. What is important is that the Court's analysis, to the effect that the contested decision is vitiated by a breach of the obligation to state reasons, derives from a genuine assessment and that there was an opportunity for the latter to be challenged.

115. Any assessment of compliance with the requirement to state the reasons for a Community act must be based on a specific analysis of that act, in the light of a number of criteria, set out in settled case-law.

116. The statement of reasons required by Article 253 EC must, according to settled case-law, be appropriate to the measure at issue and must disclose in a clear and unequivocal fashion the reasoning followed by the institution which adopted the measure in question in such a way as to enable the persons concerned to ascertain the reasons for the measure and to enable the competent Community court to exercise its power of review. The requirements to be satisfied by a statement of reasons depend on the circumstances of each case, in particular the content of the measure, the nature of the reasons given and the interest which the addressees of the measure or other parties to whom it is of direct and individual concern may have in obtaining explanations. It is not necessary for the statement of reasons to go into all the relevant facts and points of law, since the question whether the statement of reasons meets the requirements of Article 253 EC must be assessed with regard not only to its

wording but also to its context, and to all the legal rules governing the matter in question.⁴⁶

117. In the judgment under appeal, the Court of First Instance took care to set out, in paragraphs 56 to 62, the reasons for which, in its view, the Commission should have considered whether the exemptions at issue could be regarded as existing aid within the meaning of Article 1(b)(v) of Regulation No 659/1999 and from which it inferred that the contested decision, by merely stating that that provision was not applicable, was vitiated by an inadequate statement of reasons.

118. It is conceivable that the Court's assessment might have been different if it had given the Commission an opportunity to submit its observations on those matters and to put to the Court the same arguments as those which it has put forward in the fourth and fifth pleas of the present appeal.

119. In view of all the foregoing considerations, I propose that the Court declare that the second plea put forward by the Commission is well founded and hold that the Court of First Instance, by annulling the contested decision on a ground which was raised by it of

⁴⁶ — See, inter alia, Case C-390/06 *Nuova Agricast* [2008] ECR I-2577, paragraph 79, and Joined Cases C-341/06 P and C-342/06 P *Chronopost and La Poste v UFEX and Others* [2008] ECR I-4777, paragraph 88 and the case-law there cited.

its own motion and was not discussed by the parties, infringed the rule that the parties should be heard and, in so doing, adversely affected the Commission's interests.

120. I therefore propose that the judgment under appeal be set aside.

C — The consequences of setting aside the judgment under appeal

121. Where a judgment is set aside on appeal, Article 61 of the Statute of the Court of Justice provides that the Court may either refer the case back to the Court of First Instance or else itself give final judgment in the matter, where the state of the proceedings so permits.

122. The dispute in the present case is of a twofold nature. First, the contested decision was the subject of an application for annulment based on a large number of pleas, which were not examined by the Court of First Instance, and consequently the state of the proceedings is not such that those pleas can be examined by the Court of Justice.

123. Second, the Court of First Instance held that the decision in question was vitiated by a breach of the obligation to state reasons and that it was necessary for that issue to be examined before it assessed the pleas in annulment raised by the parties.

124. In so far as the question whether the contested decision is vitiated by an inadequate statement of reasons regarding the non-application of Article 1(b)(v) of Regulation No 659/1999 has been discussed between the parties before the Court of Justice, I am of the opinion that, on that point, the state of the proceedings is such that a decision may be given.

125. Moreover, as the Commission has stated, adjudication on that issue by the Court of Justice would appear necessary to ensure the sound administration of justice. It will make it possible to ensure that the discussion of this question is not repeated before the Court of First Instance and does not give rise to a judgment limited to that issue which, in the worst case, might be the subject of an appeal and a further reference back to the Court of First Instance for examination of the pleas in annulment raised by the parties.

126. The Court of Justice followed that course of action in *Plant and Others v Commission and South Wales Small Mines* in which, after finding that the Court of First Instance had committed a procedural irregu-

larity adversely affecting the applicants' interests by declaring their action inadmissible on the basis of documents of which they had had no knowledge, it then decided to consider the admissibility of that action.⁴⁷

127. I therefore propose that the Court of Justice examine together the Commission's fourth and fifth pleas, which seek to show that the judgment under appeal is incorrect in so far as the Court of First Instance held that the contested decision was vitiated by a defective statement of reasons regarding the non-application of Article 1(b)(v) of Regulation No 659/1999.

1. Arguments of the parties

128. The Commission's fourth and fifth pleas allege infringement of Article 253 EC, in conjunction with Articles 87(1) EC and 88(1) EC together with the rules governing procedure in relation to State aid matters and Article 1(b)(v) of Regulation No 659/1999.

129. In support of its fourth plea, the Commission maintains that the statement of reasons for the contested decision shows that the exemptions in question have constituted

aid ever since they were introduced, and that decision made it clear to the requisite legal standard and in accordance with the requirements of the case-law that those exemptions were capable of affecting trade between Member States and causing distortions of competition. In those circumstances, it was not necessary in the Commission's view to explain in greater detail the reasons for which Article 1(b)(v) of Regulation No 659/1999 was not applicable.

130. In support of its fifth plea, the Commission states that the Court of First Instance erred in law by considering that special circumstances, all relating to the conduct of the Council or the Commission, required that the contested decision contain a specific statement of reasons regarding the applicability of Article 1(b)(v) of Regulation No 659/1999, in so far as the concept of State aid, whether existing or new, is objective in nature and cannot depend on the conduct or statements of the institutions, *a fortiori* where such conduct or declarations have no bearing on a procedure for the review of aid. The Court of First Instance's finding thus ran counter to the position adopted by the Court of Justice in its judgment in *Belgium and Forum 187 v Commission*.⁴⁸

131. In response to the fourth plea, the respondents consider that the reasons for the inapplicability of Article 1(b)(v) of Regula-

⁴⁷ — *Plant and Others v Commission and South Wales Small Mines* (paragraph 35).

⁴⁸ — Joined Cases C-182/03 and C-217/03 [2006] ECR I-5479.

tion No 659/1999 cannot be clearly inferred from the contested decision which, therefore, does not meet the requirement of a clear and unequivocal statement of reasons. Moreover, what the Court of First Instance criticised the Commission for was its failure to set out its reasons for considering that the exemptions at issue distorted competition in the common market despite appearing to take a contrary view earlier. In that context, the Court of First Instance rightly held, having regard to the case-law, that the Commission should have given reasons showing that it had undertaken an analysis supporting its conclusion. By this plea, the Commission seeks, in their view, to compensate for the defective statement of reasons affecting the contested decision and to obtain from the Court of Justice a decision on matters of substance which are not connected with that defect.

132. In response to the fifth plea, the respondents maintain that the Court of First Instance did not call into question the objective nature of the concept of State aid but merely considered that, in the light of the earlier decisions of the Council and the Commission and their legitimate expectations deriving therefrom regarding the lawfulness of the exemptions at issue, the Commission was under an obligation to explain, in the contested decision, the reasons objectively leading to the non-application of Article 1(b)(v) of Regulation No 659/1999. Since the reasons for a decision must appear in the body of its text, the explanations given by the Commission cannot make up for the lack of a statement of reasons.

2. Assessment

133. I am of the opinion that the failure to explain the non-application of Article 1(b)(v) of Regulation No 659/1999 in the contested decision does not justify the annulment of the decision for breach of the obligation to state reasons.

134. According to the case-law referred to above, the question whether a Community measure satisfies the obligation to state reasons laid down by Article 253 EC must be the subject of a specific assessment, having regard, in particular, to the content of the measure in question, the circumstances in which it was adopted and the need for the persons directly and individually concerned by it to be given an explanation.

135. We have seen that, in the contested decision, the Commission came to the conclusion that the exemptions from excise duties on mineral oils, which had been authorised by the Council on a proposal from it, constituted new aid which was incompatible with the Treaty rules on State aid.

136. As the Court of First Instance noted in paragraphs 56 to 62 of the judgment under appeal, the statements of reasons for the authorisation decisions give a number of

indications on the basis of which the Member States and the undertakings concerned could legitimately believe that the Commission had taken the view that those exemptions did not constitute State aid, notably because they did not involve any distortion of competition.

137. It was therefore necessary for the Commission, in the contested decision, clearly to indicate the reasons for which it came to the opposite conclusion in the decision. It was under an obligation in particular to state the reasons for which it considered that the exemptions at issue distorted or threatened to distort competition, within the meaning of Article 87(1) EC.

138. In that decision, the Commission cited, in points 58 to 64 of the statement of reasons, the reasons for which it considered that the exemptions in question constitute State aid. It thus stated that those exemptions fulfilled the conditions laid down by Article 87(1) EC, that is to say they confer an advantage on certain undertakings, that advantage is granted using State resources, they affect trade between the Member States and they are liable to distort or threaten to distort competition.

139. Thus, point 59 of the statement of reasons for the contested decision states that the exemptions are financed through State

resources since the State foregoes an amount of money which it could otherwise collect. Point 60 of the statement of reasons for that decision provides that the exemptions confer an advantage on the beneficiaries because they reduce the cost of an important raw material. Finally, according to points 61 and 62 of the statement of reasons for the decision it can be assumed that those exemptions affect intra-Community trade and distort or threaten to distort competition because alumina is traded between Member States, because the exemptions were introduced, according to the statements made by the beneficiaries themselves and the French Republic, in order to enable Community producers to compete at a global level and because alumina is also produced in Germany, Greece, Spain and Hungary.

140. It must be held that, according to those assessments by the Commission, all those conditions are fulfilled, including that of distorting or threatening to distort competition between the Member States, without any limitation in time, that is to say ever since the exemptions in question were put into effect.

141. It is thus clearly apparent from the statement of reasons that the Commission considered that the exemptions at issue did not become State aid following the evolution of the common market but rather fell within that classification from the outset, so that they do not, *a priori*, fall within the scope of Article 1(b)(v) of Regulation No 659/1999.

142. We can also infer, from the wording of the contested decision so far examined, that, although the Commission had considered that those exemptions were not contrary to the Treaty rules on State aid when they were authorised by the Council, that assessment was incorrect and that, in the context of the specific review procedure provided for in Article 88 EC, it came to the opposite conclusion.

143. In the contested decision, the Commission went on to set out the reasons for which the exemptions at issue constitute new aid and not existing aid. It thus indicated that those exemptions did not exist before the accession of the three Member States, that they had never been analysed on the basis of the Treaty rules on State aid and that they had not been notified.

144. It was in that context that the Commission indicated, in point 69 of the statement of reasons for the contested decision, that Article 1(b)(v) of Regulation No 659/1999 was not applicable in this case.

145. In the light of the interpretation of that provision given in *Belgium and Forum 187 v Commission* that statement appears well founded. Indeed, it was held in paragraph 71 of that judgment that that provision does not apply where the Commission alters its appraisal of a national measure.

146. It is true that the Commission did not include that explanation in point 69 of the statement of reasons for the contested decision. It may possibly be a matter of regret that it did not indicate that its assessment of those exemptions in connection with their authorisation by the Council, under the directives concerning excise duty on mineral oils, could not justify bringing those exemptions within the scope of Article 1(b)(v) of Regulation No 659/1999. That regret might also be based on the fact that, when the contested decision was adopted, the judgment in *Belgium and Forum 187 v Commission* had not yet been delivered.

147. But I consider that such an explanation was not truly necessary, having regard to the wording of Article 1(b)(v) of Regulation No 659/1999: that provision does not refer to a change of assessment by the Community institutions but merely to the ‘evolution of the common market’ or the ‘liberalisation of an activity by Community law’.

148. In any event, the Court of First Instance was not right to criticise the Commission for failing to examine the question whether the exemptions at issue might be regarded as existing aid within the meaning of that provision, on the basis that they had not constituted aid when they were put into effect but became aid subsequently as a result of evolution of the common market and without any alteration of those exemptions by the Member States concerned.

149. In my opinion, the Commission was not required to undertake any such examination, since it had stated, in points 58 to 64 of the statement of reasons for the contested decision, that the exemptions at issue constituted State aid without any limitation in time, and therefore ever since they were introduced. Those reasons were, in my opinion, sufficient to enable the Member States and the undertakings directly and individually concerned by the contested decision to understand why the Commission considered that the exemptions at issue had not become State aid by reason of any evolution of the common market, and consequently did not come within the scope of Article 1(b)(v) of Regulation No 659/1999.

legal standard that the exemptions in question have fulfilled the conditions laid down in Article 87(1) EC from the outset and, in particular, that they distort or threaten to distort competition and have done so since being put into effect. I would merely point out that, in view of the indications given in points 58 to 64 of the statement of reasons for the contested decision, it was not necessary for the Commission to examine whether the exemptions at issue had become aid following an evolution of the common market and fell within the scope of Article 1 (b)(v) of Regulation No 659/1999.

150. This analysis does not prejudice the question whether the Commission, in the contested decision, showed to the requisite

151. In view of those considerations, I am of the opinion that the contested decision is not vitiated by a breach of the obligation to state reasons regarding the non-application of Article 1(b)(v) of Regulation No 659/1999.

V — Conclusion

152. Having regard to the foregoing considerations, I propose that the Court of Justice should give judgment in the following terms:

The Court hereby:

- (1) sets aside the judgment of the Court of First Instance of the European Communities of 12 December 2007 in Joined Cases T-50/06, T-56/06, T-60/06, T-62/06 and T-69/06 *Ireland and Others v Commission*, to the extent to which:

- it annuls Commission Decision 2006/323/EC of 7 December 2005 concerning the exemption from excise duty on mineral oils used as fuel for alumina production in Gardanne, in the Shannon-region and in Sardinia respectively implemented by France, Ireland and Italy, on the ground that, in that decision, the Commission of the European Communities infringed the obligation to state reasons in relation to the non-application to that case of Article 1(b)(v) of Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article [88 EC];
 - it dismisses the action in Case T-62/06 as to the remainder; and
 - it orders the Commission of the European Communities to bear its own costs and those incurred by the applicants, including those relating to the application for interim measures in Case T-69/06 R;
- (2) refers Cases T-50/06, T-56/06, T-60/06, T-62/06 and T-69/06 back to the Court of First Instance of the European Communities.