JUDGMENT OF THE COURT (Grand Chamber)

2 December 2009 *

In Case C-89/08 P,

APPEAL under Article 56 of the Statute of the Court of Justice, lodged on 26 February 2008,

European Commission, represented by V. Di Bucci and N. Khan, acting as Agents, with an address for service in Luxembourg,

appellant,

the other parties to the proceedings being:

Ireland, represented by D. O'Hagan, acting as Agent, and by P. McGarry BL, with an address for service in Luxembourg,

French Republic, represented by G. de Bergues and A.-L. Vendrolini, acting as Agents,

* Languages of the case: French, English and Italian.

Italian Republic, represented by R. Adam, acting as Agent, and by G. Aiello, avvocato dello Stato, with an address for service in Luxembourg,

Eurallumina SpA, established in Portoscuso (Italy), represented by R. Denton, Solicitor,

Aughinish Alumina Ltd, established in Askeaton (Ireland), represented by J. Handoll and C. Waterson, Solicitors,

applicants at first instance,

THE COURT (Grand Chamber),

composed of V. Skouris, President, A. Tizzano, K. Lenaerts, E. Levits, Presidents of Chambers, A. Rosas, P. Kūris (Rapporteur), A. Borg Barthet, J. Malenovský, U. Lõhmus, A. Ó Caoimh and J.-J. Kasel, Judges,

Advocate General: Y. Bot,
Registrar: H. von Holstein, Deputy Registrar,

having regard to the written procedure and further to the hearing on 24 March 2009,

after hearing the Opinion of the Advocate General at the sitting on 12 May 2009,

gives the following

Judgment

1 By its appeal, the Commission of the European Communities seeks to have set 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* ('the judgment under appeal'), by which the 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 (OJ 2006 L 119, p. 12; 'the decision at issue').

Legal context

The directives concerning excise duty on mineral oils

2 Excise duty on mineral oils has been the subject of a number of directives, namely Council Directive 92/81/EEC of 19 October 1992 on the harmonisation of the structures of excise duties on mineral oils (OJ 1992 L 316, p. 12), Council Directive 92/82/EEC of 19 October 1992 on the approximation of the rates of excise duties on mineral oils (OJ 1992 L 316, p. 19) and Council Directive 2003/96/EC of 27 October 2003 restructuring the Community framework for the taxation of energy products and electricity (OJ 2003 L 283, p. 51), which repealed Directives 92/81 and 92/82 with effect from 31 December 2003.

3 Article 8(4) of Directive 92/81 enabled the Council of the European Union, on a proposal from the Commission, to authorise any Member State to introduce exemptions or reductions of the rates of excise duty other than those laid down by that directive.

4 Directive 2003/96 provided, at the second indent of Article 2(4)(b), that the directive did not apply to dual use of energy products, that is to say where a product is used both as heating fuel and for purposes other than as motor fuel and heating fuel. Thus, since 1 January 2004, the date on which that directive entered into force, there is no longer any minimum rate of excise duty on heavy fuel oil used for the production of alumina. Moreover, under Article 18(1) of Directive 2003/96, the Member States were authorised, subject to a prior review by the Council, to continue to apply until 31 December 2006 the reduced rates or exemptions set out in Annex II, which refers to the exemptions for heavy fuel oil used as fuel for the production of alumina in the region of Gardanne, in the Shannon region and in Sardinia.

Regulation (EC) No 659/1999

5 Article 1(b) of Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article [88 EC] (OJ 1999 L 83, p. 1) provides that 'existing aid' is to mean:

'…

(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.'

Background to the dispute

6 Ireland, the Italian Republic and the French Republic have exempted from excise duty mineral oils used for the production of alumina in the Shannon region since 1983, in Sardinia since 1993 and in the Gardanne region since 1997 respectively ('the exemptions at issue').

7 The exemptions at issue were authorised by Council Decision 92/510/EEC 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); by Council Decision 93/697/EC 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); and by Council Decision 97/425/EC 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) respectively. The exemptions at issue were extended several times by the Council and ultimately until 31 December 2006 by Council Decision 2001/224/EC 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).

8 At point 5 of the statement of reasons for Decision 2001/224, it was stated that the decision was 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.

9 By three decisions of 30 October 2001, the Commission initiated the procedure provided for in Article 88(2) EC with regard to each of the exemptions at issue. On completion of that procedure, the Commission adopted the decision at issue, according to which:

— the exemptions from excise duty granted by the French Republic, Ireland and the Italian Republic in respect of heavy fuel oils used in the production of alumina until 31 December 2003 constitute State aid within the meaning of Article 87(1) EC;

— aid granted between 17 July 1990 and 2 February 2002, to the extent that it is incompatible with the common market, is not to be recovered as this would be contrary to the general principles of Community law;

— the aid granted between 3 February 2002 and 31 December 2003 is incompatible with the common market within the meaning of Article 87(3) EC in so far as the beneficiaries did not pay a rate of EUR 13.01 per 1 000 kg of heavy fuel oils; and

— the latter aid must be recovered.

10 In the decision at issue, the Commission took the view that the exemptions at issue constituted new aid and not existing aid within the meaning of Article 1(b) of Regulation No 659/1999. It based that assessment on the fact, in particular, that the exemptions at issue did not exist before the entry into force of the EC Treaty in the Member States concerned, that they had never been analysed or authorised on the basis of the State aid rules, and that they had never been notified.

11 In addition, at point 69 of the statement of reasons for the decision at issue, the Commission stated that Article 1(b)(v) of Regulation No 659/1999 did not apply in this case.

12 After outlining the extent to which the aid in question was incompatible with the common market, the Commission took the view that, in the light of the exemption decisions and the fact that those decisions had been adopted on its own proposals, the recovery of the incompatible aid granted before 2 February 2002, the date on which the decisions to initiate the procedure laid down in Article 88(2) EC were published in the *Official Journal of the European Communities*, would be contrary to the principles of the protection of legitimate expectations and of legal certainty.

The proceedings before the Court of First Instance and the judgment under appeal

13 By applications lodged at the Registry of the Court of First Instance on 16, 17 and 23 February 2006, the Italian Republic, Ireland, the French Republic, Eurallumina SpA and Aughinish Alumina Ltd brought proceedings for the annulment, in whole or in part, of the decision at issue. The various cases were joined for the purposes of the oral procedure and of the judgment.

14 According to the judgment under appeal, the applicants put forward, in essence, a total of 23 pleas in law in support of their application, alleging, inter alia, the wrongful classification of the exemptions at issue as new aid — when in fact they constituted

existing aid — and breach of the principles of the protection of legitimate expectations, legal certainty, observance of a reasonable time-limit, the presumption of validity, *lex specialis derogat legi generali*, 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.

15 However, at paragraph 46 of the judgment under appeal, the Court of First Instance stated that, notwithstanding the fact that those pleas had been raised, it considered it appropriate in the present case to raise of its own motion a plea relating to the defective statement of the reasons on which the decision at issue was based, with regard to the non-application of Article 1(b)(v) of Regulation No 659/1999.

16 Having noted at paragraph 47 of the judgment under appeal that a lack or an insufficiency of reasoning is a matter of public policy which the Community judicature must raise of its own motion, and having cited, at paragraphs 48 and 49, the case-law relating to the scope of the duty to state the reasons for a Community measure, the Court of First Instance stated at paragraphs 52 and 53 of the judgment under appeal that the Commission had, in the decision at issue, examined whether the exemptions at issue constituted new aid or existing aid but, with regard to Article 1(b)(v) of Regulation No 659/1999, merely stated that that provision did not apply in this case, without giving reasons.

17 The Court of First Instance held, at paragraphs 56 to 63 of the judgment under appeal, that the particular circumstances of the present case were nevertheless such that it was necessary to ascertain whether the exemptions at issue could be regarded as existing aid by reason of the fact that at the time they were put into effect they did not constitute aid but that subsequently they became aid due to the evolution of the common market and without having been altered by the Member States concerned. It considered, therefore, that the Commission was required to give adequate reasons for the decision at issue with regard to the applicability of Article 1(b)(v) of Regulation No 659/1999.

18 The particular circumstances in question are set out, in essence, as follows at paragraphs 56 to 62 of the judgment under appeal.

19 First, in a number of decisions authorising the exemptions at issue, it is indicated that the Commission recognises that those exemptions do not entail any distortion of competition or interfere with the working of the internal market. However, there is nothing in the decision at issue to explain how 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.

20 Second, at point 97 of the statement of reasons for the decision at issue, the Commission at least recognised that those authorisation decisions, adopted on the basis of its own proposals, might have given the impression that the exemptions at issue could not be classified as State aid when they were put into effect. The fact that point 97 is in the part of the statement of reasons relating to the recovery of the aid cannot restrict its scope.

21 Third, the exemptions at issue were authorised and successively extended by decisions of the Council adopted on a proposal from the Commission and, with the exception of Decision 2001/224, none of those decisions mentioned any possible conflict with the State aid rules. Indeed, at point 96 of the statement of reasons for the decision at issue, the Commission itself states that the interested parties would not expect the Commission to submit proposals to the Council which are incompatible with Treaty provisions.

22 The Court held, at paragraph 64 of the judgment under appeal, that the Commission had infringed the duty to give reasons imposed on it by Article 253 EC with regard to the non-application in the present case of Article 1(b)(v) of Regulation No 659/1999.

Forms of order sought by the parties

23 The Commission asks the Court to set aside the judgment under appeal, to refer the case back to the Court of First Instance for reconsideration and to reserve the costs of the proceedings at first instance and on appeal.

24 The French Republic, Ireland, the Italian Republic, Eurallumina SpA and Aughinish Alumina Ltd contend that the Court should dismiss the appeal and order the Commission to pay the costs.

25 In the alternative, in the event that the Court upholds the sixth ground of appeal — according to which the Court of First Instance was not entitled to annul the decision at issue in so far as that decision extended the formal investigation procedure to the exemptions at issue beyond 31 December 2003 — Eurallumina SpA asks the Court to set aside the judgment under appeal with regard to that point alone.

The appeal

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

27 The first plea alleges, in essence, that the Court of First Instance exceeded its powers by raising of its own motion the issue of an inadequate statement of reasons for the decision at issue. The second plea alleges infringement of the rule that the parties should be heard and of the rights of the defence. The third relates to an infringement of Articles 230 EC and 253 EC, in conjunction with Article 88 EC and the rules governing procedure in respect of State aid. The fourth and fifth pleas in law allege, in essence, an infringement by the Court of First Instance of Article 253 EC in that it erred in finding that the Commission had failed to fulfil its obligation to state reasons regarding the applicability of Article 1(b)(v) of Regulation No 659/1999. The sixth plea seeks a ruling

that the Court of First Instance was not entitled to annul the decision at issue in so far as the decision extends the formal investigation procedure to the exemptions at issue beyond 31 December 2003.

The first ground of appeal, alleging that the Court of First Instance exceeded its powers by raising of its own motion the absence of a statement of reasons for the decision at issue

Arguments of the parties

28 The first ground of appeal is divided into two parts. In the first part, the Commission submits that, by raising of its own motion the plea relating to the absence of a statement of reasons for the decision at issue, the Court of First Instance went outside the scope of the dispute as defined by the parties, infringed the principle that the subject-matter of an action is delimited by the parties, ruled *ultra petita*, thus exceeding its jurisdiction, and committed a breach of procedure adversely affecting the Commission's interests.

29 In support of those allegations, the Commission claims that the plea raised by the Court of First Instance of its own motion is entirely unrelated to the 23 pleas in law put forward by the applicants at first instance and to the facts in the files of the five joined cases, which did not reveal anything that might have suggested that the exemptions at issue did not constitute aid when they were introduced, but that they became aid subsequently as a result of the evolution of the common market.

30 In the second part, the Commission submits that the plea raised of the Court's own motion goes, in reality, to the substantive legality of the decision at issue, not to the statement of reasons for that decision, since the statement of reasons demanded by the Court of First Instance was not needed by the persons concerned or by the Court itself. The Court thus disregarded the distinction established by the case-law between pleas concerning the statement of reasons and pleas concerning the substance, and put itself

in the place of the applicants at first instance by raising a plea which only they could put forward. In so doing, it infringed the provisions of Article 230 EC in conjunction with Article 253 EC and, moreover, the rules on the presentation of pleas in the application contained 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, thereby depriving those rules of any practical effect. The infringements also constitute breaches of procedure that adversely affected the interests of the Commission.

31 In opposing that ground of appeal, the respondents observe, in essence, that the absence of reasoning, which constitutes an infringement of essential procedural requirements, is a matter of public policy which must be raised by the Community judicature of its own motion. The Court of First Instance cannot, therefore, be accused of having ruled *ultra petita* or, moreover, of having infringed the rule under Article 48(2) of the Rules of Procedure of the Court of First Instance, which applies not to the Court but to the applicant.

32 Furthermore, according to the respondents, the plea relating to the absence of a statement of reasons for the decision at issue was not entirely unrelated to the pleas put forward by the applicants at first instance or to the facts of the case. Notably, the particular circumstances referred to at paragraphs 56 to 62 of the judgment under appeal were explained and discussed in the course of the proceedings before the Court of First Instance.

33 The plea raised of the Court's own motion does not concern a matter of substantive law but simply the absence of a statement of reasons. Furthermore, in the judgment under appeal, the Court did not question the Commission's classification of new aid, but merely the absence of any explanation as to the inapplicability of Article 1(b)(v) of Regulation No 659/1999. Therefore, the Court did not disregard the distinction between the statement of reasons and the substance, and was entitled to hold that the decision at issue must contain reasons as to the applicability of that provision, since the Commission was required, in the context of the present case, to state the reasons for its classification of the exemptions at issue as new aid rather than existing aid.

Findings of the Court

34 In order to rule on the first part of this ground of appeal, according to which the Court of First Instance went outside the scope of the dispute as defined by the parties, it should be noted that it has consistently been held that an absence of or inadequate statement of reasons constitutes an infringement of essential procedural requirements for the purposes of Article 230 EC and is a plea involving a matter of public policy which may, and even must, be raised by the Community judicature of its own motion (see, in particular, Case C-166/95 P *Commission* v *Daffix* [1997] ECR I-983, paragraph 24; Case C-367/95 P *Commission* v *Sytraval and Brink's France* [1998] ECR I-1719, paragraph 67; Case C-265/97 P *VBA* v *Florimex and Others* [2000] ECR I-2061, paragraph 114; and Case C-413/06 P *Bertelsmann and Sony Corporation of America* v *Impala* [2008] ECR I-4951, paragraph 174).

35 By raising such a plea of its own motion — a plea which a priori has not been put forward by the parties — the Community judicature does not go beyond the scope of the dispute that has been brought before it, or in any way infringe the rules of procedure relating to the presentation in the application of the subject-matter of the dispute or of the pleas in law.

36 Accordingly, in the present case, the Court of First Instance did not exceed its jurisdiction by raising of its own motion a plea in law relating to the absence of a statement of reasons for the decision at issue.

37 It follows from this that the first part of the first plea is unfounded.

38 As regards the second part of this plea, according to which, in reality, the Court of First Instance raised of its own motion a plea regarding the substantive legality of the decision at issue, it must be observed that the Court annulled that decision on the

ground, stated at paragraph 63 of the judgment under appeal, that the Commission was required, in the light of the particular circumstances set out at paragraphs 56 to 62 of the judgment, to ascertain whether Article 1(b)(v) of Regulation No 659/1999 was applicable in the present case and to give adequate reasons for the decision at issue in that regard, instead of merely stating that Article 1(b)(v) did not apply in this case.

39 It must be held, therefore, that the Court of First Instance did not in any way rule in the judgment under appeal, as to the substance, on the applicability of Article 1(b)(v) or, more generally, on the question — debated by the parties — whether the exemptions at issue constituted existing or new aid.

40 Accordingly, the Court of First Instance cannot be accused of having disregarded the distinction recognised by the case-law between a plea raised by the Community judicature of its own motion as to an absence of reasons or an inadequacy of the reasons stated and a plea going to the substantive legality of a decision which can be examined only if it is raised by the applicant (see *Commission* v *Sytraval and Brink's France*, paragraph 67).

41 Therefore, the second part of the plea is also unfounded.

42 It follows from all the foregoing that the first ground of appeal must be dismissed.

The second ground of appeal, alleging that the Court of First Instance infringed the rule that the parties should be heard and the rights of the defence

Arguments of the parties

43 Observing that the plea raised of the Court's own motion in the judgment under appeal was not debated or even touched upon in the course of the written and oral procedures before the Court of First Instance, the Commission claims that the Court infringed the general principle that the parties should be heard and the principle of respect for the rights of the defence.

44 The Commission relies in that regard on the case-law of the European Court of Human Rights in relation to Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950 ('the ECHR'), according to which a court must itself observe the rule that all parties are to be heard, in particular, when it dismisses an appeal or decides a dispute on a ground it has identified of its own motion.

45 The Commission submits, moreover, that the principle that both sides must be heard is a general principle of procedure before the Community Courts which has been acknowledged by the Court of Justice as a fundamental right, and that the Court of First Instance had the option of ordering the reopening of the oral procedure in order to invite the parties to debate the plea which it intended to raise of its own motion.

46 The respondents contend, in essence, that, under Article 62 of the Rules of Procedure of the Court of First Instance, the Court has a discretion to order the reopening of the oral procedure, and that it follows from that provision and also from Article 113 of the Rules of Procedure that the obligation to hear the parties before raising a plea of the Court's own motion arises only with regard to pleas culminating in the inadmissibility of the action or in there being no need to adjudicate. Moreover, they note, where the Court of Justice intends to raise of its own motion a plea involving a matter of public policy, it does not necessarily reopen the oral procedure.

47 They contend that, as the Commission acknowledges, the ECHR does not apply to legal persons governed by public law and that, even though the rule that the parties should be heard is a fundamental right, the application of that rule must be appropriate to the status of the parties and to the specific circumstances of the case.

48 In the present case, according to the respondents, the rule that the parties should be heard was complied with, since the judgment under appeal was not based on documents or facts with which the Commission was unfamiliar. Furthermore, the plea raised of the Court's own motion did not touch upon the merits of the case, but related to the infringement of an essential procedural requirement.

49 In addition, the interests of the European Community have not been affected; its rights have not been infringed, since there has been no finding of civil or criminal liability against the Commission and no penalty has been imposed upon it, and, moreover, the reopening of the oral procedure would not have enabled the Commission to put forward arguments that would have caused the Court of First Instance not to raise of its own motion the plea alleging the absence of a statement of reasons, since that is a defect that could not be remedied after the event.

Findings of the Court

50 The rule that the parties should be heard forms part of the rights of the defence. It applies to any procedure which may result in a decision by a Community institution perceptibly affecting a person's interests (see, in particular, Case C-315/99 P *Ismeri Europa* v *Court of Auditors* [2001] ECR I-5281, paragraph 28 and the case-law cited, and *Bertelsmann and Sony Corporation of America* v *Impala*, paragraph 61).

51 The Community Courts ensure that the rule that the parties should be heard is respected in proceedings before them and that they themselves respect that rule.

52 Thus, the Court has already held that the principle that the parties should be heard means, as a rule, that the parties have a right to a process of inspecting and commenting on the evidence and observations submitted to the court (Case C-450/06 *Varec* [2008] ECR I-581, paragraph 47) and, moreover, that that basic principle of law is infringed where a judicial decision is founded on facts and documents which the parties, or one of them, have not had an opportunity to examine and on which they have therefore been unable to comment (Joined Cases 42/59 and 49/59 *SNUPAT* v *High Authority* [1961] ECR 53, 84; Case C-480/99 P *Plant and Others* v *Commission and South Wales Small Mines* [2002] ECR I-265, paragraph 24; and Case C-199/99 P *Corus UK* v *Commission* [2003] ECR I-11177, paragraph 19).

53 The rule that the parties should be heard must benefit all parties to proceedings before the Community judicature, irrespective of their legal status. The Community institutions may also, therefore, avail themselves of that principle when they are parties to such proceedings.

54 A court must itself observe the rule that the parties should be heard, in particular, when it decides a dispute on a ground it has identified of its own motion (see, by analogy, in the sphere of human rights, the judgments of the European Court of Human Rights in *Skondrianos v. Greece*, nos. 63000/00, 74291/01 and 74292/01, §29 and 30, 18 December 2003; *Clinique des Acacias and Others v. France*, nos. 65399/01, 65405/01 and 65407/01, §38, 13 October 2005; and *Prikyan and Angelova v. Bulgaria*, no. 44624/98, §42, 16 February 2006).

55 As the Advocate General stated at points 93 to 107 of his Opinion, the principle that the parties should be heard does not, as a rule, merely confer on each party to proceedings the right to be apprised of the documents produced and observations made to the Community Courts by the other party and to discuss them, and does not merely prevent the Community Courts from basing their decision on facts and documents which the parties, or one of them, have not had an opportunity to examine and on which they have therefore been unable to comment. It also, as a rule, implies a right for the parties to be apprised of pleas in law raised by those Courts of their own motion, on which they intend basing their decisions, and to discuss them.

56 In order to satisfy the requirements associated with the right to a fair hearing, it is important for the parties to be apprised of, and to be able to debate and be heard on, the matters of fact and of law which will determine the outcome of the proceedings.

57 Accordingly, except in particular cases such as, inter alia, those provided for by the rules of procedure of the Community Courts, those Courts cannot base their decisions on a plea raised of their own motion, even one involving a matter of public policy and — as in the present case — based on the absence of a statement of reasons for the decision at issue, without first having invited the parties to submit their observations on that plea.

58 Moreover, in the analogous context of Article 6 of the ECHR, the Court of Justice has held that it is precisely in deference to that article and to the very purpose of every individual's right to adversarial proceedings and to a fair hearing within the meaning of that provision that the Court may of its own motion, on a proposal from the Advocate General or at the request of the parties, order that the oral procedure be reopened, in accordance with Article 61 of its Rules of Procedure, if it considers that it lacks sufficient information, or that the case must be dealt with on the basis of an argument which has not been debated between the parties (see the order of 4 February 2000 in Case C-17/98 *Emesa Sugar* [2000] ECR I-665, paragraphs 8, 9 and 18, and Joined Cases C-270/97 and C-271/97 *Deutsche Post* [2000] ECR I-929, paragraph 30).

59 The discretion which the Court of First Instance has in that regard under Article 62 of its Rules of Procedure cannot be exercised without taking account of the obligation to comply with the rule that the parties should be heard.

60 In the present case, it is apparent from the file and from the hearing before the Court of Justice that, by the judgment under appeal, the Court of First Instance annulled the decision at issue on the basis of a plea that it had raised of its own motion concerning an infringement of Article 253 EC without first having invited the parties, in the course of

the written or oral procedures, to submit their observations on that plea. In so doing, the Court of First Instance failed to have regard to the rule that the parties should be heard.

61 Contrary to the respondents' contentions, the failure to comply with the rule that the parties should be heard adversely affected the interests of the Commission for the purposes of Article 58 of the Statute of the Court of Justice. As the Advocate General noted at points 114 to 118 of his Opinion, while it is true that an inadequate statement of reasons is a defect which, in principle, cannot be remedied, the finding of such a defect nevertheless follows from an assessment which, as has consistently been held, must take certain matters into consideration, as the Court of First Instance indeed noted at paragraphs 48 and 49 of the judgment under appeal. Such an assessment may be open to debate, particularly where it relates to the reasons for a specific point of fact and of law rather than to the total absence of reasons. In the present case, if the Commission had been in a position to submit its observations, it could, inter alia, have put forward the same arguments as those advanced in relation to the fourth and fifth grounds of this present appeal, set out at paragraphs 64 to 67 of the present judgment.

62 For all those reasons, the second ground of appeal put forward by the Commission must be accepted.

63 Moreover, the Court considers it appropriate in the present case, in the interests of the sound administration of justice, to examine also the fourth and fifth grounds of appeal, by which the Commission submits that the Court of First Instance infringed Article 253 EC in so far as it considered that the Commission had infringed the obligation to state reasons, as required by that article, in relation to the applicability of Article 1(b)(v) of Regulation No 659/1999.

The fourth and fifth grounds of appeal, alleging an infringement of Article 253 EC

Arguments of the parties

64 By the fourth ground of its appeal, the Commission claims that the Court of First Instance infringed Article 253 EC, in conjunction with Articles 87(1) EC and 88(1) EC and with the rules governing procedure in respect of State aid.

65 In support of that plea the Commission submits, in particular, that the statement of reasons for the decision at issue demonstrates that the exemptions at issue constituted aid ever since their introduction, since the decision showed to the requisite legal standard and in accordance with the requirements of the case-law that those exemptions were such as to affect trade between the Member States and distort competition. That being the case, it was not necessary, according to the Commission, to explain in more detail why Article 1(b)(v) of Regulation No 659/1999 did not apply. Furthermore, even on the assumption that the exemptions at issue did not constitute aid when they were introduced, it would follow from this that they do not constitute aid now, as some of the applicants (wrongly) argued at first instance, but not that they constitute existing aid, as envisaged by the Court of First Instance.

66 In relation to the fifth ground of its appeal, the Commission submits that the Court of First Instance also infringed Article 253 EC in conjunction with Article 87(1) EC, Article 88(1) EC and Article 1(b)(v) of Regulation No 659/1999, as well as the obligation to state the grounds of its judgments.

67 In support of that plea, the Commission submits, inter alia, that the Court of First Instance erred in law in considering that the particular circumstances, all of which relate to the conduct of the Council or of the Commission, required that the decision at

issue should contain a specific statement of reasons with regard to the applicability of Article 1(b)(v) of Regulation No 659/1999 whereas, being objective in nature, the concept of State aid, whether existing or new, cannot depend on the conduct or statements of the institutions, especially if the conduct or statements in question are extraneous to the procedure for the control of aid. Furthermore, such an assessment would contradict the Court's decision in Joined Cases C-182/03 and C-217/03 *Belgium and Forum 187* v *Commission* [2006] ECR I-5479.

68 In response to the fourth ground of appeal, the respondents state, inter alia, that the reasons for the non-application of Article 1(b)(v) of Regulation No 659/1999 are not readily apparent from the decision at issue which, therefore, does not satisfy the requirement of clear and unequivocal reasoning. Furthermore, the Court of First Instance criticised the Commission for having failed to set out the reasons for its view that the exemptions at issue distorted competition in the common market, when it appeared previously to have reached the opposite conclusion. In that context, the Court of First Instance was entitled to hold, in the light of the case-law, that the Commission was required to state reasons showing that it had carried out an analysis that supported its conclusion. By that plea, the Commission was, in reality, seeking to compensate for the inadequacy of its statement of reasons in respect of the decision at issue and to obtain a ruling from the Court of Justice on substantive issues unrelated to that inadequacy.

69 In response to the fifth plea, the respondents contend that the Court of First Instance did not deny the objective nature of the concept of State aid, but merely considered that, in view of earlier decisions of the Council and the legitimate expectations to which they gave rise regarding the legality of the exemptions at issue, the Commission was required to state in its decision the reasons for objectively ruling out the application of Article 1(b)(v) of Regulation No 659/1999. Since the statement of reasons for a decision must appear in the body of that decision, the explanations given by the Commission could not make up for the absence of reasoning.

Findings of the Court

70 Under Article 1(b)(v) of Regulation No 659/1999, aid is deemed to be an existing aid if, 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.

71 The concept of evolution of the common market may be understood as a change in the economic and legal framework of the sector concerned by the measure in question, and does not apply, for example, in a situation where the Commission alters its appraisal on the basis of a more rigorous application of the rules on State aid (see *Belgium and Forum 187* v *Commission*, paragraph 71).

72 More generally, the concept of State aid, whether existing or new, corresponds to an objective situation. As the Commission submits, that concept cannot depend on the conduct or statements of the institutions.

73 That is why, having pointed out that the obligation under Article 253 EC to state the reasons for a Community measure must be appropriate to the act at issue, the Court held, at paragraph 137 of the judgment in *Belgium and Forum 187* v *Commission*, that the Commission is not required to state the reasons why it made a different assessment of the regime in question in its previous decisions.

74 That is all the more the case where a previous, different assessment by the Commission of the national measure at issue was, as in the present case, made in the context of a procedure other than that of the control of State aid.

75 Consequently, the circumstances referred to at paragraphs 56 to 62 of the judgment under appeal — which relate principally to the fact that the Commission had taken the view, when the decisions authorising the exemptions at issue were adopted by the Council, that those exemptions did not give rise to distortions in competition or interfere with the working of the internal market and, moreover, that those decisions might suggest that the exemptions at issue could not be classified as State aid — were not such as to require the Commission, in principle, to set out in the decision at issue reasons for the inapplicability of Article 1(b)(v) of Regulation No 659/1999.

76 The Court of First instance therefore annulled the decision at issue on grounds that are incorrect in law when it concluded that, taking those circumstances into consideration, the Commission was required in the present case to ascertain whether Article 1(b)(v) of Regulation No 659/1999 was applicable and to give specific reasons in its decision with regard to that point, and that, having failed to do so, the Commission had infringed Article 253 EC.

77 Furthermore, it has been consistently held that the statement of reasons required by Article 253 EC must 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 the statement of reasons depend on the circumstances of each case, in particular the content of the measure in question, 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 reasoning 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 (see, in particular, *Commission* v *Sytraval and Brink's France*, paragraph 63 and the case-law cited, and *Bertelsmann and Sony Corporation of America* v *Impala*, paragraph 166 and the case-law cited).

78 In the present case, at points 58 to 64 of the statement of reasons for the decision at issue, the Commission first of all set out why it considered that the exemptions at issue

constitute aid that is incompatible with the common market for the purposes of Article 87(1) EC, finding that they confer an advantage on certain undertakings, that that advantage is granted through State resources, that they affect trade between Member States and that they distort or threaten to distort competition.

79 In particular, at point 60 of the statement of reasons for the decision at issue, the Commission stated that the exemptions at issue reduce the costs of one input and thus confer an advantage on the beneficiaries which are placed in a more favourable situation than other undertakings using mineral oils in other industries or regions. At points 61 and 62 of the statement of reasons for the decision at issue, the Commission stated that the comments of the beneficiaries and of the French Republic confirmed that the excise reductions are explicitly intended to strengthen the competitiveness of those beneficiaries vis-à-vis their competitors by reducing their costs and, moreover, that alumina, which is also produced in Greece, Spain, Germany and Hungary, is traded between Member States, and that it can therefore be assumed that the exemptions at issue affect intra-Community trade and distort or threaten to distort competition.

80 At points 65 to 70 of the statement of reasons for the decision at issue, the Commission went on to set out the reasons for its view that the exemptions at issue constitute new aid rather than existing aid under Article 1 of Regulation No 659/1999. Accordingly, it explained that the exemptions in question did not exist before the entry into force of the Treaty in the three Member States concerned, that they had never been analysed or authorised pursuant to the State aid rules, that they had never been notified and, finally, that Article 1(b)(v) of the regulation did not apply in this case.

81 Although the Commission did not expand on that last point in the decision at issue, it nevertheless follows clearly from all those reasons that the Commission took the view that the exemptions at issue did not become State aid as a result of the evolution of the common market but that they constituted State aid from the outset, with the result that Article 1(b)(v) of Regulation No 659/1999 could not apply in the present case.

82 Moreover, it is common ground that the applicants at first instance had not made any submissions that there had been an evolution of the common market since the introduction of the exemptions at issue which ought to have led the Commission to explain in reply why it considered that Article 1(b)(v) of Regulation No 659/1999 did not apply in the present case.

83 Furthermore, it also follows clearly from the statement of reasons for the decision at issue that, while the Commission had taken the view, when the decisions authorising the exemptions at issue were adopted by the Council, that those exemptions did not give rise to distortions in competition or interfere with the working of the internal market, the fact remains that they had never been analysed or authorised under the State aid rules, on the basis of which the Commission came to the opposite conclusion. It must also be noted in that regard that the fact that those decisions were adopted on a proposal from the Commission and made no mention of a possible contradiction with the State aid rules gives rise, at points 95 to 100 of the statement of reasons for the decision at issue, to a specific statement of reasons in that decision, culminating in the Commission's conclusion that it would be contrary to the principles of the protection of legitimate expectations and of legal certainty to recover from the beneficiaries the aid resulting from the exemptions granted until 2 February 2002.

84 Therefore, having regard in particular to the nature and content of the decision at issue, to the State aid rules and to the interest which the addressees of that decision and other parties to whom it is of direct and individual concern may have in obtaining explanations, it is apparent that the statement of reasons for that decision satisfies the requirements of the case-law referred to at paragraph 77 of the present judgment and, as the Commission submits, did not necessarily need to contain specific explanations concerning the inapplicability in the present case of Article 1(b)(v) of Regulation No 659/1999.

85 It follows that the Court of First Instance erred in law in holding that the Commission failed to fulfil the obligation to state reasons imposed on it by Article 253 EC with regard to the non-application in the present case of Article 1(b)(v) of Regulation No 659/1999.

86 Accordingly, the fourth and fifth grounds of appeal must also be upheld.

87 In the light of all these considerations, the judgment under appeal must be set aside in so far as it annulled the decision at issue on the ground that, in that decision, the Commission failed to fulfil its obligation to state reasons with regard to the non-application in the present case of Article 1(b)(v) of Regulation No 659/1999, and in so far as it ordered the Commission to bear its own costs and to pay those of the applicants, including the costs relating to the interim proceedings in Case T-69/06 R. There is thus no need to examine the other arguments and pleas of the parties.

Reference of the case back to the General Court of the European Union

88 In accordance with the first paragraph of Article 61 of the Statute of the Court of Justice, if the Court quashes a decision of the Court of First Instance, it may itself give final judgment in the matter, where the state of the proceedings so permits, or refer the case back to the Court of First Instance.

89 In the present case, since the Court of First Instance did not give judgment on the substance of any of the pleas put forward by the parties, the Court considers that the state of the proceedings does not permit it to give final judgment. Accordingly, the joined cases must be referred back to the General Court of the European Union.

Costs

90 Since the cases are to be referred back to the General Court, the costs relating to the present appeal shall be reserved.

On those grounds, the Court (Grand Chamber) 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* in so far as it:**

   — **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, on the ground that, in that decision, the Commission of the European Communities failed to fulfil its obligation to state reasons with regard to the non-application in the present 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]; and**

   — **ordered the Commission of the European Communities to bear its own costs and to pay those of the applicants, including the costs relating to the interim proceedings in Case T-69/06 R;**

2. Refers Joined Cases T-50/06, T-56/06, T-60/06, T-62/06 and T-69/06 back to the General Court of the European Union;

3. Orders that costs are reserved.

[Signatures]