



## Reports of Cases

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

**Case C-118/10**

**European Commission**

**v**

**Council of the European Union**

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

1. By the action which forms the subject-matter of the present proceedings, the Commission claims that the Court should annul Council Decision 2009/991/EU of 16 December 2009 on the granting of State aid by the authorities of the Republic of Latvia for the purchase of agricultural land between 1 January 2010 and 31 December 2013 (the ‘contested decision’).<sup>2</sup>

2. By means of three other applications lodged in parallel, the Commission has contested three other Council decisions relating to aid of the same type granted by the Republic of Lithuania (Case C-111/10), the Republic of Poland (Case C-117/10) and the Republic of Hungary (Case C-121/10).

3. All of the actions raise the same delicate question: does a proposal for appropriate measures drawn up by the Commission in the context of the constant review of aid schemes existing in the Member States carried out in accordance with Article 108(1) TFEU (or Article 88(1) EC as far as Case C-117/10 is concerned) constitute a final position adopted by that institution on the compatibility of the scheme in question with the common market such as to prevent the Council from exercising the power bestowed on it by the third subparagraph of Article 108(2) TFEU (or by the third subparagraph of Article 88(2) EC) to authorise aid in derogation from Article 107 TFEU (or from Article 87 EC) and from other applicable provisions where justified by exceptional circumstances?

### **I – Legislative background**

4. Under Article 108(1) TFEU:

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

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

<sup>2</sup> — OJ 2009 L 339, p. 34.

5. The third and fourth subparagraphs of Article 108(2) TFEU read as follows:

‘On application by a Member State, the Council may, acting unanimously, decide that aid which that State is granting or intends to grant shall be considered to be compatible with the common market, in derogation from the provisions of Article 107 or from the regulations provided for in Article 109, if such a decision is justified by exceptional circumstances. If, as regards the aid in question, the Commission has already initiated the procedure provided for in the first subparagraph of this paragraph, the fact that the State concerned has made its application to the Council shall have the effect of suspending that procedure until the Council has made its attitude known.

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

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

7. In a communication published in the Official Journal of 15 March 2008,<sup>7</sup> the Commission took note, pursuant to Article 19(1) of Regulation No 659/1999, of the ‘explicit and unconditional agreement’ of Latvia to the proposals for appropriate measures set out in point 196 of the 2007-2013 Agricultural Guidelines, which the Latvian authorities notified to the Commission in writing on 20 February 2007.

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

8. In a communication published by the Commission in 2005 on aid notified in accordance with the procedure laid down in Point 4 of Chapter 4 of Annex IV to the 2003 Treaty of Accession, which the Member States that had joined in 2004 wished to be regarded as existing aid within the meaning of Article 88(1) EC until the end of the third year from the date of accession, the measures notified by Latvia included an aid scheme entitled ‘Programme for granting loans for the purchase of agricultural land’.<sup>8</sup>

9. Latvia established the abovementioned scheme in 2002, but application of the scheme was suspended on 1 January 2006 because the credit line provided for that purpose had been exhausted at the end of 2005. The aid had been granted to farmers (natural or legal persons) in the form of an interest rebate on long-term loans (up to 20 years) intended to finance investment. The subsidy was

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

4 — OJ 1999 L 83, p. 1.

5 — OJ 2000 C 28, p. 2.

6 — OJ 2006 C 319, p. 1.

7 — OJ 2008 C 70, p. 11.

8 — OJ 2005 C 147, p. 2. In the case of Latvia, the name of the scheme in question is given in point 23. In the application the Commission indicates that it received the notification under the procedure laid down in point 1(c) of Chapter 3 of Annex IV to the Act of Accession, which does not apply, however, to ‘activities linked to the production, processing or marketing of products listed in Annex I to the EC Treaty’ (products to which the provisions of the Treaty on the common agricultural policy apply).

subject to certain conditions relating to the interest rate, the maximum amount of the loan, the percentage of the borrower's income derived from agricultural production, the borrower's tax position and the situation of his own funds (which must, for the greater part, belong to Latvian citizens or to permanent residents).

10. By letter of 30 May 2005, the Commission invited the Member States to submit proposals for simplifying the rules on aid in the agricultural sector. A number of Member States asked the Commission to retain the possibility of granting aid for investment in the purchase of agricultural land, proposing that Article 4(8) of Regulation No 1857/2006 be repealed and that the purchase of agricultural land be included among expenses eligible for investment aid as already laid down in the 2000 Agricultural Guidelines. Latvia made no proposal in that regard.

11. By letter of 17 November 2009 addressed to the 'Agriculture and Fisheries' Council, the Latvian authorities requested that aid for the purchase of agricultural land in Latvia be authorised on an exceptional basis pursuant to the third subparagraph of Article 88(2) EC. On 3 December 2009, that Member State provided additional information to the Council. On 16 December 2009 the Council adopted the contested decision unanimously (with eight delegations abstaining). Article 1 of that decision states:

'Exceptional State aid by the Latvian authorities for loans for the purchase of agricultural land, amounting to a maximum of LVL 8 million and granted between 1 January 2010 and 31 December 2013, shall be considered to be compatible with the internal market.'

12. The aid declared to be compatible is described in the following terms in recitals 9 and 10 in the preamble of the contested decision:

'(9) The State aid to be granted amounts to a maximum of 8 million Latvian lats (LVL) and should enable the purchase of a total of 70 000 hectares of agricultural land by approximately 1 000 farmers during the period from 2010 to 2013. Both state and municipality owned land, as well as land owned by natural persons, is eligible.

(10) The State aid will take the form of subsidising interest payments on loans covering 4 percentage points of the annual interest rate applied by the bank. However, where this annual interest rate is below 4 percentage points, the actual interest rate paid by the borrower will be entirely refunded.'

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

13. By act lodged at the Registry of the Court on 26 February 2010, the Commission brought the action which forms the subject-matter of the present proceedings. By order of 16 September 2010, the Republic of Lithuania was granted leave to intervene in support of the form of order sought by the Council.

14. The Commission claims that the Court should set aside the contested decision and order the Council to pay the costs. The Council asks the Court to dismiss the action as being unfounded and to order the Commission to pay the costs. Lithuania contends that the Court should dismiss the action as unfounded.

### **IV – The action**

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

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

16. In its first plea, based on a lack of competence on the part of the Council, the Commission maintains essentially that the proposal for appropriate measures set out in point 196 of the 2007-2013 Agricultural Guidelines, together with acceptance of that proposal by Latvia, constitutes a ‘decision’ in which the Commission declared the aid scheme authorised in the contested decision for the entire period to which those guidelines applied, that is to say until 31 December 2013, to be incompatible with the common market. Citing the judgments in Cases C-110/02<sup>9</sup> and C-399/03,<sup>10</sup> for an analysis of which I refer to points 27 to 31 of the Opinion which I have delivered today in Case C-117/10, the Commission holds that, by virtue of the principle of pre-emption, on which, on the basis of those judgments, the criterion of the distribution of the powers attributed to the Commission and the Council by Article 108(2) TFEU rests, the Council was not competent to adopt the contested decision in the matter at issue.

17. The exchange of views between the parties before the Court essentially raises four questions. The first is to determine whether, as the Commission maintains but the Council disputes, the aid scheme for the purchase of agricultural land notified by Latvia in 2004 retained the status of ‘existing aid’ until 31 December 2009 and could thus be the subject of the proposal for appropriate measures set out in point 196 of the 2007-2013 Agricultural Guidelines (see section 1 below). The second question concerns the status of the aid scheme authorised in the contested decision and calls for the Court to assess, in particular, whether, as the Commission claims, that scheme was identical to the one that was the subject-matter of the proposal for appropriate measures set out in point 196 of the abovementioned guidelines or whether, as the Council maintains, it constitutes new and different aid (see section 2 below). The third question relates to the effects of a proposal for appropriate measures accepted by the Member State concerned (see section 3 below). Lastly, the fourth question calls for a definition of the scope of the proposal for appropriate measures set out in point 196 of the 2007-2013 Agricultural Guidelines and its acceptance by Latvia (see section 4 below).

1. The status of the aid scheme for the purchase of agricultural land granted by Latvia up to 31 December 2009

18. The Commission’s argument is based on the premiss that the scheme to support investment in the purchase of agricultural land established in Latvia before that country’s accession to the Community did not cease to constitute existing aid within the meaning of Article 108(1) TFEU from the date on which it was notified to the Commission in 2004 until 31 December 2009.

19. The Council considers that premiss to be incorrect. It maintains, first, that, within the meaning of Point 4 of Chapter 4 of Annex IV to the 2003 Act of Accession, the aid scheme notified by Latvia in 2004 could be considered existing aid only until the end of the third year from the date of accession and that the Commission was not entitled to extend the application of such a scheme by means of a proposal for appropriate measures pursuant to Article 108(1) TFEU, as, however, it did in point 196 of the 2007-2013 Agricultural Guidelines. Moreover, such a proposal could not have the effect of altering the provisions of primary law, in this case the rule laid down in Annex IV to the 2003 Act of Accession. On this point I refer to points 44 to 47 of the Opinion delivered today in Case C-117/10, in which I dismissed identical arguments raised by the Council.

20. Secondly, the Council claims that, since the credit line set for the aid scheme in question was exhausted at the end of 2005 with the result that, from 2006 onwards, no new loan was granted by the Latvian authorities, that scheme was no longer in force after 31 December 2005. In this regard I would point out that it is evident from the documents produced by the Commission, and which the

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

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

Council does not contest, that the scheme notified to the Commission by Latvia in 2004 in accordance with the procedure laid down in Point 4 of Chapter 4 of Annex IV was intended to apply until 2023, that a number of technical changes to the scheme were made in 2007 and that there is express provision for the possible further financing of the scheme. In those circumstances, I consider that the Commission is correct to conclude that, although the scheme was no longer in operation from 2006 onwards, it could be reactivated at any time without requiring a change in legislation and without the scheme losing its status as existing aid.

21. It must therefore be concluded that, as the Commission claims, the aid scheme for the purchase of agricultural land notified by Latvia in 2004 retained its status as an existing scheme within the meaning of Point 4 of Chapter 4 of Annex IV to the Act of Accession of 2003 until 31 December 2009, the date set in point 196 of the 2007-2013 Agricultural Guidelines for it to be rendered compliant with those guidelines. It follows that the scheme in question could indeed be the subject of appropriate measures within the meaning of Article 108(1) TFEU and Article 18 of Regulation No 659/1999.

## 2. The aid scheme authorised in the contested decision

22. It is common ground between the parties that both the aid scheme approved by the Council and that notified by Latvia in 2004 consist in subsidising interest payments on loans to cover four percentage points of the annual interest rate charged by the bank. I also observe that in various passages of the letter of 17 November 2009 to the Council the Latvian authorities refer expressly to the scheme established in Latvia in 2002 and notified to the Commission in 2004 as a frame of reference for their request, and furthermore it is clear from the wording of that letter that the Member State in question was essentially asking the Council to authorise it to ‘reactivate’ that scheme for the period from 2010 to 2013. The arguments put forward by the Council to illustrate the differences between the two schemes, primarily with the aim of maintaining that the scheme approved in the contested decision has a different duration, will benefit different persons and is based on new factual and legal elements, are, in my view, to be dismissed for the same reasons as those set out in points 53, 54 and 56 of the Opinion which I have delivered today in Case C-117/10, to which I refer. As to the Council’s assertion that implementation of the scheme authorised in the contested decision will require the adoption of new legislation, I note that the letter of 17 November 2009 to the Council sets out clearly the intention of the Latvian Government to make no substantive amendments to the existing scheme apart from the provision of fresh finance.

23. Moreover, in the present case it is common ground that the credit line set in 2002 by the Latvian authorities to finance the aid scheme notified to the Commission in 2004 ran out at the end of 2005 and that no further finance was provided for the scheme, at least up to the time of the contested decision. It is apparent from the case-law that the provision of fresh financing for an aid scheme for which the Member State has provided a specific allocation and which has been approved by the Commission on the basis of a notification including that allocation constitutes new aid.<sup>11</sup> In my opinion, that case-law is applicable *mutatis mutandis* to the present case.

24. I therefore consider that the aid scheme declared to be compatible with the internal market in the contested decision constitutes ‘new aid’ within the meaning of Article 1(c) of Regulation No 659/1999, in that it is an ‘alteration to existing aid’.<sup>12</sup> The consequences of such a classification will be examined below (section 4).

11 — Case T-3/09 *Italy v Commission* [2011] ECR II-95, confirmed by the order in Case C-200/11 P *Italy v Commission* [2012] ECR. See also Article 4(1) and (2)(a) of Commission Regulation (EC) No 794/2004 of 21 April 2004 implementing Council Regulation (EC) No 659/1999.

12 — It is an alteration that can be separated from the scheme into which it is inserted, and hence does not entail the transformation of the scheme into new aid.

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

25. For the reasons set out in points 62 to 72 of the Opinion delivered today in Case C-117/10, to which I refer, I take the view that a proposal for appropriate measures that has been accepted by the Member State to which it is addressed constitutes *the adoption of a final position* by the Commission on the compatibility of the aid scheme in question and has *binding legal effects similar to those of a decision*. In my opinion, such an act may therefore, on the basis of the case-law of the Court mentioned in point 16 of this Opinion, prevent the adoption of decisions under the third subparagraph of Article 108(2) TFEU that conflict with it.

26. That said, it is necessary to define the scope not only of the position on compatibility of the aid for the purchase of agricultural land adopted by the Commission in the context of the proposal for appropriate measures contained in point 196 of the 2007-2013 Agricultural Guidelines but also of the obligations assumed by Latvia in accepting that proposal. Any finding that the Council was not competent to adopt the contested decision depends on the outcome of this dual examination. In the present case it is also necessary to assess the impact of the conclusion which I reached in point 23 above, namely that the scheme approved by the Council constitutes an alteration to an existing aid scheme within the meaning of Article 1(c) of Regulation No 659/1999.

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

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

28. In that context, by reason of the joint effect of the proposal for appropriate measures set out in point 196 of the 2007-2013 Agricultural Guidelines and the obligation assumed by the Member State involved, in the abovementioned Opinion I held that the position adopted by the Commission with regard to aid schemes for the purchase of agricultural land existing in the Member State concerned was final and could preclude the competence of the Council under the third subparagraph of Article 88(2) EC (see points 75 and 76).

29. In the present case, Latvia notified in writing its 'explicit and unconditional'<sup>13</sup> agreement to the measures proposed by the Commission in point 196 of the 2007-2013 Agricultural Guidelines, thereby assuming an obligation to alter the scheme for supporting the purchase of agricultural land notified to the Commission in 2004 by 31 December 2009. By maintaining that scheme in force and failing to alter it, Latvia breached that obligation.

13 — See the communication published in OJ 2008 C 70.

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

30. In the present case it is also necessary to examine the consequences of the fact that the aid that is the subject-matter of the contested decision constitutes ‘new aid’ within the meaning of Article 1(c) of Regulation No 659/1999.

31. It is clear from the case-law cited in point 16 of this Opinion that such a circumstance is not of itself decisive for precluding the competence of the Council under the third subparagraph of Article 108(2) TFEU. Indeed, as I have already stated in point 50 of the Opinion which I have delivered today in Case C-117/10, in its judgment in Case C-110/02 *Commission v Council*, the Court dismissed a similar argument adduced by the Council<sup>14</sup> and, preferring an approach based on examination of the effects of the measures at issue, made it clear that the competence of the Council under the third subparagraph of Article 108(2) TFEU can be denied not only with regard to an aid measure that the Commission has already declared to be incompatible with the common market but also with regard to a different measure that can be classified as ‘new aid’ where there is a link between the two measures *such that it would be artificial to distinguish between them*.

32. In the present case, such a link does, in my view, exist between the scheme notified to the Commission by the Latvian authorities in 2004 and the provision of fresh financing. By approving such fresh financing, the Council in effect released Latvia from the undertaking which it had given to the Commission to alter that aid scheme, thereby legitimising the breach of an agreement concluded under Article 88(1) EC. The consequence of the contested decision was to neutralise the effects of the adoption of a final position by the Commission in point 196 of the 2007-2013 Agricultural Guidelines as to the compatibility of the abovementioned scheme with the common market.

33. In these circumstances, I propose that the Court accept the first plea of the action and declare, in accordance with the case-law mentioned in point 16 of the present Opinion, that the Council was not competent to adopt the contested decision. Hence, in my view, the Commission’s application must be upheld and the contested decision annulled. I shall proceed to examine briefly the other pleas raised by the Commission in case the Court does not endorse the solution which I have proposed.

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

34. The second and third pleas in the action are identical to the second and third pleas of the action in Case C-117/10, which are examined briefly in points 80 to 84 of the Opinion which I have delivered today in that case. Since in both sets of proceedings I propose that the Court accept the first plea of the respective actions, I consider that the analysis conducted in points 80 to 84 of the Opinion in Case C-117/10 can be transposed to the present case, and I therefore refer the Court to those passages.

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

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

<sup>14</sup> – The Council, supported by the Portuguese Government, claimed that the disputed aid constituted ‘new aid’ because it consisted of a new payment, arose from a national provision other than the decree-laws that had established the aid scheme declared incompatible by the Commission and corresponded to different eligibility and payment conditions from those which applied to the aid granted on the basis of that scheme (paragraph 21).

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

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

37. In the context of the complaint under examination, the Commission claims, first, that the contested decision wrongly presents certain *structural problems of the agricultural sector in Latvia* as exceptional circumstances. In this regard, I agree first of all with the Commission in considering that the facts to which the Council refers in the second recital in the preamble to the contested decision – relating to the ‘*unfavourable area structure of farms in Latvia*’, to ‘*Latvia’s receipt of the lowest direct payments among Member States following a phasing-in mechanism provided for in [the] 2003 Act of Accession*’ and to ‘*low agricultural incomes*’,<sup>15</sup> and the fact that a stated proportion of agricultural land is owned and managed by non-farmers, mentioned in the third recital in the preamble to the decision – do not, *in themselves*, constitute exceptional circumstances within the meaning of the third subparagraph of Article 108(2) TFEU. These are facts which, on the one hand, simply describe the structure of the Latvian agricultural economy (small farm size, low level of incomes) and, on the other, relate to the application of direct support instruments<sup>16</sup> provided for in measures taken when the Member State in question acceded to the European Union. The fact that these factors are not cyclical means that they lack the necessary character of exceptionality.

38. However, contrary to the Commission’s assertions, in the economy of the contested decision these factors are not presented as exceptional circumstances but rather, precisely, as structural characteristics of the Latvian agricultural economy, reference to which serves above all as a benchmark for assessing the economic and social repercussions of the recession, the main factor justifying the authorised measures, according to the wording of the third and fourth recitals in the preamble to that decision. The same may be said of farmers’ lack of financial resources, mentioned in the seventh recital, the structural nature of which the Commission merely invokes without providing proof. On the other hand, it is clear from the judgment in Case C-122/94 *Commission v Council* that, in the exercise of its powers under the third subparagraph of Article 108(2) TFEU, the Council may base its decisions on the *persistence* or *worsening* of structural problems in a particular sector of the economy for the purpose of assessing the effects of an unfavourable cyclical situation on that sector.<sup>17</sup>

39. As regards the Commission’s argument that all Member States were affected by the fall in the level of incomes in 2009 mentioned in the second recital in the preamble to the contested decision, the ‘*deepening recession in the world economy caused by the global crisis*’ in 2009, referred to in the fourth recital in the preamble to that decision, and the increase in the prices of agricultural inputs in 2008, mentioned in the fifth recital, I would point out that, on the basis of case-law, the fact that a particular situation may affect several Member States simultaneously or may involve various sectors of the economy does not mean that it may not nevertheless constitute a relevant circumstance for the

15 — All emphasis added.

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

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



purpose of applying the third subparagraph of Article 108(2) TFEU,<sup>18</sup> even taking account of the particular consequences that it may have produced in a given Member State. In this regard, the Commission itself states in its written pleadings that Latvia was seriously affected by the economic crisis, which, as I have indicated above, is the main factor on which the Council based the contested decision. Moreover, the Commission does not rule out the possibility that a general economic crisis may, in abstract terms, constitute an exceptional circumstance.

40. Lastly, as to the Commission's allegation that the data set out in the eighth recital in the preamble to the contested decision concerning the severity of the recession in the market in agricultural land are not reliable because the reference level used is the volume of transactions in 2007, the year in which the so-called 'property bubble' peaked, even if that allegation were sufficiently supported by evidence<sup>19</sup> it would not be sufficient to cast doubt on the exceptional nature of the recession, which the Commission, indeed, does not dispute, and its exceptional impact on the Latvian agricultural sector.

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

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

42. The Commission states, first of all, that the schemes to support the purchase of land neither resolve nor mitigate the structural problems mentioned in the second recital in the preamble to the contested decision, in particular the smallness of Latvian farms. Taking Eurostat data as a basis, the Commission observes that the average size of farms in Latvia has increased over the years, largely independently of the granting of aid for the purchase of agricultural land. In this regard I note that the statistics produced by the Commission show that the increase in the size of Latvian farms was greater between 2003 and 2005, the period during which the scheme to support purchases of agricultural land was in operation (an increase of 5.2 hectares in average farm size), than between 2005 and 2007 (3.2 hectares), and hence do not exclude the possibility that the scheme in question contributed directly to such a greater increase during the years in which it was operational. In any case, even if in the light of such data it were held that only a small increase in the average size of Latvian farms can be attributed to the operation of that scheme, this would not, in my view, be sufficient of itself to demonstrate that the Council *manifestly* overstepped the limits of its power of assessment by maintaining that the measures approved in the contested decision were appropriate to pursue, in particular, the objectives mentioned in the sixth recital in the preamble to the contested decision, that is to say, to encourage the unemployed to switch to farming, to help semi-subsistence farmers no longer working as employees in sectors other than agriculture to improve the area structure of their holding, and to facilitate the sale of agricultural land owned by the unemployed who need capital to switch to self-employed status.

43. Secondly, the Commission states that in 2009, in order to deal with the consequences of the crisis, it adopted a specific communication setting out a temporary Community framework for State aid measures to support access to finance in the current financial and economic crisis<sup>20</sup> (the "Temporary Community Framework"), on the basis of which, as a result of subsequent amendments,<sup>21</sup> various types of measure by Member States to assist farms were authorised, including, in particular,

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

19 — The data to which the Commission refers, which were contained in an article entitled 'Latvia's Recession: the Cost of Adjustment With An "Internal Devaluation"' published by the Centre for Economic and Policy Research in February 2010, do not relate specifically to the market in agricultural land.

20 — OJ 2009 C 83, p. 1.

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

temporary aid amounting to a maximum of EUR 15 000 up to the end of 2010. The Commission considers that the Council breached the principle of proportionality by not taking account of such aid, which is specifically intended to remedy problems connected with the crisis and, in particular, by failing to examine whether the aid in question had helped to remedy such problems. Furthermore, the Commission maintains that the Council should have taken account of other measures adopted by the Commission or by the Council itself aimed at remedying the problems indicated in the contested decision or capable of being used by Latvia for that purpose.

44. The Commission's arguments make it necessary to assess whether, and within what limits, the Council is under an obligation to take account of measures already adopted at European Union level to remedy the situations relied upon by the applicant Member State as exceptional circumstances. In this regard, basing my assessment on the considerations set out in point 96 of the Opinion delivered today in Case C-117/10, to which I make reference, I hold that the Council has a duty, when carrying out an assessment under the third subparagraph of Article 108(2) TFEU, at least to take into consideration existing measures aimed *specifically* at overcoming situations capable of justifying the authorisation of the aid at issue,<sup>22</sup> without this imposing a duty on that institution to examine, or indicate in its decision, the set of legal rules governing the matter in question.

45. In the present case it is not evident from the contested decision that the Council examined whether Latvia used the opportunities offered by the Temporary Community Framework and what effects any measures taken on that basis produced.<sup>23</sup> However, I note two points with regard to the small direct subsidy to which the Commission refers: first, while its purpose was to mitigate the economic impact of the crisis, it was not specifically intended to encourage investment to improve the structure of farms, and secondly it could be granted only until 31 December 2010. In those circumstances, the Council was, in my opinion, right to take the view that a more targeted measure with a longer timeframe could serve to pursue, possibly in conjunction with other instruments, the objective of palliating the consequences of the financial crisis, and in particular the difficulty for farmers to gain access to credit, and could better address the structural problems of the Latvian agricultural economy. Equally, although in my view the Council had a duty to take into consideration, in the contested decision, the actions to combat rural unemployment provided for under the Community's rural development policy in accordance with Regulation No 1698/2005,<sup>24</sup> that omission is not, in my opinion, sufficient of itself to call into question the lawfulness of that decision, given that the decision is based on a multitude of reasons and on an overall assessment of the state of the sector in question in a particular economic situation. I also note that, in the letter of 3 December 2009 from the Latvian authorities to the Council, the Latvian authorities partly indicated the reasons why they considered that such actions could not take the place of a scheme aimed at encouraging farmers to purchase agricultural land. It does not appear to me, however, that the Council had a specific obligation, as the Commission contends, to take account of Regulation No 1535/2007,<sup>25</sup> as that regulation is not aimed specifically at pursuing the objectives stated in the decision. In any event, the scheme approved in the contested decision is designed to encourage investment in the purchase of agricultural land, and therefore operates at a different level to that of that regulation.

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

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

23 — I note that one, albeit brief, reference to the Temporary Community Framework and to its inadequacy to deal with the difficulties created by the economic and financial crisis is to be found in paragraph 9 of the letter of 3 December 2009 sent by the Latvian authorities to the Council.

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

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

47. It follows, in my opinion, from the exceptional nature of the Council's competence under the third subparagraph of Article 108(2) TFEU that the derogation granted under that provision should be limited in duration and granted only for the period strictly necessary for remedying the circumstances adduced as the reason for the decision.<sup>26</sup> This means that where a decision under the third subparagraph of Article 108(2) TFEU concerns aid schemes to be applied for a relatively long period, as in the case in point, the Council is under an obligation to indicate why it considers this to be necessary in the light of the circumstances adduced to support the declaration of compatibility. In the present case, although the Latvian authorities' letter of 27 November 2009 to the Council and the contested decision provide only scant indication as to the reasons why it was deemed necessary to authorise the scheme in question for a period of four years, those reasons can be deduced from the context in which the contested decision was taken and from the nature of the measures authorised, the problems that they were intended to help resolve and the objectives pursued. Moreover, the Council provided additional information in its written submissions.

48. As to the substance of the criticism raised by the Commission, I note that it is based essentially on the finding that the duration of the derogation granted in the contested decision matched the period of application of the 2007-2013 Agricultural Guidelines, which, according to the Commission, reveals that the Council's decision accords more with a desire to paralyse the application of those guidelines than to limit the derogation to the extent strictly necessary for restoring the situation of imbalance found to exist. While taking note of that temporal match, I consider that, given the long-term objectives that the decision is intended to pursue and the repercussions of the economic and financial crisis, which are also likely to be protracted and which are cited as exceptional circumstances to justify the decision, the Commission has failed to show that, by authorising the scheme in question for the period from 1 January 2010 to 31 December 2013, the Council manifestly exceeded the limits of the discretionary power that it enjoys in the exercise of its competence pursuant to the third subparagraph of Article 108(2) TFEU.

## V – Conclusion

49. On the grounds indicated in points 15 to 31 above, I propose that the Court should:

- uphold the first plea of the action alleging lack of competence on the part of the Council;
- annul the contested decision;
- order the Council to pay the costs; and
- order the intervening Member State to bear its own costs.

<sup>26</sup> — To that effect, see Case C-122/94 *Commission v Council*, paragraph 25.