



## Reports of Cases

### JUDGMENT OF THE COURT (Grand Chamber)

10 December 2013\*

(Appeal — State aid — Exemption from excise duty on mineral oils — Court acting of its own motion — Plea adopted of its own motion by a court of the European Union — Relationship between tax harmonisation and monitoring of State aid — Respective powers of the Council and the Commission — Principle of legal certainty — Presumption of legality attaching to European Union measures)

In Case C-272/12 P,

APPEAL under Article 56 of the Statute of the Court of Justice of the European Union, brought on 1 June 2012,

**European Commission**, represented by V. Di Bucci, G. Conte, D. Grespan, N. Khan and K. Walkerová, acting as Agents, with an address for service in Luxembourg,

appellant,

the other parties to the proceedings being:

**Ireland**, represented by E. Creedon, acting as Agent, and P. McGarry SC, with an address for service in Luxembourg,

**French Republic**, represented by G. de Bergues and, initially, J. Gstalter, and, subsequently N. Rouam, acting as Agents,

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

**Eurallumina SpA**, established in Portoscuso (Italy), represented by R. Denton, A. Stratakis, L. Martin Alegi and L. Philippou, Solicitors,

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

applicants at first instance,

THE COURT (Grand Chamber),

composed of V. Skouris, President, K. Lenaerts, Vice-President, A. Tizzano, R. Silva de Lapuerta and T. von Danwitz, Presidents of Chambers, A. Rosas, J. Malenovský, E. Levits, A. Arabadjiev, M. Berger, A. Prechal, E. Jarašiūnas (Rapporteur) and C. Vajda, Judges,

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

Advocate General: Y. Bot,

Registrar: V. Tourrès, Administrator,

having regard to the written procedure and further to the hearing on 9 April 2013,

after hearing the Opinion of the Advocate General at the sitting on 18 July 2013,

gives the following

### Judgment

- 1 By its appeal, the European Commission asks that the Court set aside the judgment of the General Court of the European Union of 21 March 2012 in Joined Cases T-50/06 RENV, T-56/06 RENV, T-60/06 RENV, T-62/06 RENV and T-69/06 RENV *Ireland and Others v Commission* [2012] ECR ('the judgment under appeal'), whereby the General 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 contested decision'), in so far as that decision finds, or is based on the finding, that the exemptions from excise duty on mineral oils used as fuel for alumina production granted by the French Republic, Ireland and the Italian Republic until 31 December 2003 constitute State aid within the meaning of Article 87(1) EC and in so far as it orders the French Republic, Ireland and the Italian Republic to take all measures necessary to recover those exemptions from the beneficiaries to the extent that the latter did not pay excise duty at the rate of at least EUR 13.01 per 1 000 kg of heavy fuel oils.

### Legal context

- 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 provided:

'The Council, acting unanimously on a proposal from the Commission, may authorise any Member State to introduce further exemptions or reductions for specific policy considerations.

A Member State wishing to introduce such a measure shall accordingly inform the Commission and shall also provide the Commission with all relevant or necessary information. The Commission shall inform the other Member States of the proposed measure within one month.

The Council shall be deemed to have authorised the exemption or reduction proposed if, within two months of the other Member States' being informed as laid down in the second subparagraph, neither the Commission nor any Member State has requested that the matter be considered by the Council.'

4 Under Article 8(5) of that directive:

‘If the Commission considers that the exemptions or reductions provided for in paragraph 4 are no longer sustainable, particularly in terms of fair competition or distortion of the operation of the internal market, or Community policy in the area of protection of the environment, it shall submit appropriate proposals to the Council. The Council shall take a unanimous decision on these proposals.’

- 5 Article 6 of Directive 92/82 fixed the minimum rate of excise duty on heavy fuel oil, as from 1 January 1993, at EUR 13 per 1 000 kg.
- 6 The second indent of Article 2(4)(b) of Directive 2003/96 provided that that directive did not apply to dual use of energy products, that is to say where products are used both as heating fuel and for purposes other than as motor fuel and heating fuel. The use of energy products for chemical reduction and in electrolytic and metallurgical processes is to be regarded as dual use. Hence, since 1 January 2004, when that directive became applicable, there has no longer been any minimum excise duty for heavy fuel used in the production of alumina. Moreover, under Article 18(1) of Directive 2003/96, the Member States were authorised to continue to apply, until 31 December 2006, the reduced rates or exemptions set out in Annex II to that directive, which refers to the excise duty 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.

### **Background to the dispute**

- 7 Ireland, the Italian Republic and the French Republic have exempted from excise duty mineral oils used for the production of alumina, respectively in the Shannon region since 1983, in Sardinia since 1993 and in the Gardanne region since 1997.
- 8 Those exemptions (‘the exemptions at issue’) were authorised, respectively, 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 (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 (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 (OJ 1997 L 182, p. 22). Those authorisations were thereafter extended several times by the Council and ultimately, by means of 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), extended until 31 December 2006.
- 9 Recital 5 in the preamble to Decision 2001/224 stated that that decision was without prejudice ‘to the outcome of any procedures relating to distortions of the operation of the single market that may 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]’.

- 10 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 Ireland, the French Republic 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 insofar as the beneficiaries did not pay a rate of at least EUR 13.01 per 1 000 kg of heavy fuel oils, and
  - the latter aid must be recovered.
- 11 In the contested decision, the Commission held that the exemptions at issue constituted new aid and not existing aid within the meaning of 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). 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.
- 12 After setting out how the aid at issue was incompatible with the common market, the Commission took the view that, having regard to the Council decisions authorising the exemptions at issue ('the authorisation decisions') and in the light of the fact that those decisions had been adopted on proposals by the Commission, the recovery of incompatible aid granted before 2 February 2002, the date of publication in the *Official Journal of the European Communities* of the decisions to initiate the procedure laid down in Article 88(2) EC, would be contrary to the principles of protection of legitimate expectations and legal certainty.

### **The procedure and the judgment under appeal**

- 13 By applications lodged at the Registry of the General Court on 16, 17 and 23 February 2006, the Italian Republic, Ireland, the French Republic, Eurallumina SpA ('Eurallumina') and Aughinish Alumina Ltd ('AAL') brought proceedings for the annulment, in whole or in part, of the contested decision.
- 14 By judgment 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 General Court annulled the contested decision. The Court, by judgment of 2 December 2009 in Case C-89/08 P *Commission v Ireland and Others* [2009] ECR I-11245, to which reference is made for a fuller account of the earlier procedure, set aside that judgment in so far as it annulled the contested decision 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 case of Article 1(b)(v) of Regulation No 659/1999.
- 15 The cases were referred back to the General Court, where they were then joined for the purposes of the written and oral procedure and the final judgment.
- 16 In order to annul the contested decision a second time, the General Court, in the judgment under appeal, upheld the pleas or grounds of complaint put forward by some or all of the parties, relating to the infringement of the principles of legal certainty and the presumption of legality attaching to

European Union measures, whereby the applicants claimed, in essence, that the Commission had erred, in its decision, by partially nullifying the legal effects produced by the authorisation decisions. In examining those pleas, the General Court considered, *inter alia*, that the authorisation decisions precluded the Commission being able to attribute the exemptions at issue to the Member States themselves and, consequently, being able to classify them as State aid within the meaning of Article 87(1) EC. Further, in Case T-62/06 RENV, the General Court upheld the complaint of an infringement of the principle of sound administration.

### **Forms of order sought by the parties**

- 17 The Commission asks the Court to set aside the judgment under appeal, to refer the cases back to the General Court and to reserve the costs.
- 18 Ireland, the French Republic, the Italian Republic, Eurallumina and AAL contend that the appeal should be dismissed and that the Commission should be ordered to pay the costs.

### **The appeal**

- 19 The Commission advances five grounds in support of its appeal. The first two are procedural whereas the other three involve claims of substantive infringements of European Union law.
- 20 The first ground of appeal is based on the claim that the General Court lacked jurisdiction, that there were procedural irregularities and that there were infringements of the principle that the subject-matter of an action is defined by the parties, of Article 21 of the Statute of the Court of Justice of the European Union and of Articles 44(1) and 48(2) of the Rules of Procedure of the General Court, and, in the alternative, that there was a failure to state reasons.

### *Arguments of the parties*

- 21 The Commission complains that the General Court erred in raising of its own motion a plea of infringement of Article 87(1) EC or in reclassifying the actual subject-matter of the action. The Commission considers that the real reason which led to the annulment of the contested decision is that, according to the General Court, the exemptions at issue were not subject to the rules relating to the monitoring of State aid, because they were attributable not to the Member States concerned but to the European Union. Yet none of the applicants at first instance put forward that plea, which was brought into the debate by a question sent by the General Court to the parties on 20 July 2011, even though such a plea could not be raised by the court of its own motion. The General Court then attempted, in the judgment under appeal, to treat that plea as equivalent to those relied on by the parties, alleging an infringement of the principles of legal certainty and the presumption of legality attaching to European Union measures.
- 22 Ireland, the French Republic, the Italian Republic, Eurallumina and AAL contest that first ground of appeal.
- 23 First, the French Republic and the Italian Republic observe that the reasoning set out in the judgment under appeal is not solely based on the non-attributability of the exemptions at issue to the Member States, but rests on an examination both of the issue of distortion of competition and the issue of whether the aid could be attributed to the State, those being two essential prerequisites of a measure being classified as State aid. According to the Italian Republic, while the General Court is bound to give a ruling within the limits defined by the pleas in the action, it may however determine of its own motion whether one of the essential conditions for the existence of State aid is lacking, while remaining within the ambit of the provisions relied on in support of those pleas.

- 24 Ireland and the Italian Republic add that the General Court was entitled to raise of its own motion an infringement of essential procedural requirements. In this case, the Commission, by failing to set out in the contested decision the reasons why it considered that the exemptions at issue were attributable to the Member States, had failed to comply with its obligation to state reasons.
- 25 Secondly, the French Republic, Eurallumina and AAL consider, in essence, that the General Court amplified the pleas which they had put forward, as a result of the dialogue between the parties in the course of the procedure. The French Republic states that its first plea for annulment was based on an infringement of the concept of State aid within the meaning of Article 87(1) EC, while Eurallumina states that it had, without using the word ‘attributability’, raised the issue of whether the exemption affecting it could constitute aid granted by the Italian Republic. The Commission itself introduced the issue of the attributability of the exemptions at issue into the debate, in its defence to the plea alleging an infringement of the principle of legal certainty. According to Eurallumina, the General Court then examined that issue in order to reject the Commission’s arguments and to support its assessment of whether the effects of an authorisation granted by one European Union institution which leaves no discretion in respect of its implementation by the Member State can be called into question and nullified as they have been by another European Union institution. According to AAL, the General Court did no more than examine, and then reject, an argument of the Commission.
- 26 Thirdly, the French Republic, the Italian Republic and Eurallumina consider that, in any event, the issue of the attributability of the exemptions at issue is of relative importance in the grounds for the judgment under appeal which, if the first ground of appeal were upheld, would continue to be well founded on other grounds.

#### *Findings of the Court*

- 27 It follows from the rules governing the procedure before the Courts of the European Union, in particular Article 21 of the Statute of the Court and Article 44(1) of the Rules of Procedure of the General Court, that the dispute is in principle determined and circumscribed by the parties and that the Courts of the European Union may not rule *ultra petita*.
- 28 While certain pleas may, and indeed must, be raised by the courts of their own motion, such as the question whether a statement of reasons for the decision at issue is lacking or is inadequate, which falls within the scope of essential procedural requirements, a plea going to the substantive legality of that decision, which falls within the scope of infringement of the Treaties or of any rule of law relating to their application, within the meaning of Article 263 TFEU, can, by contrast, be examined by the Courts of the European Union only if it is raised by the applicant (see, to that effect, 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 *Commission v Ireland and Others*, paragraph 40).
- 29 Consequently, a plea based on an infringement of Article 87(1) EC because of the non-attributability of the measure in question to the State cannot be raised by a court of its own motion.
- 30 In this case, after stating in paragraphs 73 and 74 of the judgment under appeal that, before advantages can be classified as State aid within the meaning of Article 87(1) EC, they must, in particular, be attributable to the State, the General Court, in paragraphs 98 and 99 of the judgment under appeal, rejected the Commission’s arguments that the authorisation decisions could not, in any event, have the effect of relieving Ireland, the French Republic and the Italian Republic of their obligation to comply with State aid rules and procedures and that the Council was not entitled, in exercising its own powers in the area of fiscal harmonisation, to encroach on the Commission’s powers in the area of State aid. The General Court held that the advantages which the exemptions at issue might have conferred on their beneficiaries had been granted in accordance with the authorisation decisions, and

consequently they were attributable not to the Member States but to the European Union and, accordingly, the Commission was not entitled, even in the exercise of its almost exclusive powers under Articles 87 EC and 88 EC, to classify those exemptions as State aid.

- 31 In paragraph 104 of the judgment under appeal, the General Court concluded that the authorisation decisions precluded the Commission being able to attribute the exemptions at issue to the Member States concerned and, therefore, being able to classify them as State aid within the meaning of Article 87(1) EC and ordering their partial recovery to the extent that it regarded them as not compatible with the internal market, within the meaning of Article 87(3) EC.
- 32 Consequently, in paragraph 110 and in the operative part of the judgment under appeal, the General Court annulled the contested decision ‘in so far as it finds, or is based on the finding, that the exemptions [at issue] constituted State aid, within the meaning of Article 87(1) EC’ and in so far as it orders the recovery of those exemptions from their beneficiaries.
- 33 By holding that the exemptions at issue were attributable to the European Union, the General Court, rather than raising a plea based on an infringement of essential procedural requirements, as suggested by Ireland and the Italian Republic, instead raised a plea going to the substantive legality of the contested decision, which falls within the scope of an infringement of the EC Treaty.
- 34 Yet, as submitted by the Commission and as stated by the Advocate General in points 57 to 63 of his Opinion, none of the applicants before the General Court relied on such a plea. It is clear from the General Court’s file that the question of attributability of the exemptions at issue, merely alluded to by the Commission in its defence in Case T-56/06, and by Eurallumina in its reply in Case T-62/06, where however it stated that ‘[h]owever ... it is not necessary to address this issue’, was introduced into the debate by the General Court by sending a written question to the parties, and, it may be added, it is also clear from paragraph 98 of the judgment under appeal.
- 35 Contrary to what is maintained by the French Republic, Eurallumina and AAL, it cannot be held that the General Court engaged in an amplification of the pleas raised by the parties. Although the General Court may have linked the question of the attributability of the exemptions at issue with the pleas relied on by the parties, alleging infringement of the principles of the presumption of legality attaching to European Union measures and legal certainty, it remains the case, first, that that question derives from a plea in law which is distinct and different in kind, its subject being not an infringement of general principles of European Union law but an infringement of the EC Treaty and, secondly, that the parties, as is clear from, in particular, the account of the parties’ pleas set out in paragraphs 53 to 56 of the judgment under appeal, did not plead those principles with a view to the court finding that the exemptions at issue did not constitute State aid.
- 36 It follows that, by raising of its own motion the plea that the exemptions at issue were attributable not to the Member States but to the European Union, and, for that reason, did not constitute State aid within the meaning of Article 87(1) EC, the General Court caused the judgment under appeal to be vitiated by an error in law.
- 37 However, the reasoning relating to the attributability of the exemptions at issue, dealt with only in paragraphs 73, 74, 98, 99 and 104 of the judgment under appeal, constitutes only one element of the grounds stated in that judgment. It is therefore necessary to examine whether that judgment remains well founded on the basis of the other grounds stated.
- 38 The General Court, in addition to the considerations relating to the non-attributability of the exemptions at issue to the Member States, based the judgment under appeal on the following grounds.

- 39 In paragraphs 63 to 72 of the judgment under appeal, the General Court held, first, that, in the light of the fact that the rules governing the harmonisation of national fiscal legislation and the rules on State aid have a shared objective, namely to promote the proper functioning of the internal market, by combating, *inter alia*, distortions of competition, the concept of distortion of competition had to be regarded as having the same scope and the same meaning in both those areas, in order to ensure the consistent implementation of those rules. The General Court stated, in that regard, that Article 8(4) and (5) of Directive 92/81 confers in particular on the Commission, which submits a proposal, and the Council, which enacts a measure, the responsibility for assessing whether there is any distortion of competition, in order to decide whether or not to authorise a Member State to apply or continue to apply an exemption from the harmonised excise duty and that, if the assessments differ, the Commission has the option of bringing an action for annulment of the Council's decision.
- 40 The General Court then found, in paragraphs 76 to 97 of the judgment under appeal, that, in this case, it was not in dispute that Ireland, the French Republic and the Italian Republic had, in order to apply or continue to apply the exemptions at issue until 31 December 2003, relied on the authorisation decisions and that they had fully complied with those decisions which, in so far as restrictive conditions of a geographical and temporal nature were attached to them, were binding on those Member States.
- 41 In that context, in paragraphs 79 to 96 of the judgment under appeal, the General Court discounted the Commission's arguments that the authorisation decisions, first, were a necessary, but not sufficient, condition of the Member States being able to grant the exemptions at issue and, second, did not alter the fact that, if those exemptions constituted State aid, within the meaning of Article 87(1) EC, they had to be notified to the Commission and be authorised by it, in accordance with Article 88 EC, as stated in recital 5 in the preamble to Decision 2001/224. The General Court observed, in that regard, that the authorisation decisions prior to Decision 2001/224 contained no such qualification and held that recital 5 could not be construed as a manifestation of the Council's intention to make the effects of its authorisation conditional on compliance with any subsequent procedures and decisions of the Commission in the area of State aid.
- 42 According to the General Court, the Commission's interpretation of recital 5 in the preamble to Decision 2001/224 is rebutted by the Council's reply to questions put by the General Court. Further, that interpretation could not, in any event, be accepted since it would result, in the circumstances of the case, in an inconsistent implementation of the rules governing the harmonisation of fiscal legislation and the rules on State aid, since, first, the authorisation decisions, adopted unanimously by the Council on a proposal from the Commission, were based on those two institutions' shared assessment that the exemptions at issue did not give rise to a distortion of competition and did not impede the proper functioning of the internal market; secondly, the fact that those exemptions were regionally selective was a direct consequence of those decisions and, thirdly, those decisions authorised full exemptions from excise duties.
- 43 Last, after finding, in paragraphs 100 to 103 of the judgment under appeal, that the Commission had never used the powers available to it, under Article 8(5) of Directive 92/81 or Articles 230 EC and 241 EC, in order to secure the abolition or alteration of the authorisation decisions, an annulment of those decisions or a declaration that Directive 92/81 was invalid, the General Court stated, in paragraphs 104 and 105 of the judgment under appeal, that, when the contested decision was adopted, Decision 2001/224 remained valid and that that decision, the decisions which had preceded it and Directive 92/81 were entitled to the presumption of legality attaching to European Union measures and produced all their legal effects. The General Court held that, consequently, Ireland, the French Republic and the Italian Republic were entitled to rely on those decisions in order to continue to apply the exemptions at issue. The General Court concluded that, in the particular circumstances of the case, the contested decision directly called into question the validity of the exemptions at issue and



also, indirectly, but necessarily, the validity of the authorisation decisions and the effects arising from those decisions, thereby infringing the principles of legal certainty and the presumption of legality attaching to European Union measures.

- 44 Further, in paragraphs 107 to 109 of the judgment under appeal, the General Court upheld the complaint alleging an infringement of the principle of sound administration, raised by Eurallumina in Case T-62/06 RENV, holding that such an infringement resulted from the fact that the Commission had adopted the contested decision without taking account of the specific rights which the Italian Republic had conferred on that company in accordance with Decision 2001/224, the effects of which were legally protected by the principles of legal certainty and the presumption of legality attaching to European Union measures.
- 45 In so ruling, the General Court disregarded, however, the respective powers of the Council and the Commission in the area of the harmonisation of legislation relating to excise duties, on the one hand, and in the area of State aid, on the other.
- 46 It must be borne in mind that Directive 92/81 was adopted on the basis of Article 99 of the EEC Treaty (which became Article 99 of the EC Treaty, which itself became Article 93 EC) which conferred on the Council the power to adopt provisions for the harmonisation of legislation concerning turnover taxes, excise duties and other forms of indirect taxation to the extent that that harmonisation was necessary to ensure the establishment and functioning of the internal market.
- 47 The authorisation decisions were adopted pursuant to Article 8(4) of Directive 92/81, which granted to the Council, acting unanimously on a proposal from the Commission, the power to authorise any Member State to introduce exemptions or reductions other than those laid down by that directive ‘for specific policy considerations’. The purpose and the scope of the procedure laid down in that article differ from those of the rules established in Article 88 EC.
- 48 As the Court held in paragraphs 29 to 31 of Case C-110/02 *Commission v Council* [2004] ECR I-6333, the intention of the EC Treaty, in providing through Article 88 EC for aid to be kept under constant review and monitored by the Commission, is that the finding that aid may be incompatible with the common market is to be arrived at, subject to review by the General Court and the Court of Justice, by means of an appropriate procedure which it is the Commission’s responsibility to set in motion. Articles 87 EC and 88 EC thus reserve a central role for the Commission in determining whether aid is incompatible. The power conferred upon the Council in the area of State aid by the third subparagraph of Article 88(2) EC is exceptional in character, which means that it must necessarily be interpreted strictly (see also, to that effect, the judgment of 4 December 2013 in Case C-111/10 *Commission v Council* [2013] ECR, paragraph 39).
- 49 Consequently, a Council decision authorising a Member State, in accordance with Article 8(4) of Directive 92/81, to introduce an exemption of excise duties could not have the effect of preventing the Commission from exercising the powers conferred on it by the Treaty and, consequently, setting in motion the procedure laid down in Article 88 EC in order to review whether that exemption constituted State aid and on the conclusion of that procedure, if appropriate, to adopt a decision such as the contested decision.
- 50 The fact that the authorisation decisions granted full exemptions from excise duties while setting detailed conditions of a geographical and temporal nature and that those conditions were strictly respected by the Member States had no effect on the division of powers between the Council and the Commission and therefore could not deprive the Commission of the right to exercise its powers.

- 51 It may be added that respect for that division of powers prompted recital 5 of Decision 2001/224, which was in force in the period for which the contested decision orders the recovery of aid, to state that Decision 2001/224 was to be without prejudice to the outcome of any procedures that might be undertaken 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 ...’.
- 52 Admittedly, the authorisation decisions were adopted on a proposal from the Commission and the latter never used the powers available to it, under Article 8(5) of Directive 92/81 or Articles 230 EC and 241 EC, in order to secure the abolition or alteration of the authorisation decisions, an annulment of those decisions or a declaration that Directive 92/81 was invalid. It is clear, in that regard, from the contested decision that the Commission had taken the view, at the time when the Council adopted the authorisation decisions, that those decisions did not give rise to a distortion of competition and did not impede the proper functioning of the internal market (*Commission v Ireland and Others*, paragraph 83).
- 53 However, as claimed by the Commission, the concept of State aid corresponds to an objective situation and cannot depend on the conduct or statements of the institutions (*Commission v Ireland and Others*, paragraph 72). Consequently, the fact that the authorisation decisions were adopted on a proposal from the Commission could not preclude those exemptions being classified as State aid, within the meaning of Article 87(1) EC, if the conditions governing the existence of State aid were met. That fact however had to be taken into consideration in relation to the obligation to recover the incompatible aid, in the light of the principles of protection of legitimate expectations and legal certainty, as was done by the Commission in the contested decision when it declined to order the recovery of aid granted before the date of publication in the *Official Journal of the European Communities* of the decisions to initiate the procedure laid down in Article 88(2) EC.
- 54 It follows that the grounds of the judgment under appeal set out in paragraphs 39 to 44 of this judgment cannot provide a legal basis for the General Court’s conclusion that the contested decision calls into question the validity of the Council’s authorisation decisions and thereby is in breach of the principles of legal certainty and the presumption of legality attaching to European Union measures. The same is true of the conclusion, based on the same grounds, that, in Case T-62/06 RENV, the Commission infringed the principle of sound administration.
- 55 In the light of the foregoing, the judgment under appeal must be set aside in its entirety, there being no need to examine the parties’ other arguments and pleas.

### **Whether the cases should be referred back to the General Court**

- 56 In accordance with the first paragraph of Article 61 of the Statute of the Court of Justice, the latter may, after quashing the decision of the General Court, itself give final judgment in the matter, where the state of the proceedings so permits, or refer the case back to the General Court for judgment.
- 57 In the present case, since the General Court examined only some of a number of pleas in law 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.

### **Costs**

- 58 Since the cases have been referred back to the General Court, the costs relating to the present appeal proceedings must be reserved.

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

1. **Sets aside the judgment of the General Court of the European Union of 21 March 2012 in Joined Cases T-50/06 RENV, T-56/06 RENV, T-60/06 RENV, T-62/06 RENV and T-69/06 RENV *Ireland and Others v Commission*;**
2. **Refers Joined Cases T-50/06 RENV, T-56/06 RENV, T-60/06 RENV, T-62/06 RENV and T-69/06 RENV back to the General Court of the European Union;**
3. **Reserves the costs.**

[Signatures]