Reports of Cases

OPINION OF ADVOCATE GENERAL
MENGOZZI
delivered on 17 January 2013 [1]

Case C-111/10

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 Lithuania)

1. By its application in the present case, the Commission asks the Court to annul Council Decision 2009/983/EU of 16 December 2009 on the granting of State aid by the authorities of the Republic of Lithuania for the purchase of State-owned agricultural land between 1 January 2010 and 31 December 2013 (the 'contested decision'). [2]

2. By three other applications submitted in parallel, the Commission has challenged three other decisions of the Council concerning aid of the same kind granted by the Republic of Poland (Case C-117/10), the Republic of Latvia (Case C-118/10) and the Republic of Hungary (Case C-121/10).

3. All of the applications raise the same difficult issue: does a proposal for appropriate measures drawn up by the Commission in the context of the constant review of the systems of aid existing in the Member States, which is conducted pursuant to Article 108(1) TFEU (or Article 88(1) EC as regards Case C-117/10) constitute a final position of the Commission on the compatibility with the common market of the relevant system, which is capable of blocking the exercise by the Council of the competence conferred 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 Article 87 EC) and all other applicable provisions, if justified by exceptional circumstances?

I – Legal context

4. According to 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.'

1 — Original language: Italian.
2 — OJ 2009 L 338, p. 93.

5. The third and fourth subparagraphs of Article 108(2) TFEU provide 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. Given that the legal context of the present case largely mirrors that of Case C-117/10, for an account of the relevant provisions of Chapter 4 of Annex IV to the Act of Accession of Lithuania to the European Union (the '2003 Act of Accession'),[3] of Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 93 of the EC Treaty,[4] of the Community Guidelines for State aid in the agriculture sector (the '2000 Agricultural Guidelines')[5] and of the Community Guidelines for State aid in the agriculture and forestry sector 2007-2013 ('the 2007-2013 Agricultural Guidelines'),[6] I would refer to points 5 to 16 of the Opinion which I have today delivered in that case.

7. In a communication published in the *Official Journal* of 15 March 2008,[7] the Commission recorded, pursuant to Article 19(1) of Regulation No 659/1999, Lithuania's 'explicit and unconditional agreement' to the proposals for appropriate measures contained in point 196 of the 2007-2013 Agricultural Guidelines, of which the Lithuanian authorities had informed the Commission in writing on 22 March 2007.

II – Background to the dispute and the contested decision

8. On 31 August 2004, in accordance with the procedure provided for in Chapter 4 of Annex IV to the 2003 Act of Accession, Lithuania communicated to the Commission the measures which it wished to be regarded as existing aid within the meaning of Article 88(1) EC until the end of the third year following accession. Those measures included a scheme of 'support for acquisition of land'.[8]

9. By decision of 22 November 2006,[9] the Commission examined, and authorised until 31 December 2010, a proposed aid scheme for investment in the purchase of agricultural land extending over a maximum of 300 hectares, which was notified by the Lithuanian authorities and designed to establish the conditions necessary for the creation of rationally managed agricultural holdings. Under the proposal, the aid could be granted on the basis of two alternative mechanisms. The first, which only young farmers could access, provided for a reduction in the purchase price, by applying a coefficient of 0.6 if the plot was purchased outright or of 0.75 in other circumstances. Under the latter mechanism, the aid consisted in the difference between the interest rate actually paid by the purchaser (equal to at

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, at p. 798 in particular).

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 of 17 June 2005, p. 2. In the case of Lithuania, the description of the scheme at issue appears in point 20.

9 — N 112/05 Support for acquisition of land, OJ 2006 C 317, p. 6. The English version of the decision can be accessed on the website of the European Commission's Directorate-General for Competition at http://ec.europa.eu/agriculture/stateaid/decisions/n11205_en.pdf.

least 5%) and the rate applied by the bank. The grant of the aid was subject to compliance with a number of additional conditions which varied according to the mechanism applied, such as, for instance, compliance with minimum environmental-protection or animal-welfare requirements, or the obligation not to transfer the land purchased or not to change the main purpose of State-owned land purchased for a period of five years. In addition, potential recipients of the aid had to satisfy certain conditions, such as having experience in practical farming or a document certifying vocational training in farming. The aid intensity could not exceed 40% of the eligible costs. The scheme was to apply until 2010. [10]

10. By letter of 30 May 2005, the Commission invited the Member States to propose simplifications of the State aid rules in the agricultural sector. By letter of 19 June 2006, the Lithuanian Government requested the Commission to allow the aid for investment in the purchase of agricultural land to be retained, for the benefit of young farmers in particular, if necessary by reducing the intensity of the aid. Lithuania confirmed its position at the meeting held between the Commission and the Member States on 22 and 23 June 2006.

11. By letter of 12 November 2009 addressed to the Agriculture and Fisheries Council, the Lithuanian authorities requested that aid for the purchase of agricultural land in Lithuania should be approved on an exceptional basis pursuant to the third subparagraph of Article 88(2) EC. On 4 December 2009, Lithuania provided additional information to the Council.

12. On 16 December 2009, the Council unanimously adopted the contested decision (with seven delegations abstaining). According to Article 1 of the decision:

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

13. The aid declared to be compatible is described in recitals 5 and 6 in the preamble to the contested decision as follows:

'(5) The State aid will be provided in two alternative forms: (1) by multiplying the market price of the purchased land by a weighting factor (0.6 or 0.75 for young farmers if all the conditions set in the aid scheme are fulfilled); (2) by selling the State-owned agricultural land on an instalment basis, in which case the aid corresponds to the difference between the actual interest rate paid by the purchaser, which is minimum 5%, and the interest rate applied by the lending bank.

(6) The State aid to be granted amounts to a maximum of LTL 55 million and should enable the purchase of a total of 370 000 hectares of agricultural land – in the form of a maximum of 300 hectares of agricultural land per purchaser – during the period from 2010 to 2013. The average amount of aid per holding should be approximately LTL 11 000 ...'

III – Procedure before the Court and forms of order sought

14. 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 9 August 2010, the Republic of Hungary, the Republic of Lithuania and the Republic of Poland were granted leave to intervene in support of the form of order sought by the Council.

10 — See paragraph 2.2 of the decision.

15. The Commission claims that the Court should annul the contested decision and order the Council to pay the costs. The Council asks the Court to dismiss the action as unfounded and order the Commission to pay the costs. Hungary, Poland and Lithuania ask the Court to dismiss the action as unfounded. Poland also supports the form of order sought by the Council in relation to having the Commission ordered to pay the costs.

IV – The application

16. The Commission sets out four pleas in support of its application, based, respectively, on the Council's lack of competence to adopt the contested decision, a misuse of powers, a breach of the principle of sincere cooperation between institutions and a manifest error of assessment.

A – *The first plea, concerning the lack of competence of the Council*

17. By its first plea, based on the Council's lack of competence, the Commission claims, in essence, that the proposal for appropriate measures set out in point 196 of the 2007-2013 Agricultural Guidelines, combined with Lithuania's agreement to that proposal, constitutes a 'decision' by which the Commission declared incompatible with the common market the aid scheme authorised in the contested decision for the whole of the period of validity of those guidelines, that is to say up to 31 December 2013. Citing the Court's judgments in Case C-110/02[11] and in Case C-399/03,[12] for an analysis of which I would refer to points 27 to 31 of the Opinion which I have today delivered in Case C-117/10, the Commission takes the view that, pursuant to the principle of pre-emption, on which, according to those judgments, the criterion for the allocation of the competences conferred on the Commission and on the Council by Article 108(2) TFEU is based, the Council lacked the competence to adopt the contested decision in the present case.

18. The exchange of views between the parties before the Court basically raises three issues. The first issue concerns the status of the aid scheme authorised in the contested decision and requires, in particular, an assessment as to whether, as the Commission maintains, the latter scheme is the same as the scheme which formed the subject-matter of the proposal for appropriate measures set out in point 196 of the 2007-2013 Agricultural Guidelines, or whether, as the Council in fact contends, it constitutes new and different aid (see section (1) below). The second question concerns the effects of a proposal for appropriate measures which has been accepted by the Member State concerned (see section (2) below). Finally, the third question requires a definition of the scope of the proposal for appropriate measures set out in point 196 of the 2007-2013 Agricultural Guidelines and of Lithuania's acceptance of that proposal (see section (3) below).

1. The aid scheme authorised in the contested decision

19. In my view, it is hard to dispute that the aid schemes set out in the Commission's decision of 22 November 2006 and in the contested decision, respectively, are fundamentally the same. Moreover, in its letter of 12 November 2009 to the Council, Lithuania specifically requests the latter to approve 'the extension of the already applied State aid for the acquisition of State-owned agricultural land until 31 December 2013'. The arguments put forward by the Council to demonstrate the difference between the two schemes, and seeking, in essence, to maintain that the scheme approved in the contested decision has a different scope in time, will benefit other persons and is based on new elements of fact and law, have, in my view, to be rejected for the same reasons as those which I set out in points 53, 54 and 56 of the Opinion which I have today delivered in Case C-117/10, to which I would refer. As

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

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

regards the Council's claim that the implementation of the scheme authorised by the contested decision will require the adoption of a new legislative framework, I would point out that the Lithuanian Government makes no mention of the adoption of any such framework, and actually states repeatedly in its observations that the rules notified to the Commission in 2005 have not been amended. Lastly, it must be pointed out that, in the letters of 12 November 2009 and of 4 December 2009 addressed to the Council, Lithuania specifically requests the latter to approve 'the extension of the already applied State aid'.

20. Moreover, it is common ground that the aid scheme declared compatible with the internal market in the contested decision constitutes 'new aid' within the meaning of Article 1(c) of Regulation No 659/1999, given that the scheme notified by Lithuania in 2005 was intended to apply until 31 December 2009 only, and was authorised by the Commission in its abovementioned decision of 22 November 2006 up to that date. While it is, in principle, apparent from the case-law cited in point 17 of this Opinion that classification as new aid is not of itself decisive for the purpose of excluding the competence of the Council under the third subparagraph of Article 108(2) TFEU (see, to that effect, point 50 of the Opinion which I have today delivered in Case C-117/10), in the present case, however, it is a determining factor, as we shall see below. In this case, it is sufficient to point out that the extension beyond 31 December 2009 of the scheme approved by the Commission in 2006 would have required new notification and the adoption by the Commission of a new position confirming its compatibility, as the scheme was not compatible with Regulation No 1857/06.

2. The effects of a proposal for appropriate measures which has been accepted by the Member State concerned

21. On the basis of the reasons set out in points 62 to 72 of the Opinion which I have today delivered in Case C-117/10, to which I would refer, I am of the view that a proposal for appropriate measures which is accepted by the Member State to which it is addressed constitutes a *final position* of the Commission on the compatibility of the aid scheme at issue and produces *binding legal effects similar to those of a decision*. Consequently, in my view, an act of that nature is capable, on the basis of the Court's case-law cited in point 17 of this Opinion, of blocking the adoption of decisions under the third subparagraph of Article 108(2) TFEU which conflict with it.

22. That said, it is necessary to define the scope, on the one hand, of the position on the 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 and, on the other, the scope of the obligations entered into by Lithuania through its acceptance of that proposal. Determining whether the Council lacked the competence to adopt the contested decision actually turns on the outcome of that two-pronged analysis.

3. The scope of the appropriate measures contained in point 196 of the 2007-2013 Agricultural Guidelines and of Lithuania's acceptance of those measures

23. At point 74 of the Opinion which I have today delivered in Case C-117/10, I noted that, while it is true that the 2007-2013 Agricultural Guidelines take the approach that aid for investment in the purchase of agricultural land which does not fulfil the requirements of Article 4(8) of Regulation No 1857/2006 is in principle incompatible in the case of individual aid or aid schemes to be introduced, that position may not of itself be considered to be final, since the Commission is required, on the basis of point 183 of the guidelines, to establish and to declare that the aid is incompatible by means of the review procedure provided for by Article 108 TFEU. For that reason, I rejected the Commission's argument, which it repeated in the context of the application forming the subject-matter of the present proceedings, that the 2007-2013 Agricultural Guidelines 'declare' to be incompatible with the common market, from 31 December 2007 and until 31 December 2013, all –

thus including the aid yet to be introduced – of the aid for investment in the purchase of agricultural land which does not comply with the guidelines. As, in my view, correctly observed by the Council and the Lithuanian Government, an approach of that nature would imply conferring on the Commission a regulatory power derogating from the procedure provided for by Article 108 TFEU.

24. In that context, it was on the basis of the combined effect of the proposal for appropriate measures set out in point 196 of the 2007-2013 Agricultural Guidelines and the obligation entered into by the Member State concerned that I concluded, in my Opinion in Case C-117/10, that the position adopted by the Commission on the aid schemes for the purchase of agricultural land existing in that Member State was final and capable of blocking the competence of the Council under the third subparagraph of Article 88(2) EC (see points 75 and 76).

25. In the present case, the circumstances are, however, different and do not allow of the same conclusion. Indeed, while it is true that Lithuania confirmed in writing its 'explicit and unconditional agreement' [13] to the measures proposed by the Commission at point 196 of the 2007-2013 Agricultural Guidelines, thereby, like the other Member States which notified their agreement, entering into the obligation to amend its support scheme for the purchase of agricultural land by 31 December 2009, it is none the less common ground that the scheme in question ceased to apply on that very date. It follows that Lithuania was not in fact required to make any amendment, and that the obligation which it had entered into lapsed at precisely the point in time at which a failure to meet that obligation began to take effect.

26. In those circumstances, the contested decision did not justify the breach of an agreement entered into pursuant to Article 108(1) TFEU, nor does it conflict with a final position of the Commission, given that, as pointed out above, a position of that nature exists solely in regard to the schemes mentioned in point 196 of the 2007-2013 Agricultural Guidelines, that is to say, in the case of Lithuania, a scheme which was intended to apply until 31 December 2009 only.

27. A different conclusion might possibly be reached only by arguing that Lithuania accepted the 2007-2013 Agricultural Guidelines as a whole, by undertaking to refrain from introducing support schemes for the purchase of agricultural land which failed to satisfy those guidelines for the whole of the period between 31 December 2009 and 31 December 2013. However, on the one hand, that argument, which is found in a number of passages in the Commission's observations, would be inconsistent with the scope of the acceptance of which Lithuania informed the Commission, which, as is clear from the notice published in the *Official Journal* of 15 March 2008, was confined to the appropriate measures contained in point 196 of the guidelines. In addition, it would *de facto* permit the mechanism provided for by Article 108(1) TFEU, and set out in Articles 18 and 19 of Regulation No 659/1999, to be applied outside its intended scope, that is to say for the purpose of the constant review of existing aid schemes.

28. Lastly, while, as the Commission correctly states, there is no question that the 2007-2013 Agricultural Guidelines contain a position of the Commission to the effect that aid for investment in the purchase of agricultural land which fails to satisfy the conditions laid down by Regulation No 1857/2006 is incompatible with the internal market, it would not, however, be possible to regard a position of that nature as being capable of blocking the competence of the Council under the third paragraph of Article 108(2) TFEU without amending the case-law cited in point 17 of this Opinion, according to which only a final position is capable of producing that effect. Although it may appear excessively formalistic, the solution which I suggest that the Court should adopt in the present case seems, therefore, to be the only solution which is compatible with the Court's interpretation in that case-law of the criteria concerning the allocation of the competences conferred on the Commission and on the Council by Article 108 TFEU.

13 — See the communication published in Official Journal C 70, of 15 March 2008.

4. Conclusions on the Council's competence to adopt the contested decision

29. On the basis of the foregoing considerations, I propose that the Court should reject the Commission's first plea concerning a lack of competence on the part of the Council.

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

30. By its second plea, the Commission claims in essence that, by authorising aid measures declared to be incompatible with the common market at point 196 of the 2007-2013 Agricultural Guidelines, the Council has used the competence conferred upon it by the third subparagraph of Article 108(2) TFEU for purposes other than those provided for in the Treaty. According to the Commission, that provision authorises the Council to declare compatible with the common market, in exceptional circumstances, aid which the Commission is not able to authorise, but it does not confer on the Council the power to neutralise the Commission's assessment as to the compatibility of aid where that assessment is contained in an act which has binding force.

31. In that regard, I agree with the premiss on which the present plea is based, namely that point 196 of the 2007-2013 Agricultural Guidelines, combined with Lithuania's acceptance of the appropriate measures which it defines, constitutes a final and binding position of the Commission on the compatibility with the common market of measures which are fundamentally the same as the measures which form the subject-matter of the contested decision. However, it is apparent from the circumstances of the present case that this position, which related to a scheme which, like the obligation to amend the scheme which Lithuania had entered into, expired on 31 December 2009, could not have effect beyond that date.

32. I therefore consider that the second plea also, concerning a misuse of power, should be rejected.

33. By its third plea, the Commission claims that, by adopting the contested decision, the Council has released Lithuania from the obligation to cooperate which is incumbent upon it in the context of the constant review of existing aid schemes provided for by Article 108(1) TFEU, and from the obligation which it had entered into by agreeing to the appropriate measures recommended by the Commission. According to the Commission, in so doing, the Council has overturned the system of institutional equilibrium laid down by the Treaty, thereby encroaching on the functions which the Treaty confers on the Commission.

34. In my view, the present plea must also be rejected. It is actually founded on the premiss that the contested decision interfered with the obligation entered into by Lithuania vis-à-vis the Commission to amend the existing support scheme for the purchase of land in order to bring it into line with the 2007-2013 Agricultural Guidelines. Since that obligation lapsed on 31 December 2009, the date on which the abovementioned scheme ceased to apply, setting aside any other consideration, the interference of which the Commission complains has not been demonstrated.

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

35. In the context of its fourth plea, the Commission basically puts forward two heads of complaint which I shall consider separately. It first claims that the contested decision is flawed by a manifest error of assessment because the circumstances relied upon to justify the authorised aid measures are not exceptional in nature. Second, it claims that those measures are disproportionate to the aims sought, in view in particular of the length of the period for which they are authorised.

36. As regards generally 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 power of discretion in exercising the competence conferred upon it by that article and the limits on the Court's review of the decisions adopted on the basis of it, I would refer to the considerations set out in points 86 and 87 of my Opinion delivered today in Case C-117/10.

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

37. The Commission first argues that the contested decision erroneously presents as exceptional circumstances certain *structural problems of the agricultural sector in Lithuania*. It refers in particular to recital 2 in the preamble to the contested decision, in which the Council states that '[d]ue to insufficient agricultural incomes, it is difficult to improve the unfavourable area structure of Lithuanian agricultural holdings', specifying that '[i]n 2009, farms with an area of up to 5 hectares made up 52.5% of all farms'. The Commission further maintains that the Council erroneously presented as an exceptional circumstance '*the variation in market conditions*' and, in particular, the decline, during 2009, in the producer prices of agricultural products, mentioned in recital 3 in the preamble to the contested decision. Finally, as regards the factors mentioned in recital 4 in the preamble to the contested decision, namely the 'lack of equity capital of farmers' and the 'high interest rates applied by credit institutions on loans for the purchase of agricultural land' at the end of 2008 and during 2009, the Commission observes that the former is structural in nature and the latter, being a symptom of the economic crisis, is not independent of the general circumstance cited in recital 3 in the preamble to the decision.

38. In that regard, I would first point out that, in my view, the Commission is correct in its assertion that the factors mentioned in recital 2 in the preamble to the contested decision, that is to say the small size of agricultural holdings and the low level of agricultural incomes, do not *of themselves* constitute exceptional circumstances within the meaning of the third subparagraph of Article 108(2) TFEU, given that they are structural and not conjunctural in nature, something which neither the Council nor Lithuania disputes.

39. However, contrary to what the Commission maintains, in the scheme of the contested decision, those factors are not presented as exceptional circumstances but rather, specifically, as factors characterising the structure of Lithuania's agricultural economy, and the reference to them has, above all, a specific part to play in terms of assessing the economic and social repercussions of the recession, which, according to the wording of recitals 3 and 4 in the preamble to the contested decision, is the main factor justifying the authorised measures. The same may be said of the lack of equity capital of farmers, which the Commission merely mentions as being structural in nature, but without furnishing evidence of this.

40. Moreover, it is clear from the judgment in Case C-122/94 *Commission* v *Council* [1996] ECR I-881 that, in exercising the competence conferred upon it by the third subparagraph of Article 108(2) TFEU, the Council may rely upon the *continued existence* or *worsening* of the structural problems of a particular sector of the economy for the purpose of assessing the impact on that sector of economic bad times. [14]

41. With regard to the Commission's argument that the decline in income levels and in the producer prices of agricultural products experienced during 2009, as well as the economic crisis which took hold in the autumn of 2008 and continued throughout 2009, affected all of the Member States, I would draw attention to the fact that, according to case-law, the fact that a specific situation may affect several Member States at one and the same time, or possibly affect different sectors of the

14 — Paragraph 21.

economy, does not preclude it from in any event constituting a relevant circumstance for the purposes of the application of the third subparagraph of Article 108(2) TFEU,[15] bearing in mind also the particular consequences which it may have led to in a given Member State. In that connection, the Commission itself stresses, in its written submissions, that Lithuania was hit hard by the economic crisis, which, as I stated above, is the main factor relied upon by the Council in its contested decision. Moreover, the Commission does not rule out that a situation of general economic crisis may, in theory, constitute an exceptional circumstance.

42. In the light of the foregoing, I consider that the Commission has failed to demonstrate the existence of a manifest error of assessment as to the presence of exceptional circumstances capable of justifying the adoption of a decision pursuant to the third subparagraph of Article 108(2) TFEU.

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

43. The Commission first claims that the support schemes for the purchase of land do not make it possible to resolve or to ameliorate structural problems such as the small size of the agricultural holdings. According to the Commission, aid of the kind approved by the Council would increase the demand for agricultural land and would lead to an increase in the prices of such land, rather than change the structure of ownership of agricultural land, ultimately proving of greater benefit to sellers than to buyers. Citing statistics drawn up by Eurostat – supplemented, in response to a request from the Court, by data from the Lithuanian Department of Statistics – the Commission notes that, although a support scheme for the purchase of agricultural land has existed in Lithuania since 2003, the average size of agricultural holdings has increased only marginally over the years. In its reply, the Commission explains, without being contradicted by the Lithuanian Government, which was asked for its view in a question put by the Court, that the increase recorded in 2006 and 2007 cannot, in any event, be the result of the grant of aid, since Lithuania did not notify the Commission of expenditure in that regard for those years. In reply to a written question from the Court, Lithuania stated that the Eurostat data relate principally to the restoration to its previous owners of land which had been nationalised, whereas an analysis of the statistics on the privatisation of State-owned land, in the context of which the grant of the aid in question was envisaged, reveals a significant increase in the average size of agricultural plots between 2005 and 2009.

44. Setting aside the interpretation of the statistics produced by the Commission and by Lithuania, I take the view that, even if the data show that the average size of Lithuanian agricultural holdings has increased only slightly over the years, this is not in itself sufficient to demonstrate that the Council *manifestly* exceeded the limits of its power of assessment in taking the view that the measures approved in the contested decision were appropriate to pursue the aims mentioned in recital 10 in the preamble to that decision, which include, in addition to improving the structure of farms and the efficiency of farming in Lithuania, successfully finishing land reform. Similarly, failing evidence to the contrary, I do not consider the mere affirmation that the application of the support scheme for investment in the purchase of agricultural land did not make it possible to reduce the – structurally high – level of interest rates on loans for the purchase of agricultural land in Lithuania to be sufficient to demonstrate that a scheme of that nature was manifestly inappropriate to pursue the aim of improving farmers' prospects to access such loans. As for the Commission's argument, similarly unsupported by evidence, that the only result of the aid for investment in the purchase of agricultural land was to push up the price of that land, I would point out that the approved aid scheme concerns only the transfer of State-owned land, a factor which should restrict speculative practices.

15 — A similar argument by the Commission was rejected at paragraph 22 of the judgment in the abovementioned Case C-122/94.

45. Second, the Commission points out that, in an effort to deal with the consequences of the crisis, it adopted, in 2009, a specific communication on a Temporary Community Framework for State aid measures to support access to finance in the current financial and economic crisis [16] (the 'Temporary Community Framework'), on the basis of which, as a result of a number of subsequent amendments, [17] various forms of Member State intervention for the benefit of agricultural holdings were authorised, including, in particular, temporary aid in the maximum amount of EUR 15 000 until the end of 2010. The Commission maintains that, by failing to take account of that aid, which was specifically designed to remedy the problems linked to the crisis, and, in particular, by failing to consider whether that aid made it possible to resolve those problems, the Council breached the principle of proportionality. The Commission further contends that the Council ought to have taken account of other aid instruments, such as Regulation No 1535/2007, [18] which the Lithuanian authorities could have used to remedy the problems of farmers identified in the contested decision.

46. The Commission's arguments call for an assessment of whether, and within what limits, the Council is required to take account of the measures that have already been adopted at European Union level for the purpose of remedying the situations invoked as exceptional circumstances by the applicant Member State. In that connection, on the basis of the considerations which I set out in point 96 of the Opinion delivered today in Case C-117/10, to which I would refer, I consider that the Council is at least required to take into account, in its assessment under the third subparagraph of Article 108(2) TFEU, the pre-existing measures *specifically* designed to remedy the situations likely to justify the authorisation of the aid at issue, [19] without it being necessary for the Council to review or to set out in its decision all of the rules of law governing the field in question.

47. In the present case, it is not clear from the contested decision that the Council addressed the question whether Lithuania had made use of the possibilities afforded by the Temporary Community Framework or what effects any measures put in place on that basis had yielded. [20] I would, however, point out that, although designed to mitigate the economic effects of the crisis, the direct subsidy of a limited amount to which the Commission refers was not specifically intended to encourage investments geared to improving the structure of the agricultural holdings or successfully finishing the land reform under way in Lithuania, and, in addition, was able to be granted only until 31 December 2010, as, moreover, pointed out by Lithuania in its letters to the Council of 12 November 2009 and 4 December 2009. In those circumstances, the Council could properly consider, in my view, that a more focused measure which extended further over time could both pursue, possibly in conjunction with other instruments, the aim of mitigating the consequences of the financial crisis, and the difficulties experienced by farmers in accessing credit in particular, and could provide a better response to the structural problems of Lithuania's agricultural economy. It does not, however, seem to me that the Council was under a specific obligation to take account, as the Commission claims, of Regulation No 1535/2007, [21] as this was not an instrument specifically designed to pursue the aims set out in the decision. In any event, the scheme approved in the contested decision is designed to promote investment in the purchase of agricultural land and therefore functions on a different level from the regulation.

16 — OJ 2009 C 83, p. 1.

17 — 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).

18 — 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).

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

20 — I would point out, however, that in both their letter of 12 November 2009 and their letter of 4 December 2009 to the Council, the Lithuanian authorities set out the reasons why they considered that the Temporary Community Framework was not enough to tackle the problems created by the economic and financial crisis.

21 — 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).

48. Third, the Commission notes a discrepancy between the structural problems which the approved measures are supposed to help resolve and the justification for those measures. In that regard, I have already had occasion to state that, within the scheme of the contested decision, the repercussions of the economic and financial crisis on Lithuania's agricultural sector are the essential reason on which the declaration of compatibility of the measures at issue is founded. *Prima facie*, the Commission is, therefore, right to identify a discrepancy between that justification and the conclusion reached by the Council in recital 10 in the preamble to the contested decision, namely that '[e]xceptional circumstances ... exist, making it possible to consider such aid, by way of derogation and to the extent strictly necessary to finish land reform successfully and to improve the structure of farms and the efficiency of farming in Lithuania, to be compatible with the internal market'. However, if the contested decision is read in the light of Lithuania's application (as emerges in particular from the letter of 12 November 2009 to the Council), it is clear that the measures in question are primarily designed to make it possible successfully to complete the land reform in Lithuania, which was at a standstill, or had at least slowed down, as the Lithuanian Government explains in its statement in intervention, because of the negative, exceptional and unpredictable effects which the crisis had had within Lithuania's agricultural sector, in that the sector's structural problems had further deteriorated and the opportunities for farmers to access loans for the purchase of agricultural land had declined. Construed in those terms, the contested decision does not display the inconsistency identified by the Commission.

49. Finally, the Commission contends that the extension in time of the approved measures, as well as the extension over time of their effects (involving the financing of long-term loans), means that the measures are in themselves disproportionate.

50. In my view, it follows 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 must be limited in time and accorded only for the duration of the period strictly necessary to remedy the circumstances invoked as grounds for the decision.[22] This means that where a decision under the third subparagraph of Article 108(2) TFEU concerns aid schemes designed to remain in force for a relatively long period of time, as in the present case, it is incumbent upon the Council to state the reasons why it considers this to be necessary in the light of the circumstances invoked in support of the declaration of compatibility. In the present case, while it is true that the contested decision provides only scant information as to the reasons why it was regarded as necessary to authorise the scheme in question for a four-year period, those reasons may be gleaned from the backdrop to the decision, as well as from the nature of the measures authorised, the problems which these were intended to help remedy and the aims pursued. Furthermore, the issue of the duration of the measures to be approved was covered by Lithuania in its letters of 12 November 2009 and of 4 December 2009, which referred in essence to the slowing-down of the process of land privatisation in the wake of the financial crisis and to the impossibility of completing the process within a short period of time and, in any event, by 31 December 2010, the date on which the Temporary Community Framework ceased to apply. In the light of the reference to that request in the contested decision, it may be concluded that the Council implicitly took on board the reasons set out by Lithuania. Finally, in its written observations to the Court, the Council elaborated and expanded on its reasons.

51. As regards the substance of the Commission's complaint, I note that it is based, in essence, on the fact that the duration of the derogation accorded in the contested decision coincides with the scope in time of the 2007-2013 Agricultural Guidelines, which, according to the Commission, suggests that the Council's decision reflected the wish to paralyse the application of the guidelines rather than to limit the derogation to the extent strictly necessary to remedy the imbalances which had been identified. While I take note of that coincidence, I consider that, bearing in mind the long-term aims which the

22 — See, to that effect, the judgment in Case C-122/94 *Commission* v *Council*, paragraph 25.

decision seeks to pursue (particularly bringing the agricultural reform to a conclusion) and the effects, which are also likely to extend over a lengthy period, of the repercussions of the economic and financial crisis, invoked as exceptional circumstances justifying the decision, the Commission has failed to demonstrate that, by authorising the scheme in question for the period between 1 January 2010 and 31 December 2013, the Council manifestly exceeded the limits of the discretion which it enjoys in exercising the competence conferred upon it by the third subparagraph of Article 108(2) TFEU.

52. On the basis of the reasons set out above, I consider that the fourth plea in the action must also be rejected.

V – Conclusion

53. On the basis of the foregoing considerations, I propose that the Court should:

— dismiss the action;

— order the Commission to pay the costs; and

— order the Member States which have intervened in the proceedings to bear their own respective costs.