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INFORMATION NOTE

from: Council Legal Service

to: CSA and Coreper I

Subject : **Judgments of the Court of Justice in Cases**

- **C-111/10** (European Commission v. Council of the European Union)
 - **C-117/10** (European Commission v. Council of the European Union)
 - **C-118/10** (European Commission v. Council of the European Union)
 - **C-121/10** (European Commission v. Council of the European Union)
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Introduction

1. By its judgments of 4th December 2013 in Cases C-111/10, C-117/10, C-118/10 and C-121/10, the Court of Justice (Grand Chamber) dismissed the actions, brought by the European Commission against the Council, 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 ¹, Council Decision 2010/10/EC of 20 November 2009 on the granting of a State aid by the authorities of the Republic of Poland for the purchase of agricultural land between 1 January 2010 and 31 December 2013 ², 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

¹ OJ L 338, 19.12.2009, p. 93.

² OJ L 4, 08.01.2010, p. 89.

agricultural land between 1 January 2010 and 31 December 2013³, and Council Decision 2009/1017/EU of 22 December 2009 on the granting of a State aid by the authorities of the Republic of Hungary for the purchase of agricultural land between 1st January 2010 and 31 December 2013⁴ (the "contested Decisions").

2. The contested Decisions were adopted by the Council on the basis of the third subparagraph of Article 108(2) of the Treaty on the Functioning of the European Union ("TFEU") (ex-Article 88(2) of the EC Treaty). The judgments may have several implications for the Council's future practice regarding the authorisation of State aids on that legal basis.

II. Summary of the judgments

3. In the first plea in law concerning the four Cases, the Commission argued that the Council was not competent to adopt the contested decisions because the aid which it approved was existing aid which the Member States in question had committed themselves to eliminate by the end of 2009 when they accepted the appropriate measures referred to in Article 108(1) TFEU. In Case C-117/10 only, the Commission also argued that the Council by adopting the contested decision five months after the date on which Poland had requested it to authorise the aid, acted beyond the three months' period provided for in the fourth subparagraph of Article 108(2) TFEU and therefore lacked power.
4. The Court rejected the first and second part of the first plea in law and upheld the arguments put forward by the Council.
5. On the first part of the first plea, the Court confirmed in Case C-117/10 that the three months' period for the Council to act following a request by a Member State only applied where the Commission had already initiated the procedure under the first subparagraph of Article 108(2) TFEU without yet having adopted a final decision on the compatibility of the aid with the

³ OJ L 339, 22.12.2009, p 34.

⁴ OJ 2009 L 348, p. 55.

internal market⁵. Since in that case the Commission never initiated the procedure under the first subparagraph of Article 108(2) TFEU, the fact that a period of five months elapsed between the application by Poland and the adoption of the contested decision could not deprive the Council of its competence.

6. On the second part of the first plea, the Court accepted the view that the aid scheme authorised by the Council was a new one but maintained its case law (e.g. Case C-110/02 *Commission v. Council*) that the Council cannot rely only on that fact in order to reassess a situation in respect of which the Commission has already made a final assessment, thereby contradicting that assessment (see e.g. paragraph 76 of the Judgment in Case C-117/10). The Court made it clear that the Council does not have power to decide that a new aid scheme must be regarded as compatible with the internal market "*where it is so indissolubly linked to an existing aid scheme*" that a Member State has undertaken to modify or abolish, in the framework of Article 108(1) TFEU, that "*it appears largely artificial to claim to make a distinction between those two schemes*" for the purposes of applying Article 108(2) TFEU.
7. However, the judgments in Cases C-111/10, C-117/10, C-118/10 and C-121/10, as defended by the Council, allowed for some flexibility with respect to the interpretation of the above-mentioned conditions under which the Council is deprived from the power to act where the Commission has already taken a position on a similar aid. The Court indeed distinguished the present four cases from its previous cases (Cases C-110/02 and C-399/03) in noting that "*a significant period of time*" elapsed between the Commission's assessment (agricultural guidelines adopted in 2006) and that made by the Council (Council decisions adopted in 2009). The Court further noted that the contested decisions were specifically based on the occurrence of "*new circumstances*", considered to be exceptional by the Council in 2009, "*which could not be taken into account by the Commission*" in its assessment in 2006. The Court concluded that "*owing to the substantial change in circumstances ... , the assessment by the Commission of those aid schemes cannot therefore be considered as prejudicing the assessment which would have been carried out of an aid scheme, containing similar measures, but which would have fallen to be implemented in economic circumstances radically different from those which the*

⁵ This interpretation was implicitly confirmed in Case C-110/02 *Commission v. Council*, paragraph 33, as the Council argued in its pleadings and supported by the Advocate General in its opinion.

Commission took into account in its assessment. It follows that the compatibility with the internal market of the new aid scheme which was the subject of an application addressed to the Council by [a Member State] under the third subparagraph of Article 108(2) TFEU must be evaluated following an individual assessment distinct from that of the schemes ..., which takes into consideration the relevant economic circumstances at the time when the aid is granted ..." (see e.g. paragraph 82 of the Court judgment in Case C-117/10).

8. The Court also rejected the Commission's argument that the Council was not competent to authorise aid contrary to the policy set out in the agricultural guidelines of 2006. In line with what the Council defended, the Court ruled that those guidelines, except as regards point 196 which had been accepted by the Member States as "*appropriate measures*", are merely general policy rules which are to be followed by the Commission without binding the Member States and *a fortiori* the Council which can derogate in exceptional circumstances from the provisions of Article 107 TFEU or from the regulations provided for in Article 109 TFEU.
9. The Court rejected the second plea in law which alleged a misuse of powers since the Commission has not furnished such evidence and the Council was in any event entitled to consider that the Commission had not adopted a position on the compatibility of the aid scheme in question, as stated in the Recitals in the preamble to the contested Decisions.
10. The Court also rejected the third plea in law alleging breach of the principle of sincere cooperation since the Member States in question did not make any specific commitment concerning the aid scheme authorised by the Council.
11. Finally, the Court rejected the first and second part of the fourth plea in law which alleged a manifest error of assessment with regard to the presence of "*exceptional circumstances*" and a breach of the principle of proportionality. On the basis of its previous case law, the Court first recalled that "*the Council enjoys wide discretion in the application of the third subparagraph of Article 108(2) TFEU*". It then reiterated its traditional case law whereby the tests to be applied for both aspects are the following: "*manifest error of assessment of the facts*" and with regard to compliance with the principle of proportionality "*manifest inappropriateness of the measure, having regard to the objective which the Council is seeking to pursue*". On the basis

of the reasons set out in the contested decisions and the further explanations developed in the Council's pleadings, the Court concluded that the Council committed no manifest error of assessment in considering the presence of exceptional circumstances, notably in the light of the impact of the economic crisis of 2008/2009 on the farmers in the four Member States concerned. The Court also considered that the Council did not breach the principle of proportionality (for example, on approving a four-year duration of the aid scheme or by not following the alternative measures which were available under the temporary framework established by the Commission or *de minimis* aid authorised under Regulation No 1535/2007).

12. As none of the pleas put forward by the Commission has been upheld, the actions have been dismissed.

III. Consequences of the judgment for the Council's future practice

13. These new Court judgments provide for a more flexible interpretation of two procedural requirements of the third and fourth subparagraph of Article 108(2) TFEU.
14. Firstly, these judgments would allow the Council in the future to adopt decisions within a period which may exceed three months after the application made by the Member State but only in cases where the Commission has not initiated a procedure under the first subparagraph of Article 108(2) TFEU. This outcome confirms what already implicitly emerged from previous case law and from the actual wording of the third and fourth subparagraphs of Article 108(2) TFEU.
15. Secondly, these judgments would also allow the Council in the future to adopt decisions authorising State aid where the Commission has already taken a position on a previous similar scheme but only in exceptional cases (i.e. where no indissoluble link exists between the two aid schemes). In the contested Decisions, those exceptional cases were the following: (i) a significant period of time elapsed between the Commission's assessment and that made by the Council and (ii) a substantial change in circumstances occurred between those two assessments (see paragraph 7 above).

16. As regards the substance of the Council decisions, the Court confirmed that the Council enjoys wide discretion on the presence of "*exceptional circumstances*" which empower the Council to derogate from Article 107 TFEU or from the regulations adopted on the basis of Article 109 TFEU.
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