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STATE AID CASES FROM CENTRAL AND EASTERN EUROPE I.

A SELECTION OF EMBLEMATIC JUDGMENTS OF THE EU COURTS

Budapest, 28 May 2019

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I.1. Advantage

Judgment of 16 March 2016, *Frucona Košice v Commission*, T-103/14, EU:T:2016:152 and

Judgment of 20 September 2017, *Commission v Frucona Košice*, C-300/16 P, EU:C:2017:706

Relevance: Private creditor test

Facts

The Slovak producer of spirits and spirit-based beverages *Frucona Košice* benefited from several deferrals of payment of tax debts and excise duties during 2002-2003, in return of which it provided financial securities to the Košice local tax authority. In 2004, the company was unable to pay its excise duties, and following a legislative change, it could no longer obtain a deferral in payment. As a consequence, its license for the production of alcohol was revoked. With regard to its position of indebtedness the company initiated the so-called arrangement procedure; it proposed to pay each of its creditors 35% of the amount of the sum that it owed to them. The local tax authority (its largest creditor by far) accepted the offer, the competent Slovak court confirmed the arrangement, and the company paid them the agreed amount by the end of 2004, and the arrangement procedure was declared to be terminated. However, in the meantime Slovakia acceded to the EU, and the local tax authority realised that the remission of 65% of its tax claim constituted unlawful State aid. On the basis of a complaint the Commission investigated the case, compared the arrangement procedure first with the ordinary bankruptcy procedure and second with the tax execution procedure, and found that both other options were more favourable for the local tax authority. So the Commission concluded that the private creditor test was not satisfied and that the measure constituted incompatible State aid.

Frucona Košice requested the annulment of the decision but the General Court first dismissed the action in 2010.[1] Ruling on the appeal the Court set aside the judgment of the General Court in 2013[2] on the ground that Commission failed to take into account the duration of the bankruptcy procedure and committed thereby a manifest error of assessment in applying the private creditor test. Following the judgment of the Court of Justice, the Commission repealed its decision[3] and adopted a new one in 2014 correcting the error identified by the Court of Justice. In its new decision the Commission found again that the measure constituted incompatible State aid. *Frucona Košice* sought annulment of the Commission's new decision before the General Court which annulled the contested decision in 2016. The judgment was appealed by the Commission in 2017 which was rejected the Court.

Held

[1] Judgment of 7 December 2010*, Frucona Košice v Commission*, T-11/07, EU:T:2010:498.

[2] Judgment of 24 January 2013, *Frucona Košice v Commission,* C-73/11 P, EU:C:2013:32

[3] The decision had not been annulled as the Court referred the case back to the General Court.

The most important fining of the *Frucona Košice* judgments concerning the Commission's second decision is that the beneficiary shall be capable to rely on the applicability of the private creditor test even in situations where the Member State itself did not refer to it. In this case, during the administrative procedure Slovakia submitted to the Commission that the measure constituted State aid and acknowledged that at the time of the arrangement the question of State aid was simply not considered. According to the Commission, the private creditor test concerned the subjective state of mind of the authority when taking the decision to adopt the measure in question, so it could not be invoked by third parties, including the beneficiary. However, the Court made it clear that the applicability of the private creditor test was not dependent on the State's intentions, but on the economic nature of the action, which was an objective factor.

Findings of the Court

Findings in judgment of 16 March 2016, Case T-103/14

"97 In the context of the private investor in a market economy test, the Court of Justice has, moreover, held that, if a Member State relies on that test during the administrative procedure, it must, where there is doubt, establish unequivocally and on the basis of objective and verifiable evidence that the measure implemented falls to be ascribed to the State acting as shareholder (judgment in *Commission v EDF,* cited in paragraph 26 above, EU:C:2012:318, paragraph 82). That evidence must show clearly that, before or at the same time as conferring the economic advantage at issue, the Member State concerned took the decision to make an investment, by means of the measure actually implemented, in the public undertaking (see judgment in *Commission v EDF*, cited in paragraph 26 above, EU:C:2012:318, paragraph 83 and the case-law cited). In that regard, it may be necessary to produce evidence showing that the decision is based on economic evaluations comparable to those which, in the circumstances, a rational private investor in a situation as close as possible to that of the Member State would have had carried out, before making the investment, in order to determine its future profitability (judgment in *Commission v EDF*, cited in paragraph 26 above, EU:C:2012:318, paragraph 84). By contrast, economic evaluations made after the advantage was conferred, a retrospective finding that the investment made by the Member State concerned was actually profitable, or subsequent justifications of the course of action actually chosen do not suffice to show that, before or at the same time as conferring the advantage, the Member State took that decision as a shareholder (see judgment in *Commission v EDF*, cited in paragraph 26 above, EU:C:2012:318, paragraph 85 and the case-law cited).

According to that case-law, if the Member State concerned provides the Commission with the requisite evidence, it is for the Commission to carry out a global assessment, taking into account — in addition to the evidence provided by that Member State — any other relevant evidence enabling it to determine whether the Member State took the measure in question in its capacity as shareholder or as a public authority (see, to that effect, judgment in *Commission v EDF,* cited in paragraph 26 above, EU:C:2012:318, paragraph 86).

99 In the contested decision, the Commission noted that, in the decision to open the formal investigation procedure, it had raised doubts as to whether the Slovak Republic behaved in relation to the applicant as a private creditor (recital 78 of the contested decision). While noting that the conditions of the arrangement were identical for the private creditors and for the local tax office (recital 79 of the contested decision), the Commission observed that the position of that tax office as creditor was

unusually strong. The Commission inferred from this that 'it therefore need[ed] to be examined in detail whether the Tax Office [had] used all the means available to it to obtain the highest possible repayment of its receivables, as a market economy creditor would do' (recital 80 of the contested decision).

100 To that end, the Commission inter alia recalled, in recitals 81 and 82 of the contested decision, the case-law relating to the application of the private creditor test, cited in essence in paragraphs 93 and 94 above, and to the applicability of that test, by analogy with the case-law cited in paragraphs 95 and 97 above. Thereafter, after stating as follows in recitals 83 and 84 of the contested decision, the Commission applied that test:

> '(83) In brief, the Slovak Republic submits that, in its view, the measure constitutes state aid. It acknowledge[s] that, at the time of the arrangement, the question of state aid was simply not considered and requested that the disputed measure be treated as rescue aid. It therefore appears that the requirements of the case-law referred to above have not been complied with in this case and the disputed measure constitutes state aid within the meaning of Article 107(1) TFEU.
>
> (84) It is the [applicant] who argued that the measure [was] free of aid and submits the documents described above, in particular reports from two auditors.'

[…]

108 In that regard, it should be observed that, by analogy with the case-law cited in paragraph 97 above, if a Member State relies on the private creditor test during the administrative procedure, it must, where there is doubt, establish unequivocally and on the basis of objective and verifiable evidence, such as that referred to in that paragraph, that the measure implemented falls to be ascribed to the State acting as a private operator.

109 It should be noted, however, that it does not follow from that case-law that, where the Member State concerned does not rely on the private creditor test and considers that the disputed measure constitutes State aid, the Commission may, on that ground alone, dispense with an examination of that test or consider it to be inapplicable. On the contrary, the private creditor test may be relied on by the recipient of the aid.

110 First of all, according to the case-law, when the Commission decides to initiate the formal investigation procedure, it is for the Member State concerned and the beneficiaries of the measure under consideration to put forward the arguments whereby they seek to show that the measure at issue either does not constitute aid or is aid compatible with the internal market, since the object of the formal procedure is specifically to ensure that the Commission is fully informed of all the facts of the case (see judgments of 28 November 2008 in Hotel Cipriani and Others v Commission, T-254/00, T-270/00 and T-277/00, ECR, EU:T:2008:537, paragraph 208 and the case-law cited, and 20 September 2011 in *Regione autonoma della Sardegna and Others v Commission*, T-394/08, T-408/08, T-453/08 and T-454/08, ECR, EU:T:2011:493, paragraph 246 and the case-law cited).

111 The private creditor test is not an exception which applies only if a Member State so requests, in situations characterised by all the constituent elements of State aid incompatible with the internal market, as laid down in Article 107(1) TFEU. It follows from paragraph 94 above that, where it is applicable, that test is among the factors which the Commission is required to take into account for the purposes of establishing the existence of such aid (see, by analogy, judgment in *Commission v EDF*, cited in paragraph 26 above, EU:C:2012:318, paragraph 103).

112 It follows that, besides the fact that, in the light of the case-law cited in paragraph 111 above, the possibility of relying on the private creditor test is in no way reserved solely for the Member State concerned, an interpretation of the case-law according to which the recipient of the aid is precluded from relying on the private creditor test on the sole ground that the Member State concerned neither relied on that test nor even disputed the classification of the disputed measure as

State aid would be incompatible with the case-law set out in paragraph 110 above, according to which the beneficiary may put forward the arguments whereby he seeks to show that the measure at issue does not constitute State aid.

[…]

115 Nevertheless, it must be observed that, like a Member State which relies on the private creditor test, where the recipient of the aid relies on the private creditor test, it must, in case of doubt, establish unequivocally and on the basis of objective and verifiable evidence that the measure implemented falls to be ascribed to that Member State acting as a market operator.

[…]"

Findings in judgment of 20 September 2017, Case C-300/16 P

"19 According to the settled case-law of the Court, classification as 'State aid' within the meaning of Article 107(1) TFEU requires that all the conditions set out in that provision are fulfilled. Thus, first, there must be intervention by the State or through State resources; second, the intervention must be liable to affect trade between Member States; third, it must confer a selective advantage on the recipient; fourth, it must distort or threaten to distort competition (judgments of 21 December 2016, *Commission v Hansestadt Lübeck*, C-524/14 P, EU:C:2016:971, paragraph 40, and of 21 December 2016, Commission v World Duty Free Group and Others, C-20/15 P and C-21/15 P, EU:C:2016:981, paragraph 53).

20 The concept of 'aid' embraces not only positive benefits, such as subsidies, but also measures which, in various forms, mitigate the charges which are normally included in the budget of an undertaking and which, therefore, without being subsidies in the strict sense of the word, are similar in character and have the same effect (judgment of 21 March 2013, *Commission v Buczek Automotive*, C-405/11 P, not published, EU:C:2013:186, paragraph 30).

21 However, the conditions which a measure must meet in order to be treated as 'aid' for the purposes of Article 107 TFEU are not met if the recipient undertaking could, in circumstances which correspond to normal market conditions, have obtained the same advantage as that which has been made available to it through State resources (judgment of 24 January 2013, *Frucona Košice v Commission,* C-73/11 P, EU:C:2013:32, paragraph 70 and the case-law cited).

22 When a public creditor grants payment facilities in respect of a debt payable to it by an undertaking, that assessment is made by applying, in principle, the private creditor test (judgment of 21 March 2013, *Commission v Buczek Automotive*, C-405/11 P, not published, EU:C:2013:186, paragraph 32).

23 Accordingly, the private creditor test is not an exception which applies only if a Member State so requests, when all the constituent elements of State aid incompatible with the common market, as laid down in Article 107(1) TFEU, exist. In fact, that test, where applicable, is among the factors which the Commission is required to take into account for the purposes of establishing whether such aid exists (see, to that effect, judgments of 5 June 2012, *Commission v EDF*, C-124/10 P, EU:C:2012:318, paragraph 103, and of 21 March 2013, *Commission v Buczek Automotive,* C-405/11 P, not published, EU:C:2013:186, paragraph 32).

24 As a result, where it appears that the private creditor test might be applicable, it is for the Commission to ask the Member State concerned to provide it with all the relevant information enabling it to determine whether the conditions for applying that test are satisfied (judgment of 21 March 2013, *Commission v Buczek Automotive*, C-405/11 P, not published, EU:C:2013:186, paragraph 33).

25 In the first place, it is clear from that case-law of the Court that, when it appears that the private creditor test might be applicable, it is for the Commission to examine that

possibility, irrespective of any request to that effect.

26 Accordingly, as the Advocate General noted in points 72 and 76 of his Opinion, nothing prevents the recipient of the aid from invoking the applicability of that test and, if the recipient does invoke that test, it falls to the Commission to assess whether the test needs to be applied and, if so, to assess its application.

27 In the second place, as regards the relevance of the subjective state of mind, it must be noted, as the Advocate General pointed out in point 74 of his Opinion, that the starting point for determining whether the private operator test is to be applied must be the economic nature of the Member State's action, not how that Member State, subjectively speaking, thought it was acting or which alternative courses of action it considered before adopting the measure in question.

28 In any case, the private creditor test is intended to determine whether the recipient undertaking would manifestly not have obtained comparable facilities from a private creditor in a situation as close as possible to that of the public creditor that sought to recover sums due to it by a debtor in financial difficulty (judgment of 24 January 2013, *Frucona Košice v Commission*, C-73/11 P, EU:C:2013:32, paragraph 72) and, accordingly, whether that undertaking could, in circumstances which correspond to normal market conditions, have obtained the same advantage as that which has been made available to it through State resources (judgment of 24 January 2013, *Frucona Košice v Commission*, C-73/11 P, EU:C:2013:32, paragraph 70).

29 It follows from this that the assessment which the Commission is required, where appropriate, to carry out cannot be limited to just the options that the competent public authority actually took into consideration, but must necessarily cover all the options that a private creditor would reasonably have envisaged in such a situation.

[…]"

Judgment of 17 May 2011, *Buczek Automotive v Commission*, T-1/08, EU:T:2011:216

Relevance: private creditor test

Facts

The applicant, *Buczek Automotive* (hereinafter: BA) was a Polish tube manufacturer and together with *Huta Buczek* (hereinafter: HB) a subsidiary belonging to the *Technologie Buczek* (hereinafter: TB) steel producer group. From 2001, TB was faced with increasing debts towards its public and private creditors. In 2001, TB drafted a restructuring plan to deal with its financial difficulties, on the basis of which it became eligible for State aid in the framework of the restructuring program of the steel industry. However, TB's restructuring plan had never been approved, in lack of two essential conditions prescribed by law, therefore its debts were never written off nor rescheduled. During 2004-2006 the Polish tax authorities took the relevant steps as prescribed by national legislation concerning enforcement by public authorities to recover the sums owed by TB. Those recovery measures included the seizure of assets belonging to TB and in addition to that the public authorities obtained securities over TB's assets in order to guarantee their claims. In 2005 and 2006 TB accomplished major restructuring within the company group to spin off two profitable activities. These restructuring measures included capital injections (mainly transfers of assets and offsettings of debts) made available for its subsidiaries BA and HB. After that, in 2006 TB was declared insolvent but was allowed to continue trading.

As restructuring aid to the Polish steel industry was subject to a protocol annexed to the Act of Accession, evaluation of the implementation of it revealed in 2005 that TB had increased its financial obligations to public creditors and the Commission started its State aid investigation. As a result of the formal investigation the Commission concluded that Poland had unlawfully granted State aid to TB, basically by the fact that although TB's public creditors had solid legal guarantees in their possession to recover the debts, and bearing in mind also the ineffectiveness of the legal steps they had taken as part of the recovery procedure, they had failed to apply for a declaration of insolvency. The Commission claimed that a prudent private creditor would have chosen the insolvency proceedings, and laid down that by pursuing the recovery proceedings instead the Polish authorities practically waived TB of its public debts, so ordered the recovery of the entire amount as illegal State aid. In addition to that, the Commission assessed the restructuring of the group so that the advantage had been passed on to BA and HB, and consequently it ordered that recovery be effected from those subsidiaries in proportion to the advantage they obtained from their mother company.

The Court annulled the Commission's above decision (the part relating to BA) in May 2011 on ground that the Commission failed to establish that the advantage was not available at normal market circumstances, i.e. that a private creditor would have opted for the insolvency proceedings. The Commission brought an appeal against the judgment of the General Court which was rejected by the Court in March 2013. In the meantime, in 2009 the Commission brought infringement proceedings against Poland before the Court for failure to recover aid on time. In those proceedings Poland referred to the difficulties it faced on the basis of national insolvency proceedings, namely, that the public debts were recoverable from TB, the mother company (which originally owed the sums to the tax authorities) and that recovery from the subsidiaries BA and HB in insolvency proceedings against them, as requested by the

Commission, risked that the same sums were recovered twice. The Court did not accept Poland's explanations and declared the infringement in its judgment of 14 April 2011 (Commission v Poland, C-331/09, EU:C:2011:250), about one month earlier than the General Court annulled the Commission's State aid decision.[4] As a consequence of the infringement proceedings Poland initiated insolvency proceedings against BA and HB, and as a final result of them, the applicant BA was declared bankrupt and erased from the commercial register of companies in Autumn 2012. Finally, when the Commission returned to reassess the case in order to implement the EUCJ judgments that had annulled its decision, it laid down in its final decision of 25.06.2014 that the original formal investigation procedure "has become devoid of purpose, as even if the aid was to be declared incompatible with the internal market, there would be no means of recovering the aid in question."[5]

Held

When assessing the case the Court confirmed the Commission's finding that the simple fact that the Polish authorities did not apply for a declaration of insolvency in respect of TB but let it pursue its economic activities and restructure its group constituted an advantage within the meaning of Article 107(1), even taking into account that they pursued, and as the Court acknowledged they indeed pursued with diligence, the relevant legal procedure for the recovery of the public debts. However, the Commission drew the conclusion in its decision concerning the private creditor test (i.e. that a private creditor would have opted for the insolvency proceedings as it was more favourable) without supporting it by any evidence. As the Court laid down in that judgment, the Commission should have collected or prepared analyses or studies comparing the relevant aspects (costs, time-frame, available benefits) of those proceedings and should have supported its conclusion by material evidence in order to establish properly the existence of State aid.

Findings of the Court

"74 […] the Commission does not dispute that the Polish authorities neither wrote off nor rescheduled TB's public debts. For example, it is clear from the contested decision, in particular recitals 38 to 40 thereof, that the Commission was fully aware that the Polish authorities had adopted the measures laid down in law to recover their claims, such as the seizure of bank accounts, obtaining mortgages and pledges and transfers of ownership of certain assets. At the hearing on 7 September 2010, the Commission made clear that it had taken the view, for the purposes of the adoption of the contested decision, that the recovery undertaken by the public bodies referred to in paragraph 2 above had been ineffective, in the light of the increase in the level of TB's indebtedness, and that the effective non-recovery of public claims had to be equated with a write-off or rescheduling of the debts.

75 Nevertheless, it is clear from the contested decision, in particular recitals 91, 96 and 97 thereof, that the Commission was of the opinion that the advantage conferred on TB resulted not from the fact that the ineffective nature of the recovery undertaken by the public bodies referred to in paragraph 2 above could be equated with a write-off or rescheduling of its debt, but from the fact that those authorities had waived their right to enforce a claim in the amount of PLN 20 761

[4] This judgment was confirmed on appeal by the Court of Justice in its judgment of 13 March 2013, Commission v Buczek Automotive, C-405/11 P, EU:C:2013:186.

[5] See: http://ec.europa.eu/competition/state_aid/cases/215428/215428_1577625_132_2.pdf

643, since they had failed to apply for TB to be declared insolvent with effect from the end of 2004 even though at that time it had become unlikely that TB would be able to return to any degree of profitability. In the view of the Commission, as expressed in recital 97 of the contested decision, this constituted operational support for TB, which was thus able to continue its non-profitable activity.

76 Accordingly, it must be stated that the contested decision is based neither on the grant of a write-off or a rescheduling of TB's debts nor on the ineffectiveness of the recovery measures adopted by the Polish authorities equated by the Commission with a write--off or a rescheduling of the debt, but rather on the fact that the Polish authorities had at their disposal an alternative method of enforcing their claims – the application for a declaration of insolvency – which, in the view of the Commission, would have allowed for an effective recovery of the debts.

77 In those circumstances, having regard to the case-law cited in paragraphs 68 and 69 above, pursuant to which neither the form nor the cause nor the aim of State measures can prevent them from being regarded as State aid, the Commission did not commit any error by taking the view that the fact that the Polish authorities did not opt, at the end of 2004, to apply for a declaration of insolvency in respect of TB and simply pursued, and indeed pursued with diligence, the legal procedures for the recovery of public debts represented an advantage granted to TB. Indeed, it must be pointed out all insolvency proceedings, whether they result in the recovery of the company declared insolvent or in its liquidation, have – at the very least – the objective of discharging the liabilities of that company. In that context, the freedom of the company declared insolvent to manage both its assets and its business is limited. Accordingly, by failing to apply for a declaration of insolvency in respect of TB, the Polish authorities referred to in paragraph 2 above allowed that company to have a period of time in which it could make use of its assets freely and continue to trade, thus conferring on it an advantage.

[…]

80 Secondly, since, by the very fact of having pursued the legal procedures for the recovery of public debts but refrained from seeking a declaration of insolvency, the Polish authorities conferred an advantage on TB, it is necessary to establish, in accordance with the case-law cited in paragraph 70 above, whether the Commission infringed Article 87(1) EC by taking the view that that advantage would not have been granted under normal market conditions. It is therefore necessary to determine whether the Commission correctly applied the test of the hypothetical private creditor, a fact which the applicant disputes.

81 In particular, the applicant is of the opinion that a private creditor would not have chosen to realise the guarantees which it held in the context of insolvency proceedings in view of the length of such proceedings, the costs to which such proceedings give rise, the fact that the securities held by the public bodies did not all have first--class status and the fact that the debt recovery proceedings implemented by the Polish authorities had allowed for gradual payment of the sums owed. The Republic of Poland submits, inter alia, that the Commission did not conduct in-depth economic analyses enabling it to conclude that the Polish authorities would have recovered a larger share of the sums owed to them at an earlier stage if, towards the end of 2004, they had applied for a declaration of insolvency in respect of TB.

82 In that connection, it must be remembered that the assessment by the Commission of whether an investment satisfies the private investor test involves a complex economic appraisal. When the Commission adopts a measure involving such an appraisal, it consequently enjoys a wide discretion and judicial review is limited to verifying whether the Commission complied with the relevant rules governing procedure and the statement of reasons, whether there was any error of law, whether the facts on which the contested

finding was based have been accurately stated and whether there has been any manifest error of assessment of those facts or any misuse of powers. In particular, the Court is not entitled to substitute its own economic assessment for that of the author of the decision (see, to that effect, Case C-323/00 P DSG v Commission [2002] ECR I-3919, paragraph 43; HAMSA v Commission, cited above in paragraph 70, paragraph 127; and Case T-196/04 Ryanair v Commission [2008] ECR II-3643, paragraph 41).

83 However, although the European Union judicature recognises that the Commission has a margin of assessment in economic or technical matters, that does not mean that it must decline to review the Commission's interpretation of economic or technical data. Indeed, in order to take due account of the parties' arguments, the European Union judicature must not only, inter alia, establish whether the evidence relied on is factually accurate, reliable and consistent but also whether that evidence contains all the relevant information which must be taken into account in order to assess a complex situation and whether it is capable of substantiating the conclusions drawn from it (Case C-290/07 P Commission v Scott [2010] ECR I-0000, paragraph 65).

84 It must further be borne in mind that, in accordance with case-law, when a firm faced with a substantial deterioration of its financial situation proposes an agreement or series of agreements for debt arrangement to its creditors with a view to remedying the situation and avoiding liquidation, each creditor must make a decision having regard to the amount offered to it under the proposed agreement, on the one hand, and the amount it expects to be able to recover following possible liquidation of the firm, on the other. Its choice is influenced by a number of factors, including the creditor's status as the holder of a secured, preferential or ordinary claim, the nature and extent of any security it may hold, its assessment of the chances of the firm being restored to viability, as well as the amount it would receive in the event of liquidation (HAMSA v Commission, cited in paragraph 70 above, paragraph 168). It is for the Commission to determine, for each public body in question, having regard inter alia to the abovementioned factors, whether the debt remissions granted by them were manifestly more generous than those which would have been granted by a hypothetical private creditor in a situation comparable vis-à-vis the undertaking concerned to that of the public body in question and seeking to recover the sums owed to it (DM Transport, cited in paragraph 70 above, paragraph 25, and HAMSA v Commission, cited in paragraph 70 above, paragraph 170).

85 By analogy, in a case such as the present one in which a debt arrangement agreement has not been concluded, a hypothetical private creditor faced with a choice between, on the one hand, the foreseeable proceeds from the legal procedure for the recovery of debts and, on the other hand, the amount it expects to be able to recover following insolvency proceedings initiated in respect of the company. Its choice is influenced by a number of factors, such as those mentioned in paragraph 84 above. It follows that, in the present case, the Commission was required to establish whether, taking those factors into account, a private creditor would have opted for the legal procedure for the recovery of debts over insolvency proceedings, as the public bodies referred to in paragraph 2 above did.

86 That finding is not contradicted by the Commission's interpretation of Lenzing v Commission, cited in paragraph 63 above, to the effect that it was not necessary to demonstrate the primacy of insolvency proceedings over other recovery procedures since the Polish authorities had not made use of all the recovery measures available – including insolvency proceedings – even though it was obliged to do so.

87 First, there is no obligation on national authorities seeking to recover public debts to make use of all the methods of recovery at their disposal. As is clear from paragraph 70 above, the only obligation to which those authorities are subject, in order that their intervention falls outside the classification as State aid, is to behave how a private creditor would have behaved under normal market

conditions. However, where there are several methods of recovery, it is necessary to compare the respective merits of the different methods in order to determine which method a private creditor would have chosen.

88 Second, although in Lenzing v Commission, cited above in paragraph 63, the Court was not prompted to rule expressly on the need for the Commission to conduct a comparison of the respective merits of the different recovery procedures from the point of view of a hypothetical private creditor, that judgment nevertheless by no means supports the argument advanced by the Commission. On the contrary, the Court does point out in paragraph 152 of that judgment that it is for the Commission to ascertain, in each individual case and by reference to the facts of the case, whether the decision of the public bodies in question to agree to reschedule the debts of an undertaking in difficulties and also the conditions of that rescheduling are consistent with the private creditor test. Furthermore, in paragraphs 159 and 160 of that judgment, the Court held that the Commission could not conclude that the public bodies in question had acted in such a way as to maximise their prospects of recovery without having conducted a substantiated analysis of the viability of the recipient undertaking. The Court therefore acknowledges that the merits of the recovery procedure conducted by the public bodies at issue had to be assessed inter alia in the light of the undertaking's viability, which means – implicitly – that, on the basis of the information relating to that viability, preference should perhaps have been given to an alternative recovery procedure.

89 In accordance with the case-law set out in paragraph 83 above, consideration should therefore be given to whether the evidence available to the Commission at the time the contested decision was adopted enabled it to conclude that a hypothetical private creditor would have opted to apply for a declaration of insolvency and would not have pursued the legal procedures for recovery.

90 In that connection, first, with regard to the nature and the extent of the securities held by the public bodies referred to in paragraph 2 above, it must be pointed out that it is clear from recitals 40 and 91 of the contested decision that the Commission conducted an analysis of those securities. Following that analysis, it concluded, in recital 91 of the contested decision, that the ZUS, the Państwowy Fundusz Rehabilitacji Osób Niepełnosprawnych and the Tax Office all had 'good securities' which they were able to convert into liquid assets in the context of insolvency proceedings and that, following the deterioration of TB's situation and of its assets, making use of those securities appeared to make more economic sense than restructuring. Although that conclusion is contested by the applicant, it must nevertheless be stated that it is clear from recital 91 of the contested decision that the analysis conducted by the Commission is based on material evidence provided by the Republic of Poland as part of the administrative procedure.

91 Second, with regard to the prospects of TB returning to viability, the Commission examined those prospects as at the end of 2004, inter alia in recitals 89, 90 and 96 of the contested decision. Following that examination, the Commission concluded that, at the end of 2004, all the indications regarding the prospects for TB's return to viability were negative. Although, as in the case of the analysis of the nature and the extent of the securities, the applicant disputes that conclusion, it must however be pointed out that the examination is based on the material evidence referred to in recitals 49 to 51 of the contested decision, namely the monitoring reports prepared by the Commission's independent consultant for the years 2003 and 2004 and the monitoring reports prepared by the Republic of Poland also for the years 2003 and 2004.

92 Third, with regard to the benefit that a hypothetical private creditor could have hoped to obtain in the context of insolvency proceedings, it must be pointed out that the Commission stated, in recital 88 of the

contested decision, that ‘careful examination of the advantage derived from rescheduling the debt would have shown that the potential recovery would not have exceeded the safe return inherent in the firm’s liquidation’. However, the Court observes that the contested decision does not indicate what material evidence forms the basis of that claim.

93 In particular, the Commission fails to state in the contested decision whether it had in its possession, in support of that claim, analyses comparing the benefit which would be obtained by the hypothetical private creditor following insolvency proceedings – taking into account inter alia the costs incurred in the context of such proceedings – as compared with the benefit obtained from the legal procedure for the recovery of public debts.

94 When asked about this point by means of a written question to which it was asked to give a response at the hearing on 7 September 2010, the Commission was unable to state whether such analyses and studies had been prepared and used for the purposes of adopting the contested decision. It simply explained that those analyses were contained in recitals 84, 87 and 88 of the contested decision. However, those recitals do not contain any comparative analysis of the foreseeable proceeds from the legal procedure for the recovery of public debts and those from insolvency proceedings. Furthermore, the Commission was unable to produce documents containing such an analysis, as it was requested to do by the Court. It must therefore be held that the claim made in recital 88 of the contested decision is unsupported by any evidence.

95 Fourth, with regard to other factors likely to influence the choice of a hypothetical private creditor, the Court observes that the Commission fails to state in the contested decision whether it had in its possession studies or analyses comparing the duration of insolvency proceedings with that of the legal procedure for the recovery of public debts. On the contrary, when asked about this point by means of a measure of organisation of procedure to which it was asked to give a response at the hearing on 7 September 2010, the Commission stated that it had not compared the duration of the two procedures on the ground that TB’s position in 2005 was such that insolvency was inevitable.

96 In the light of the foregoing, the Court takes the view that the Commission did not have in its possession material evidence enabling it to claim that a private creditor would have opted for insolvency proceedings at the end of 2004. It must therefore be concluded, having regard to the case-law cited in paragraph 83 above and without it being necessary to establish the validity of the conclusions drawn by the Commission following, on the one hand, the analysis of the guarantees held by the Polish authorities and, on the other hand, the evaluation of TB’s prospects, that the Commission’s application of the test of the hypothetical private creditor is contrary to Article 87(1) EC and that, therefore, the Commission has failed to establish properly the existence of State aid granted to TB.

[…]”

I.2. SELECTIVITY

Judgment of 12 November 2013, *MOL v Commission*, T-499/10, EU:T:2013:592 and

Judgment of 4 June 2015, *Commission v MOL*, C-15/14 P, EU:C:2015:362

Relevance: Selectivity of the advantage

Facts

In December 2005 *MOL Hungarian Oil and Gas Plc*. and the competent Hungarian Minister concluded an agreement concerning the extension of statutory deadlines for the putting into production of some of MOL's hydrocarbons mining plots (the 2005 Agreement). According to the applicable legal framework, MOL had to undertake in that agreement the payment of somewhat (2-5 %) higher rates of mining fees (mining royalties) than those applicable under the Mining Act, and the rates thus set were fixed by the parties for the entire duration of the Agreement, i.e. for 15 years, until the end of 2020. The Agreement set the mining fee rates for all of MOL's hydrocarbons fields put into production before its conclusion. Two years later, following a considerable and rather unexpected increase in international crude oil prices, the Hungarian legislator decided to modify the Mining Act, to increase some of its rates (the 2008 Amendment).[6] However, as MOL's hydrocarbons production was covered by the 2005 Agreement, the modified mining fee rates did not become applicable to its production.

Following a complaint concerning MOL's alleged preferential treatment, the European Commission opened State aid investigations concerning the combined effect of the 2005 Agreement and the 2008 Amendment. The formal investigation procedure was closed in 2010 with the conclusion that the measure granted an unfair advantage to MOL over its competitors, and constituted thereby illegal State aid. In Autumn 2010 MOL had to pay to Hungary an amount of HUF 35 billions[7] as alleged aid with interest, and brought proceedings against the Commission's decision before the European Court of Justice.

At first instance the General Court upheld MOL's application and annulled the Commission Decision of 2010. The General Court held that the Commission did not prove the selectivity of the measure. The Commission appealed against that judgment, but the Court of Justice completely rejected its appeal in June 2015.

Held

In the 2010 Commission Decision subsequently annulled by the Court, selectivity of the measure was based on the consideration that the Hungarian authorities had certain margin of manoeuvre when they decided about concluding the 2005 Agreement and when setting the

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[6] Some mining fee rates increased, while by the introduction of a lower rate for natural gas with high inert content, the rate applicable to such production decreased. The modification also introduced the so-called Brent-rate, an additional mining fee rate becoming applicable only in case international crude oil prices rose to high levels (USD 80/bbl or USD 90/bbl). The modifications actually did not apply to ongoing production, except for the Brent rate. The rational in introducing the Brent-rate with a 'retroactive' effect (i.e. to apply it also to ongoing hydrocarbons production) was that when producing mining plots were under exploration and when investment decisions were made with regard to those fields, prospections concerning international oil prices (expected revenues) were considerably lower, so the Brent-rate only provided a share to the State from revenues originally not expected by the investors concerned.

[7] The amount was calculated as the difference between mining royalty actually paid by MOL and mining royalties which would have been due according to the modified Mining Act.

exact terms (i.e. the increased mining fee rates, the one-off fee and the duration) thereof. The Commission confined itself to that consideration because, according to relevant case-law of the Court, discretion on the part of national authorities when deciding about the grant of an advantage was sufficient proof for selectivity. However, in MOL's case, when the 2005 Agreement was concluded, it did not confer an advantage, but on the contrary, it made subject the company to higher charges. So the first, and for MOL's case, the most determining new interpretation laid down by the General Court was that individual treatment (provided to MOL under the generally applicable regime of the Mining Act governing prolongation agreements) did not necessarily mean unjustified preferential treatment. As the General Court held, the proof of margin of assessment did not necessarily prove selectivity, as it could be justified by objective factors and it could help the authorities to preserve equal treatment. This was confirmed by the Court which (ruling on the Commission's appeal) laid down the following general principle in par. (64): "[…] there is a fundamental difference between, on the one hand, the assessment of the selectivity of general schemes for exemption or relief, which, by definition, confer an advantage, and, on the other, the assessment of the selectivity of optional provisions of national law prescribing the imposition of additional charges. In cases in which the national authorities impose such charges in order to maintain equal treatment between operators, the simple fact that those authorities enjoy discretion defined by law, and not unlimited, as the Commission claimed in its appeal, cannot be sufficient to establish that the corresponding scheme is selective."

The other important new interpretation concerned the evaluation and proof of selectivity in case of a combined State measure. The Court took account of evidence concerning prospections and actual evolution of international crude oil prices, and stated that the 2008 Amendment was a reaction of the Hungarian legislator to a considerable price increase, which was not foreseeable in 2005 when the agreement was concluded with MOL. The Court also reminded to case-law concerning conditions for different State interventions to be defined by the Commission as a single State measure. According to them, the combined elements must be inseparably linked to each other, having regard to their chronology, their purpose and other relevant factors.[8] The General Court applied that test to MOL's case and concluded that in order to prove the selectivity of the combined State aid measure, the Commission should have argued and established that the Hungarian authorities selectively proposed the conclusion of the agreement to MOL in order to exempt it from the effects of the subsequent modification of the Mining Act, and that the Hungarian authorities already had the intention in 2005 to subsequently modify the statutory mining fee rates. As laid down in par. (67) of the judgment in general terms: "(…) a combination of elements such as that relied upon by the Commission in the contested decision may be categorised as State aid where the State acts in such a way as to protect one or more operators already present on the market, by concluding with them an agreement granting them fee rates guaranteed for the entire duration thereof, whilst having the intention at that time of subsequently exercising its regulatory power, by increasing the fee rate so that other market operators are placed at a disadvantage, be they operators already present on the market on the date on which the agreement was concluded or new operators."

[8] As laid down in judgment in *Bouygues and Bouygues Télécom v Commission and Others* (C-399/10 P) and *Commission v France and Others* (C-401/10 P), EU:C:2013:175, par. 103-104: *„As State interventions take various forms and have to be assessed in relation to their effects, it cannot be excluded, as the Bouygues companies and the Commission rightly argued, that several consecutive measures of State intervention must, for the purposes of Article 107(1) TFEU, be regarded as a single intervention. That could be the case in particular where consecutive interventions, especially having regard to their chronology, their purpose and the circumstances of the undertaking at the time of those interventions, are so closely linked to each other that they are inseparable from one another (see, to that effect, Case 72/79 Commission v Italy [1980] ECR 1411, paragraph 24)."*

Findings of the Court

Findings in judgment of 12 November 2013, Case T-499/10

“54 With respect to the selective nature of the aid measure, it must also be observed that Article 107(1) TFEU does not distinguish between measures of State intervention by reference to their causes or their aims but defines them in relation to their effects (Case C-409/00 *Spain v Commission* [2003] ECR I-1487, paragraph 46). It follows that the application of that provision only requires it to be determined whether under a particular statutory scheme a State measure is such as to favour ‘certain undertakings or the production of certain goods’ over others which are in a legal and factual situation that is comparable in the light of the objective pursued by the measure in question (see *Spain v Commission*, paragraph 47 and the case-law cited). If so, the aid measure satisfies the condition of selectivity which defines State aid as laid down by that provision.

55 Before assessing the validity of the conclusions of the contested decision as regards the selective nature of the 2005 agreement, it is necessary to set out the arguments presented by Hungary and the applicant during the administrative procedure.

56 In that regard, Hungary put forward, during the administrative procedure, several arguments contesting the selective nature of the 2005 agreement, which was already relied upon by the Commission in the opening decision, in which it was noted that the contested measure under examination granted exemption from mining fees to a single undertaking (recitals 18 and 21 of the opening decision).

57 During the preliminary stage, Hungary replied, on 17 March 2008, to the Commission’s question relating to the provisions of the Mining Act in the light of which the applicant was authorised to pay stable mining fees until 2020, by presenting Article 20(11) and Article 26/A(5) of that act. According to Article 20(11) of the Mining Act, the amount of the mining fee expressed in monetary terms is to be a percentage of the value of the extracted minerals as specified in that act or in the concession agreement or in a contract under Article 26/A(5) of the act in question. Hungary noted that any mining undertaking holding an authorisation was entitled to apply for the extension of the statutory deadline for starting production by payment of a fee replacing the lost mining fee, pursuant to the principles of Article 26/A(5) of the Mining Act (see paragraph 6 above), but that the conclusion of such an extension agreement was not obligatory. Hungary considered that the Mining Act allowed extension of mining rights on the basis of the same principles as the rules applicable to concession. It concluded that any mining undertaking was entitled to enter into extension agreements in a non-discriminatory manner, since such an undertaking had the right to extend the starting date of production subject to compliance with the requirements of Article 26/A(5) of the Mining Act.

58 On 8 September 2008, Hungary moreover provided clarification as regards the legal grounds on which it was possible for an undertaking that had failed to start production in due time to pay lower mining fees than those stipulated by the Mining Act, citing once again the provisions of Article 20(11) of that act in taking the view that, where the activity was undertaken under authorisation, the rate of the mining fee was set, as the case may be, by Article 20(3) of that act which determines the statutory rate of fee according to the type of materials extracted, or by an agreement concluded pursuant to Article 26/A(5) of the act in question in the event of extension of authorisation.

59 In its reply of 9 April 2009 to the opening decision, Hungary first of all concentrated on the logic of the mining legislation, which implies that a clause such as that setting the rate of the increased mining fee for each of the fifteen years of duration of the agreement and providing that the rates thus set would stay unchanged is a ‘natural’ element of any

extension agreement, and that subsequent modifications to mining fee rates could not apply to the rates fixed in such an agreement. According to Hungary, the 2005 agreement does not grant preferential treatment to the applicant, since any other mining undertaking in the same situation could expect to conclude a similar agreement fixing the mining fee rates in the same way as the 2005 agreement. Next, Hungary turned its attention once more to Article 20(11) of the Mining Act, which, in its view, specifies the methods for calculating mining fee rates. In its submission, by referring to agreements concluded pursuant to Article 26/A(5) of the Mining Act, Article 20(11) of that act has the stated aim of making the mining fees set in those agreements applicable in law to the production of the fields to which those fees relate, irrespective of the mining fee rate set by the act in question. Lastly, Hungary contested the finding in recital 29 of the opening decision that no other market player could have expected to secure such an agreement under the conditions provided for by the 2005 agreement, since, in its submission, the opposite resulted from Article 26/A(5) of the Mining Act, namely that the 2005 agreement was in fact the only type of agreement that could be concluded.

60 Furthermore, the applicant put forward, during the formal investigation procedure, arguments alleging that the 2005 agreement was not selective.

61 In its comments of 27 April 2008, the applicant also submitted that any mining undertaking in the same situation would conclude, on the basis of Article 26/A(5) of the Mining Act, an extension agreement containing the same provisions as the 2005 agreement, setting the mining fee rates laid down in the agreement and precluding a subsequent change in the statutory rate from having an effect. The applicant also contested the selective nature of the 2005 agreement by reference to agreements of the same nature concluded between the Hungarian authorities and mining undertakings in the solid minerals sector which it claims include clauses such as that setting the rate of the increased mining fee for each of the fifteen years of duration of the 2005 agreement and that providing that the rates thus set would remain unchanged. The applicant referred to Article 20(11) of the Mining Act as justification for the fact that the mining fee rates laid down by the 2005 agreement differed from the rate under the authorisation regime, and submitted that, if the legislature had intended that a future change in the statutory mining fee replace the fee rates set by the 2005 agreement, it should have included an express provision to that effect.

62 As a preliminary point, it should be recalled that the contested measure consists of two elements, namely the 2005 agreement, which sets mining fee rates for all the applicant's fields, whether in production or the subject of extension, for each of the fifteen years of duration thereof, and the 2008 amendment, which increases mining fee rates for all hydrocarbon fields under authorisation, but does not contain any provisions relating to fields that have already been the subject of an extension agreement.

63 In that regard, it should be noted at the outset that the Commission was right to state, in recital 53 of the contested decision, that the 2005 agreement is not contrary to the State aid rules. Since the fees stipulated by the 2005 agreement, which were applicable to both fields already in production and fields concerned by extension of authorisation, were higher than the statutory fees applicable at the time of its conclusion, that agreement did not involve any State aid element for the purposes of Article 107 TFEU.

64 Next, the Court considers that, where a Member State concludes with an economic operator an agreement which does not involve any State aid element for the purposes of Article 107 TFEU, the fact that, subsequently, conditions external to such an agreement change in such a way that the operator in question is in an advantageous position vis-à-vis other operators that have not concluded a similar agreement is not a sufficient basis on which to conclude that, together, the agreement and the subsequent modification of the conditions external to that agreement can be regarded as constituting State aid.

65 In the absence of such a principle, any agreement that an economic operator might conclude with a State which does not involve any State aid element for the purposes of Article 107 TFEU would always be open to challenge, where the situation on the market on which the operator party to the agreement is active evolves in such a way that an advantage is conferred on it as described in paragraph 64 above or where the State exercises its regulatory power in an objectively justified manner following a market evolution whilst observing the rights and obligations resulting from such an agreement.

66 However, a combination of elements such as that observed by the Commission in the contested decision may be categorised as State aid where the terms of the agreement concluded were proposed selectively by the State to one or more operators rather than on the basis of objective criteria laid down by a text of general application that are applicable to any operator. In that regard, it must be pointed out that the fact that only one operator has concluded an agreement of that type is not sufficient to establish the selective nature of the agreement, since that may result inter alia from an absence of interest by any other operator.

67 Moreover, it should be recalled that, for the purposes of Article 107(1) TFEU, a single aid measure may consist of combined elements on condition that, having regard to their chronology, their purpose and the circumstances of the undertaking at the time of their intervention, they are so closely linked to each other that they are inseparable from one another (see, to that effect, Joined Cases C-399/10 P and C-401/10 P *Bouygues and Bouygues Télécom v Commission and Others* and *Commission v France and Others* [2013] ECR, paragraphs 103 and 104). In that context, a combination of elements such as that relied upon by the Commission in the contested decision may be categorised as State aid where the State acts in such a way as to protect one or more operators already present on the market, by concluding with them an agreement granting them fee rates guaranteed for the entire duration thereof, whilst having the intention at that time of subsequently exercising its regulatory power, by increasing the fee rate so that other market operators are placed at a disadvantage, be they operators already present on the market on the date on which the agreement was concluded or new operators.

68 It is in the light of those considerations that it is necessary to examine whether, in the present case, the Commission was entitled to consider that the contested measure was selective, on the ground that, in so far as the 2005 agreement sets the rate of the increased mining fee for each of the fifteen years of its duration and provides that the rates thus set would remain unchanged, it was selective.

69 In the first place, it is necessary to analyse specifically the legal framework in the light of which the 2005 agreement was concluded.

70 Article 26/A(5) of the Mining Act allows any mining undertaking, whether it operates hydrocarbon or solid mineral fields, to apply for the extension of its mining rights on one or more fields on which it has not started extraction within five years of issuance of the authorisation. To that extent, Article 26/A(5) of the Mining Act does not appear to be a provision of a selective nature.

71 As regards the circumstance, noted in recital 66 of the contested decision, that a mining undertaking and the Hungarian authorities may decide not to conclude an extension agreement, it must be stated, first, that it is not apparent from Article 26/A(5) of the Mining Act that, if an extension application is submitted to them, the Hungarian authorities may refuse to open negotiations with a view to concluding an agreement having as its object the extension of the mining rights in question. Second, in accordance with Article 26/A(5) of the Mining Act, any mining undertaking may apply for the extension of its mining rights (see paragraph 70 above). However, such an undertaking may also decide not to make an extension application - inter alia in the light of the financial cost brought about by the increase of the applicable fee rate on the date

of the extension application - relating, as the case may be, to all fields put into production (see paragraph 6 above), or decide not to accept the rates proposed by the Hungarian authorities following an extension application, so that no extension agreement will be concluded.

72 Moreover, it is true that Article 26/A(5) of the Mining Act leaves the Hungarian authorities a margin of discretion, by providing that the rate of the extension fee, which determines, where applicable, that of the increased mining fee, is not to exceed 1.2 times the rate applicable on the date of the extension application. However, such a margin of assessment cannot automatically be regarded as favouring certain undertakings or the production of certain goods over others and, thus, confer a selective nature on the extension agreements concluded. Such a margin of assessment may be justified by various factors, such as the number of fields extended and their estimated importance in relation to the fields already in production. Specifically, if, as Hungary asserted during the administrative procedure (see paragraph 57 above), the increase of the fee rate applicable on the date of the extension application is aimed at offsetting the loss of fees concerning fields that have not been put into production within five years of issuance of authorisation, it is not illogical that the rate of the extension fee and, where applicable, the rate of the increased mining fee, which apply to fields where the date on which production starts is delayed and to fields already put into production respectively, are higher where the number of fields extended is significant in relation to the number of fields already in production and that they are lower where, as in the present case, the number of fields extended accounts for a small proportion of fields in production. It follows from this that the margin of assessment conferred by Article 26/A(5) of the Mining Act is such as to enable the administration to preserve equal treatment between operators according to whether they are in comparable or different situations for the purposes of the case-law cited in paragraph 54 above, by adjusting its proposed fees to the characteristics of each extension application submitted, and that it appears to be the expression of a latitude limited by objective criteria which are not unrelated to the system of fees established by the legislation in question. More broadly, it must be observed that the margin of assessment at issue here can be distinguished, by its nature, from cases where the exercise of such a margin is connected with the grant of an advantage in favour of an economic operator. In the present case, the Hungarian authorities' margin of assessment allows the fixing of an additional charge on economic operators in such a manner as to take account of the imperatives arising from the principle of equal treatment.

73 Article 26/A(5) of the Mining Act also provides that an extension agreement sets the rates of the extension fee and, where the extension application relates to more than two or more than five fields, that that agreement sets the rates of the increased mining fee for a period of at least five years and the amount of the one-off payment (see paragraph 6 above). It follows from that provision that, in the event of extension, the rates of the extension fee and, where applicable, the rates of the increased mining fee are determined exclusively by the extension agreement, a principle which is moreover laid down expressly in the first sentence of Article 20(11) of the Mining Act.

74 Accordingly, in the light of the provisions of Article 26/A(5) of the Mining Act, which are applicable to any undertaking wishing to apply for the extension of its authorisation and on the basis of which the 2005 agreement was concluded, the fact that the rates set by year of validity of that agreement are the result of negotiation does not suffice to confer on that agreement a selective character. In the light of what has been held in paragraph 72 above, the situation would have been different only if the Hungarian authorities had exercised their margin of assessment during the negotiations resulting in the 2005 agreement, which sets the rates of the extension fee and of the increased mining fee, in such a way as to favour the applicant by agreeing to a low fee level without any objective reason having regard to the rationale of increasing fees in the event of an extension

of authorisation and to the detriment of any other operator which has sought to extend its mining rights or, in the absence of such an operator, where there is concrete evidence that unjustified favourable treatment has been reserved to the applicant. Moreover, in so far as its provisions stipulate that the contractually agreed rates of the increased mining fee are to apply for the entire period of that agreement and cannot be amended unilaterally during that period, the 2005 agreement adds nothing to the rule laid down by Article 26/A(5) of the Mining Act noted in paragraph 73 above.

[…]"

Findings in judgment of 4 June 2015, Case C-15/14 P

It must be observed at the outset that, as the Advocate General stated in point 47 of his Opinion, the requirement as to selectivity under Article 107(1) TFEU must be clearly distinguished from the concomitant detection of an economic advantage, in that, where the Commission has identified an advantage, understood in a broad sense, as arising directly or indirectly from a particular measure, it is also required to establish that that advantage specifically benefits one or more undertakings. It falls to the Commission to show that the measure, in particular, creates differences between undertakings which, with regard to the objective of the measure, are in a comparable situation. It is necessary therefore that the advantage be granted selectively and that it be liable to place certain undertakings in a more favourable situation than that of others.

60 It must, however, be noted that the selectivity requirement differs depending on whether the measure in question is envisaged as a general scheme of aid or as individual aid. In the latter case, the identification of the economic advantage is, in principle, sufficient to support the presumption that it is selective. By contrast, when examining a general scheme of aid, it is necessary to identify whether the measure in question, notwithstanding the finding that it confers an advantage of general application, does so to the exclusive benefit of certain undertakings or certain sectors of activity.

61 It follows that the appropriate comparator for establishing the selectivity of the measure at issue in the present case was to ascertain whether the procedure for concluding and setting the terms and conditions of the agreement extending mining rights, laid down in Article 26/A(5) of the Mining Act, draws a distinction between operators that are, in the light of the objective of the measure, in a comparable factual and legal situation, a distinction not justified by the nature and general scheme of the system at issue.

62 It follows from those considerations that the present case must be clearly distinguished from those cases giving rise to the case-law mentioned by the Commission in support of its arguments, set out in paragraphs 54 and 56 above, seeking to criticise the analysis made by the General Court of the legal framework governing the 2005 agreement.

63 Those cases relate to provisions of national law granting relief on taxes or other charges (judgments in *France v Commission*, C-241/94, EU:C:1996:353; *Piaggio,* C-295/97, EU:C:1999:313; *DM Transport,* C-256/97, EU:C:1999:332; P, C-6/12, EU:C:2013:525; *Ministerio de Defensa and Navantia,* C-522/13, EU:C:2014:2262; and *British Telecommunications v Commission,* C-620/13 P, EU:C:2014:2309), or exceptions in matters of insolvency (judgment in *Ecotrade*, C-200/97, EU:C:1998:579).

64 As the Advocate General stated in point 86 of his Opinion, there is a fundamental difference between, on the one hand, the assessment of the selectivity of general schemes for exemption or relief, which, by definition, confer an advantage, and, on the other, the assessment of the selectivity of optional provisions of national law prescribing the imposition of additional charges. In cases in which the national authorities impose such charges in order to maintain equal treatment between operators, the simple fact that those authorities enjoy discretion defined by law, and not unlimited, as the Commission claimed in its appeal,

cannot be sufficient to establish that the corresponding scheme is selective.

65 Consequently, it must be stated, first, that the General Court correctly held in paragraph 72 of the judgment under appeal that the margin of assessment at issue in the present case allows the fixing of an additional charge imposed on economic operators in order to take account of the imperatives arising from the principle of equal treatment, and can be distinguished, by its very nature, from cases in which the exercise of such a margin is connected with the grant of an advantage in favour of a specific economic operator.

66 Secondly, it cannot validly be argued that the General Court erred in law by finding, in paragraph 74 of the judgment under appeal that the fact that the rates set by year of validity of the 2005 agreement are the result of negotiation does not suffice to confer on that agreement a selective character, and that the situation would have been different only if the Hungarian authorities had exercised their margin of assessment in such a way as to favour MOL by agreeing to a low fee level without any objective reason having regard to the rationale of increasing fees in the event of an extension of authorisation and to the detriment of any other operator having sought to extend its mining rights or, if there is no such operator, where there is concrete evidence that unjustified favourable treatment has been reserved to MOL.

67 In addition, in order to determine whether the selective nature of the 2005 agreement had been demonstrated by the Commission, the General Court first analysed, in paragraph 79 of the judgment under appeal, the rates stipulated under that agreement and found that no evidence of unjustified preferential treatment of MOL was apparent from the decision at issue, and that therefore it could not be assumed that MOL was afforded favourable treatment in relation to any other undertaking that was potentially in a situation comparable to its own for the purposes of the case-law cited in paragraph 54 of the judgment under appeal.

68 Secondly, the General Court found in paragraph 80 of the judgment under appeal that, although the Commission had mentioned that there were other extension agreements in the solid minerals sector, it did not take account of them, and that in doing so it did not take into consideration all the factors by means of which it would have been in a position to assess whether the 2005 agreement was selective as regards MOL in the light of the situation created by other agreements extending mining rights, also concluded on the basis of Article 26/A(5) of the Mining Act.

69 Following the analysis carried out in paragraphs 70 to 74 and 79 to 80 of the judgment under appeal, the General Court was right to conclude, in paragraph 81 of that judgment, that, in the light, first, of the absence of selectivity characterising the legal framework governing the conclusion of agreements extending mining rights and given the considerations justifying the grant of a margin of assessment, and secondly, of the absence of any evidence that those authorities treated MOL favourably in relation to any other undertaking in a comparable situation, the selective nature of the 2005 agreement cannot be regarded as established.

[…]”

Judgment of 14 September 2016, *Trajektna luka Split v Commission*, T-57/15, EU:T:2016:470

Relevance: Financing from State resources

Facts

Trajektna, the applicant is a private operator of the passenger terminal at the Port of Split and was the supplier of the port services on the basis of an exclusive concession granted by the Split Port Authority in 2003, for a period of 12 years. Two years later the port authority limited the fees for port services in respect of domestic traffic to a level that was at least 40% lower than that of the fees applied in other Croatian ports (and 45-70% lower than the level of fees charged for international traffic). Domestic services constituted approximately 80% of the *Trajektna*'s business, so the price regulation forced it to run its business at a loss. The primary beneficiary of the service fee limitations was the Croatian State-owned ferry operator, *Jadrolinija* (operating 90% of domestic traffic in the port of Split). According to the applicant the difference between the aforementioned limited fees and the fees applicable in other Croatian ports constituted an advantage for *Jadrolinija*. The applicant filed a complaint with the European Commission alleging that the port authority was providing unlawful State aid to *Jadrolinija.* However, the Commission held that the measure did not involve the transfer of State resources, so it did not constitute State aid under Article 107 TFEU. *Trajektna* brought an action before the EU General Court to contest the decision of the Commission.

Held

The Court upheld the Commission's assessment, according to which the fact that the financial resources directly flew from one private entity to another without passing through a public or private body designated by the State to administer the aid was sufficient to conclude that the measure did not involve the transfer of State resources. The Court agreed with the Commission that the resources were not under public control, so were not available to State authorities. The Court held that the losses incurred by the applicant were irrelevant, and also laid down that the fact that the applicant enjoyed exclusive rights could not mean that this undertaking was in the same situation as a public undertaking.

Findings of the Court

"23 As a preliminary point, it should be recalled that only advantages granted directly or indirectly through State resources are to be regarded as aid within the meaning of Article 107(1) TFEU. The distinction made in that provision between 'aid granted by a Member State' and aid granted 'through State resources' does not signify that all advantages granted by a State, whether financed through State resources or not, constitute aid, but is intended merely to bring within that definition both advantages which are granted directly by the State and those granted by a public or private body designated or established by the State (see judgment of 15 January 2013, *Aiscat v Commission*, T-182/10, EU:T:2013:9, paragraph 103 and the case-law cited).

24 It should also be borne in mind that Article 107(1) TFEU covers all the financial means

by which the public authorities may actually support undertakings, irrespective of whether or not those means are permanent assets of the State. Consequently, even though the sums involved in the measure at issue are not permanently held by the public authorities, the fact that they remain constantly under public control, and therefore available to the competent national authorities, is sufficient for them to be categorised as State aid (see judgment of 15 January 2013, *Aiscat v Commission*, T-182/10, EU:T:2013:9, paragraph 104 and the case-law cited).

[…]

26 In the present case, the measure in question concerns fees for port services which […] although fixed by the Split Port Authority, are paid directly to the applicant by the users of those services whether they are in the private sector or the public sector, as in the case of Jadrolinija.

27 In recitals 44 to 46 of the contested decision, the Commission stated that, as the financial resources in question flow directly between the applicant, which is 100% privately-owned, and its customers, those resources flow directly from one private entity to another without passing through a public or private body designated by the State and it concluded that the measure concerned does not therefore involve a transfer of State resources (see paragraphs 13 to 15 above).

28 Accordingly, it suffices to note that the Commission applied, by analogy, the approach adopted in the judgment of 13 March 2001, *PreussenElektra* (C-379/98, EU:C:2001:160, paragraphs 59 to 62). In that judgment, the Court of Justice stated that the obligation imposed on private undertakings to purchase a certain type of electricity at minimum prices set by a Member State did not involve any direct or indirect transfer of State resources to undertakings which produce that type of electricity. Therefore, the allocation of the financial burden arising from that obligation for those private electricity supply undertakings as between themselves and other private undertakings could not constitute a direct or indirect transfer of State resources either. The Court, therefore, took the view that the fact that the purchase obligation was imposed by statute and conferred an undeniable advantage on certain undertakings was not capable of conferring upon it the character of State aid within the meaning of Article 107(1) TFEU. […]

29 Such an approach has, moreover, been upheld by the General Court in its judgment of 15 January 2013, *Aiscat v Commission* (T-182/10, EU:T:2013:9, paragraph 105), according to which the sums corresponding to the result of the increase of the toll for a first motorway set by the State authorities with a view to financing the repayment of the construction costs of a second motorway, paid directly to the concession holder for that second motorway, a private company, by the concession holders for the first motorway, also private companies, thus transferring directly and exclusively between private companies without any public body thereby acquiring, if only transiently, possession or control, do not constitute State resources within the meaning of the case-law.

30 The Commission was therefore right to conclude (…) that the measure at issue did not involve the transfer of State resources within the meaning of Article 107(1) TFEU.

[…]

36 […] the applicant seems to connect the existence of State aid directly with the fact that it has incurred losses. Apart from the fact that it does not explain how the existence of an alleged loss is a matter which might reveal the existence of State aid, it must be stated that the applicant has not produced any document, such as an accounting document, showing the existence of such a loss. (…) the question whether the applicant, a private company, has incurred losses is, in any event, irrelevant in determining whether State resources have been used. Article 107 TFEU is designed to protect competition in the internal market and cannot be circumvented from that purpose in order to be used as a means of calling into question the financial conditions of a concession contract which the concession holder considers to be unfair.

[…]

43 According to the applicant, the Commission failed to take into account the

fact that it had been granted a special right within the meaning of Article 106(1) TFEU, which needs to be considered in the context of Article 107(1) TFEU. The applicant adds that, as it submitted in the administrative proceedings, in the case of undertakings which enjoy exclusive rights under Article 106(1) TFEU, since, as in the present case, the other conditions laid down in Article 107(1) TFEU are fulfilled, there is no need for State resources to be involved to reach the conclusion that there is State aid, given that the mere fact that the undertaking has been granted an exclusive right already makes measures taken by the undertaking imputable to the State where, as in the present case, those measures are imposed by State authorities. Accordingly, the applicant submits, in essence, that where an undertaking enjoys exclusive rights, it finds itself in the same situation as a public undertaking. Therefore, a combined reading of Articles 106 TFEU and 107 TFEU requires that the resources of those undertakings be treated in the same way, in the light of the objective laid down in Article 107 TFEU.

44 In the contested decision, the Commission found that undertakings to which Member States granted exclusive rights cannot, for that reason alone, be regarded as sufficiently under the control of the State for their private resources to automatically become State resources (see paragraph 16 above).

45 In that regard, it must be noted that, in support of its arguments the applicant refers, inter alia, to paragraph 63 of the judgment of 13 March 2001, *PreussenElektra* (C-379/98, EU:C:2001:160).

46 However, that paragraph does not relate to the Court of Justice's decision, as suggested by the applicant, but to the Commission's argument that the concept of State aid must be interpreted so as to include support measures decided on by the State and financed by private undertakings.

47 The Court, however, rejected that argument and, on the contrary, held in that judgment that a statutory provision of a Member State which, first, requires private electricity supply undertakings to purchase electricity produced in their area of supply from renewable energy sources at minimum prices higher than the real economic value of that type of electricity, and, second, distributes the financial burden resulting from that obligation between those electricity supply undertakings and upstream private electricity network operators, does not constitute State aid within the meaning of Article 107(1) TFEU (judgment of 13 March 2001, P*reussenElektra*, C-379/98, EU:C:2001:160, paragraphs 64 to 66; see also paragraph 28 above).

48 Likewise, it should be observed that the judgment of 15 January 2013, *Aiscat* v Commission (T-182/10, EU:T:2013:9), concerned measures financed directly by private undertakings with exclusive rights, namely the concession holders for an Italian motorway. In that case, as was noted at paragraph 29 above, the General Court held that no State resources were involved and there was no State aid (judgment of 15 January 2013, *Aiscat* v Commission, T-182/10, EU:T:2013:9, paragraphs 105 and 106).

49 Thus, contrary to what the applicant maintains, it cannot be inferred from the mere fact that an undertaking enjoys exclusive rights that it is in the same situation as a public undertaking.

50 The Commission was therefore right to state, in recital 47 of the contested decision (see paragraph 16 above), that the conclusion that the setting of port fees by the Split Port Authority did not involve a transfer of State resources within the meaning of Article 107(1) was not affected by the fact that the applicant enjoyed *de facto* exclusive rights within the meaning of Article 106(1) TFEU."

Judgment of 13 September 2017, *ENEA*, C-329/15, EU:C:2017:671

Relevance: Financing from State resources

Facts

The Polish Law on energy imposed an obligation on energy suppliers to purchase electricity produced by cogeneration. In accordance with this law the energy companies engaged in the production or trading of electricity and the sale of that to end users were obliged to supply a certain proportion (15% in the year 2006) of electricity produced by cogeneration. The energy companies could fulfil this obligation by producing that electricity themselves or by purchasing it from other electricity providers. In the case of purchasing, the purchase price was to be freely agreed by the parties of the transaction, however, as such electricity was relatively scarce on the Polish market, increased demand for it resulted in high market prices. On the other hand, the president of the Polish Office for the Regulation of Energy (URE) had the power to determine the maximum tariffs for sale of electricity to end users, so the electricity providers could not pass on to the end users the extra costs resulting from the purchase obligation. If a company did not fulfil this obligation, the President of URE could impose financial penalty on it. In the main proceedings giving rise to the dispute, the President of URE imposed financial penalty on *ENEA* for breach of the purchase obligation (*ENEA* supplied only 14.596% of its total electricity sales with electricity produced by cogeneration). *ENEA* is an energy company governed by private law, wholly owned by the Polish State, producing, marketing and selling electricity. *ENEA* brought an action against the President of URE to challenge the legality of the financial penalty, claiming that the obligation to purchase electricity produced by cogeneration constituted Stat aid within the meaning of Article 107(1) TFEU, implemented in breach of the prior notification obligation, so it was unlawful, together with the financial penalty enforcing it. The Polish Supreme Court referred the question for a preliminary ruling whether the purchase obligation of electricity produced by cogeneration constituted State aid, and in particular, whether the advantage granted to cogeneration producers as a consequence of the purchase obligation was financed from State resources.

Held

The Court pointed out that the supply obligation was imposed by the Law of Energy, so that measure must be regarded as attributable to the State. The Court also recalled that the condition that there be an intervention by the State or through State resources is satisfied where the aid is granted by public or private bodies established or designated by State with a view to administering the aid. *ENEA* and the Commission emphasized that most of the undertakings bound by the purchase obligation were public undertakings governed by private law, so the abovementioned obligation could be regarded as being financed through State resources. In response, the Court noted that the resources of public undertakings may be regarded as State resources where the State is capable, by exercising its dominant influence over such undertakings, of directing the use of their resources in order to finance advantages to the benefit of other undertakings. The Court expressed that the mere fact that the State held the majority of the capital in some of the undertakings subject to the purchase obligation did not lead to the conclusion that the State exercised a dominant influence that enabled it to direct the use of the resources of those undertakings. Furthermore, it was not proven that the conduct of *ENEA* was dictated by instructions from public authorities. On the contrary, *ENEA* rejected the offers for sale of electricity produced by cogeneration because of the high purchase prices. In the Court's view this decision was a wholly autonomous business decision. In the light of the foregoing, the conclusion of the Court was that the national measure placing an obligation on undertakings

to purchase electricity produced by cogeneration did not constitute intervention by the State or through State resources.

Findings of the Court

“20 In that regard, it should be noted that, for it to be possible to classify advantages as ‘State aid’ within the meaning of Article 107(1) TFEU, they must be granted directly or indirectly through State resources and be attributable to the State (judgments of 16 May 2002, *France v Commission*, C-482/99, EU:C:2002:294, paragraph 24, and of 19 December 2013, *Association Vent De Colère! and Others*, C-262/12, EU:C:2013:851, paragraph 16).

21 First, in order to assess whether a measure is attributable to the State, it is necessary to examine whether the public authorities were involved in the adoption of that measure (judgments of 16 May 2002, *France v Commission*, C-482/99, EU:C:2002:294, paragraph 52, and of 19 December 2013, *Association Vent De Colère! and Others*, C-262/12, EU:C:2013:851, paragraph 17).

22 In that regard, it is sufficient to point out that the obligation at issue in the main proceedings, to supply electricity produced by cogeneration, was imposed by the Law on energy, and that measure must therefore be regarded as attributable to the State (see, to that effect, judgment of 19 December 2013, *Association Vent De Colère! and Others,* C-262/12, EU:C:2013:851, paragraph 18)

23 Secondly, the condition that there must be intervention by the State or through State resources is satisfied not only where aid is granted directly by the State but also where it is granted by public or private bodies established or designated by the State with a view to administering the aid (judgments of 22 March 1977, *Steinike & Weinlig*, 78/76, EU:C:1977:52, paragraph 21, and of 13 March 2001, *PreussenElektra,* C-379/98, EU:C:2001:160, paragraph 58).

24 A measure consisting, inter alia, in an obligation to purchase energy may thus fall within the definition of ‘aid’ even though it does not involve a transfer of State resources (judgment of 19 December 2013, *Association Vent De Colère! and Others*, C-262/12, EU:C:2013:851, paragraph 19 and the case-law cited).

25 Article 107(1) TFEU covers all the financial means by which public authorities may actually support undertakings, irrespective of whether or not those means are permanent assets of the public sector. Even if the sums corresponding to the aid measure are not permanently held by the Treasury, the fact that they constantly remain under public control, and therefore available to the competent national authorities, is sufficient for them to be categorised as ‘State resources’ (judgments of 16 May 2002, *France v Commission*, C-482/99, EU:C:2002:294, paragraph 37; of 17 July 2008, *Essent Netwerk Noord and Others*, C-206/06, EU:C:2008:413, paragraph 70; and of 19 December 2013, *Association Vent De Colère! and Others*, C-262/12, EU:C:2013:851, paragraph 21).

26 Such circumstances must, however, be distinguished from those in which undertakings, mostly private undertakings, are not appointed by the State to manage a State resource, but are merely bound by an obligation to purchase using their own financial resources (judgments of 17 July 2008, *Essent Netwerk Noord and Others*, C-206/06, EU:C:2008:413, paragraph 74, and of 19 December 2013, *Association Vent De Colère! and Others*, C-262/12, EU:C:2013:851, paragraph 35).

27 It should be noted in that regard that the mechanism at issue in the main proceedings required electricity suppliers to sell a quota of the electricity produced by cogeneration accounting for at least 15% of their annual electricity sales to end users.

28 The President of the URE set the maximum tariffs for sale of electricity to end users, so that the financial burden resulting from that purchase obligation could not be systematically passed on to end users by undertakings.

29 It is thus apparent from the information before the Court that, in certain circumstances, electricity suppliers purchased electricity produced by cogeneration at a higher price than that charged to end users, which resulted in extra costs for the suppliers.

30 Consequently, given that those extra costs cannot be passed on entirely to end users and are not financed by a compulsory contribution imposed by the State or by a full offset mechanism (see, to that effect, judgments of 17 July 2008, *Essent Netwerk Noord and Others,* C-206/06, EU:C:2008:413, and of 19 December 2013, *Association Vent De Colère! and Others*, C-262/12, EU:C:2013:851), it must be concluded, as the Advocate General observed in point 86 of his Opinion, that the supply undertakings were not appointed by the State to manage a State resource, but were funding a purchase obligation imposed on them by having recourse to their own financial resources.

31 As regards the argument put forward by ENEA and the Commission that most of the undertakings bound by the purchase obligation were public undertakings governed by private law and therefore that obligation could be regarded as being financed through State resources, it should be noted that the resources of public undertakings may be regarded as State resources where the State is capable, by exercising its dominant influence over such undertakings, of directing the use of their resources in order to finance advantages to the benefit of other undertakings (see, to that effect, judgment of 16 May 2002, *France v Commission*, C-482/99, EU:C:2002:294, paragraph 38).

32 As the Advocate General noted in points 91, 94 to 96 and 100 of his Opinion, the mere fact that the State held the majority of the capital in some of the undertakings subject to the purchase obligation does not lead to the conclusion that, in the main proceedings, the State exercised a dominant influence that enabled it to direct the use of the resources of those undertakings within the meaning of the case-law referred to in the preceding paragraph.

33 It appears that the purchase obligation applied equally to all electricity suppliers, regardless of whether their capital was predominantly held by the State or by private operators.

34 In addition, it is not clear from the information submitted to the Court, in particular from the information provided at the hearing, that ENEA's conduct was dictated by instructions from public authorities. On the contrary, it was indicated that the decision to decline offers for the sale of electricity produced by cogeneration during the year 2006 was the result of wholly autonomous business decisions.

[…]

37 Accordingly, the answer to the first question is that Article 107(1) TFEU must be interpreted as meaning that a national measure, such as that at issue in the main proceedings, placing an obligation on both private and public undertakings to purchase electricity produced by cogeneration does not constitute intervention by the State or through State resources."

I.4. Affectation of trade between Member States

Judgment of 28 February 2018, *ZPT AD*, C-518/16, EU:C:2018:126

Relevance: Affectation of trade between Member States

Facts

In its 2008 tax return, *ZPT AD* a company incorporated under Bulgarian law requested for a corporation tax reduction on the basis of the investments that have been made in certain of its facilities. The declared reduction was not allowed by the tax authority mainly on the ground that the investments had been made in connection with the manufacture of products with the purpose of export which were excluded from the tax reduction scheme, an aid scheme implemented in Bulgaria in accordance with the rules of *de minimis* aid. *ZPT* brought an appeal against the decision. At first instance the national court annulled the decision, however the second instance court set aside that judgment and dismissed *ZPT*'s appeal. *ZPT* submitted a claim for compensation in order to establish before the Sofiyski gradski sad (Sofia City Court, Bulgaria) the liability of the National Assembly of the Republic of Bulgaria, the Varhoven administrativen sad (Supreme Administrative Court) and the National Revenue Agency on the basis of alleged infringements of EU law. The Sofiyski gradski sad (Sofia City Court) referred its questions for a preliminary ruling to the EU Court. The Sofia City Court basically wanted to know how the *de minimis* Regulation was applicable in this case and how the relevant provision of the *de minimis* Regulation excluding export aid from its scope should be interpreted in light of Article 35 TFEU, the prohibition of quantitative restrictions on exports.

Held

The Court found that the relevant provision of the *de minimis* Regulation (excluding aid to export-related activities from its scope) did not constitute a measure having equivalent effect to a quantitative restriction on exports contrary to Article 35 TFEU, first of all because it had no effect on trade in itself, being only a legal condition requiring Member States to refrain from granting certain types of aid (export aid). Second, the Court took into account that export aid, even of a modest amount, was, by definition, one of the forms of aid which may affect trade between Member States. As the Court laid down, "Article 35 TFEU cannot justify a measure contrary to Article 107 TFEU. The reasons for which the Court held that the provisions of the FEU Treaty on State aid cannot be used to frustrate the Treaty rules on the free movement of goods also justify the reciprocal assertion, namely that those provisions and those rules have a common purpose, namely to ensure the free movement of goods between Member States under normal conditions of competition." So the Court held that export aid was lawfully excluded from the scope of the *de minimis* Regulation.

Concerning the national measure at issue, which excluded not only export aid in the strict sense but also investment aid for facilities enabling the manufacture of goods to be exported, the Court recalled that the *de minimis* Regulation created a derogation from the general rules of State aid (the prohibition of State aid and the notification obligation), and that a restriction to the scope of that derogation was practically the return to the said general rules. Consequently, it does not need to be interpreted strictly, meaning that a national provision excluding from a *de minimis* aid scheme not only investment aid directly related to exports, but also investment aid having an impact on it may be lawfully implemented.

Findings of the Court

"43 In that regard, the Court has held that a national measure applicable to all traders active in the national territory which has a greater effect on goods leaving the market of the exporting Member State than on the marketing of goods in the domestic market of that Member State is covered by the prohibition laid down by Article 35 TFEU (see judgment of 21 June 2016, *New Valmar,* C-15/15, EU:C:2016:464, paragraph 36 and the case-law cited).

44 It follows from that definition that classification as a 'measure having equivalent effect to a quantitative restriction on exports' presupposes the existence of restrictive effects on trade (judgment of 21 June 2016, New Valmar, C-15/15, EU:C:2016:464, paragraph 42). Those effects may be of merely minor importance (judgment of 1 April 2008, *Government of the French Community and Walloon Government*, C-212/06, EU:C:2008:178, paragraph 52), provided that they are not too uncertain or too indirect (judgment of 21 June 2016, New Valmar, C-15/15, EU:C:2016:464, paragraph 45 and the case-law cited).

45 The prohibition of aid linked to exports to Member States laid down in Article 1(1)(d) of Regulation No 1998/2006, even if it does not exceed the de minimis threshold, has no effect on trade in itself, since it merely requires the Member States to refrain from granting a certain type of aid. Consequently, that provision cannot amount to a measure having an effect equivalent to a quantitative restriction on exports, prohibited by Article 35 TFEU.

46 However, the main effect of the fundamental rules of the internal market and of the general aid scheme which forms part of it is that the exclusion of export aid from the scope of Regulation No 1998/2006 is justified in the light of the actual purpose of Article 107 TFEU. According to that article, State aid is, indeed, incompatible with the internal market 'in so far as it affects trade between Member States'. Export aid, even of a modest amount, is, by definition, one of the forms of aid which may affect trade between Member States, both directly by conferring a competitive advantage on the products exported and indirectly by inciting the other Member States to take symmetric countermeasures intended to counterbalance that competitive advantage. As the Commission argued during the hearing, allowing such aid would be particularly detrimental to the functioning of the internal market.

47 It follows that Article 35 TFEU cannot justify a measure contrary to Article 107 TFEU. The reasons for which the Court held that the provisions of the FEU Treaty on State aid cannot be used to frustrate the Treaty rules on the free movement of goods also justify the reciprocal assertion, namely that those provisions and those rules have a common purpose, namely to ensure the free movement of goods between Member States under normal conditions of competition (judgments of 5 June 1986, *Commission v Italy,* 103/84, EU:C:1986:229, paragraph 19, and of 20 March 1990, *Du Pont de Nemours Italiana*, C-21/88, EU:C:1990:121, paragraphs 19 to 21).

[…]

49 By the first and second questions, the first two parts of the third question and the fourth question, the referring court asks, in essence, whether Article 1(1)(d) of Regulation No 1998/2006 must be interpreted as precluding provisions of national law, such as those at issue in the main proceedings, which exclude investments in assets used for export-related activities from the benefit of tax relief constituting de minimis aid.

50 It must be noted, in the first place, that Article 1(1)(d) of Regulation No 1998/2006 must be placed back in the overall context of that regulation, the purpose of which is to allow derogations, for State aid of a limited amount, from the rule that all aid must, prior to implementation, be notified to the Commission.

51 The purpose of Article 1(1)(d) of Regulation No 1998/2006 is to limit the

possible scope of that derogation by excluding export aid from it. That prohibition thus amounts to a return to the principle of prohibition of State aid laid down by the Treaty. It cannot, therefore, be interpreted strictly.

52 It should be noted, in the second place, that Regulation No 1998/2006 did not in any way have the purpose, and in addition could not lawfully have had the effect, either of obliging the Member States to grant certain aid or of compelling them to use all the possibilities of derogation for which it provides.

53 The questions raised by the national court must be answered in the light of those reservations.

54 Articles 184 and 188 of the Law on corporation tax grant a tax reduction of an amount below the ceiling set by Regulation No 1998/2006 to undertakings engaged in manufacturing activities in a municipality identified as presenting a significantly higher unemployment rate than the national average, on condition that they invest in that municipality the amount of the tax reduction within a period of four years starting from the beginning of the year in respect of which the tax is deducted. Under Article 182(2)(7) of that law, the tax relief does not apply 'to investment in assets used in activities relating to exports'. The Republic of Bulgaria thus intended to comply with Article 1(1)(d) of Regulation No 1998/2006, which excludes aid benefiting exports from the benefit of the de minimis rule.

55 Article 1(1)(d) of Regulation No 1998/2006 does not exclude all aid which may have an impact on exports, but only that which has as its direct purpose, by its very form, the promotion of sales in another State. Aid 'directly linked to the quantities exported', aid relating to the establishment and operation of a distribution network or aid relating to other current expenditure linked to the export activity are the only forms of aid that are regarded as such.

56 It follows that investment aid, on condition of it not being, in one form or another, determined, in principle and in its amount, by the quantity of the goods exported, is not included within 'aid to export-related activities' within the meaning of Article 1(1)(d) of Regulation No 1998/2006 and does not therefore come within the scope of application of that provision, even if the investments thus supported facilitate the development of goods intended for export.

57 In the opposite case – that is to say, where investment aid is determined by the quantity of goods exported and by whether it subsequently comes within the scope of application of Article 1(1)(d) of Regulation No 1998/2006 – it is excluded from the benefit of the de minimis rule. Thus interpreted, Article 1(1)(d) of Regulation No 1998/2006 does not preclude provisions of national law such as those of Article 182(2)(7) of the Law on corporation tax, provided that they are interpreted by the national courts, as their wording allows, as involving the same exclusion.

58 Therefore, the answer to the first and second questions, the first two parts of the third question and the fourth question is that Article 1(1)(d) of Regulation No 1998/2006 must be interpreted as not precluding provisions of national law, such as those at issue in the main proceedings, which exclude investments in assets used for export-related activities from the benefit of tax relief constituting de minimis aid."

II. RECOVERY AND PROCEDURAL ISSUES

II.1. Effects of Article 108(3) TFEU

Judgment of 25 April 2018, *Hungary v Commission*, joined cases T-554/15 and T-555/15, EU:T:2018:220

Relevance: Effects of Art. 108(3) TFEU, role of national courts

Facts

Hungary introduced two similar tax measures in 2014 (concerning the health contribution of tobacco companies and the so-called food chain inspection fees) which imposed progressive rates on certain companies depending on their turnover, resulting in differentiation between undertakings in similar situations. After having received complaints relating to those impositions, and having consulted the Hungarian authorities (both concerning the complaints and its intention to issue suspension orders against Hungary), the Commission opened the formal investigation procedures in both cases. In the opening decisions the Commission laid down its preliminary assessment according to which the national measures at issue constituted incompatible State aid. In the second place the Commission considered that the national measures constituted unlawful aid still being applied, and therefore it ordered Hungary the suspension of them on the basis of Article 11(1) of Regulation No 659/1999. One year later the Commission closed the formal investigation procedures by concluding that the measures at issue constituted incompatible aid. Hungary brought actions before the EU General Court for the partial annulment of the opening decisions, i.e. for the annulment of the suspension orders, without claiming that the provisional finding of the Commission concerning the aid was unlawful. Hungary also refrained from bringing proceedings against the final decisions, which became therefore final, so Hungary did not contest the classification of the measures as State aid in any proceedings that could have led to the annulment of that classification. However, Hungary claimed that the suspension orders were illegal for several reasons, including because the classification of the measures as State aid was not an *a priori* case.

Held

Hungary’s allegations included the claim that the Commission’s power to order the suspension of the measures interfered with the division of roles between the national courts and the Commission (i.e. Hungary claimed that it was for national courts alone to draw the conclusions from an infringement of the suspension obligation provided for in Article 108(3) TFEU). The Court also had to examine whether the proceedings became devoid of purpose, taking into account both that the opening decisions (even without the suspension orders) had the effect of compelling the Member State concerned to suspend the measures, and also that the final decisions found incompatible aid which had to be eliminated anyway. Therefore, the Court reiterated its well-established case-law concerning the effects of Article 108(3) TFEU and the respective roles of national courts and the Commission. The preliminary observations of the Court (summarizing the general framework) and the interpretations concerning the roles of national courts and the Commission are quoted below.

Findings of the Court

"19 In accordance with Article 107(1) TFEU, save as otherwise provided in the Treaties, any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between Member States, be incompatible with the internal market.

20 Article 108 TFEU organises the procedure for reviewing aid granted by Member States, in order to prevent distortion of competition caused by aid that is incompatible with the internal market.

21 First, Article 108(2) TFEU provides that if, after giving notice to the parties concerned to submit their comments, the Commission finds that aid granted by a State or through State resources is not compatible with the internal market having regard to Article 107 TFEU, it is to decide that the State concerned must abolish or alter such aid within a period of time to be determined by the Commission.

22 Secondly, Article 108(3) TFEU provides that Member States must inform the Commission, in sufficient time to enable it to submit its comments, of any plans to grant or alter aid. If the Commission considers that any such plan is not compatible with the internal market having regard to Article 107 TFEU, it must without delay initiate the procedure provided for in Article 108(2) TFEU. The Member State concerned must not put its proposed measures into effect until this procedure has resulted in a final decision.

23 The extensive case-law of the Court of Justice and of the General Court that specifies the provisions of Article 108 TFEU was largely reproduced in Regulation No 659/1999, repealed and replaced with effect from 14 October 2015 by Council Regulation (EU) 2015/1589 of 13 July 2015, laying down detailed rules for the application of Article 108 [TFEU] (OJ 2015 L 248, p. 9).

24 Under Article 4(4) of Regulation No 659/1999, the Commission is to initiate the procedure provided for in Article 108(2) TFEU where, after a preliminary examination, it finds that doubts are raised as to the compatibility with the internal market of a notified measure. The decision taken on the basis of that article is referred to as a decision to initiate the formal investigation procedure.

25 Initiation of a formal investigation procedure is possible not only where the Commission examines a notified measure, but also, under Article 13 of Regulation No 659/1999, where it examines possible unlawful aid, that is to say, in accordance with Article 1(f) of that regulation, a measure which the Commission considers, at that stage of the procedure, to be new aid put into effect in contravention of Article 108(3) TFEU.

26 The adoption of a decision to initiate the formal investigation procedure in relation to a national measure in the situation provided for in Article 13 of Regulation No 659/1999 alters the legal position of that measure, in the light of the Commission's provisional conclusion as to its State aid status within the meaning of Article 107(1) TFEU and as to its unlawful nature, arising from the possible infringement of the requirement to notify any new aid plans, established in Article 108(3) TFEU. Until the adoption of such a decision, the Member State from which the measure originated, the beneficiary undertakings and other economic operators may believe that the measure is being lawfully implemented, for example as a general measure not falling within the scope of Article 107(1) TFEU or as existing aid within the meaning of Article 108(1) TFEU and within the meaning of Article 1(b) of Regulation No 659/1999, the continued implementation of which remains lawful at that stage. On the other hand, after its adoption there is at the very least a significant element of doubt as to the legality of the measure at issue, which, without prejudice to the possibility of seeking interim relief from the judge hearing the application for interim measures, must lead the Member

State to suspend its application, since the initiation of the formal investigation procedure excludes the possibility of an immediate decision that the measure is compatible with the internal market, which would enable it to continue to be lawfully implemented (see, to that effect, judgment of 16 October 2014, *Alro v Commission*, T-517/12, EU:T:2014:890, paragraph 28 and the case-law cited).

27 The classification as unlawful State aid of a national measure that forms the subject matter of a decision to initiate the formal investigation procedure therefore requires the Member State to which that decision is addressed immediately to suspend the implementation of that measure (see, to that effect, judgments of 10 May 2005, *Italy v Commission*, C-400/99, EU:C:2005:275, paragraph 39, and of 16 October 2014*, Alro v Commission,* T-517/12, EU:T:2014:890, paragraph 27 and the case-law cited).

28 The obligation to suspend the implementation of a non-notified national measure that is classified as unlawful State aid is based on Article 108(3) TFEU, which establishes a prior control of plans to grant new aid, the aim of which is to ensure that only aid that is compatible with the internal market is implemented. In order to achieve that aim, the implementation of such planned aid must therefore be suspended until the doubt as to its compatibility is resolved by the Commission's final decision (see, to that effect, judgment of 21 November 2013, *Deutsche Lufthansa*, C-284/12, EU:C:2013:755, paragraphs 25 and 26 and the case-law cited).

29 The obligation to suspend the implementation of a national measure classified as unlawful State aid by the decision initiating the formal investigation procedure follows automatically from that decision, in that the Member State is required itself to draw all the appropriate conclusions from that decision (see, to that effect, judgment of 9 October 2001, *Italy v Commission*, C-400/99, EU:C:2001:528, paragraph 60).

30 In order to enable the Commission to counteract any infringement of the rules laid down in Article 108(3) TFEU, the Court of Justice also conferred on it the power to require the Member State concerned to suspend immediately the payment of any aid which it considers to be unlawful, after giving that Member State an opportunity to submit its comments on the matter (judgments of 14 February 1990, *France v Commission*, C-301/87, EU:C:1990:67, paragraphs 18 to 20; of 21 March 1990, *Belgium v Commission*, C-142/87, EU:C:1990:125, paragraphs 14 to 16 and 19; and of 21 March 1991, *Italy v Commission*, C-303/88, EU:C:1991:136, paragraphs 46 to 48).

31 It does not follow from that case-law, or from Article 11(1) of Regulation No 659/1999 which reproduced it, that the Commission is obliged to require automatically the Member State concerned to suspend payment of aid which has not been notified in accordance with Article 108(3) TFEU. The opposite outcome would render nugatory the legal obligation imposed on the Member State by Article 108(3) TFEU not to implement planned aid before the Commission's final decision and would have the consequence of reversing the roles of the Member States and the Commission (see, to that effect, judgment of 17 June 1999, *Belgium v Commission*, C-75/97, EU:C:1999:311, paragraph 74 and the case-law cited).

32 There are procedural differences between, on the one hand, the suspension of a measure in the process of being implemented arising from the decision to initiate the formal investigation procedure classifying that measure as unlawful State aid and, on the other hand, a suspension order issued in relation to that measure. In particular, under Article 12 of Regulation No 659/1999, in the event of non-compliance with a suspension order, the Commission is entitled to refer the matter directly to the Court of Justice of the European Union without further notice and apply for a declaration that the failure to comply constitutes an infringement of the Treaty on the Functioning of the European Union.

33 Those procedural differences do not, however, affect the principal legal effect of both the decision to initiate a formal investigation procedure and the suspension order, that is to say the obligation, imposed on the Member State, to suspend the implementation of the measure which forms the subject matter of those decisions, based on Article 108(3) TFEU (see, to that effect, judgment of 9 October 2001, *Italy v Commission*, C-400/99, EU:C:2001:528, paragraph 60).

[…]

66 It is clear from the summary of the procedural rules set out in paragraphs 24 to 29 above that, where the Commission decides to initiate a formal investigation procedure within the meaning of Article 4(4) of Regulation No 659/1999 against a national measure of which it has not been notified, the Member State is required immediately to suspend the implementation of that measure. The fact that the classification of the national measure at issue as unlawful State aid is a provisional classification does not affect that suspension obligation in any way.

67 Contrary to Hungary's submissions, under the case-law of the Court of Justice, which recognised, very early on, the direct effect of the obligation to suspend the payment of State aid before its compatibility with the internal market has been examined by the Commission (judgments of 15 July 1964, *Costa*, 6/64, EU:C:1964:66, p. 596, and of 11 December 1973, *Lorenz,* 120/73, EU:C:1973:152, paragraph 8), it is not for the national courts alone to draw the appropriate conclusions from an infringement of the suspension obligation provided for in Article 108(3) TFEU.

68 According to the case-law, Articles 107 and 108 TFEU confer on the Commission the principal and exclusive role of holding aid to be incompatible with the internal market where this is appropriate, the role of national courts being to safeguard rights which individuals enjoy as a result of the direct effect of the prohibition laid down in the last sentence of Article 108(3) TFEU (see, to that effect, judgment of 21 November 1991, *Fédération nationale du commerce extérieur des produits alimentaires and Syndicat national des négociants et transformateurs de saumon,* C-354/90, EU:C:1991:440, paragraph 14). The powers granted to the national courts in the area of State aid control cannot therefore limit the powers of the Commission in this area. On the contrary, according to the case-law, it is the power of the national courts which is limited where the Commission adopts a decision initiating the formal examination procedure (see, to that effect, judgment of 21 November 2013, *Deutsche Lufthansa*, C-284/12, EU:C:2013:755, paragraphs 41 and 42).

69 As noted in paragraph 30 above, in order to enable the Commission to ensure that the rules of Article 108(3) TFEU are complied with, the Commission was granted the power to require the Member State concerned to suspend immediately the payment of any aid which it considers to be unlawful, after giving that Member State the opportunity to submit its comments.

70 The conditions for the adoption of such an order, laid down in Article 11(1) of Regulation No 659/1999, are restricted to a substantive condition, namely the classification by the Commission, at that stage of the procedure, of the national measure concerned as unlawful State aid, and a procedural condition, namely giving the Member State concerned the possibility to submit its comments.

71 No other condition needs to be satisfied in order for the Commission to be authorised to adopt an order under Article 11(1) of Regulation No 659/1999, and it should be pointed out that this is as a result of the legislature's intention, and not, as submitted by Hungary, its oversight. The wording of that article, which reflects the legal arrangements covered by the settled case-law cited in paragraph 30 above, was not altered by the amendments introduced in Regulation No 659/1999 and was reproduced, in its

original form, in the new Regulation 2015/1589.

72 In particular, contrary to what Hungary submits, the adoption of a suspension order cannot be subject to the conditions laid down for the adoption of a recovery order within the meaning of Article 11(2) of Regulation No 659/1999, or to any conditions otherwise inspired by that provision.

73 In the first place, the suspension order is a tool intended to prevent the continued infringement of the obligation, laid down in Article 108(3) TFEU, not to implement plans seeking to grant or alter aid. Since, in the case of non-notified aid, that obligation occurs at the moment of initiation of the formal investigation procedure and provisional classification of the national measure at issue as unlawful State aid, making the adoption of the suspension order subject to additional substantive conditions would weaken the effectiveness of that mechanism which is designed to ensure full compliance with the legal obligation imposed on the Member State by Article 108(3) TFEU.

74 In the second place, the conditions laid down for the adoption of a recovery order are justified by the nature of that order and its place in the system of prior control of new aid plans established by Article 108 TFEU.

75 Pursuant to Article 108(2) TFEU, only incompatible aid must be abolished by Member States, which implies an obligation to recover incompatible aid which has already been paid. However, according to the case-law, EU law does not impose an obligation of full recovery of any unlawful aid (see, to that effect, judgment of 12 February 2008, *CELF and ministre de la Culture et de la Communication,* C-199/06, EU:C:2008:79, paragraphs 46 and 52).

76 According to the case-law, aid paid by Member States cannot be considered to be incompatible solely on the ground that it was put into effect in breach of the notification and suspension obligations provided for in Article 108(3) TFEU (see, to that effect, judgment of 14 February 1990, *France v Commission*, C-301/87, EU:C:1990:67, paragraphs 9 to 11, 16 and 17). That is why, even though the initiation of the formal investigation procedure in relation to a national measure in the situation provided for in Article 13 of Regulation No 659/1999 requires the Member State concerned immediately to suspend the payment of aid, it does not, however, require it to recover that aid.

77 The fact remains that EU law does not preclude the possibility of recovering aid paid unlawfully before the Commission has taken a decision on its compatibility.

78 First, in order to give full effect to the provisions of Article 108(3) TFEU, it is for the national courts, in cases of infringement of that provision, to draw the appropriate conclusions, in accordance with their national law, with regard to both the validity of the acts giving effect to the aid and the recovery of financial support granted in disregard of that provision (see judgment of 21 July 2005, *Xunta de Galicia*, C-71/04, EU:C:2005:493, paragraph 49 and the case-law cited). In particular, a finding that aid has been granted in breach of the last sentence of Article 108(3) TFEU may, depending on the circumstances, lead to its reimbursement in accordance with the internal rules of procedure, even if that aid is subsequently declared to be compatible with the internal market (see, to that effect, judgment of 12 February 2008, *CELF and ministre de la Culture et de la Communication,* C-199/06, EU:C:2008:79, paragraphs 52 and 53).

79 Secondly, the EU legislature provided for the possibility for the Commission to adopt orders seeking to recover aid paid unlawfully before the end of the formal investigation procedure. However, as a result of the effect of such an order on the beneficiary's situation, it made their adoption subject to strict conditions, set out in Article 11(2) of Regulation No 659/1999.

80 It is clear from the foregoing that, first, the Commission was not required, in the contested decisions, to refer to established practice or case-law in the light of which the State aid status of the national measures at issue cannot be in any doubt.

[…]"

II.2. RECOVERY

Judgment of 22 December 2010, *Commission v Slovakia*, C-507/08, EU:C:2010:802

Relevance: Recovery of unlawful incompatible aid

Facts

Frucona Košice benefited from several deferrals of payment of tax debts and excise duties during 2002-2003, in return of which it provided financial securities to the Košice local tax authority. In 2004, the company was unable to pay its excise duties. With regard to its position of indebtedness the company initiated the so-called arrangement procedure; it proposed to pay each of its creditors 35% of the amount of the sum that it owed to them. The local tax authority (its largest creditor by far) accepted the offer, the competent Slovak court confirmed the arrangement, and the company paid them the agreed amount by the end of 2004, and the arrangement procedure was declared (by the competent Slovak court) to be terminated. However, in the meantime Slovakia acceded to the EU, and the local tax authority realised that the remission of 65% of its tax claim constituted unlawful State aid. On the basis of a complaint the Commission investigated the case, compared the arrangement procedure first with the ordinary bankruptcy procedure and second with the tax execution procedure, and found that both other options were more favourable for the local tax authority. So the Commission concluded that the private creditor test was not satisfied and that the measure constituted incompatible State aid. *Frucona Košice* requested the annulment of the decision but the General Court first dismissed the action in 2010.[9] Ruling on the appeal the Court set aside the judgment of the General Court in 2013[10] on the ground that Commission failed to take into account the duration of the bankruptcy procedure and committed thereby a manifest error of assessment in applying the private creditor test. Following the judgment of the Court of Justice, the Commission repealed its decision and adopted a new one in 2014 correcting the error identified by the Court of Justice. In its new decision the Commission found again that the measure constituted incompatible State aid. The dispute concerning the new decision gave rise to judgments of 16 March, *Frucona Košice v Commission*[11] and of 20 September 2017, *Commission v Frucona Košice*[12] described in a separate summary.

In order to implement the Commission's original decision the Slovak tax office called on *Frucona Košice* to repay the unlawful State aid, but *Frucona Košice* did not comply with that obligation. The tax office brought a debt recovery action before the competent local court. The court dismissed the action and, in the appeal proceedings, the first instance decision was upheld by the second instance court, mainly on the ground that the court was not entitled to review the decision on the arrangement with creditors because it had acquired the force of *res judicata*. The Commission brought infringement proceedings against Slovakia for failure to recover the

[9] Judgment of 7 December 2010, *Frucona Košice v Commission*, T-11/07, EU:T:2010:498.

[10] Judgment of 24 January 2013, *Frucona Košice v Commission,* C-73/11 P, EU:C:2013:32

[11] T-103/14, EU:T:2016:152

[12] C-300/16 P, EU:C:2017:706

aid, and the EU Court declared that Slovakia did not comply with its EU law obligations by failing to take all the necessary measures to recover the aid in question.

Held

The Court acknowledged the importance of the principle of *res iudicata* in the EU legal order, and admitted, on the basis of its established case-law, that "European Union law does not in all circumstances require a national court to disapply domestic rules of procedure conferring the force of *res judicata* on a judgment, even if to do so would make it possible to remedy an infringement of European Union law by the judgment in question." The Court also laid down that its *Lucchini* case-law, according to which *res iudicata* of a national court's judgment could not prevent the recovery of unlawfully implemented incompatible State aid, was not applicable in this case. In order to admit that, the Court took into account that the national court's judgment approving the arrangement with the creditors (and having the force of *res iudicata*) was delivered earlier than the Commission's decision ordering recovery. However, the Court took into account that there were other means available to the Slovak authorities which they failed to use diligently, so it concluded that the failure to recover the aid immediately and effectively constituted an infringement of Slovakia's obligations.

Findings of the Court

"50 […] it must first be borne in mind that, in accordance with Article 14(3) of Regulation No 659/99, recovery of the unlawful aid which is the subject of a Commission decision is to be effected without delay and in accordance with the procedures under the national law of the Member State concerned, provided that they allow the immediate and effective execution of the Commission decision.

51 Accordingly, a Member State which, pursuant to a Commission decision, is obliged to recover unlawful aid is free to choose the means of fulfilling that obligation, provided that the measures chosen do not adversely affect the scope and effectiveness of European Union law (see, to that effect, Case C-209/00 *Commission v Germany* [2002] ECR I-11695, paragraph 34, and Case C-210/09 *Scott and Kimberly Clark* [2010] ECR I-0000, paragraph 21).

52 European Union law therefore imposes an obligation to take all appropriate measures to ensure the execution of Commission decisions on the recovery of unlawful aid but respects the specific features of the various procedures provided by Member States for that purpose. It should be stated that it is consistent with that law that, within this action, the Commission has maintained that it has no intention of dictating to the competent authorities of the Slovak Republic the precise manner in which the State aid unlawfully granted to Frucona ought to be recovered, but that it takes the view that the procedure employed for that purpose does not meet the requirement of immediate and effective recovery of that aid.

53 The fact that, following Decision 2007/254, the tax office took steps to reclaim the unlawful State aid by initiating legal proceedings cannot therefore in itself be a ground for criticism, since a Member State is free, as stated above, to choose the means by which it will implement its obligation to effect recovery.

54 However, in this case, the measures taken by the competent Slovak authorities did not lead to the recovery of the wrongful aid and normal conditions of competition were therefore not restored. The main obstacle in the way of that recovery was the refusal, first by the Košice II District Court and then by the Košice Regional Court, to uphold the recovery action brought by the tax office, in the light of the fact that the judgment of 14 July 2004 of the court with jurisdiction approving the agreement in the arrangement with creditors had acquired the force of *res judicata.*

55 The first issue raised therefore by this case is whether, where, as part of a procedure for arrangement with creditors under court supervision, a national court judgment decides on an arrangement which involves a debt to a public authority being partly written off, and that write-off is thereafter categorised by the Commission as State aid, the finality of that judgment can prevent the recovery of that aid.

56 In that regard, it must, first, be stated that the situation at issue here is distinguishable from that in Lucchini, relied on by the Commission, where the Court held that European Union law precludes the application of a provision of national law which seeks to lay down the principle of *res judicata* in so far as the application of that provision prevents the recovery of State aid granted in breach of European Union law which has been found to be incompatible with the common market in a decision of the Commission which has become final (see, to that effect, paragraph 63 of *Lucchini*).

57 In the present case, the court judgment possessed of the force of *res judicata* relied on by the Slovak Republic precedes the decision whereby the Commission requires the recovery of the aid at issue.

58 Consequently, as maintained by the Slovak Republic, *Lucchini* cannot be of direct relevance to this case.

59 Secondly, attention should be drawn to the importance, both in the European Union legal order and in the national legal orders, of the principle of *res judicata*. In order to ensure stability of the law and legal relations, as well as the sound administration of justice, it is important that judicial decisions which have become definitive after all rights of appeal have been exhausted or after expiry of the time-limits provided to exercise those rights can no longer be called into question (Case C-224/01 *Köbler* [2003] ECR I-10239, paragraph 38; Case C-234/04 K*apferer* [2006] ECR I-2585, paragraph 20; and Case C-2/08 *Fallimento Olimpiclub* [2009] ECR I-7501, paragraph 22).

60 Accordingly, European Union law does not in all circumstances require a national court to disapply domestic rules of procedure conferring the force of *res judicata* on a judgment, even if to do so would make it possible to remedy an infringement of European Union law by the judgment in question (see, to that effect, *Kapferer,* paragraph 21, and *Fallimento Olimpiclub*, paragraph 23).

61 As stated by the Advocate General in his Opinion, it is clear both from the documents before the Court and from the observations made at the hearing by the Slovak Republic that under national law there were available to the national authorities resources which, if diligently used, could have ensured that the Slovak Republic was able to recover the aid at issue.

62 Nonetheless, the Slovak Government has not provided any precise information on the circumstances in which it used the resources which were available to it.

63 In particular, the Slovak Republic has not clearly explained what action was taken in response to the request by the tax office that an extraordinary appeal be brought against the contested judgment.

64 The Court can therefore do no other than hold that, standing the Commission's specific criticism, the information provided by the Slovak Republic is insufficient to allow the conclusion that it took, within the prescribed period, all the measures which it could have employed in order to obtain the repayment of the aid at issue.

65 In the light of the foregoing, it must be held that, by failing to take within the prescribed period all the measures necessary to recover from the beneficiary the aid referred to in Decision 2007/254, the Slovak Republic has failed to fulfil its obligations under the fourth paragraph of Article 249 EC and Article 2 of that decision."

II.3. Tasks and obligations of national authorities and national courts under EU State aid law

Judgment of 5 March 2019, *Eesti Pagar AS*, Case C-349/17, EU:C:2019:172

Relevance: Tasks of national authorities with regard to aid granted unlawfully on the basis of a block exemption regulation

Facts

Eesti Pagar AS is an Estonian undertaking which was contracted to buy a production line for bread-making from another market participant. It applied for State subsidy for the purchase of the machine. The application was submitted after the conclusion of the contract. Nonetheless, *Eesti* was granted the aid by the competent national authority as compatible with EU State aid law. The aid was part-financed from the European Regional Development Fund.

Nearly four years after the delivery of the administrative decision which granted the subsidy, *Eesti* was informed by the competent national authority that the aid awarded did not meet the conditions laid down in Article 8(2) of the GBER.[13] That provision holds that aid granted to SMEs (small- and medium-sized enterprises) can be considered to have an incentive effect and meet that condition "if, before work on the project or activity has started, the beneficiary has submitted an application for the aid to the Member State concerned." In the present case, the contract to purchase the production line had been concluded before the aid application was submitted. The competent national authority raised that the aid granted to *Eesti* was illegal aid and advised it to notify it to the European Commission for approval. *Eesti* refused to notify the Commission as it considered the aid received as compatible with the GBER.

A year later, the competent national authority issued an administrative decision which ordered the recovery of the aid. It also ordered the payment of interest from the day of the outpayment of the aid until the date of the earlier administrative decision which established its incompatibility with the GBER. The reasoning of the recovery order held that in the circumstances of the case the incentive effect of the aid, as defined by Article 8(2) of the GBER, cannot be established.

The recovery decision was challenged by *Eesti* in appeal and later in judicial review. Proceeding in extraordinary appeal, the Estonian Supreme Court held that the decision was illegal and ordered a new examination of the case by second instance court, the Tallin High Court. In this procedure, *Eesti* submitted that the prior conclusion of the purchase agreement alone does not exclude the compatibility of the aid with Article 8(2) of the GBER. It contested the relevance of the contract by arguing, first, that it could have withdrawn from the contractual obligations without significant difficulties, and, second, that without the aid it would not have proceeded with the purchase of the production line. It also claimed that at the time of the submission of the aid application the competent national authority knew about the purchase agreement. *Eesti* submitted that a representative of that authority explicitly suggested the conclusion of the agreement before the submission of the aid application. Finally, *Eesti* claimed that the recovery of the aid was excluded by the limitation rules laid down in national and EU law and the demand for the payment of interest violated the relevant rules of national law.

[13] Commission Regulation (EC) No 800/2008 of 6 August 2008 declaring certain categories of aid compatible with the common market in application of Articles [107 and 108 TFEU] (General block exemption regulation), OJ 2008 L 214, p. 3.

In the procedure before the national court, the European Commission made *amicus curiae* submissions.

Held

The Court of Justice ruled on a number of interconnected issues concerning the application and the enforcement of EU State aid law in the Member States.

1) The interpretation of the condition of incentive effect in Article 8(2) of the GBER

The Court of Justice rejected that Article 8(2) of the GBER would allow the granting of aid to finance projects and activities the contractual obligations for which have been concluded before the submission of the aid application. It also held that when discharging their task under Article 8(2) of the GBER national authorities face a decisional situation which is different from that when the Commission applies Article 107(3) TFEU, and, thus, have no decisional discretion.

Findings of the Court concerning the general nature of the rules in the GBER:

56 In that regard, it should be recalled that the notification requirement is one of the fundamental features of the system of control put in place by the FEU Treaty in the field of State aid. Within that system, Member States are under an obligation, first, to notify to the Commission each measure intended to grant new aid or alter aid for the purposes of Article 107(1) TFEU and, secondly, not to implement such a measure, in accordance with Article 108(3) TFEU, until that institution has taken a final decision on the measure (judgment of 21 July 2016, *Dilly's Wellnesshotel*, C-493/14, EU:C:2016:577, paragraphs 31 and 32 and the case-law cited).

57 In accordance with Article 109 TFEU, the Council of the European Union is authorised to make any appropriate regulations for the application of Article 107 TFEU and Article 108 TFEU and may in particular determine the conditions in which Article 108(3) TFEU is to apply and the categories of aid exempt from the procedure under that provision. In addition, as provided for in Article 108(4) TFEU, the Commission may adopt regulations relating to the categories of State aid that the Council has, pursuant to Article 109 TFEU, determined may be exempt from the procedure provided for in Article 108(3) TFEU (judgment of 21 July 2016, *Dilly's Wellnesshotel*, C-493/14, EU:C:2016:577, paragraphs 33 and 34).

58 Consequently, Regulation No 994/98, in accordance with which Regulation No 800/2008 was subsequently adopted, had itself been adopted pursuant to Article 94 of the EC Treaty (subsequently Article 89 EC and now Article 109 TFEU) (judgment of 21 July 2016, *Dilly's Wellnesshotel*, C-493/14, EU:C:2016:577, paragraph 35).

59 It follows that, notwithstanding the obligation of prior notification of each measure intended to grant or alter new aid, which is incumbent on the Member States under the Treaties and is one of the fundamental features of the system of monitoring in the field of State aid, if an aid measure adopted by a Member State fulfils the relevant conditions provided for in Regulation No 800/2008, that Member State may rely on its being exempted, as laid down in Article 3 of that regulation, from the notification requirement. Conversely, it is apparent from recital 7 of that regulation that State aid not covered by that regulation should remain subject to the notification requirement laid down in Article 108(3) TFEU (judgment of 21 July 2016, *Dilly's Wellnesshotel*, C-493/14, EU:C:2016:577, paragraph 36).

60 Further, as a qualification of the general rule that notification is required, the provisions of Regulation No 800/2008 and the conditions laid down by it must be interpreted

strictly. While the Commission is authorised to adopt regulations for block exemptions of aid, with a view to ensuring efficient supervision of the competition rules concerning State aid and simplifying administration, without weakening Commission monitoring in that area, the aim of such regulations is also to increase transparency and legal certainty. Fulfilling the conditions laid down by those regulations, including, therefore, those laid down by Regulation No 800/2008 enables those aims to be fully achieved (judgment of 21 July 2016, *Dilly's Wellnesshotel*, C-493/14, EU:C:2016:577, paragraphs 37 and 38).

61 As argued by the Estonian Government and by the Commission, the objectives of ensuring efficient supervision of the competition rules concerning State aid, simplifying administration and increasing transparency and legal certainty, no less than the necessity of ensuring a consistent application throughout the European Union of the prescribed conditions for exemption, mean that the criteria for the application of an exemption must be clear and easily enforceable by the national authorities.

Findings of the Court concerning Article 8(2) of the GBER:

62 Under Article 8(2) of Regulation No 800/2008, aid granted to SMEs, within the scope of that regulation, is to be considered to have an incentive effect if, before work on the project or activity in question has started, the beneficiary has submitted an application for the aid to the Member State concerned.

63 In that regard, first, it is clear from recital 28 of that regulation that the Commission laid down the criterion that such an application must precede the work on the project at issue in order to ensure that the aid is necessary and acts as an incentive to develop further activities or further projects, and, therefore, to ensure that that regulation should not apply to aid for activities in which the beneficiary would already engage under market conditions alone.

64 The criterion that the aid application must precede the start of work on the investment project is simple, pertinent and adequate, enabling the Commission to presume that the proposed aid has an incentive effect.

65 Second, it follows from, inter alia, recitals 1, 2 and 5 of Regulation No 800/2008 and from Article 3 thereof that the Commission, in essence, exercised ex ante, by adopting that regulation, all the powers conferred on it by Article 107(3) TFEU with respect to all such aid as satisfied the criteria laid down by that regulation, and only with respect to such aid.

66 In that regard, it is clear from, in particular, recital 28 and Article 8(3) and (6) of Regulation No 800/2008, that it is the duty of the national authorities to verify, before granting aid pursuant to that regulation, that the conditions, relating to whether that aid acts as an incentive for SMEs, laid down in Article 8(2) of that regulation are satisfied.

67 Last, in the first place, there is nothing in Regulation No 800/2008 to indicate that the Commission, by adopting that regulation, intended to transfer to the national authorities the task of determining whether or not there exists a genuine incentive effect. On the contrary, Article 8(6) of Regulation No 800/2008, in stating that the entire aid measure is not to be exempted if the conditions laid down in Article 8(2) and (3) of that regulation are not fulfilled, is intended to confirm that, with respect to the condition specified in Article 8(2), the role of those authorities is confined to verifying whether the aid application has been submitted before the start of work on the project or activity in question and, for that reason, whether the aid is or is not to be considered to have an incentive effect.

68 In the second place, it is plain that whether or not such an effect exists cannot be regarded as being a criterion that is clear and easily applicable by the national authorities, since, inter alia, its verification would necessitate, on a case-by-case basis, complex economic assessments. Such a criterion would consequently not comply with the

requirements identified in paragraph 61 of the present judgment.

69 In those circumstances, it must be held that Regulation No 800/2008 confers on the national authorities not the task of verifying whether or not the aid at issue has a genuine incentive effect, but the task of verifying whether or not the applications for aid that are submitted to them satisfy the conditions, laid down in Article 8 of that regulation, that govern whether aid can be considered to act as an incentive.

70 It is therefore the task of the national authorities to determine, inter alia, whether the condition laid down in Article 8(2) of Regulation No 800/2008, namely that the aid application was submitted 'before work on the project or activity has started', is satisfied, failing which the entire aid measure is not to be exempted, as laid down in Article 8(6) of that regulation.

75 In that regard, it is the duty of the competent national authorities, as the Advocate General stated in point 82 of his Opinion, to examine on a case-by-case basis the precise nature of the commitments that may have been given before the submission of an aid application by a potential beneficiary.

76 From that perspective, while a contract for the purchase of equipment concluded subject to the condition that the aid to be applied for is obtained may be considered, as correctly argued by EAS and the Estonian Government at the hearing before the Court, not to be a legally binding commitment, with a view to the application of Article 8(2) of Regulation No 800/2008, the same cannot be said of an unconditional commitment, which must, as a general rule, be considered to be legally binding irrespective of any costs of resiling from the contract.

77 In accordance with the structure and the objectives of that provision, economic considerations such as those associated with the costs of resiling cannot be taken into account by a national authority when an unconditional and legally binding commitment has been made.

Findings of the Court concerning the decisional discretion available to national authorities under Article 8(2) of the GBER:

78 As regards the judgment of 13 June 2013, *HGA and Others v Commission* (C-630/11 P to C-633/11 P, EU:C:2013:387), cited by the referring court in its request for a preliminary ruling, the Court admittedly stated, in essence, in paragraph 109 of that judgment, that, in the context of Article 107(3)(a) TFEU, the necessity of aid with respect to a regional investment project could be demonstrated on the basis of criteria other than that of whether the aid application preceded the start of implementation of that project.

79 As argued by the Commission, that conclusion is not, however, transposable to the assessment which must be undertaken by a national authority under Article 8(2) of Regulation No 800/2008, since the Commission enjoys, in the application of Article 107(3) TFEU, wide discretion, the exercise of which involves complex economic and social assessments (judgments of 11 September 2008, *Germany and Others v Kronofrance*, C-75/05 P and C 80/05 P, EU:C:2008:482, paragraph 59, and of 8 March 2016, *Greece v Commission*, C-431/14 P, EU:C:2016:145, paragraph 68).

80 In this case, it is clear from the narrative of the facts set out in the order for reference that on 28 August 2008 Eesti Pagar entered into a sale contract under which it committed itself to purchasing a tin loaf and sandwich loaf bread production line; that that contract took effect upon a first payment of 5% of the agreed price, which took place on 3 September 2008; that on 29 September 2008 Eesti Pagar entered into a leasing contract, and that, thereafter, on 13 October 2008, the parties to those two contracts entered into a tripartite sale contract which took effect upon signature.

81 It therefore appears, though this is a matter to be determined by the referring court, that

Eesti Pagar undertook, before the submission of its aid application on 24 October 2008, unconditional and legally binding commitments, and consequently Eesti Pagar had to be regarded, whatever the cost of resiling from those contracts, as being ineligible for the aid scheme at issue in the main proceedings.

2) The obligation of national authorities to order the repayment of illegal aid in their own competences

Based on its previous jurisprudence, the Court of Justice confirmed that under EU law national authorities are obliged to recover illegal State aid from its beneficiaries. National authorities must make this decision in their own competences, on their own initiative, without waiting for the Commission to decide on the aid in its powers provided in Article 108 TFEU.

Findings of the Court

84 It must at the outset be recalled that Article 108(3) TFEU establishes a prior control of plans to grant new aid. The aim of that system of prior control is therefore that only compatible aid may be implemented. In order to achieve that aim, the implementation of planned aid is to be deferred until doubt as to its compatibility is resolved by the Commission's final decision (judgment of 21 November 2013, *Deutsche Lufthansa*, C-284/12, EU:C:2013:755, paragraphs 25 and 26 and the case-law cited).

85 It has been stated above, in paragraph 56 of the present judgment, that the notification requirement is one of the fundamental features of that system of control, and that the Member States are under an obligation, first, to notify to the Commission each measure intended to grant new aid or alter aid and, secondly, not to implement such a measure until such time as the Commission has taken a final decision on that measure.

86 It has also been stated, in paragraph 59 of the present judgment, that only if an aid measure adopted by a Member State fulfils the relevant conditions provided for in Regulation No 800/2008 may that Member State rely on its being exempted, as laid down in Article 3 of that regulation, from the notification requirement, and conversely, State aid not covered by that regulation is to remain subject to the notification requirement laid down in Article 108(3) TFEU.

87 It follows that, if aid has been granted pursuant to Regulation No 800/2008 although the conditions laid down to qualify for exemption under that regulation were not satisfied, the granting of that aid was in breach of the notification requirement and must, therefore, be considered to be unlawful.

88 In that regard, the Court has stated that the prohibition on implementation of planned aid laid down in the last sentence of Article 108(3) TFEU has direct effect and that the immediate enforceability of the prohibition on implementation referred to in that provision extends to all aid which has been implemented without being notified (see, to that effect, judgment of 21 November 2013, *Deutsche Lufthansa*, C-284/12, EU:C:2013:755, paragraph 29 and the case-law cited).

89 The Court has concluded that it is the task of the national courts to ensure that all appropriate action, in accordance with their national law, to address the consequences of an infringement of the last sentence of Article 108(3) TFEU, particularly as regards both the validity of measures giving effect to the aid and the recovery of financial support granted in disregard of that provision, the essence of their task being, consequently, to adopt the appropriate measures to cure the unlawfulness of implementation of the aid, so that the aid does not remain freely available to the beneficiary until such time as the Commission's decision is made (see, to that effect, judgment of 21 November 2013, *Deutsche Lufthansa*, C-284/12, EU:C:2013:755, paragraphs 30 and 31 and the case-law cited).

90 Any provision of EU law that satisfies the conditions required to have direct effect is binding on all the authorities of the Member States, that is to say, not merely the national courts but also all administrative bodies, including decentralised authorities, and those authorities are required to apply it (see, to that effect, judgment of 24 May 2012, *Amia*, C-97/11, EU:C:2012:306, paragraph 38 and the case-law cited).

91 In accordance with the Court's settled case-law, both the administrative authorities and the national courts that are called upon, within the exercise of their respective powers, to apply provisions of EU law are under a duty to give full effect to those provisions (judgment of 14 September 2017, *The Trustees of the BT Pension Scheme*, C-628/15, EU:C:2017:687, paragraph 54 and the case-law cited).

92 It follows that, where a national authority finds that aid which it has granted pursuant to Regulation No 800/2008 does not satisfy the conditions laid down to qualify for the exemption provided for by that regulation, it is the duty of that authority, mutatis mutandis, to comply with the same obligations as those referred to in paragraph 89 of the present judgment, including that of recovering on its own initiative the aid that was unlawfully granted.

93 That said, taking into consideration not only the consequences that such recovery of the aid may have for the undertaking concerned but also the obligation on the Member States, laid down in the second subparagraph of Article 4(3) TEU, to take any appropriate measure, general or particular, to ensure fulfilment of the obligations arising out of the Treaties or resulting from acts of institutions of the Union, it is the duty of the national authority to which there has been submitted an aid application that may fall within the scope of Regulation No 800/2008 to examine carefully, taking account of the information submitted to it, whether the aid applied for meets all the relevant conditions laid down by that regulation and to reject that application if one of those conditions is not satisfied.

94 As regard the legal basis for such recovery, it is apparent from, in particular, the considerations set out in paragraphs 89 to 92 of the present judgment that Article 108(3) TFEU obliges the national authorities to recover on their own initiative aid which they have unlawfully granted, including where Regulation No 800/2008 has been misapplied. Those considerations are equally applicable to aid that is co-financed from a structural fund, since Article 101 of Regulation No 1083/2006 reiterates that obligation. Further, in a situation where Regulation No 2988/95 is applicable, Article 4(1) of that regulation imposes the same obligation.

3) The protection of legitimate expectations under the GBER

Based on its earlier jurisprudence on the protection of legitimate expectations under Article 108 TFEU, the Court of Justice, first, determined the applicability of the principle in the context of the GBER and rejected, on that basis, that undertakings may legitimately rely for the protection of their interest on the interpretation and application of EU State aid law by national authorities. The message of the ruling is that undertakings must make sure that the aid received complies with EU law. The risks of the incorrect interpretation and application of EU rules are also theirs.

Findings of the Court

97 In accordance with the Court's settled case-law, the right to rely on the principle of the protection of legitimate expectations presupposes that precise, unconditional and consistent assurances originating from authorised, reliable sources have been given to the person concerned by the competent authorities of the European Union. That

right applies to any individual in a situation in which an EU institution, body or agency, by giving that person precise assurances, has led him to entertain well-founded expectations. Information which is precise, unconditional and consistent, in whatever form it is given, constitutes such assurances (judgment of 13 June 2013, *HGA and Others v Commission*, C-630/11 P to C-633/11 P, EU:C:2013:387, paragraph 132).

98 It is also in accordance with the Court's settled case-law that, in view of the mandatory nature of the supervision of State aid by the Commission pursuant to Article 108 TFEU, undertakings to which aid has been granted may not, in principle, entertain a legitimate expectation that the aid is lawful unless it has been granted in compliance with the procedure laid down in that article, and furthermore, an economic operator exercising due care should normally be able to determine whether that procedure has been followed. In particular, where aid is implemented without prior notification to the Commission, with the result that it is unlawful under Article 108(3) TFEU, the recipient of the aid cannot have at that time a legitimate expectation that its grant is lawful (judgments of 15 December 2005, *Unicredito Italiano*, C-148/04, EU:C:2005:774, paragraph 104, and of 19 March 2015, *OTP Bank*, C-672/13, EU:C:2015:185, paragraph 77).

99 The finding has already been made, in paragraphs 59 and 87 of the present judgment, that only if an aid measure adopted by a Member State satisfies the relevant conditions laid down by Regulation No 800/2008 is that Member State exempted from its obligation to notify aid and that, conversely, the granting of aid pursuant to that regulation, although the conditions laid down for eligibility with respect to that regulation were not satisfied, was a breach of the notification requirement, and such aid must be considered to be unlawful.

100 Further, it has been stated, in paragraphs 89 to 92 of the present judgment, that, in such a situation, it is the duty of both the national courts and the administrative bodies of the Member States to ensure that all appropriate action is taken to address the consequences of an infringement of the last sentence of Article 108(3) TFEU, particularly as regards the validity of measures giving effect to the aid and the recovery of financial support granted in disregard of that provision.

101 It follows, first, that a national authority granting aid pursuant to Regulation No 800/2008 cannot be regarded as being vested with the power to adopt a final decision finding that there is no obligation to notify the aid applied for to the Commission, under Article 108(3) TFEU.

102 Since the Commission, in essence, itself exercised ex ante, by adopting Regulation No 800/2008, the powers conferred on it by Article 107(3) TFEU with respect to all such aid as satisfies the criteria laid down by that regulation, and only with respect to such aid, as stated in paragraph 65 of the present judgment, the Commission did not confer any decision-making power on the national authorities with respect to the extent of the exemption from notification, those authorities being in the same position as the potential beneficiaries of aid and being required, as was stated in paragraph 93 of the present judgment, to ensure that their decisions are in conformity with that regulation, failing which the consequences mentioned in paragraph 100 of this judgment are set in motion.

103 It follows, second, that, where a national authority grants aid while misapplying Regulation No 800/2008, its doing so is an infringement of both the provisions of that regulation and of Article 108(3) TFEU.

104 Following the Court's settled case-law, the principle of the protection of legitimate expectations cannot be relied upon against an unambiguous provision of EU law; nor

can the conduct of a national authority responsible for applying EU law, which acts in breach of that law, give rise to a legitimate expectation on the part of an economic operator of beneficial treatment contrary to EU law (judgments of 20 June 2013, *Agroferm*, C-568/11, EU:C:2013:407, paragraph 52 and the case-law cited, and of 7 August 2018, *Ministru kabinets*, C-120/17, EU:C:2018:638, paragraph 52).

105 It follows that it can be immediately ruled out that, in a situation such as that in the main proceedings, a national authority, such as EAS, could have caused a beneficiary of aid wrongly granted pursuant to Regulation No 800/2008, such as Eesti Pagar, to hold a legitimate expectation that that aid was lawful.

4) Limitation periods and the recovery of unlawful aid in procedures before national authorities

The Court of Justice held that the limitation periods applicable to the recovery of illegal aid are those laid down in national law, unless EU law specifically regulates a limitation period. In regard this latter point, it ruled that the ten-year limitation period in Article 15(1) of Regulation 659/1999/EC[14] was not applicable, as that legislation covers only the State aid procedure before the Commission and is not applicable to procedures before national authorities. Since the aid granted to *Eesti* was part-financed from the European Regional Development Fund, the Court found that the four-year limitation period in Article 3(1) of Regulation 2988/95/EC, Euratom[15] may be applied. This, however, requires establishing that the undertaking concerned was responsible for the violation of EU law. In the Court's view, in the context of the GBER the responsibility of the aid recipient undertaking can be established in most cases.

Findings of the Court

108 In that regard, it is clear from the case-law cited in paragraph 89 of the present judgment that, where there is no EU legislation on the subject, the unlawful aid must be recovered in accordance with the rules for implementation laid down by the applicable national law.

109 In particular, contrary to what is claimed by the Estonian and Greek Governments and by the Commission, there cannot be applied to such recovery, neither directly, nor indirectly, nor by analogy, the period of 10 years specified in Article 15 of Regulation No 659/1999.

110 First, as stated by the Advocate General in points 149 and 152 of his Opinion, the Court has stated, in paragraphs 34 and 35 of the judgment of 5 October 2006, *Transalpine Ölleitung in Österreich* (C-368/04, EU:C:2006:644), that, in so far as Regulation No 659/1999 contains rules of a procedural nature which apply to all administrative procedures in the matter of State aid pending before the Commission, that regulation codifies and reinforces the Commission's practice in reviewing State aid and does not contain any provision relating to the powers and obligations of the national courts, which

[14] Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article [108 TFEU], OJ 1999 L 83, p.1.

[15] Council Regulation (EC, Euratom) No 2988/95 of 18 December 1995 on the protection of the European Communities' financial interests, OJ 1995 L 312, p. 1.

continue to be governed by the provisions of the Treaty as interpreted by the Court.

111 It follows from the considerations set out in paragraphs 89 to 92 of the present judgment that those findings are no less valid with respect to the powers and obligations of the national administrative authorities.

112 Second, in accordance with settled case-law, a limitation period, in general, fulfils the function of ensuring legal certainty (judgment of 13 June 2013, *Unanimes and Others*, C-671/11 to C-676/11, EU:C:2013:388, paragraph 31); in order to fulfil that function, that period must be fixed in advance, and any application 'by analogy' of a limitation period must be sufficiently foreseeable by a litigant (judgment of 5 May 2011, *Ze Fu Fleischhandel and Vion Trading*, C-201/10 and C-202/10, EU:C:2011:282, paragraph 32 and the case-law cited).

113 Having regard to the case-law cited in the preceding paragraph, an application by analogy, in circumstances such as those obtaining in the main proceedings, of the 10-year period specified in Article 15 of Regulation No 659/1999, cannot be regarded as being sufficiently foreseeable by a litigant, such as Eesti Pagar.

114 In any event, as stated by the Advocate General in point 147 of his Opinion, the mere fact that national rules on limitation are, in principle applicable to the recovery of unlawfully granted aid by national authorities on their own initiative, does not detract from the possibility of that aid being recovered subsequently, in implementation of a decision to that effect by the Commission which, where it has in its possession information on the alleged unlawfulness of that aid, whatever the source of that information, after the national limitation periods have expired, remains free to assume, within the period of 10 years referred to in Article 15 of Regulation No 659/1999, an examination of that aid.

115 Moreover, as regards specifically aid co-financed from an EU structural fund, such as, in this case, the ERDF, Regulation No 2988/95 may be applicable, where the financial interests of the Union are at stake.

116 By adopting Regulation No 2988/95, in particular the first subparagraph of Article 3(1) thereof, the European Union legislature decided to establish a general rule on limitation which was applicable in that area, whereby it intended, first, to define a minimum period applied in all the Member States and, secondly, to waive the possibility of bringing proceedings concerning an irregularity that is detrimental to the European Union's financial interests after the expiry of a four-year period after the irregularity was committed (judgment of 22 December 2010, *Corman*, C-131/10, EU:C:2010:825, paragraph 39 and the case-law cited).

117 It follows that, as from the date on which Regulation No 2988/95 entered into force, proceedings may be brought by the competent authorities of the Member States within a period of four years, as a rule, and other than in the sectors for which the European Union legislature has prescribed a shorter period, concerning any irregularity that is detrimental to the European Union's financial interests. (judgment of 22 December 2010, *Corman*, C-131/10, EU:C:2010:825, paragraph 40 and the case-law cited).

118 In that regard, it must be observed that, under Article 1 of Regulation No 2988/95, that regulation is applicable to any 'irregularity' with respect to EU law, that concept being defined as meaning any infringement of a provision of EU law resulting from an act or omission by an economic operator, which has, or would have, the effect of prejudicing the general budget of the European Union or budgets managed by it, either by reducing or losing revenue accruing from own resources collected directly on behalf of the Union, or by an unjustified item of expenditure.

119 As regards more specifically the condition that the infringement of a provision of EU law must result from an act or omission by an economic operator, the Court had occasion to make clear that the rule concerning the limitation period laid down in the first subparagraph of Article 3(1) of that regulation is not intended to apply to proceedings in respect of irregularities resulting from errors on the part of the

national authorities granting a financial advantage in the name of and on behalf of the European Union budget (judgment of 21 December 2011, *Chambre de commerce et d'industrie de l'Indre*, C-465/10, EU:C:2011:867, paragraph 44 and the case-law cited).

120 That said, in a situation such as that at issue in the main proceedings, it is primarily the duty of the applicant for aid to ensure that it satisfies the conditions laid down by Regulation No 800/2008 so that it can qualify for aid that is exempted under that regulation, and consequently the granting of aid that is contrary to those conditions cannot be regarded as being exclusively the result of an error committed by the national authority concerned.

121 The same is true where that authority has been informed by the beneficiary of the aid at issue of circumstances that entail the infringement of a provision of EU law; that does not, in itself, have any effect on the classification of an 'irregularity', within the meaning of Article 1(2) of Regulation No 2988/95 (see, to that effect, judgment of 21 December 2011, *Chambre de commerce et d'industrie de l'Indre*, C-465/10, EU:C:2011:867, paragraph 48 and the case-law cited).

122 Further, the definition of an 'irregularity', within the meaning of Article 1(2) of Regulation No 2988/95, also covers intentional irregularities or irregularities arising out of negligence which may, in accordance with Article 5 of that regulation, result in an administrative fine, as well as those irregularities which entail nothing more than the withdrawal of the wrongly obtained advantage in accordance with Article 4 of that regulation (judgment of 24 June 2004, *Handlbauer*, C-278/02, EU:C:2004:388, paragraph 33).

123 The commission of an irregularity which causes the limitation period to begin to run therefore requires two conditions to be satisfied, namely an economic operator's act or omission that constitutes an infringement of EU law and a prejudice, or potential prejudice, caused to the budget of the European Union (judgment of 6 October 2015, *Firma Ernst Kollmer Fleischimport und -export*, C-59/14, EU:C:2015:660, paragraph 24).

124 In circumstances where the infringement of EU law has been discovered after the occurrence of the prejudice, the limitation period begins to run from the time when the irregularity was committed, namely from the time when both the economic operator's act or omission that infringed EU law and the prejudice caused to the budget of the European Union or budgets managed by it have occurred (judgment of 6 October 2015, *Firma Ernst Kollmer Fleischimport und -export*, C-59/14, EU:C:2015:660, paragraph 25).

125 Under the third subparagraph of Article 3(1) of Regulation No 2988/95, the limitation period for bringing proceedings is interrupted by any act of the competent authority, notified to the person in question, relating to investigation or legal proceedings concerning the irregularity.

126 In that regard, it is clear from the wording of the third subparagraph of Article 3(1) of Regulation No 2988/95 that the concept of a 'person in question' designates the economic operator suspected of having committed the irregularities, that the concept of 'act relating to investigation or legal proceedings' means any act which sets out with sufficient precision the transactions to which the suspicions of irregularities relate, and that, therefore, the condition specified in that provision must be regarded as satisfied where a set of facts taken as a whole lead to the conclusion that the person in question has effectively been made aware of those acts relating to investigation or legal proceedings (see, to that effect, judgment of 11 June 2015, *Pfeifer & Langen*, C-52/14, EU:C:2015:381, paragraphs 36, 38 and 43).

127 In this case, while the matter is for the referring court to determine, it follows from that case-law that Regulation No 2988/95 is applicable to the facts of the main proceedings, that an irregularity within the

meaning of Article 1 of that regulation was committed by Eesti Pagar, that any knowledge by EAS of an order of equipment by means of that company's entering into a unconditional and legally binding commitment prior to the submission of its aid application does not affect the existence of that irregularity, that the limitation period of four years laid down in the first subparagraph of Article 3(1) Regulation No 2988/95 therefore started to run on 10 March 2009, the date when, as stated in paragraph 23 of the present judgment, EAS approved the aid application submitted by Eesti Pagar and when, therefore, the EU budget was prejudiced, and that that period was interrupted by the letter of 22 January 2013 referred to in paragraph 24 of the present judgment or, if the conditions referred to in paragraph 126 of the present judgment are satisfied, by the ex post control carried out in December 2012, as referred to in paragraph 26 of the present judgment.

5) The obligation of national authorities to order the payment of interest together with the recovery of unlawful aid

The Court of Justice's ruling confirmed the obligation of national authorities to order in national competences the repayment of illegal aid together with a payment of interest. Its amount must be calculated on the basis of national law but having regard to the obligations arising for national authorities, in particular under Article 108(3) TFEU.

Findings of the Court

130 It has been stated, in paragraphs 99 and 100 of the present judgment, that, if aid has been granted pursuant to Regulation No 800/2008, although the conditions laid down for eligibility under that regulation were not satisfied, that aid must be considered to be unlawful and that, in such circumstances, it is the duty of both the national courts and the administrative bodies of the Member States to ensure that all appropriate action is taken to address the consequences of an infringement of the last sentence of Article 108(3) TFEU, particularly as regards the validity of measures giving effect to the aid and the recovery of aid granted in disregard of that provision.

131 As regards those consequences, it must be recalled that, in accordance with the Court's settled case-law, the logical consequence of a finding that aid is unlawful is the removal of that aid by means of recovery in order to re-establish the situation previously obtaining. The main objective pursued in recovering unlawfully paid State aid is to eliminate the distortion of competition caused by the competitive advantage which such aid affords. By repaying the aid, the recipient loses the advantage which it had enjoyed over its competitors on the market, and the situation prior to payment of the aid is restored (judgment of 8 December 2011, *Residex Capital IV*, C-275/10, EU:C:2011:814, paragraphs 33 and 34).

132 That said, from the aid recipient's point of view, the undue advantage will also have consisted in the non-payment of the interest which it would have paid on the aid amount in question, had it had to borrow that amount on the market during the period of the unlawfulness, and in the improvement of its competitive position as against the other operators in the market while the unlawfulness lasts (see, to that effect, judgment of 12 February 2008, *CELF et ministre de la Culture et de la Communication*, C-199/06, EU:C:2008:79, paragraph 51).

133 Therefore, in circumstances such as those in the main proceedings, and without prejudice to the applicable rules on limitation, a measure which was to comprise solely an obligation to effect recovery without interest

would not be an adequate remedy for the effects of the unlawfulness, since it would not restore the situation previously obtained and would not eliminate entirely the distortion of competition (see, to that effect, judgments of 12 February 2008, *CELF et ministre de la Culture et de la Communication*, C-199/06, EU:C:2008:79, paragraphs 52 to 54, and of 8 December 2011, *Residex Capital IV*, C-275/10, EU:C:2011:814, paragraphs 33 and 34).

134 A national authority is therefore bound, under Article 108(3) TFEU, to order the beneficiary of the aid to pay interest in respect of the period of unlawfulness (see, to that effect, judgments of 12 February 2008, *CELF et ministre de la Culture et de la Communication*, C-199/06, EU:C:2008:79, paragraph 52, and of 8 December 2011, *Residex Capital IV*, C-275/10, EU:C:2011:814, paragraphs 33 to 35).

135 As regards the rules that are applicable to the calculation of interest, it is clear from the case-law cited in paragraph 89 of the present judgment that, in the absence of EU legislation on the subject, the unlawful aid must be recovered in accordance with the rules of applicable national law.

136 In particular, for the reasons stated in particular in paragraphs 110 and 111 of the present judgment, neither Article 14(2) of Regulation No 659/1999 nor Articles 9 and 11 of Regulation No 794/2004 can be considered as being EU legislation on that subject. Contrary to what is claimed by the Estonian and Greek Governments and by the Commission, nor can those provisions, on the basis of the same considerations, be applied either indirectly or by analogy.

137 That said, in accordance with the Court's settled case-law, the applicable national legislation must not be less favourable than that governing similar domestic situations (the principle of equivalence) and must not be framed in such a way as to make it in practice impossible or excessively difficult to exercise the rights conferred by EU law (the principle of effectiveness) (judgment of 11 November 2015, *Klausner Holz Niedersachsen*, C-505/14, EU:C:2015:742, paragraph 40).

138 As regards the principle of effectiveness, the Court has previously held that every case in which the question arises as to whether a national procedural provision makes the application of EU law impossible or excessively difficult must be analysed by reference to the role of that provision in the procedure, its progress and its special features, viewed as a whole, before the various national bodies (judgment of 11 November 2015, *Klausner Holz Niedersachsen*, C-505/14, EU:C:2015:742, paragraph 41).

139 In that regard, it must be held that the application of national law cannot have the consequence of frustrating the application of EU law in making it impossible for the national courts or authorities to satisfy their obligation to ensure compliance with the third sentence of Article 108(3) TFEU (see, to that effect, judgment of 11 November 2015, *Klausner Holz Niedersachsen*, C-505/14, EU:C:2015:742, paragraphs 42 and 45).

140 A national rule that would prevent a national judge or a national authority from taking action to respond to the consequences of an infringement of the third sentence of Article 108(3) TFEU must be regarded as being incompatible with the principle of effectiveness (see, to that effect, judgment of 11 November 2015, *Klausner Holz Niedersachsen*, C-505/14, EU:C:2015:742, paragraphs 42 and 45).

141 In this case, it is clear from that case-law that, while unlawful aid must be recovered in accordance with the rules of the applicable national law, the fact remains that Article 108(3) TFEU requires those rules to ensure full recovery of the unlawful aid and that, therefore, the beneficiary of that aid must be ordered to pay, inter alia, interest for the whole of the period over which it benefited from that aid and at a rate equivalent to that which would have been applied if the beneficiary had had to borrow the amount of the aid at issue on the market within that period.

Judgment of 15 September 2016, *PGE*, C-574/14, EU:C:2016:686

Relevance: jurisdiction of national courts in disputes concerning the implementation of an approved aid scheme

Facts

The applicant, *PGE Górnictwo i Energetyka Konwencjonalna S.A.* (hereinafter: PGE) a Polish electricity power generator concluded before 2007 certain long term Power Purchase Agreements (hereinafter: PPA) with the publicly owned network operator, *Polskie Sieci Elektroenergetyczne S.A*. in which it undertook to make certain investments, such as to create new generation facilities, while the network operator in return undertook to purchase a fixed minimum amount of electricity.

Directive 96/92/EC laid down the rules and legal bases for the opening-up to competition of the electricity sector the implementation of which was accompanied, in certain Member States, including Poland, by providing public aid in favour of national companies active in the electricity sector. In that context, the European Commission adopted a communication relating to the methodology for analysing State aid linked to stranded costs (hereinafter: Stranded Costs Methodology). Following the entry into force of EU rules governing electricity market opening, Poland adopted a legislation on the compensation of stranded costs providing also for the early voluntary termination of PPAs. At the time of the adoption of this law and its approval by the Commission, PGE belonged to a group of companies *PGE Elektrownia Bełchatów SA* (hereinafter: ELB), however, when it entered into the obligations giving rise to stranded costs, it was not part of that company group. When calculating the yearly adjustment of the stranded costs, i.e. the actual amount that was to be paid to PGE, the Polish energy market authority took the financial results of ELB also into account. This decision was challenged by PGE on the ground that, at the time of the conclusion of the PPA, it did not belong to the same group of companies with ELB and neither the Polish law approving the stranded costs nor the Commission's decision regarded the two companies as belonging to the same group. The Polish courts upheld PGE's legal action and stated that the energy market authority had not been entitled to take into account ELB's financial results. The chairman of the authority submitted an appeal against this decision claiming that, according to the Commission's Stranded Cost Methodology the stranded costs should be adjusted in the given year on the fact which group of companies the company in question actually belongs to. The Polish Supreme Court reviewing the case referred questions to the EU Court of Justice for preliminary ruling.

Held

The Court had to provide a ruling on whether the calculation of the stranded costs in case of group-affiliated power generators should be based on the undertaking's situation at the time of the Commission's decision or the actual situation of the undertaking (at the time of the yearly adjustment) shall be decisive in that regard. However, the Court first had to answer the question whether a court of a Member State in the course of a dispute concerning the implementation of an approved aid scheme may examine the compatibility of the Member State's legislation with the Commission's Stranded Cost Methodology. The Court reiterated its well-established case-law that the Commission had exclusive powers to assess the compatibility of State aid measures,

which precludes the Polish court from examining, at the time when the State aid in question is implemented, the compatibility of the aid regime established by the Polish law, with the principles laid down in the Stranded Costs Methodology. With regard to the second question the Court referred to the fact that the Stranded Costs Methodology has explicitly allowed for changes in the market conditions, in particular the aspect of the 'development of genuine competition on the market' to be taken into account. On the basis of this, the Court concluded that the calculation must be interpreted in light of the dynamic approach, meaning that when determining the amounts that must actually be paid, any changes in the ownership of companies must be taken into account as an aspect of the changes of the actual situation on the market.

Findings of the Court

"29 By its first question, the referring court asks, in essence, whether Article 107 TFEU and Article 4(3) TEU, read together with Article 4(2) of Decision 2009/287, must be interpreted as precluding, where the Commission has assessed a State aid scheme in the light of the Stranded Costs Methodology and classified it as being compatible with the internal market before its implementation, the national authorities and courts from reviewing in turn, at the time the State aid in question is implemented, whether it is consistent with the principles set out in that methodology.

30 In order to answer that question, it must be stated that, in accordance with the Court's settled case-law, in the context of the system of State aid control established by the FEU Treaty, the national courts, on the one hand, and the Commission, on the other, have complementary but distinct roles (see, to that effect, judgment of 21 November 2013, Deutsche Lufthansa, C-284/12, EU:C:2013:755, paragraph 27 and the case-law cited).

31 In particular, national courts ensure the safeguarding, until the final decision of the Commission, of the rights of individuals faced with a possible breach by State authorities of the prohibition laid down by Article 108(3) TFEU (judgment of 21 November 2013, Deutsche Lufthansa, C-284/12, EU:C:2013:755, paragraph 28 and the case-law cited). For this purpose, proceedings may be commenced before national courts requiring those courts to interpret and apply the concept of 'State aid', contained in Article 107(1) TFEU, in order to determine whether a State measure introduced without observance of the preliminary examination procedure provided for in Article 108(3) TFEU ought or ought not to have been subject to this procedure (see, to that effect, judgment of 18 July 2007, Lucchini, C-119/05, EU:C:2007:434, paragraph 50 and the case-law cited).

32 On the other hand, national courts do not have jurisdiction to give a ruling on whether aid measures or a State aid regime are compatible with the internal market. Indeed, in accordance with the Court's settled case-law, that assessment falls within the exclusive competence of the Commission, subject to review by the Courts of the European Union (see, to that effect, judgments of 18 July 2007, Lucchini, C-119/05, EU:C:2007:434, paragraphs 51 and 52 and the case-law cited, and of 21 November 2013, Deutsche Lufthansa, C-284/12, EU:C:2013:755, paragraph 28 and the case-law cited).

33 It is also important to note that the application of the European Union rules on State aid is based on an obligation of sincere cooperation between, on the one hand, the national courts and, on the other, the Commission and the Courts of the European Union, in the context of which each acts on the basis of the role assigned to it by the Treaty. In the context of that cooperation, national courts must take all the necessary measures, whether general or specific, to ensure the fulfilment of the obligations under

European Union law and refrain from taking those which may jeopardise the attainment of the objectives of the Treaty, as follows from Article 4(3) TEU. Therefore, national courts must, in particular, refrain from taking decisions which conflict with a decision of the Commission, even if it is provisional (see judgment of 21 November 2013, Deutsche Lufthansa, C-284/12, EU:C:2013:755, paragraph 41).

34 In this case, as is apparent from the order for reference, the referring court is seeking to ascertain whether it is appropriate to assess the compatibility of the aid regime established by a national law, such as the KDT, with the principles laid down in the Stranded Costs Methodology, even though the Commission, in Decision 2009/287, has already established compatibility with the internal market.

35 In this respect, it must be stated that, after having held, in Article 1 of that decision, that the compensation scheme at issue in the main proceedings amounted to 'State aid', within the meaning of Article 107(1) TFEU, in favour of electricity generators, the Commission gave final approval to that scheme, having held, in Article 4(2) of that decision, that stranded costs compensation was compatible with the internal market, precisely 'on the basis of the Stranded Costs Methodology'.

36 That being the case, to allow national courts, in the context of the implementation of a State aid scheme such as that at issue in the main proceedings, to review the compatibility of such a scheme with the internal market would amount in essence to giving those courts the power to substitute their own assessment for that of the Commission, in this instance in its Decision 2009/287. Therefore, it would be open to those courts, contrary to the case-law cited in paragraph 32 of this judgment, to encroach on the Commission's exclusive competences relating to the assessment of the compatibility of State aid with the internal market.

37 Furthermore, to accept that national courts may undertake such an assessment would in fact have the consequence that those courts would exceed the limits of their own jurisdiction aimed at ensuring compliance with EU law on State aid, referred to in paragraph 31 of this judgment, and would be in breach of their duty of sincere cooperation with the institutions of the European Union, referred to in paragraph 33 of this judgment. Indeed, it is conceivable — as moreover seems to be the case here — that the assessment undertaken by the national court in question would lead it to take a decision that runs counter to the decision, which is final, made by the Commission.

38 Admittedly, when the Commission rules on the compatibility of a State aid scheme with the internal market, it is conceivable that the facts taken into consideration by that institution evolve between the time it assesses those facts and the adoption of its final decision. That situation can indeed be of such a nature as to lead the national court, responsible for assessing whether a given measure comes under an authorised aid scheme, to question the relevance of the Commission's decision in that respect.

39 Nonetheless, as the Advocate General stated in point 54 of his Opinion, such a problem cannot be resolved by giving the national courts powers that are exclusive to the Commission; the solution must instead be sought in defining the boundaries of the complementary, but distinct, roles, referred to in paragraphs 30 to 33 of this judgment, played by those parties in the field of State aid.

40 Thus, if a national court entertains doubts regarding the interpretation of a decision of the Commission which classified a specific measure as State aid, that court may seek clarification from the Commission or, depending on the circumstances, may or must, in accordance with the second and third subparagraphs of Article 267 TFEU, refer a question to the Court of Justice for a preliminary ruling on the interpretation of Article 107 TFEU (see, to that effect, in particular, judgments of 11 July 1996, SFEI and Others, C-39/94, EU:C:1996:285, paragraphs 50 and 51, and of 21 November 2013, Deutsche Lufthansa, C-284/12, EU:C:2013:755, paragraph 44).

41 In the light of the foregoing, the answer to the first question is that Article 107 TFEU and

Article 4(3) TEU, read together with Article 4(2) of Decision 2009/287, must be interpreted as precluding, where the Commission has assessed a State aid scheme in light of the Stranded Costs Methodology and classified it as being compatible with the internal market before its implementation, the national authorities and courts from reviewing in turn, at the time the State aid in question is implemented, whether it is consistent with the principles set out in that methodology."