Reports of Cases

JUDGMENT OF THE COURT (Grand Chamber)

5 March 2019*

Table of contents

* Language of the case: Estonian.

(Reference for a preliminary ruling — State aid — Regulation (EC) No 800/2008 (General block exemption regulation) — Article 8(2) — Aid with an incentive effect — Concept of 'start of work on the project' — Powers of the national authorities — Unlawful aid — No decision of the European Commission or of a national court — Obligation on the national authorities to recover unlawful aid on their own initiative — Legal basis — Article 108(3) TFEU — General principle of EU law of protection of legitimate expectations — Decision of the competent national authority granting aid under Regulation No 800/2008 — Knowledge of circumstances excluding the eligibility of the aid application — Creation of a legitimate expectation — None — Limitation — Aid co-financed from a structural fund — Applicable legislation — Regulation (EC, Euratom) No 2988/95 — National legislation — Interest — Obligation to claim interest — Legal basis — Article 108(3) TFEU — Applicable legislation — National rules — Principle of effectiveness)

In Case C-349/17,

REQUEST for a preliminary ruling under Article 267 TFEU from the Tallinna Ringkonnakohus (Court of Appeal, Tallinn, Estonia), made by decision of 18 May 2017, received at the Court on 13 June 2017, in the proceedings

Eesti Pagar AS

v

Ettevõtluse Arendamise Sihtasutus,

Majandus- ja Kommunikatsiooniministeerium,

THE COURT (Grand Chamber),

composed of K. Lenaerts, President, A. Arabadjiev (Rapporteur), M. Vilaras, E. Regan and C. Toader, Presidents of Chambers, E. Juhász, M. Ilešič, J. Malenovský, L. Bay Larsen, D. Šváby and C.G. Fernlund, Judges,

Advocate General: M. Wathelet,

Registrar: R. Şereş, administrator,

having regard to the written procedure and further to the hearing on 18 June 2018,

after considering the observations submitted on behalf of:

– Eesti Pagar AS, by R. Paatsi and T. Biesinger, vandeadvokaadid,

– the Ettevõtluse Arendamise Sihtasutus, by K. Jakobson-Lott,

– the Estonian Government, by N. Grünberg, acting as Agent,

– the Greek Government, by M. Tassopoulou, D. Tsagkaraki, E. Tsaousi and A. Dimitrakopoulou, acting as Agents,

– the European Commission, by T. Maxian Rusche, B. Stromsky, K. Blanck-Putz and K. Toomus, acting as Agents, and by L. Naaber-Kivisoo, vandeadvokaat,

after hearing the Opinion of the Advocate General at the sitting on 25 September 2018,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Article 8(2) of 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); the obligation on the national authorities to recover unlawful aid on their own initiative; the interpretation of the general principle of EU law of protection of legitimate expectations with respect to recovery of unlawful aid; the limitation period applicable to recovery by the national authorities of unlawful aid on their own initiative, and, last, the obligation on the Member States to claim, when such recovery is made, interest.

2 The request has been made in proceedings where the opposing parties are Eesti Pagar AS, on the one hand, and Ettevõtluse Arendamise Sihtasutus (Entreprise Estonia; 'EAS') and the Majandus- ja Kommunikatsiooniministeerium (Ministry of Economic Affairs and Communications, Estonia; 'the Ministry'), on the other, concerning the lawfulness of an EAS decision, upheld on administrative complaint by the Ministry, ordering the recovery from Eesti Pagar of a sum of EUR 526 300, together with interest, with respect to aid previously granted to it by EAS.

Legal context

EU law

Regulation (EC, Euratom) No 2988/95

3 Article 1 of 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) provides:

'1. For the purposes of protecting the European Communities' financial interests, general rules are hereby adopted relating to homogenous checks and to administrative measures and penalties concerning irregularities with regard to Community law.

2. "Irregularity" shall mean any infringement of a provision of Community 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 Communities or budgets managed by them, either by reducing or losing revenue accruing from own resources collected directly on behalf of the Communities, or by an unjustified item of expenditure.'

4 The first and third subparagraphs of Article 3(1) of that regulation provide:

'The limitation period for proceedings shall be four years as from the time when the irregularity referred to in Article 1(1) was committed. However, the sectoral rules may make provision for a shorter period which may not be less than three years.

…

The limitation period shall be interrupted by any act of the competent authority, notified to the person in question, relating to investigation or legal proceedings concerning the irregularity. The limitation period shall start again following each interrupting act.'

5 Article 4(1) and (2) of that regulation state:

'1. As a general rule, any irregularity shall involve withdrawal of the wrongly obtained advantage:

– by an obligation to … repay the amounts … wrongly received,

…

2. Application of the measures referred to in paragraph 1 shall be limited to the withdrawal of the advantage obtained plus, where so provided for, interest which may be determined on a flat-rate basis.'

6 Article 5(1)(b) of Regulation No 2988/95 provides:

'Intentional irregularities or those caused by negligence may lead to the following administrative penalties:

…

(b) payment of an amount greater than the amounts wrongly received or evaded, plus interest where appropriate; ...'

Regulation (EC) No 659/1999

7 Article 14(2) of 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) provides:

'The aid to be recovered pursuant to a recovery decision shall include interest at an appropriate rate fixed by the Commission. Interest shall be payable from the date on which the unlawful aid was at the disposal of the beneficiary until the date of its recovery.'

8 Article 15(1) of that regulation provides:

'The powers of the Commission to recover aid shall be subject to a limitation period of ten years.'

Regulation No 794/2004

9 Article 9 of Commission Regulation (EC) No 794/2004 of 21 April 2004 implementing Regulation No 659/1999 (OJ 2004 L 140, p. 1, and corrigendum OJ 2005 L 25, p. 74), as amended by Commission Regulation (EC) No 271/2008 of 30 January 2008 (OJ 2008 L 82, p. 1) ('Regulation No 794/2004') provides:

'1. Unless otherwise provided for in a specific decision, the interest rate to be used for recovering State aid granted in breach of Article [108(3) TFEU] shall be an annual percentage rate which is fixed by the Commission in advance of each calendar year.

2. The interest rate shall be calculated by adding 100 basis points to the one-year money market rate. Where those rates are not available, the three-month money market rate will be used, or in the absence thereof, the yield on State bonds will be used.

3. In the absence of reliable money market or yield on stock bonds or equivalent data or in exceptional circumstances the Commission may, in close co-operation with the Member State(s) concerned, fix a recovery rate on the basis of a different method and on the basis of the information available to it.

4. The recovery rate will be revised once a year. The base rate will be calculated on the basis of the one-year money market recorded in September, October and November of the year in question. The rate thus calculated will apply throughout the following year.

5. In addition, to take account of significant and sudden variations, an update will be made each time the average rate, calculated over the three previous months, deviates more than 15% from the rate in force. This new rate will enter into force on the first day of the second month following the months used for the calculation.'

10 Article 11 of Regulation No 794/2004 states:

'1. The interest rate to be applied shall be the rate applicable on the date on which unlawful aid was first put at the disposal of the beneficiary.

2. The interest rate is to be applied on a compound basis until the date of recovery of the aid. The interest accruing in the previous year shall be subject to interest in each subsequent year.

3. The interest rate referred to in paragraph 1 shall be applied throughout the whole period until the date of recovery. However, if more than one year has elapsed between the date on which the unlawful aid was first put at the disposal of the beneficiary and the date of the recovery of the aid, the interest rate shall be recalculated at yearly intervals, taking as a basis the rate in force at the time of recalculation.'

Regulation (EC) No 1083/2006

11 Article 101 of Council Regulation (EC) No 1083/2006 of 11 July 2006, laying down general provisions on the European Regional Development Fund, the European Social Fund and the Cohesion Fund and repealing Regulation (EC) No 1260/1999 (OJ 2006 L 210, p. 25), provides:

'A financial correction by the Commission shall not prejudice the Member State's obligation to pursue recoveries under Article 98(2) of this Regulation and to recover State aid under Article [107 TFEU] and under Article 14 of [Regulation No 659/1999].'

Regulation No 800/2008

12 Recitals 1, 2, 5, 28 and 29 of Regulation No 800/2008 read as follows:

'(1) [Council] Regulation (EC) No 994/98 [of 7 May 1998, on the application of Articles (107 and 108 TFEU) of the Treaty establishing the European Community to certain categories of horizontal State aid (OJ 1998 L 142, p. 1)] empowers the Commission to declare, in accordance with Article [107 TFEU] that under certain conditions aid to small and medium-sized enterprises ("SMEs"), aid in favour of research and development, aid in favour of environmental protection, employment and training aid, and aid that complies with the map approved by the Commission for each Member State for the grant of regional aid is compatible with the common market and not subject to the notification requirement of Article [108](3) [TFEU].

(2) The Commission has applied Articles [107 and 108 TFEU] in numerous decisions and gained sufficient experience to define general compatibility criteria as regards aid in favour of SMEs, in the form of investment aid in and outside assisted areas, in the form of risk capital schemes and in the area of research, development and innovation, …

…

(5) This Regulation should exempt any aid that fulfils all the relevant conditions of this Regulation, and any aid scheme, provided that any individual aid that could be granted under such scheme fulfils all the relevant conditions of this Regulation. …

…

(28) In order to ensure that the aid is necessary and acts as an incentive to develop further activities or projects, this Regulation should not apply to aid for activities in which the beneficiary would already engage under market conditions alone. As regards any aid covered by this Regulation granted to an SME, such incentive should be considered present when, before the activities relating to the implementation of the aided project or activities are initiated, the SME has submitted an application to the Member State. …

(29) As regards any aid covered by this Regulation granted to a beneficiary which is a large enterprise, the Member State should, in addition to the conditions applying to SMEs, also ensure that the beneficiary has analysed, in an internal document, the viability of the aided project or activity with aid and without aid. ...'

13 Article 3 of Regulation No 800/2008 provides:

'1. Aid schemes fulfilling all the conditions of Chapter I of this Regulation, as well as the relevant provisions of Chapter II of this Regulation, shall be compatible with the common market within the meaning of Article [107(3) TFEU] and shall be exempt from the notification requirement of Article [108(3) TFEU] provided that any individual aid awarded under such scheme fulfils all the conditions of this Regulation, and the scheme contains an express reference to this Regulation, by citing its title and publication reference in the *Official Journal of the European Union*.

2. Individual aid granted under a scheme referred to in paragraph 1 shall be compatible with the common market within the meaning of Article [107(3) TFEU] and shall be exempt from the notification requirement of Article [108(3) TFEU] provided that the aid fulfils all the conditions of Chapter I of this Regulation, as well as the relevant provisions of Chapter II of this Regulation, and that the individual aid measure contains an express reference to the relevant provisions of this Regulation, by citing the relevant provisions, the title of this Regulation and its publication reference in the *Official Journal of the European Union*.

3. Ad hoc aid fulfilling all the conditions of Chapter I of this Regulation, as well as the relevant provisions of Chapter II of this Regulation, shall be compatible with the common market within the meaning of Article [107(3) TFEU] and shall be exempt from the notification requirement of Article [108(3) TFEU] provided that the aid contains an express reference to the relevant provisions of this Regulation, by citing the relevant provisions, the title of this Regulation and its publication reference in the *Official Journal of the European Union*.'

14 Article 8(1) to (3) and (6) of that regulation provide:

'1. This Regulation shall exempt only aid which has an incentive effect.

2. Aid granted to SMEs, covered by this Regulation, shall be considered to have an incentive effect if, before work on the project or activity has started, the beneficiary has submitted an application for the aid to the Member State concerned.

3. Aid granted to large enterprises, covered by this Regulation, shall be considered to have an incentive effect if, in addition to fulfilling the condition laid down in paragraph 2, the Member State has verified, before granting the individual aid concerned, that documentation prepared by the beneficiary establishes one or more of the following criteria:

…

6. If the conditions of paragraphs 2 and 3 are not fulfilled, the entire aid measure shall not be exempted under this Regulation.'

The Guidelines

15 Paragraph 38 of the Guidelines on national regional aid for 2007-2013 (2006/C 54/08) (OJ 2006 C 54, p. 13; 'the Guidelines') states:

'It is important to ensure that regional aid produces a real incentive effect to undertake investments which would not otherwise be made in the assisted areas. Therefore aid may only be granted under aid schemes if the beneficiary has submitted an application for aid and the authority responsible for administering the scheme has subsequently confirmed in writing [footnote 39] that, subject to detailed verification, the project in principle meets the conditions of eligibility laid down by the scheme before the start of work on the project [footnote 40]. An express reference to both conditions must also be included in all aid schemes [footnote 41]. In the case of ad hoc aid, the competent authority must have issued a letter of intent, conditional on Commission approval of the measure, to award aid before work starts on the project. If work begins before the conditions laid down in this paragraph are fulfilled, the whole project will not be eligible for aid.'

16 Footnote 40 (39 in the Estonian language version) to the Guidelines states:

'"Start of work" means either the start of construction work or the first firm commitment to order equipment, excluding preliminary feasibility studies.'

Estonian law

17 Paragraph 26(5) and (6) of the Perioodi 2007-2013 struktuuritoetuse seadus (Law on structural aid for the period 2007–2013), of 7 December 2006 (RT I 2006, 59, 440), in the version in force from 1 January 2012 to 30 June 2014 ('the STS'), that paragraph being headed 'Recovery of aid', provide:

'(5) A decision on recovery may be issued not later than 31 December 2025. In the situation provided for in Article 88 of [Regulation No 1083/2006], a decision on recovery may be issued until expiry of the period laid down by the Government for the retention of documents.

(6) The Government shall lay down the conditions and procedures for the recovery and repayment of the aid.'

18 Paragraph 28(1) to (3) of the STS, that paragraph being headed 'Interest and interest on late payment', state:

'(1) The outstanding amount of aid to be repaid under Paragraph 26(1) and (2) of this Law shall incur interest. The rate of interest on the outstanding amount of the aid to be repaid shall be the Euribor for six months plus 5% per annum. The basis for the calculation of interest shall be a period of 360 days.

(1^1) Interest shall not be payable where a profit achieved is to be recovered and the recipient of the aid has satisfied the requirements to notify profit arising under the procedure laid down in accordance with Paragraph 21(2) of this Law.

(2) Interest shall be calculated from the date on which the recovery decision becomes effective on the basis of the interest rate applicable on the last working day of the month preceding the calendar month in which the decision was adopted. If, in connection with the application for, or use of, the aid, a criminal offence was committed, the interest shall be calculated from the date of payment of the aid on the basis of the interest rate applicable on that day.

(3) Interest shall run until the date of repayment of the aid, but not beyond the date laid down for repayment and, in the event of deferral, until the definitive date of repayment. ...'

19 Under Paragraph 11(1) of the Vabariigi Valitsuse määrus nr 278 'Toetuse tagasinõudmise ja tagasimaksmise ning toetuse andmisel ja kasutamisel toimunud rikkumisest teabe edastamise tingimused ja kord' (Government Decree No 278 on the conditions and procedures for recovery and repayment of aid and for the provision of information concerning an infringement occurring on the grant and use of the aid), of 22 December 2006 (RT I 2006, 61, 463), adopted on the basis of, inter alia, Paragraph 26(6) of the STS:

'The decision on recovery of aid is discretionary and is to be issued within 45 calendar days or, where the amount to be recovered exceeds EUR 127 823, within 90 calendar days, calculated from the date on which grounds for recovery of the aid become known. Where a good reason exists, the period for the issue of the decision may be extended by a reasonable period.'

20 Paragraph 1 of the Majandus- ja kommunikatsiooniministri määrus nr 44 'Tööstusettevõtja tehnoloogiainvesteeringu toetamise tingimused ja kord' (Decree No 44 of the Minister of Economic Affairs and Communications on the conditions and procedure for the promotion of investment in technology by industrial undertakings; 'Decree No 44'), of 4 June 2008 (RTL 2008, 48, 658), headed 'Scope', provides, inter alia:

'(1) The conditions and procedure for the promotion of investment in technology by industrial undertakings … shall be established in order to attain the objectives of "innovation and growth capacity of undertakings" within the priority axis of the operational programme "improvement of the economic environment".

(2) There may be granted, for the purposes of [such promotion]: (1) regional aid, granted in accordance with the provisions of [Regulation No 800/2008], and subject to the provisions of that regulation and of Paragraph 34^2 of the konkurentsiseadus (Competition Act); ...'

The dispute in the main proceedings and the questions referred for a preliminary ruling

21 On 28 August 2008 Eesti Pagar entered into a contract whereby it committed itself to acquire from Kauko-Telko Oy a tin loaf and sandwich loaf bread production line for the price of EUR 2 770 000. In accordance with its terms, that contract was to take effect upon an initial payment of 5% of that price, which occurred on 3 September 2008.

22 On 29 September 2008 Eesti Pagar concluded with AS Nordea Finance Estonia a leasing contract, following which there was concluded, on 13 October 2008, a tripartite sale contract, whereby Kauko-Telko undertook to sell the bread production line to Nordea Finance Estonia, which undertook to lease the line to Eesti Pagar. That contract took effect upon signature.

23 On 24 October 2008 Eesti Pagar submitted to EAS, on the basis of Paragraph 1 of Decree No 44 of 4 June 2008, an application for aid with respect to the acquisition and installation of that bread production line. By a decision of 10 March 2009, EAS granted the application for aid amounting to EUR 526 300. It was stated at the hearing before the Court that that aid was co-financed from the European Regional Development Fund (ERDF).

24 By letter of 22 January 2013, EAS informed Eesti Pagar that the sale contract concluded on 28 August 2008 was in breach of the condition concerning the incentive effect of aid laid down in Article 8(2) of Regulation No 800/2008, and consequently Eesti Pagar had been granted unlawful State aid. Since Eesti Pagar considered that the State aid that it had received did act as an incentive, it did not, as EAS advised it to do in the same letter, send an application for the authorisation of that aid to the Commission.

25 By letter of 12 July 2013, EAS informed Eesti Pagar that it had commenced a non-compliance procedure because of that irregularity and that it intended to recover the sum of EUR 526 300 paid with respect to the aid at issue.

26 On 8 January 2014 EAS adopted a decision to recover from Eesti Pagar the amount of the aid at issue, together with EUR 98 454 in compound interest for the period from the date of payment of that aid until the date of its recovery, in accordance with Article 9 of Regulation No 794/2004 and Paragraph 28 of the STS. According to that decision, an *ex post* review carried out in December 2012 had revealed the existence of the sale contract of 28 August 2008, entered into before submission of the aid application to EAS, so that the incentive effect required in Article 8(2) of Regulation No 800/2008 had not been demonstrated.

27 On 10 February 2014 Eesti Pagar lodged an administrative complaint against that decision, that complaint being rejected by means of a Ministry Decision No 14 0003 of 21 March 2014.

28 On 21 April 2014 Eesti Pagar brought an action before the Tallinna Halduskohus (Administrative Court of Tallinn, Estonia) seeking primarily, the annulment of the EAS recovery decision and the Ministry's confirmatory decision; in the alternative, a declaration that those decisions with respect to recovery of the aid at issue are unlawful, and, as a further alternative, the annulment of those decisions in so far as the interest claimed is concerned. By judgment of 17 November 2014, that court dismissed that action in its entirety.

29 On 16 December 2014 Eesti Pagar brought an appeal against that judgment before the referring court, which dismissed the appeal by judgment of 25 September 2015.

30 On 26 October 2015, Eesti Pagar brought an appeal on a point of law before the Riigikohus (Supreme Court, Estonia) which partially upheld the appeal by judgment of 9 June 2016, setting aside the judgment of the referring court and point 1.1 of the operative part of the recovery decision of 8 January 2014, together with the part of point 1.2 of that decision concerning interest. The Riigikohus (Supreme Court) further referred the case back to the referring court for further examination. The judgment of the Riigikohus (Supreme Court) is based on, inter alia, the following considerations:

– a firm commitment to purchase equipment before the submission of an aid application does not exclude an incentive effect where the purchaser can withdraw from the contract without excessive difficulty in the event that aid is refused, which is apparently not ruled out in the present case;

– since there is no provision of EU law that expressly and peremptorily requires Member States to recover unlawful aid where there is no Commission decision, the recovery of such aid on the initiative of the Member State concerned is a decision that is at the discretion of its authorities;

– when aid is to be recovered on the initiative of the Member State concerned, a discretionary assessment should be undertaken, taking into consideration the legitimate expectations of the beneficiary which may be engendered by the actions of a national authority;

– while it is not clear, in this case, that the limitation period of 4 years laid down in Article 3(1) of Regulation No 2988/95 in cases of recovery of structural aid paid by the Member State concerned is applicable, in any event, the limitation period of 10 years laid down in Article 15(1) of Regulation No 659/1999 cannot apply where there has been no decision of the Commission on the recovery of aid; and

– neither Estonian law nor EU law offer any legal basis for claiming interest over the period from payment of the aid at issue until its recovery, given, in particular, that Articles 9 and 11 of Regulation No 794/2004, in accordance with the first sentence of Article 14(2) of Regulation No 659/1999, concern only interest on aid that is to be recovered pursuant to a decision of the Commission and that Article 4(2) and Article 5(1)(b) of Regulation No 2988/95 do not impose any obligation to pay interest, but presuppose that such an obligation is provided for by EU legislation or that of the Member States.

31 In the resumed procedure before the referring court, Eesti Pagar claims, inter alia, that the contracts that it entered into on 28 August, 29 September and 13 October 2008 were not binding, since, in the event that the aid applied for had been refused, it could have easily terminated them at the expense of modest withdrawal costs. The plan to acquire and install a bread production line would not have been carried out without the aid applied for and EAS ought to have examined the substance of whether that aid had an incentive effect.

32 Eesti Pagar also claims that the fact that those contracts had been entered into was known to EAS when it submitted the aid application and that the conclusion of those contracts before the submission of that application had been recommended to it by a representative of EAS. By granting the aid applied for, EAS accordingly caused Eesti Pagar to hold a legitimate expectation that that aid was lawful.

33 Further, Eesti Pagar argues that EAS is under no obligation to recover the aid at issue; that the recovery of that aid is no longer possible because of the limitation rule laid down in Paragraph 11(1) of Government Decree No 278 and in Paragraph 26(6) of the STS, and that of Article 3(1) of Regulation No 2988/95, and that the interest claimed is contrary to Paragraph 27(1), and to Paragraph 28(1) to (3), of the STS.

34 EAS and the Ministry consider that the aid application did not satisfy the conditions laid down in Article 8(2) of Regulation No 800/2008 and that, under, in particular, Article 101 of Regulation No 1083/2006, EAS was obliged to claim from Eesti Pagar repayment of the aid at issue.

35 EAS denies that, when it was examining the aid application, it was aware of the contracts entered into by Eesti Pagar on 28 August, 29 September and 13 October 2008 or that it recommended that they be concluded. According to EAS, it did not cause Eesti Pagar to hold any legitimate expectation. The Ministry considers that, in any event, neither the good faith of the beneficiary nor the conduct of an administrative body can create an exemption from the obligation to repay unlawful aid.

36 According to EAS and the Ministry, the limitation period of 10 years provided for in Article 15(1) of Regulation No 659/1999 is applicable in this case, at least by analogy, and the obligation to pay interest follows from, inter alia, Article 14(2) of that regulation.

37 On 30 December 2016 the Commission submitted its observations to the referring court in the capacity of an *amicus curiae*.

38 The referring court states, first, that, while it is bound, in accordance with a rule of domestic law, by rulings on a point of law by the judgment of 9 June 2016 of the Riigikohus (Supreme Court), it is clear from the case-law of the Court that the existence of such a rule cannot deprive it of the right under Article 267 TFEU to refer to the Court questions on the interpretation of EU law.

39 The referring court states, second, that the analysis of the Riigikohus (Supreme Court) to the effect that it is possible to assess whether the person who submitted an application with a view to obtaining aid could, in the event that that aid was refused, have freed itself from those contracts without undue difficulty, is inspired by case-law of the Court which relates not to powers of national authorities in the context of a general block exemption regulation, but in the context of an individual assessment made by the Commission under Article 107(3) TFEU. The referring court is however doubtful whether that case-law can be transposed to an assessment of incentive effect made by the Member State concerned on the basis of Regulation No 800/2008 and is uncertain whether an authority of that Member State has the power to assess the substance of whether the aid at issue lacks an incentive effect.

40 Third, the referring court considers that it is not clear from the case-law of the Court whether a Member State, when it takes a decision to recover unlawful aid in the absence of any such decision by the Commission, is permitted to rely on the national rules of administrative procedural law and to take into consideration a legitimate expectation which the national authority caused the beneficiary of the aid at issue to hold.

41 Fourth, the referring court considers that it also remains uncertain whether, in relation to a decision to recover unlawful aid taken by an authority of a Member State, reference should be made to the limitation period of 4 years laid down in Article 3(1) of Regulation No 2988/95 or to the limitation period of 10 years laid down in Article 15(1) of Regulation No 659/1999.

42 Fifth, the referring court states that, although the Riigikohus (Supreme Court) has partially resolved the dispute in relation to interest and has annulled the recovery decision in so far as it obliged Eesti Pagar to pay interest, it remains necessary, in order to resolve the case brought before it, to understand what conditions, under EU law, govern the payment of interest in a case of recovery of unlawful aid on the initiative of a Member State.

43 According to the referring court, the case-law of the Court does not disclose sufficiently clearly whether an authority of a Member State, when it recovers unlawful aid on its own initiative, must refer in that regard to the objectives laid down in Article 108(3) TFEU, irrespective of the rules of national law applicable to the claiming of interest, and to calculate the interest in accordance with the provisions of Articles 9 and 11 of Regulation No 794/2004.

44 In those circumstances the Tallinna Ringkonnakohus (Court of Appeal, Tallinn, Estonia) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

'[(1)] Is Article 8(2) of [Regulation No 800/2008] to be interpreted as meaning that, in the context of that provision, where the activity to be supported is, for example, the acquisition of equipment, "work on the project or activity" has started when the agreement for the purchase of that equipment has been entered into? Are the Member State authorities authorised to assess an infringement of the criterion mentioned in that provision in light of the costs of withdrawal from an agreement which contravenes the requirement of an incentive effect? If the Member State authorities have such authority, what level of costs (in percentage terms) incurred by withdrawal from the agreement may be deemed to be sufficiently marginal from the aspect of meeting the requirement of the incentive effect?

[(2)] Is a Member State authority obliged to recover an unlawful aid granted by it even if the … Commission has not adopted a corresponding decision?

[(3)] Can a Member State authority which decides to grant aid — under the misconception that it is aid that accords with the requirements [of Regulation No 800/2008], but which is in fact unlawful aid — engender a legitimate expectation on the part of the aid recipient? Is, in particular, the fact that the Member State authority is aware, on granting the unlawful aid, of the circumstances causing the aid not to be covered by the block exemption sufficient to give rise to a legitimate expectation on the part of the recipients of that aid?

If the preceding question is answered in the affirmative, must the public interest and the interest of the individual be weighed against one another? In the context of that weighing-up of interests, is it significant whether, in relation to the aid at issue, the Commission has adopted a decision declaring it incompatible with the common market?

[(4)] Which limitation period applies to the recovery of unlawful aid by a Member State authority? Is that period 10 years, corresponding to the period after which, under Articles 1 and 15 of [Regulation No 659/1999] the aid becomes existing aid and can no longer be recovered, or 4 years, in accordance with Article 3(1) of [Regulation No 2988/95]?

What is the legal basis for such recovery where the aid was granted from a structural fund: Article 108(3) TFEU, or [Regulation No 2988/95]?

[(5)] If a Member State authority recovers unlawful aid, is it then obliged to demand from the recipient the payment of interest on the unlawful aid? If so, which rules will then apply to the calculation of the interest, inter alia, as regards the rate of interest and the calculation period?'

Consideration of the questions referred

Admissibility of the request for a preliminary ruling

45 Eesti Pagar submits that, by its judgment of 9 June 2016, the Riigikohus (Supreme Court) resolved the main points at issue in the dispute in the main proceedings at national level, and consequently the questions referred for a preliminary ruling are, given the stage in the procedure when they have been referred, inadmissible, with the exception of the fourth question.

46 Further, Eesti Pagar consider that the first, second, third and fourth questions, as formulated by the referring court, are not relevant and that they are based, in particular, on misconceptions and on an incomplete and erroneous description of the facts in relation to: whether or not the contract entered into on 28 August 2008 was binding; the date when the contract entered into on 29 September 2008 took effect; the obligations imposed on Eesti Pagar by the contract entered into on 28 August 2008; the date when EAS was aware of those contracts, and whether EAS recommended that Eesti Pagar conclude those contracts before the submission of the aid application.

47 In that regard, it must be borne in mind in this regard that, in accordance with the Court's settled case-law, in the context of the cooperation between the Court and the national courts provided for in Article 267 TFEU, it is solely for the national court before which a dispute has been brought, and which must assume responsibility for the subsequent judicial decision, to determine in the light of the particular circumstances of the case both the need for a preliminary ruling in order to enable it to deliver judgment and the relevance of the questions which it submits to the Court. Consequently, where the questions referred concern the interpretation of EU law, the Court is in principle required to give a ruling (judgment of 27 June 2017, *Congregación de Escuelas Pías Provincia Betania*, C-74/16, EU:C:2017:496, paragraph 24 and the case-law cited).

48 It follows that questions relating to EU law enjoy a presumption of relevance. The Court may refuse to rule on a question referred for a preliminary ruling by a national court only where it is quite obvious that the interpretation of EU law that is sought bears no relation to the actual facts of the main action or its purpose, where the problem is hypothetical, or where the Court does not have before it the factual or legal material necessary to give a useful answer to the questions submitted to it (judgment of 27 June 2017, *Congregación de Escuelas Pías Provincia Betania*, C-74/16, EU:C:2017:496, paragraph 25 and the case-law cited).

49 In that regard, it must be recalled that the need to provide an interpretation of EU law which will be of use to the national court makes it necessary for the national court to define the factual and legal context of the questions it is asking or, at the very least, to explain the factual circumstances on which those questions are based. Those requirements are of particular importance in the area of competition, where the factual and legal situations are often complex (judgment of 27 June 2017, *Congregación de Escuelas Pías Provincia Betania*, C-74/16, EU:C:2017:496, paragraph 26 and the case-law cited).

50 In this case, first, it must be stated that the referring court has clearly defined the factual and legal context of the questions that it is asking and that it is not for the Court to verify their accuracy (see, to that effect, judgment of 20 May 2010, *Ioannis Katsivardas — Nikolaos Tsitsikas*, C-160/09, EU:C:2010:293, paragraph 27).

51 Second, it is very clear from that factual context that the Riigikohus (Supreme Court), by its judgment of 9 June 2016, referred the case back to the referring court for further consideration with respect to the issues that are the subject matter of the first, second, third and fourth questions.

52 Further, in accordance with the Court's settled case-law, a rule of national law, pursuant to which courts that are not adjudicating at final instance are bound by legal rulings of a higher court, cannot take away from those courts the discretion to refer to the Court questions of interpretation of European Union law concerned by such legal rulings. The Court has held that a court which is not ruling at final instance must be free, if it considers that a higher court's legal ruling could lead it to give a judgment contrary to European Union law, to refer to the Court questions which are of concern to it (judgment of 5 October 2010, *Elchinov*, C-173/09, EU:C:2010:581, paragraph 27).

53 Last, it is true, as the referring court states, that the Riigikohus (Supreme Court) has partially resolved, by means of its judgment of 9 June 2016, the dispute in the main proceedings with respect to interest, by annulling the decision to recover the aid at issue in so far as that decision obliged the applicant to pay interest on that aid from the date of payment until the date of its recovery. However, the referring court also adds that it remains necessary, in order to resolve that part of the dispute, to have the answer of the Court to the fifth question, clarifying the conditions which, under EU law, govern the payment of interest in a case of recovery of unlawful aid.

54 It follows that the request for a preliminary ruling is admissible in its entirety.

Substance

The first question, on the incentive effect of the aid

55 By its first question, the referring court seeks, in essence, to ascertain whether Article 8(2) of Regulation No 800/2008 must be interpreted as meaning that 'work on the project or activity', within the meaning of that provision, has started when the first order of equipment intended for that project or that activity has been made by means of concluding a sale contract before the submission of an aid application, so that aid cannot be deemed to have had an incentive effect within the meaning of that provision, or whether, notwithstanding the conclusion of such a contract, the competent national authorities must determine whether, having regard to the costs of withdrawal from the contract, the requirement of an incentive effect, within the meaning of that provision, is or is not satisfied.

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.

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.

71 As regards the interpretation of that condition, the Commission has stated, in paragraph 38 of the Guidelines, that 'aid may only be granted under aid schemes if the beneficiary has submitted an application for aid and the authority responsible for administering the scheme has subsequently confirmed in writing … that subject to detailed verification, the project in principle meets the conditions of eligibility laid down by the scheme before the start of the work on the project'.

72 The Commission, moreover, defined in paragraph 38 the latter concept of 'start of work' as meaning 'either the start of construction work or the first firm commitment to order equipment, excluding preliminary feasibility studies'.

73 As stated by the Advocate General in point 81 of his Opinion, that definition, albeit that the Guidelines are not binding, is relevant in that it meets the objectives and requirements set out in paragraph 61 of the present judgment.

74 It follows that, in a situation such as that in the main proceedings, the task of the national authorities is confined, with respect to the condition laid down in Article 8(2) of Regulation No 800/2008, to verifying whether it was indeed before the first order of equipment by means of entering into a legally binding commitment that the potential beneficiary submitted its aid application.

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.

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.

82 In the light of the foregoing, the answer to the first question is that Article 8(2) of Regulation No 800/2008 must be interpreted as meaning that 'work on the project or activity', within the meaning of that provision, started when a first order of equipment required for that project or that activity was made by means of entering into an unconditional and legally binding commitment before the submission of the aid application, regardless of any costs of resiling from that commitment.

The second question and the second part of the fourth question, on the obligation to recover unlawful aid

83 By its second question and the second part of its fourth question, which can be examined together, the referring court seeks, in essence, to ascertain whether EU law must be interpreted as meaning that it is the task of the national authority to recover on its own initiative aid that it has granted pursuant to Regulation No 800/2008 when it finds, subsequently, that the conditions laid down by that regulation were not satisfied and is uncertain as to the required legal basis for such recovery where the aid was co-financed from a structural fund.

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.

95 In the light of the foregoing, the answer to the second question and to the second part of the fourth question is that Article 108(3) TFEU must be interpreted as meaning that that provision requires the national authority to recover on its own initiative aid that it has granted pursuant to Regulation No 800/2008 when it finds, subsequently, that the conditions laid down by that regulation were not satisfied.

The third question, on the principle of the protection of legitimate expectations

96 By its third question, the referring court seeks, in essence, to ascertain whether EU law must be interpreted as meaning that the national authority may, where it grants aid while misapplying Regulation No 800/2008, cause the beneficiary of that aid to hold a legitimate expectation that that aid is lawful; whether, if the answer is that it can, it is then necessary to weigh the public interest against the interest of the individual party, and whether, in that regard, it is of any relevance whether or not there is a decision of the Commission on the compatibility of that aid with the internal market.

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.

106 In the light of the foregoing, the answer to the third question is that EU law must be interpreted as meaning that a national authority cannot, where it grants aid while misapplying Regulation No 800/2008, cause the beneficiary of that aid to hold a legitimate expectation that that aid is lawful.

The first part of the fourth question, on the limitation period applicable to the recovery of unlawful aid

107 By the first part of its fourth question, the referring court seeks, in essence, to ascertain whether EU law must be interpreted as meaning that, where a national authority has granted aid from a structural fund while misapplying Regulation No 800/2008, the limitation period applicable to the recovery of unlawful aid is the period of 10 years specified in Article 15 of Regulation No 659/1999, that of 4 years specified in Article 3(1) of Regulation No 2988/95, or the period laid down by applicable national law.

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 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.

128 In the light of all the foregoing, the answer to the first part of the fourth question is that EU law must be interpreted as meaning that, where a national authority has granted aid from a structural fund while misapplying Regulation No 800/2008, the limitation period applicable to the recovery of the unlawful aid is, if the conditions for the application of Regulation No 2988/95 are satisfied, four years, in accordance with Article 3(1) of that regulation or, if not, the period laid down by the applicable national law.

The fifth question, on the obligation to claim interest

129 By its fifth question, the referring court seeks, in essence, to ascertain whether EU law must be interpreted as meaning that, where a national authority undertakes on its own initiative the recovery of aid which it has wrongly granted under Regulation No 800/2008, that authority must claim interest from the beneficiary of that aid, and, if that is the case, what rules apply to the calculation of that interest, including the rate of interest and the period in which that interest runs.

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.

142 In the light of all the foregoing, the answer to the fifth question is that EU law must be interpreted as meaning that, where a national authority undertakes on its own initiative to recover aid which it has wrongly granted under Regulation No 800/2008, it is the duty of that authority to claim interest from the beneficiary of that aid in accordance with the rules of the applicable national law. In that regard, Article 108(3) TFEU requires that those rules should be such as 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.

Costs

143 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

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

1. **Article 8(2) of 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), must be interpreted as meaning that 'work on the project or activity', within the meaning of that provision, started when a first order of equipment required for that project or that activity was made by means of entering into an unconditional and legally binding commitment before the submission of the aid application, regardless of any costs of resiling from that commitment.**

2. **Article 108(3) TFEU must be interpreted as meaning that that provision requires the national authority to recover on its own initiative aid that it has granted pursuant to Regulation No 800/2008 when it finds, subsequently, that the conditions laid down by that regulation were not satisfied.**

3. **EU law must be interpreted as meaning that a national authority cannot, where it grants aid while misapplying Regulation No 800/2008, cause the beneficiary of that aid to hold a legitimate expectation that that aid is lawful.**

4. **EU law must be interpreted as meaning that, where a national authority has granted aid from a structural fund while misapplying Regulation No 800/2008, the limitation period applicable to the recovery of the unlawful aid is, if the conditions for the application of Council Regulation (EC, Euratom) No 2988/95 of 18 December 1995 on the protection of the European Communities financial interests are satisfied, four years, in accordance with Article 3(1) of the latter regulation or, if not, the period laid down by the applicable national law.**

5. EU law must be interpreted as meaning that, where a national authority undertakes on its own initiative to recover aid which it has wrongly granted under Regulation No 800/2008, it is the duty of that authority to claim interest from the beneficiary of that aid in accordance with the rules of the applicable national law. In that regard, Article 108(3) TFEU requires that those rules should be such as 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.

[Signatures]