

TALLINN DISTRICT COURT

Administrative chamber

30.12.2016

Administrative case No 3-15-241

Case: Appeal by AS Metaprint

Appellant: AS Metaprint
registration number 10000573
address Suur-Sõjamäe 30, 11415 Tallinn

Appellant represented by:

[REDACTED]
[REDACTED]

Respondent: Enterprise Estonia (*Ettevõtlike Arendamise Sihtasutus*)
registration number 90006006
address Lasnamäe 2, 11412 Tallinn
Email: eas@eas.ee

Party submitting observations: European Commission
address Rue de la Loi 200, 1049 Brussels, Belgium

Party submitting observations represented by:

[REDACTED]
[REDACTED]

European Commission's *amicus curiae* observations

1 INTRODUCTION

- 1.1 Article 29(1) of Council Regulation (EU) 2015/1589¹ states that 'Where the coherent application of Article 107(1) or Article 108 of the Treaty on the Functioning of the European Union so requires, the Commission, acting on its own initiative, may submit written observations to the courts of the Member States that are responsible for applying the State aid rules. It may, with the permission of the court in question, also make oral observations.'
- 1.2 On 27.10.2016, the European Commission ('the Commission') notified Tallinn District Court of its wish to submit written observations in accordance with the above-mentioned Regulation. In the Commission's view, it is necessary to submit observations to ensure the coherent application of Article 107(1) and Article 108 of the Treaty on the Functioning of the European Union ('TFEU'). Tallinn District Court has given the Commission the opportunity to submit its observations, for which the Commission thanks the Court.
- 1.3 On 9 June 2016, the Supreme Court handed down a judgment in administrative case 3-3-1-8-16. The circumstances of and legal arguments involved in that case were the same as those in this administrative case. In that administrative case, the Supreme Court interpreted and assessed European Union law. However, the Supreme Court did not consider it necessary to request a preliminary ruling in that administrative case from the Court of Justice of the European Union. Since the Court of Justice has taken the view that — even where national law provides that courts must respect judgments handed down by higher courts — national law must not preclude the right set out in the Treaty to address the Court of Justice^{2 3}, Tallinn District Court has the right to request a preliminary ruling in this administrative case regardless of the Supreme Court's opinions referred to above.
- 1.4 By submitting its observations, the Commission wishes to explain its views regarding Article 8(2) of Commission Regulation (EC) No 800/2008 (the General Block Exemption Regulation) and Article 108(3) TFEU. Although the Commission's observations are not binding on Tallinn District Court, they do, if Tallinn District Court does not agree with them, constitute further grounds for requesting a preliminary ruling from the Court of Justice in this administrative case.
- 1.5 Below, the Commission provides an overview of the structure of these observations, providing an outline of the topics covered in each subparagraph and the conclusions reached.
 - 1.5.1 Incentive effect — the Commission will explain that the incentive effect is assessed by Member State authorities in accordance with Article 8(2) of the Block Exemption Regulation. This is a purely formal assessment that differs significantly from the assessment of the incentive effect conducted by the Commission under Article 107(3) TFEU.
 - 1.5.2 Obligation of Member State authorities to recover unlawful aid — if the incentive effect criterion is not met, the aid is not consistent with the General Block Exemption

¹ Council Regulation (EU) 2015/1589 of 13 July 2015 laying down detailed rules for the application of Article 108 of the Treaty on the Functioning of the European Union (OJ L 248, 24.9.2015, p. 9).

² Case C-166/73: *Rheinmühlen-Düsseldorf v Einfuhr- und Vorratsstelle für Getreide und Futtermittel*, ECLI:EU:C:1974:3; Case C-689/13: *Puligienica Facility Esco SpA v Airgest SpA*, ECLI:EU:C:2016:199, paragraphs 31-36.

³ Commission Regulation (EC) No 800/2008 of 6 August 2008 declaring certain categories of aid compatible with the common market in application of Articles 87 and 88 of the Treaty (General Block Exemption Regulation) (OJ L 214, 9.8.2008, p. 3).

Regulation. If such aid has been paid to a beneficiary, the Member State is obliged to recover it.

- 1.5.3 Legitimate expectations — the Commission will explain the principles developed in the case-law of the Court of Justice for taking account of legitimate expectations in the context of recovering State aid, and will explain why legitimate expectations cannot be protected in this case and the aid is to be recovered.
- 1.5.4 Limitation period for recovering State aid — the limitation period is linked to the way in which new aid and existing aid are defined. If the 10-year period under EU law from the aid being awarded has not expired, recovery is not time-barred. The same conclusion can also be reached on the basis of national rules.
- 1.5.5 Interest rate and accounting period applicable when recovering aid — the method of calculating interest which is applied by Member State authorities in the event of recovering aid must eliminate any competitive advantages that have arisen as a result of the unlawful aid. Thus, in order to ensure the effectiveness of the State aid rules, the appropriate rules under Commission Regulation (EC) No 794/2004⁴ must be applied.
- 1.5.6 Appellant's alternative claim for damages — the Commission will explain why the Appellant's alternative claim against the Respondent for damages cannot be satisfied inasmuch as payment of damages would limit the effective functioning of the State aid rules.
- 1.5.7 The Commission's opinion as regards requesting a preliminary ruling — in the Commission's view, a preliminary ruling should be requested from the Court of Justice in this case, and the Commission has made proposals concerning the wording of the questions to be included in the request.

2 INCENTIVE EFFECT WITHIN THE MEANING OF A GENERAL BLOCK EXEMPTION

- 2.1 State aid that meets the conditions of the General Block Exemption Regulation, including the incentive effect criterion, as an exception to the prohibition of State aid
 - 2.1.1 Article 107(1) TFEU (formerly Article 87(1) EC) defines State aid and sets out the main criteria for assessing it. In this case, there is no dispute as to the fact that the aid awarded to the Appellant by the Respondent is State aid. The issue is whether the aid in question in this case is subject to the General Block Exemption Regulation.
 - 2.1.2 Article 107(3) TFEU provides a list of aid that may be considered to be compatible with the internal market. Assessing this is an exclusive competence of the Commission. In order for the Commission to exercise this competence and assess the compatibility of aid with the internal market, Article 108(3) TFEU (formerly Article 88(3) EC) sets out the obligation to inform the Commission and the prohibition on putting measures into effect (the final sentence) as follows: '*The Commission shall be informed, in sufficient time to enable it to submit its comments, of any plans to grant or alter aid. If it considers that any such plan is not compatible with the internal market having regard to Article 107, it shall without delay initiate the procedure provided for in paragraph 2. The Member State concerned shall not put its proposed measures into effect until this procedure has resulted in a final decision.*'
 - 2.1.3 The General Block Exemption Regulation provides for an exception to Article 108(3) TFEU. As explained in recital 1 to the General Block Exemption

⁴ Commission Regulation (EC) No 794/2004 of 21 April 2004 implementing Council Regulation (EC) No 659/1999 laying down detailed rules for the application of Article 93 of the EC Treaty (OJ L 140, 30.4.2004, p. 1).

Regulation, in adopting the Regulation the Commission has used the right, as it is empowered to do under Regulation (EC) No 994/98⁵, 'to declare, in accordance with Article 87 of the Treaty (now Article 107 TFEU), that under certain conditions [particular types of aid] are compatible with the common market and not subject to the notification requirement of Article 88(3) of the Treaty' (now Article 108(3) TFEU).

- 2.1.4 New aid (see paragraphs 5.1-5.4 on the definitions of new aid and existing aid) that does not meet the incentive effect criterion set out in the General Block Exemption Regulation and is established in contradiction of Article 108(3) TFEU is unlawful aid under Article 1(f) of Council Regulation (EU) 2015/1589⁶. Unlawful aid is to be recovered to defend the Commission's exclusive competence to assess compatibility with the internal market (see paragraph 3).
- 2.1.5 The Respondent has recovered aid awarded to the Appellant on the grounds that the aid awarded to the Appellant does not meet the incentive effect criterion set out in Article 8(2) of the General Block Exemption Regulation.
- 2.1.6 Pursuant to Article 8(2) of the General Block Exemption Regulation, the incentive effect criterion is worded as follows: '*... before work on the project or activity has started, the beneficiary has submitted an application for the aid to the Member State concerned.*' Thus, if an application for aid is submitted after work on the project has started, the incentive effect criterion as one of the requirements for applying the General Block Exemption Regulation has not been met, the General Block Exemption Regulation is not applicable, and the aid is unlawful. The obligations of the Member State in such circumstances are explained in paragraph 3 below.
- 2.2 Member State authorities and the Commission have different legal grounds and criteria for assessing the incentive effect
 - 2.2.1 In the judgment handed down in case No 3-3-1-8-16, the Supreme Court took the view that the Member State authorities should assess the incentive effect in the same way as the Commission and not solely on the basis of the General Block Exemption Regulation. The Commission does not agree with this view.
 - 2.2.2 Firstly, the Commission considers it necessary to explain that there are significant differences in the incentive effect as regards the context of the assessments conducted by the Commission and those conducted by the Member State authorities. Member State authorities are competent to assess only whether the aid meets the conditions of the General Block Exemption Regulation, i.e. the incentive effect criterion. This is a purely formal assessment. Where the Member State wishes to award aid that does not meet the incentive effect criterion, it must notify the Commission of its intention in accordance with Article 108(3) TFEU. The Commission is competent to assess the compatibility of the aid with the common market.
 - 2.2.3 Since the Commission, unlike the Member States, is competent to assess the compatibility of aid with the common market, the analysis of the incentive effect has a considerably broader meaning for the Commission than for the Member State authorities. It is a substantive assessment.
 - 2.2.4 Paragraph 16 of the Commission notice on the enforcement of State aid law by national courts⁷ ('the Notice') explains that 'National court proceedings in State aid matters may sometimes concern the applicability of a Block Exemption Regulation [...] Where the applicability of such a Regulation [...] is at stake, the national court can only assess whether all the conditions of the Regulation [...] are met. It cannot assess

⁵ Council Regulation (EC) No 994/98 of 7 May 1998 on the application of Articles 92 and 93 of the Treaty establishing the European Community to certain categories of horizontal State aid (OJ L 142, 14.5.1998, p. 1).
⁶ Council Regulation (EU) 2015/1589 of 13 July 2015 laying down detailed rules for the application of Article 108 of the Treaty on the Functioning of the European Union (OJ L 248, 24.9.2015, p. 9).
⁷ 2009/C 85/01.

the compatibility of an aid measure where this is not the case, since that assessment is the exclusive responsibility of the Commission.’ In line with the case-law of the Court of Justice, national courts do not have the right to declare that State aid is compatible with Article 107(2) or (3) TFEU.⁸ The Commission is of the opinion that Member State authorities must be guided by the same principles as the courts.

- 2.2.5 The Supreme Court has not taken this distinction into account in the judgment handed down in case No 3-3-1-8-16, and considers assessments conducted by Member State authorities to be equivalent to those conducted by the Commission.
- 2.2.6 Below, please find a more detailed explanation of the circumstances that are of importance in the context of the incentive effect criterion under the General Block Exemption Regulation.
- 2.3 Appropriate criteria for establishing and applying the incentive effect in the context of the General Block Exemption Regulation
- 2.3.1 Recital 28 to the General Block Exemption Regulation sets out the objective behind making the incentive effect a requirement for the General Block Exemption Regulation to apply. Specifically, the incentive effect criterion is necessary ‘to ensure that the aid is necessary and acts as an incentive to develop further activities or projects.’ Thus the General Block Exemption Regulation ‘should not apply to aid for activities in which the beneficiary would already engage under market conditions alone.’ In order to achieve this objective, a rule is laid down in Article 8(2), which is also repeated in Recital 28 — there is deemed to be an incentive effect if the application is submitted before work on the project or activity has started.
- 2.3.2 Since the application of a general block exemption constitutes an exception to the obligation to inform and the prohibition on putting measures into effect laid down in Article 108(3) TFEU, it is essential that the Member States apply it uniformly. For this reason, the Commission has put in place a simple rule that should ensure that the incentive effect criterion is applied uniformly by all authorities awarding aid and by courts in the Member States. In its recent case-law, the Court of Justice has emphasised the need for the General Block Exemption Regulation to ‘be interpreted strictly’, explaining that ‘the aim of [the block exemption] regulations is to increase transparency and legal certainty. Fulfilling the conditions laid down by those regulations, including [...] those laid down by the General Block Exemption Regulation enables those aims to be fully achieved.’⁹
- 2.3.3 As explained above, the General Block Exemption Regulation provides a rule for establishing incentive effect which is straightforward for the Member State authorities and, according to Court of Justice case-law, is to be interpreted strictly. Specifically, aid has an incentive effect if the application for aid is submitted before work on the project or activity has started. This is a rule that is to be applied on the basis of easily identifiable and objective factors, and it does not require any complex analysis to be carried out. In order to apply the rule, it is necessary only to establish when work began on the first activity linked to the implementation of a project for which aid has been awarded, and to check whether this took place before or after the application was submitted. For the aid to be covered by the General Block Exemption Regulation, work must not have begun on the project activities before the application was submitted.

⁸ Case C-199/06: *Centre d'exportation du livre français (CELF) and Ministre de la Culture et de la Communication v Société internationale de diffusion et d'édition (SIDE)*, ECLI:EU:2008:79, paragraph 38; Case C-17/91: *Georges Lornoy en Zonen NV and others v Belgian State*, ECLI:EU:C:1992:514), paragraph 30; and Case C-354/90: *Fédération Nationale du Commerce Extérieur des Produits Alimentaires and Syndicat National des Négociants et Transformateurs de Saumon v French Republic*, ECLI:EU:C:1991:440, paragraph 14.

⁹ Case C-493/14: *Dilly's Wellnesshotel GmbH v Finanzamt Linz*, ECLI:EU:C:2016:577), paragraphs 37–38.

- 2.3.4 At this point, the Commission would point out that the Supreme Court, in paragraph 21 of the judgment handed down in case No 3-3-1-8-16, has mistakenly interpreted the role of the Member State authorities in assessing the incentive effect. The Supreme Court took the view that the appropriate position was the ruling of the General Court in line with which, where work had begun before the application was submitted, the fact that the aid was necessary (incentive effect) could be proved by other circumstances.¹⁰ The Supreme Court has not taken account of the fact that, in the case before the General Court, the issue did not concern assessment of the incentive effect to be conducted by the Member State on the basis of Article 8(2) of the General Block Exemption Regulation, but rather individual assessment to be conducted by the Commission on the basis of Article 107(3) TFEU. The Commission assesses aid measures and aid schemes individually, regardless of the provisions of the General Block Exemption Regulation. The Commission's assessment is necessary in cases where the General Block Exemption Regulation is not applicable to the aid, since in such cases the Commission has the exclusive competence to assess the compatibility of the aid with the internal market (see paragraph 2.1.2 above). In this context, the Commission may acknowledge the presence of an incentive effect even in circumstances where the aid does not match the definition of incentive effect under the General Block Exemption Regulation (i.e. work had begun on the project before the application was submitted) but, taking the circumstances into account, the view could nevertheless be taken that the project would not have been carried out without aid (i.e. under market conditions). Thus the view referred to by the Supreme Court in the judgment handed down in case No 3-3-1-8-16 is appropriate in respect of assessments to be conducted by the Commission but not in this case, where the issue at stake is application of the General Block Exemption Regulation by Member State authorities.
- 2.3.5 In this particular case, the Appellant was awarded aid to purchase equipment — the funded project was the purchase of equipment. The contract between the Appellant and Styner+Benz Form Tech Ltd for the purchase of the equipment was concluded before the application for aid was submitted. Thus the Appellant had undoubtedly begun to implement the project, since the whole reason for the project was to purchase equipment and entering into a contract to this end is directly linked to implementing the project.
- 2.3.6 In the proceedings, the Appellant has put forward views and described circumstances in support of its claim that the contract was not binding and that work had thus not begun on the project. These factors (even if they are proven during the proceedings to be true) are of no importance in assessing whether the incentive effect criterion has been met. The only question of importance is whether entry into a contract can be considered as the beginning of work on a project, and the Commission's view is that it can. In this particular case, where the whole reason for the project was precisely to purchase equipment and where a contract was concluded to this end, it cannot be said that work on the project had not begun. There is no dispute in this case as to the fact that the contract in question was signed before the application was submitted. Similarly, in the context of the General Block Exemption Regulation, the claims made by the Appellant — that when assessing the incentive effect it is necessary to ascertain whether the Appellant would under market conditions have made the investment for which support was received or whether, without that support, the Appellant would have acquired a cheaper production line offering different functionality — are irrelevant. Since any evaluation of these factors would go beyond the definition of incentive effect under the General Block Exemption Regulation, only the Commission has the competence to assess them in order to establish incentive effect (see paragraphs 2.2.2-2.2.4 above). If a Member State authority were to begin evaluating those factors, it would also go beyond the limits of the powers granted to it under the General Block Exemption Regulation and would interfere with the exclusive competence granted to the Commission under the TFEU. In this case, the

¹⁰ Case C-630/11: *HGA srl and others v European Commission*, ECLI:EU:C:2013:387, paragraphs 108-110.

Respondent has justifiably not taken these factors into account and, in taking the recovery decision, has proceeded solely on the basis of the definition of incentive effect set out in the General Block Exemption Regulation. Thus, the Respondent has correctly identified that the aid awarded to purchase the equipment has no incentive effect under Article 8(2) of the General Block Exemption Regulation, which means that one of the conditions for applying the General Block Exemption Regulation has not been met, the General Block Exemption Regulation does not apply, and the aid in question is unlawful.

- 2.3.7 In paragraphs 23 and 24 of its judgment in case No 3-3-1-8-16, the Supreme Court mistakenly found on reviewing the administrative case that it was necessary to establish whether early termination of the contract would have been possible and what the potential related costs would have been, in order to ensure that the possibility of cancelling the contract to purchase the equipment was neither merely theoretical nor prohibitively costly. Reference is made in paragraph 22 of the judgment to the fact that the Supreme Court had inferred the need for this criterion to be established from the Commission's explanations concerning Article 8 of the General Block Exemption Regulation. This conclusion is based on an incorrect interpretation of appropriate explanations. Below, the Commission will explain what was actually meant by the Commission's explanations that were referred to by the Supreme Court and what the legal status of the appropriate explanations is.
- 2.3.8 The above-mentioned document is a guide for Member States to gain a better understanding of the nature of the incentive effect criterion. Where there is doubt about whether the incentive effect criterion has been met, it would be best for Member State authorities to ask for the Commission's opinion. The aim of the document is not to provide a binding interpretation of the General Block Exemption Regulation, but rather initial references that Member State authorities can use to assess whether it is necessary to contact the Commission. That was done in this case. The Ministry of Finance asked for the Commission's opinion once the Respondent began to suspect that the incentive effect criterion had not been met as regards aid already paid. The Commission replied to the Ministry of Finance's questions by email on 1 June 2012, explaining that it may be necessary to assess the nature of contractual obligations only in respect of preparatory activities and not in respect of activities linked to the process of beginning to implement a project. The Commission's reply referred to by the Respondent was submitted to the court in this case as an annex to the reply to the appeal. The Appellant requested that this evidence be returned, and so the Commission is hereby resubmitting it to the court (Annex 1).
- 2.3.9 The Commission notes that the above-mentioned document is neither binding on nor relevant to Member State authorities or national courts. It does not present the Commission's official position, and nor is it binding on the Commission itself. The Supreme Court concluded in the judgment handed down in case No 3-3-1-8-16 that the State aid guidelines did not apply, and for the same reasons nor does the above-mentioned document apply. Member State authorities must proceed on the basis of the General Block Exemption Regulation, which is binding on them, and the definition of incentive effect set out therein.
- 2.3.10 As a result, the precise conditions of the contract to purchase equipment which was entered into by the Appellant are irrelevant in this case, as is the hypothetical question of whether the Appellant would have invested differently if it had not received support. Thus it is not necessary in this case to establish those facts or to analyse them in greater depth. Since it has been established that a contract to purchase equipment had been concluded and thus implementation of the project had begun before the application for aid was submitted, it has been proven that the aid in question was unlawful.

3 OBLIGATION OF MEMBER STATE TO RECOVER UNLAWFUL STATE AID

- 3.1 In its judgment in case No 3-3-1-8-16, the Supreme Court has based its line of reasoning to a significant extent on the fact there is no Commission decision concerning the recovery of the aid. Accordingly, the Supreme Court has observed that there is neither a recovery decision that is mandatory for the Member State, nor certainty that the aid is incompatible with the common market (paragraph 30 of the Supreme Court's judgment in case No 3-3-1-8-16). The Supreme Court found that in this case the recovery of the aid is a discretionary power of the Member State and that there is no provision of EU law that expressly and imperatively obliges Member States to recover aid without a decision by the Commission (paragraph 31 of the above-mentioned Supreme Court judgment). The Supreme Court reiterated that the important factor is the Commission's assessment — discretionary power reduces if the Commission has established that State aid is incompatible with the common market (paragraph 33 of the above-mentioned Supreme Court judgment).
- 3.2 The Commission cannot accept the above-mentioned arguments.
- 3.3 Aid that is awarded in breach of Article 108(3) TFEU is unlawful aid (see paragraph 2.1.4) and must be recovered. The aim of recovering aid is to safeguard the Commission's competence to approve aid on the basis of Article 107(3) TFEU, since the process of assessing the compatibility of aid with the common market and of deciding to approve it is an exclusive competence of the Commission.
- 3.4 The obligation to recover unlawful aid is confirmed by case-law.¹¹ There is justification for failing to recover aid only in a very limited number of exceptional cases (see paragraph 4), and the Commission has explained why this case is not one of those exceptions. It is for the Member State authorities and national courts to draw all the necessary conclusions from infringements of this nature in accordance with national law, with regard to both the validity of the acts giving effect to the aid and the recovery of financial support granted in breach of that provision.¹²
- 3.5 The question of whether the Commission has taken a recovery decision or not is of no importance here. In the Commission's view, Member State authorities are obliged to recover unlawful State aid also on their own initiative. The Court of Justice has acknowledged that recovery is mandatory also in situations in which the Member State authorities have themselves taken measures to restore the situation that existed before the aid was granted.¹³ In *Xunta de Galicia* a local authority decided to cancel an aid scheme, in *Residex Capital IV* a Member State authority refused to recognise a guarantee, since the guarantee took the form of unlawful aid, and in *Klausner Holz Niedersachsen* a Member State authority refused to observe a contract since the contract constituted unlawful aid.
- 3.6 The recovery obligation applies to all Member State authorities, both courts and administrative authorities. This has been confirmed by the Court of Justice, referring to the fact that EU law is binding not only on national courts but also on all organs of

¹¹ Case C-71/04: *Administración del Estado v Xunta de Galicia*, ECLI:EU:C:2005:493, paragraph 49; Case C-39/94: *Syndicat français de l'Express international (SFEI) and others v La Poste and others*, ECLI:EU:C:1996:285, paragraphs 40 and 68 and Case C-354/90: *Fédération Nationale du Commerce Extérieur des Produits Alimentaires and Syndicat National des Négociants et Transformateurs de Saumon v French Republic*, ECLI:EU:C:1991:440, paragraph 12. Case C-275/10: *Residex Capital IV CV v Gemeente Rotterdam*, ECLI:EU:C:2011:814, paragraph 33.

¹² Case C-275/10: *Residex Capital IV CV v Gemeente Rotterdam*, ECLI:EU:C:2011:814, paragraphs 28-29. See also Case C-690/13: *Trapeza Eurobank Ergasias AE v Agrotiki Trapeza tis Ellados AE (ATE) and Pavlos Sidiropoulos*, ECLI:EU:C:2015:235; Case C-590/14: *Dimosia Epicheirisi Ilektrismou AE (DEI) and the Commission v Alouminion tis Ellados VEAE*, ECLI:EU:C:2016:797.

¹³ Case C-505/14: *Klausner Holz Niedersachsen GmbH v Land Nordrhein-Westfalen*, ECLI:EU:C:2015:742; Case C-275/10: *Residex Capital IV CV v Gemeente Rotterdam*, ECLI:EU:C:2011:814; Case C-71/04: *Administración del Estado v Xunta de Galicia*, ECLI:EU:C:2005:493.

the administration that are obliged to apply EU law¹⁴.

- 3.7 In accordance with the case-law of the Court of Justice, the recovery of unlawful State aid is thus not a discretionary power of a Member State authority, as stated by the Supreme Court in case No 3-3-1-8-16, but a clear and unambiguous obligation that must be fulfilled by Member State authorities.

4 **LIMITS ON TAKING ACCOUNT OF RULES DERIVING FROM NATIONAL LAW AND, IN PARTICULAR, THE PRINCIPLE OF LEGITIMATE EXPECTATIONS**

- 4.1 The Court of Justice has recognised that there may be justification for failing to recover unlawful aid only in exceptional circumstances.¹⁵

- 4.2 The Court of Justice has found that ‘... although the [EU] legal order cannot preclude national legislation which provides that the principles of the protection of legitimate expectations and legal certainty are to be observed with regard to recovery [of State aid], it must be noted that, in view of the mandatory nature of the supervision of State aid ... under Article 108 TFEU (formerly Article 93), undertakings ... 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.’¹⁶ The Court of Justice also repeated the conclusion it had drawn in earlier case-law that ‘A diligent businessman should normally be able to determine whether that procedure has been followed.’¹⁷

- 4.3 In this case, the following view that has been established in case-law is of particular importance. Specifically, the Court of Justice has found that ‘The recipient’s obligation to ensure that the procedure set out in Article [108(3) TFEU] has been complied with cannot, in fact, depend on the conduct of the State authorities, even if the latter were responsible for the ... aid decision to such a degree that revocation appears to be a breach of good faith.’¹⁸ In circumstances such as those ..., failure to revoke the decision granting aid would seriously and adversely affect the Community interest and render practically impossible the recovery required by Community law.¹⁹

- 4.4 Although the possibility that the principle of legitimate expectations also applies in the context of these exceptional circumstances and in conjunction with the Member State’s conduct cannot, in principle, be ruled out, in practice there have been no cases at all in which the Court of Justice has accepted the protection of legitimate expectations in a situation in which those legitimate expectations were created by a Member State authority.

- 4.5 Having regard to the case-law described above, the Supreme Court’s views in case No 3-3-1-8-16 concerning the application of EU law are incorrect. Below, the Commission will analyse those views and explain how they contradict the EU State aid rules and relevant case-law.

- 4.6 The Supreme Court observed in its judgment in case No 3-3-1-8-16 that if a recovery decision is taken and discretionary power is exercised, account must be taken of legitimate expectations inasmuch as this does not render it impossible or unreasonably complicated to enforce EU law (paragraph 31). Firstly, the Commission stresses that the Member State is obliged to recover aid under Article 108(3) TFEU.

¹⁴ Case C-103/88: *Fratelli Costanzo SpA v Comune di Milano*, ECLI:EU:C:1989:256, paragraphs 30-31.

¹⁵ Case C-39/94: *Syndicat français de l’Express international (SFEI) and others v La Poste and others*, ECLI:EU:C:1996:285, paragraph 71.

¹⁶ Case C-24/95: *Land Rheinland-Pfalz v Alcan Deutschland GmbH*, ECLI:EU:C:1997:163, paragraph 25.

¹⁷ *Ibid.*; Case C-5/89: *Commission of the European Communities v Federal Republic of Germany*, ECLI:EU:C:1990:320, paragraphs 13-14; Case C-169/95: *Kingdom of Spain v Commission of the European Communities*, ECLI:EU:C:1997:10, paragraph 51.

¹⁸ Case C-24/95: *Land Rheinland-Pfalz v Alcan Deutschland GmbH*, ECLI:EU:C:1997:163, paragraph 41.

¹⁹ *Ibid.*, paragraph 42.

Since in this case the court is enforcing EU law, discretionary powers must be exercised and account taken of legitimate expectations in accordance with the case-law of the Court of Justice. As explained above, the Member State's margin of discretion in this case is extremely limited and concerns only the establishment of possible exceptional circumstances, and this also needs to be defined in the light of the case-law of the Court of Justice. At the same time, account must be taken of the 'diligent businessman' rule, which places on the beneficiary the responsibility to check that the aid complies with the State aid rules (including the conditions of the General Block Exemption Regulation, such as the incentive effect criterion).

- 4.7 The Supreme Court has also noted in its judgment in case No 3-3-1-8-16 that an informed recommendation by the aid provider to enter into contracts before submitting an application or the fact that the aid provider was aware of such contracts when approving an application for support may be considered factors in justification of maintaining aid (paragraph 34 of the above-mentioned Supreme Court judgment). At this point the Commission believes it is important to emphasise that, in any case, the question of whether the aid provider was aware of the breach of State aid rules has no bearing on the matter. Member State authorities that have mistakenly awarded aid in breach of the General Block Exemption Regulation cannot create legitimate expectations for the beneficiary. If Member State authorities could create legitimate expectation for the beneficiary by awarding unlawful aid, this would allow the State aid rules to be ignored. The recipient could carry on its business, proceeding on the basis of what was unlawful action by Member State authorities, and the Commission would not necessarily become aware of unlawful State aid granted by Member States.
- 4.8 Having regard to the facts which have become known to the Commission in this case, the Commission takes the view that there are no exceptional circumstances present in this case which would justify account being taken of the beneficiary's legitimate expectations and recovery of the aid not being pursued.
- 4.9 The Commission also considers it necessary to clarify that it does not agree with the views expressed in paragraph 29 of the Supreme Court's judgment in case No 3-3-1-8-16. Specifically, the Supreme Court noted that the inadmissibility of the aid was not a result of the Commission's not having been informed, but of the fact that the provider of the aid considered that the aid had no incentive effect. The Supreme Court also noted that if a Member State authority makes an error when establishing incentive effect, the authority does not become an incompetent institution. In using this argument, the Supreme Court has inferred that the aid provider would seem to have the autonomous freedom to interpret the incentive effect criterion set out in the General Block Exemption Regulation and be entitled to consider the criterion to have been met on the basis of its own subjective assessment. However, as demonstrated above, Member State authorities have no such right. The incentive effect criterion is to be interpreted strictly, and in the absence of an incentive effect aid is not to be awarded on the basis of the General Block Exemption Regulation. A diligent undertaking should not accept aid which does not meet the incentive effect criterion, which is thus incompatible with the General Block Exemption Regulation and in respect of which there has been no prior approval from the Commission. In the event of doubt, the beneficiary should ask the Member State authority to notify the Commission of its intent to award aid.
- 4.10 As a diligent undertaking, the Appellant should have known that the General Block Exemption Regulation is not applicable in situations where work has begun on implementing a project (i.e. a contract was concluded to purchase equipment) before the application was submitted. The Appellant should have waited until the application had been submitted before entering into the contract. Thus the Appellant cannot use the defence of legitimate expectations in this case, and the aid is to be recovered in line with Article 108(3) TFEU.

5 **LIMITATION PERIOD FOR RECOVERING STATE AID**

- 5.1 As mentioned above, the obligation of the Member State to recover unlawful State aid derives from Article 108(3) TFEU. The obligation concerns new aid only, not existing aid.
- 5.2 Existing aid and new aid are defined in Article 1(b) and (c) of Council Regulation (EC) No 659/1999. In accordance with Article 1(b)(iv), aid which is deemed to be existing pursuant to Article 15 of Council Regulation (EC) No 659/1999 is existing aid.
- 5.3 Pursuant to Article 15 of Council Regulation (EC) No 659/1999, the powers of the Commission to recover unlawful aid are subject to a limitation period of 10 years after it is awarded to the beneficiary. Under Article 15(3), any aid with regard to which the limitation period has expired is deemed to be existing aid.
- 5.4 Thus any aid with regard to which the limitation period has not expired is new aid. Consequently, this case concerns new aid, which means that the conclusions set out above are applicable, i.e. the aid is to be recovered.
- 5.5 For the reasons listed above, the Commission does not agree with the view expressed by the Supreme Court in its judgment in case No 3.3.1.8.16 that Regulation (EC) No 659/1999 is not applicable since it applies only in respect of recovery decisions made by the Commission (paragraph 16 of the above-mentioned Supreme Court judgment). The 10-year limitation period laid down in Regulation (EC) No 659/1999 is also applicable to Member States, since it is linked directly to the definitions of existing aid and new aid under the TFEU and, correspondingly, to ensuring the prohibition on putting measures into effect, i.e. the Commission must have the opportunity to assess the compatibility of new aid with the common market, and new aid is defined on the basis of the 10-year limitation period. In a situation in which a Member State recovers aid under Article 108(3) TFEU, the 10-year period represents the time that must pass for the recovery obligation to be extinguished.
- 5.6 A question has also arisen in this case regarding the application of the limitation period set out in Article 3(1) of Council Regulation (EC, Euratom) No 2988/95: 'The limitation period for proceedings shall be four years as from the time when the irregularity ... was committed.'
- 5.6.1 Support was granted to the Appellant in accordance with Regulation No 44 of the Minister for Economic Affairs and Communications of 4 June 2008 on the conditions and procedure for supporting investment in technology by industrial undertakings, which was adopted on the basis of the 2007-2013 Structural Assistance Act ('the SAA'). Section 1(2) SAA lays down that the Act 'applies to the grant and use of the funds allocated for structural assistance on the basis of the operational programme approved by the European Commission in accordance with Article 32(5) of Council Regulation (EC) No 1083/2006 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.' Thus the aid awarded to the Appellant is support financed by the Union funds, and the various aspects relating to it are regulated by the Regulation on the protection of financial interests.
- 5.6.2 Article 1(2) of Regulation No 659/1999 states that an irregularity is '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.' However, the Regulation on the protection of financial interests has no independent significance in this case, since the State aid rules constitute a special regime derived from the TFEU and appropriate Regulations of the EU institutions. There would be no justification for treating this extensive²⁰ set of rules

²⁰ Council Regulation (EC) No 659/1999 laying down detailed rules for the application of Article 93 of the

and relevant case-law as a part of an irregularity within the meaning of the Regulation on the protection of financial interests simply because the funds used by the Member State to provide aid are from the EU budget. It must also be borne in mind that, as far as the State aid rules are concerned, the Commission also has the authority to take recovery decisions. Since the Commission may take a recovery decision within a period of 10 years, and since the Member State is also pursuing the same goal (to eliminate the competitive advantage of unlawful State aid), there is no justification for subjecting recovery decisions taken by a Member State to a shorter limitation period. This would also be contrary to the principle of legal certainty and the aim of the limitation regime, because even after the limitation period applicable to Member State authorities has expired, the Commission could still take a recovery decision.

5.7 The Respondent took the decision to recover aid on the grounds that the conditions of the General Block Exemption Regulation had not been met. Among the bases for recovery listed by the Respondent were provisions from the 2007-2013 Structural Assistance Act, but the substantive basis for recovery arises from failure to meet the incentive effect criterion and thereby from the prohibition on putting measures into effect. Although the Commission's view is that the explanations provided above apply in respect of limitation, in this case even the application of national provisions does not restrict the limitation period, since Section 26(5) SAA sets out that recovery decisions may be made until 31 December 2025. In this case, that deadline has not yet passed.

5.8 In the light of the above, the Commission is of the opinion that, under EU law, recovery is not time-barred and that Respondent I was and remains obliged to recover the aid. Recovery is not time-barred even if the national rules apply in respect of limitation.

6 INTEREST RATE APPLICABLE TO THE RECOVERY OF AID

6.1 In accordance with Article 14(2) of Council Regulation (EC) No 659/1999, the aid to be recovered pursuant to a negative decision taken by the Commission in respect of aid (a recovery decision) is to '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.' The methods for fixing the interest rate and for applying interest are set out in Articles 9 and 11 of Commission Regulation (EC) No 794/2004²¹. Those provisions concern recovery decisions taken by the Commission and not those taken on the initiative of Member State authorities. The Commission will now explain why those rules should also be followed in this case, where the aid is being recovered by a Member State authority.

6.2 In paragraph 40 of its judgment in case No 3-3-1-8-16, the Supreme Court expressed the view that the provisions of the above-mentioned Regulations are not relevant for calculating interest in this case, since the aid is being recovered by the Respondent on its own initiative and there is no recovery decision by the Commission to make this mandatory. In justifying this position, the Supreme Court took the view that interest cannot be charged in the same manner as under an EU regulation that does not apply to this case (paragraph 41 of the judgment). The Commission does not agree with these views.

6.3 The Commission is of the opinion, as expressed in the guidelines for the national courts, that the requirement for interest arises directly from Article 108(3) TFEU and that, by requiring interest to be paid, the national courts are

EC Treaty (OJ L 83, 27.3.1999, p. 1).

²¹ Commission Regulation (EC) No 794/2004 of 21 April 2004 implementing Council Regulation (EC) No 659/1999 laying down detailed rules for the application of Article 93 of the EC Treaty (OJ L 140, 30.4.2004, p. 1).

pursuing the same objective as the Commission. Thus when it comes to interest charges, the national courts must proceed on the basis of the principle of the effectiveness of EU law. Since the aim of interest in this case is precisely to eliminate any distortions of competition, any provisions of national law which do not allow interest to be charged as of the award of aid should be disregarded in order to ensure the effective functioning of EU law. The consequences of applying the principle of effectiveness are that a national provision is not applied unless it ensures the effective functioning of the State aid rules.²²

- 6.4 The Commission's view is that, owing to the principle of the effectiveness of EU law, any method used by a national court for calculating interest may not be less rigorous than that set out in Commission Regulation (EC) No 794/2004. Consequently, interest must be calculated on a compound basis and the applicable interest rate may not be lower than the reference rate. Thus the method set out in the implementing Regulation should not apply by analogy, as indicated in paragraph 41 of the above-mentioned Supreme Court judgment, but rather the obligation to apply the method derives from Article 108(3) TFEU, which requires Member States to eliminate all competitive advantages that have arisen as a result of State aid (incl. to recover aid with interest as of the award of the aid).
- 6.5 The need to apply the same interest rate and calculation period for recovery procedures initiated by the Member State and by the Commission results from the objective of charging recovery interest, i.e. eliminating any competitive advantage resulting from unlawful State aid. The Court of Justice has clarified that the need to recover the financial advantage resulting from premature implementation of aid (i.e. interest) is part of the national courts' obligations under Article 108(3) TFEU. This is because the premature implementation of unlawful aid will at least make competitors suffer depending on the circumstances earlier than they would have to, in competition terms, from the effects of the aid. The beneficiary has therefore obtained an undue advantage.²³ The Court of Justice has confirmed that the national court must order the recovery of interest even after the Commission has adopted a positive decision.²⁴ In these circumstances, the basis for recovery is just the competitive advantage for the period during which the aid was prematurely at the beneficiary's disposal (i.e. before the Commission's positive decision).
- 6.6 Thus the recovery of interest has independent significance as one part of the Member State's obligation under Article 108(3) TFEU to eliminate any harmful effects of unlawful State aid on competition. The Member States must therefore make certain that the calculation period for interest and the interest rate ensure that any such unlawful competitive advantage is eliminated.
- 6.7 In the event of aid that is in breach of the prohibition of putting measures into effect, an unlawful competitive advantage is created as of the award of the aid. If interest were calculated only as of the recovery decision, the unlawful competitive advantage would be in place for the period from the award of the aid to the adoption of the recovery decision, during which time the beneficiary could use the aid in breach of the prohibition. In such circumstances there would be harm to the implementation of EU law and to the interests of individuals, caused by a failure on the part of the Member State authorities to act, and the effectiveness of EU law would not be ensured. It would also result in differing implementation of EU law depending on whether the recovery decision was adopted by the Commission or by the Member State, and this would be ungrounded.

²² Case C-232/05: *Commission of the European Communities v French Republic*, ECLI:EU:C:2006:651, paragraph 53.

²³ Case C-199/06: *Centre d'exportation du livre français (CELF) and Ministre de la Culture et de la Communication v Société internationale de diffusion et d'édition (SIDE)*, ECLI:EU:2008:79, paragraphs 50-52 and 55.

²⁴ *Ibid.*, paragraphs 52 and 55.

- 6.8 In paragraph 41 of its judgment in case No 3-3-1-8-16, the Supreme Court also acknowledged that justification for calculating interest as of the award of the aid would be provided by the objective of eliminating distortions of competition. The Supreme Court considered the only problem to be the fact that there was no correct legal basis for this. The Commission takes the view that the legal basis for calculating interest is Article 108(3) TFEU.
- 6.9 Thus in this case interest is to be charged in accordance with Article 108(3) TFEU, and interest is to be charged on aid being recovered in accordance with the rules laid down in Articles 9 and 11 of Commission Regulation (EC) No 794/2004, i.e. interest is to be calculated as of the award of the aid (i.e. as of the payment of support to the Appellant) until the aid is recovered at the rate set by the Commission.

7 THE COMMISSION'S OPINIONS REGARDING POSSIBLE DAMAGES CLAIMS

- 7.1 The Appellant has filed an appeal for the decision taken by the Respondent to be overturned and an alternative appeal for damages to be paid.
- 7.2 In the Commission's opinion, neither the action for the decision to be overturned nor the action for damages to be paid should be satisfied, for the reasons set out above. However, in the event that the court nonetheless finds that the decision was unlawful, this still does not constitute a legal basis for paying damages to an extent that would limit the effective functioning of Article 108(3) TFEU.
- 7.3 The General Court has clarified that interpreting compensation as damages for harm caused would make it possible to circumvent the application of Articles 107 and 108 TFEU.²⁵ Similarly, the Court of Justice has also noted that if a Member State grants beneficiaries 'new ... unlawful aid in an amount ... intended to neutralise the impact of the repayments which the beneficiaries are obliged to make pursuant to [a Commission] decision, that would clearly amount to thwarting the effectiveness of decisions taken by the Commission under Articles 87 EC and 88 EC' (now Articles 107 and 108 TFEU).²⁶ Although there is no such Commission decision in this case, paying damages would still thwart the effective functioning of Article 108(3) TFEU for the same reasons as those described above in conjunction with the award of aid — both aid and damages would have the same effect, and for this reason damages must also be subject to the State aid rules.
- 7.4 The Advocate General has expressed the opinion that if a national court rules that damages are to be paid, the harm caused can in any case not be deemed to be the same size as the amount to be repaid, since this would indirectly constitute an award of aid that is both unlawful and incompatible with the common market.
- 7.5 Consequently, the Commission's view is that the court must take account of the State aid rules in the same way in respect of both of the Appellant's claims. If the court finds that the decision taken by the Respondent is unlawful, the Appellant's claim for damages must not be for the same amount as that to be repaid by the Appellant on the basis of the decision by the Respondent.

8 THE COMMISSION'S OPINION AS REGARDS REQUESTING A PRELIMINARY RULING

- 8.1 Under Article 267 TFEU, the Court of Justice of the European Union has 'jurisdiction to give preliminary rulings concerning the interpretation of the Treaties and the validity and interpretation of acts of the institutions, bodies, offices or agencies of the Union. Where such a question is raised before any court or tribunal of a Member State, that

²⁵ Case T-15/14: *Simet SpA v European Commission*, ECLI:EU:T:2016:124, paragraphs 102-103.

²⁶ Case C-110/02: *Commission of the European Communities v Council of the European Union*, ECLI:EU:C:2004:395, paragraph 43.

court or tribunal may, if it considers that a decision on the question is necessary to enable it to give judgment, request the Court [of Justice] to give a ruling thereon.’

8.2 Having regard to the above-mentioned views and interpretations of acts of the EU institutions, which differ significantly from the judgment handed down by the Supreme Court in case No 3-3-1-8-16, the Commission believes that in this administrative case it is necessary to request a preliminary ruling from the Court of Justice to ensure uniform interpretation of EU law. The Court of Justice has taken the view that, even where national law provides that courts must respect judgments handed down by higher courts, national law must not preclude the right set out in the Treaty to refer a matter to the Court of Justice.²⁷

8.3 The Commission proposes to address the following questions to the Court of Justice:

- 1) Should Article 8(2) of Commission Regulation (EC) No 800/2008 declaring certain categories of aid compatible with the common market in application of Articles 87 and 88 of the Treaty (General Block Exemption Regulation) be interpreted as meaning that, in the context of that provision, work ‘on the project or activity’ has started if the subsidised activity is, for example, the acquisition of equipment and a contract to purchase that equipment has been signed?
- 2) Is a Member State authority entitled to recover unlawful aid that it has awarded even if the Commission has not taken a decision to that effect, having regard to the fact that recovery is an appropriate measure for remedying a breach of Article 108(3) TFEU?
- 3) Can a Member State authority that decides to award aid — having mistakenly assessed that the aid meets the conditions for a block exemption — but actually awards unlawful aid create a legitimate expectation for the beneficiary in the circumstances that are present in this case? Above all, is it sufficient for creating a legitimate expectation for the beneficiary if the Member State authority is aware when awarding aid of circumstances that cause the aid not to meet the conditions for a block exemption?
If the reply to either of the previous questions is ‘yes’, it is necessary to weigh up public and private interests. In the context of weighing up those interests, is it significant whether the Commission has taken a decision concerning the aid in question?
- 4) What limitation period applies to recovering aid awarded unlawfully by a Member State authority? Is that period 10 years, after which the aid becomes existing aid under Articles 1 and 15 of Council Regulation (EC) No 659/1999 laying down detailed rules for the application of Article 93 of the Treaty, and it can no longer be recovered?
What is the legal basis for recovery of this nature if the aid was awarded from a structural fund — Article 108(3) TFEU or Council Regulation (EC, Euratom) No 2988/95 on the protection of the European Communities financial interests?
- 5) Where a Member State authority recovers aid, is it also required to charge the beneficiary interest calculated on the unlawful aid? If yes, which rules are applicable to the calculation of interest, incl. as regards the interest rate and the calculation period?

9 PROCEDURAL QUESTIONS

9.1 [REDACTED] and [REDACTED] confirm that they are the representatives of the European Commission in this case.


9.2 If the court decides to organise a hearing, the European Commission requests the opportunity to participate and to present its observations orally.

²⁷ Case C-166/73: *Rheinmühlen-Düsseldorf v Einfuhr- und Vorratsstelle für Getreide und Futtermittel*, ECLI:EU:C:1974:3.

/signed digitally/


representative of the European Commission

/signed digitally/


representative of the European Commission