COURT JUDGMENT

ON BEHALF OF THE REPUBLIC OF ESTONIA

Court	Tallinn District Court
Court panel	Chair: [redacted] members: [redacted] and [redacted]
Date and place of judgment	30 June 2020, Tallinn
Administrative case number	**3-15-241**
Administrative case	AS Metaprint’s appeal for annulment of Enterprise Estonia’s decision of 22 September 2014
Contested decision	Judgment of Tallinn Administrative Court of 25 May 2015
Parties to the proceedings	The appellant AS Metaprint, represented by [redacted], attorney-at-law The respondent Enterprise Estonia, represented by [redacted], advocate, and [redacted], attorney-at-law The administrative body involved, the European Commission, represented by [redacted], attorney-at-law, and [redacted], advocate
Grounds for proceedings in the District Court	Appeal by AS Metaprint
Examination of case	Written proceedings

OPERATIVE PART

1. To add the following to the case file for administrative case No 3-15-241:

1.1. Annexes 1–5 to Enterprise Estonia’s procedural document of 15 June 2020 (items 750–811 in the list of documents and evidence);

1.2. Statement No SEBEELS/20/CR58 of 11 June 2020 from AS SEB Liising, annexed to AS Metaprint’s procedural document of 15 June 2020 (item 818 in the list of documents and evidence).

2. To uphold AS Metaprint’s appeal.

3. To annul the judgment of Tallinn Administrative Court of 25 May 2015 in administrative case No 3-15-241 and to pass a new judgment upholding

AS Metaprint's appeal and annulling Enterprise Estonia's decision of 22 September 2014.

4. **To order Enterprise Estonia (registration number 90006006) to pay the procedural costs incurred by AS Metaprint (registration number 10000573) in administrative case No 3-15-241, amounting to EUR 12 015.24 (twelve thousand and fifteen euro and 24 cents).**

5. **In all other respects the costs of the proceedings are to be borne by the parties to the proceedings themselves.**

APPEALS PROCEDURE

An appeal in cassation against this judgment may be filed with the Supreme Court no later than on 30 July 2020 (Section 212(1) of the Code of Administrative Court Procedure [*halduskohtumenetluse seadustik*]).

In response to an appeal in cassation filed by another party to the proceedings and in order to be considered with that appeal, a counter-appeal in cassation may be filed within 14 days of the appeal in cassation being served on the party to the proceedings or within the remainder of the time limit for cassation where that is longer than 14 days (Section 215(1) and (3) of the Code of Administrative Court Procedure).

If the appellant in cassation wishes the matter to be heard in court, this must be indicated in the appeal in cassation, otherwise it will be assumed that the appellant in cassation agrees to the matter being resolved by written procedure (Section 213(1)(5) of the Code of Administrative Court Procedure). Regardless of whether a wish for a court hearing has been indicated, the Supreme Court may examine an appeal in cassation by written procedure if it does not consider it necessary to convene a hearing (Section 223(1) of the Code of Administrative Court Procedure).

If a party to the proceedings wishes to receive procedural assistance to file an appeal in cassation, the party must submit an application to that effect to the Supreme Court. Submitting an application for procedural assistance does not cause the procedural time limit to be suspended (Section 116(5) of the Code of Administrative Court Procedure), and in order to observe the time limit for cassation, the party applying for assistance must, before that time limit expires, also perform the procedural act for the performance of which it is applying for the procedural assistance; in particular, it must file the appeal in cassation (Section 116(6) of the Code of Administrative Court Procedure).

FACTS AND PROCEDURE

1. On 31 December 2008, Enterprise Estonia issued decision No 1.1-5.1/08/2114 (amended by decision No 1.1-5.1/10/414 of 2 February 2010), approving AS Metaprint's application of 24 October 2008 for EUR 440 990.37 of aid for a production line project, and the aid was paid to AS Metaprint on 17 February 2010.

2. In a decision issued on 22 September 2014 (signed in part on 23 September 2014), **Enterprise Estonia** declared its decision of 31 December 2008 to be void from the outset and all expenditure incurred under the project to be ineligible, and it demanded that AS Metaprint repay the EUR 440 990.37 of aid plus compound interest for the period from when the aid was paid out until it was paid back. The aid and compound interest were to be paid within 90 days of the day on which the decision became valid, and were this deadline not to be met default interest of 0.1% of the outstanding amount of aid was to be paid for each calendar day repayment was late.

Enterprise Estonia's monitoring unit carried out checks between 11 June 2012 and 14 September 2012 to verify whether the State aid had an incentive effect, including analysing and assessing whether the structural aid was being used and implemented legitimately and in accordance with its purpose. The assessment of AS Metaprint's expenditure documents for the project revealed that the beneficiary had on 30 June 2008, i.e. before applying to Enterprise Estonia for aid, already taken on a binding commitment towards its contractual partner to acquire a production line in accordance with the project for which aid was sought. As a result, the aid has no incentive effect and the requirements of Article 8(2) of Commission Regulation (EC) No 800/2008 of 6 August 2008 (the General Block Exemption Regulation) have been disregarded. The beneficiary did not have written confirmation from Enterprise Estonia that the project was eligible before starting work on the project. In line with the fundamental principles of the EU, the State is required to recover any unlawful aid on the basis of Council Regulation (EC) No 659/1999 of 22 March 1999 (the Procedural Regulation). Interest is to be charged on recovered amounts (see Article 9 of Commission Regulation (EC) No 794/2004 of 21 April 2004). AS Metaprint was already aware that the granting of State aid was unlawful at the time the aid was granted and cannot have had legitimate expectations that the unlawful aid would not be recovered.

3. On 31 December 2014, the Ministry of Economic Affairs and Communications issued decision No 14-005 rejecting AS Metaprint's administrative appeal of 21 October 2014 to have Enterprise Estonia's decision of 22 September 2014 repealed.

4. AS Metaprint filed an **appeal** with Tallinn Administrative Court on 30 January 2015 for annulment of Enterprise Estonia's decision of 22 September 2014 or, as an alternative, for compensatory damages for a breach of good faith, plus default interest.

5. In its judgment of 25 May 2015, **Tallinn Administrative Court** rejected AS Metaprint's appeal and ordered the parties to bear the costs of the proceedings.

Enterprise Estonia correctly identified that the contract between AS Metaprint and Styner+Benz FormTech Ltd was binding, and since there was just one project it is of no importance that the deposit paid by the appellant was subsequently excluded from the eligible expenditure at the appellant's request. The first payment made for the equipment that was to be acquired on the basis of the contract concluded before aid was applied for confirms that the appellant was prepared to bear the risks associated with the project even without State support. Thus the aid had no incentive effect within the meaning of Article 8(1) and (2) of the General Block Exemption Regulation, and the State aid granted to the appellant was unlawful.

The question of declaring an aid decision void and recovering the aid is a discretionary decision, but the discretionary powers of the administrative body are extremely limited under EU law. The aid granted to the appellant was unlawful, and so it was legitimate to recover it. At the time of applying for aid, the appellant must have been aware that the project was ineligible. In order to restore the situation that existed before the aid was granted, the unlawful aid must be recovered, with interest (for the period from when the aid was paid out until it was paid back). Since Estonia has not set a limitation period for recovering State aid, the 4-year limitation period referred to in Article 3(1) of Council Regulation (EC, Euratom) No 2988/95 of 18 December 1995 applies. That limitation period began to run on 31 December 2008, when Enterprise Estonia decided to grant aid to the appellant. It was interrupted on 11 June 2012, when Enterprise Estonia commenced checks to verify whether the State aid had an incentive effect, and a new 4-year limitation period began to run on 14 September 2012 when the verification process ended. Thus at the time the decision was taken to recover the aid, the limitation period had not expired. The appellant could not have had the legitimate expectation that the decision to grant the aid would remain valid.

6. In its judgment of 18 May 2017, Tallinn District Court rejected AS Metaprint's appeal and upheld the administrative court's judgment.

7. In its judgment of 19 December 2019, **the Supreme Court** upheld AS Metaprint's appeal in cassation in part, and also annulled the district court's judgment of 18 May 2017 as regards the application for annulment and referred that aspect of the case back to the district court. In respect of the claim for compensatory damages, the Supreme Court upheld the operative part of the district court's judgment but replaced the district court's reasoning in that regard with its own.

On the basis of the opinions expressed by the Court of Justice in its judgment of 5 March 2019 in Case C-349/17 *Eesti Pagar*, the Supreme Court changed the opinions it had expressed in judgment No 3-3-1-8-16 of 9 June 2016 as regards verification of incentive effect by a national authority, the obligation to recover aid, and the legitimate expectations of a beneficiary. Enterprise Estonia should not have granted State aid in this case, and nor did the respondent have the authority to verify the possible incentive effect of the aid on the basis of other circumstances (such as the cost of withdrawing from the contract or the possible implementation of the project in adapted form). If a national authority subsequently finds that the conditions for granting aid as laid down in Regulation No 800/2008 were not satisfied, it must recover the aid on its own initiative. Furthermore, 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 the aid is lawful.

In Case C-349/17, the Court of Justice confirmed the position taken by the administrative court and the district court that, in circumstances similar to this case where national law does not lay down a limitation period, the 4-year limitation period referred to in Article 3(1) of Regulation No 2988/95 should be applied. There is no longer any dispute as to the fact that the period began to run on 31 December 2008 when the aid application was approved. The courts found that the limitation period had been interrupted on 11 June 2012, but in doing so

they did not focus on all the facts that have to be taken into account when assessing whether a limitation period has been interrupted. The limitation period is interrupted if, for instance, the competent authority notifies the person in question of any act relating to investigation concerning an irregularity. An act relating to investigation means any act which sets out with sufficient precision the transactions to which the suspicions of irregularities relate. 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 (see C-349/17, paragraph 126). In general, limitation periods fulfil the function of ensuring legal certainty, and this function would not be fully fulfilled if the limitation period could be interrupted by any act relating to a general check which bears no relation to any suspicion concerning the existence of irregularities regarding sufficiently precisely circumscribed transactions (see the Court of Justice's judgment of 24 June 2004 in Case C-278/02, *Handlbauer*, paragraph 40; judgment of 28 October 2010 in Case C-367/09, *SGS Belgium and others*, paragraph 68; judgment of 21 December 2011 in Case C-465/10, *Chambre de commerce*, paragraph 60; judgment of 11 June 2015 in Case C-52/14, *Pfeifer & Langen*, paragraphs 33, 41 and 47). In accordance with the third subparagraph of Article 3(1) of Regulation No 2988/95, the proceedings must be conducted by the authority that has the responsibility, under national law, for adopting acts relating to the investigation or legal proceedings. An act relating to investigation must set out with sufficient precision the transactions to which the suspicions of irregularities relate. This requires the act to state the possibility that a penalty or particular administrative measure may be imposed. Since the precise content of the communication between the appellant and the respondent in 2012 has not been ascertained, the Supreme Court is unable to assess whether the aforementioned conditions have been met. When the case returns to the district court, the court must determine which proceedings by the competent authority, which suspicions of irregularities and which planned measures the appellant was informed of, and make an assessment as regards the interruption of the limitation period in the light of the Court of Justice's explanations. The district court must also decide whether to accept the evidence concerning the limitation period as presented to the Chamber.

In principle, it is possible to charge interest for the period between the granting of the State aid and its recovery, to the extent necessary to cancel out the beneficiary's advantageous position. The respondent and the courts have mistakenly applied Regulations Nos 659/1999 and 794/2004. Since the rules applicable to the calculation of interest are not laid down in EU law, these rules must be enacted by the Member State. The national rules must ensure that interest is paid for the whole of the period during which the person benefited from that aid and at an interest 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 (see Case C-349/17, paragraphs 134–142). Estonian law has no rule equivalent to legal certainty which could be invoked when claiming and calculating interest for the period between the granting of aid and its recovery (see also 3-3-1-8-16, paragraph 41). Were EU law to have no effect, Section 28(2) of the 2007–2013 Structural Assistance Act [*perioodi 2007–2013 struktuuritoetuse seadus*], as a specific provision, would rule out applying both Section 28(1) of that Act and Section 69(1) of the Administrative Procedure Act

[*haldusmenetluse seadus*] and the provisions on unjust enrichment contained therein. Where Section 28(2) of the 2007–2013 Structural Assistance Act contradicts the interpretation given to Article 108(3) of the Treaty on the Functioning of the European Union (TFEU), that rule must not be applied. This allows Section 28(1) of the 2007–2013 Structural Assistance Act to be applied for the period in question inasmuch as this is necessary to fulfil the obligations arising under Article 108(3) TFEU. The objective of the interest obligation under Article 108(3) TFEU is to cancel out any unlawful advantage. When applying Section 28(1) of the 2007–2013 Structural Assistance Act in respect of the period between the aid being granted and the recovery decision being taken, the respondent and the courts must ensure that the interest is limited to just the amount that the beneficiary would have had to pay to take out a corresponding loan at the market rate. As far as the amount exceeding the interest expenditure actually saved is concerned, the time limit on the payment of interest as set out in Section 28(2) of the 2007–2013 Structural Assistance Act does not contradict EU law. Inasmuch as Section 28(2) of the 2007–2013 Structural Assistance Act is in line with EU law, the court must apply it. The significant factors here are precisely the elimination of a particular beneficiary's advantageous position and the terms of any loan which would have applied to that beneficiary. It must also be ensured that the interest does not have a punitive function in a situation of legal uncertainty. If necessary, the district court must determine the appellant's borrowing capacity in the period covered by the dispute. If it proves unreasonable to investigate and assess the facts in the court proceedings, the district court also has the option of annulling the part of the respondent's decision concerning the interest on the basis of incorrect legal grounds. The respondent would then have the option of charging interest again.

The claim for compensatory damages for a breach of good faith is not justified in this case. For a claim to arise on the basis of Section 67(3) of the Administrative Procedure Act, there needs to be a legitimate expectation on the part of the person concerned that the administrative act will remain valid. The opinions of the Court of Justice leave no room in this case for discussion of the appellant's legitimate expectation.

OPINIONS OF THE PARTIES ON RE-EXAMINATION OF THE CASE

8. On 15 June 2020 and 22 June 2020, **AS Metaprint** submitted **additions to its appeal** and requested a statement dated 11 June 2020 from AS SEB Liising to be added to the case file for the administrative case. According to the statement, the appellant succeeded in 2010 in obtaining credit on the market at an interest rate of 1.45% per annum, to which a base interest rate of the 6-month Euribor rate was added. In the appellant's opinion, the evidence submitted by the respondent does not support its claim concerning the interruption of the limitation period before 31 December 2012, because it is not clear from any of the documents submitted by Enterprise Estonia that the appellant had been notified of an act relating to investigation or that the consequences of the infringement and any subsequent action had been explained to the appellant. A limitation period is not interrupted by any act relating to a general check by Member State authorities, yet that is exactly what has happened here. The appellant was not made aware in 2012 of any investigation or act relating to a check which contained any

suspicion or an indication that the State aid may have to be returned. The appellant also contests the respondent's claim that meetings had taken place with AS Metaprint in November 2012 to discuss issues surrounding the infringement and that the appellant had been informed of the progress of the infringement proceedings, as a result of which the transactions concerned by the infringement and the consequences of the monitoring procedure were clear to it. This is a mere assertion by the respondent that is not supported by the evidence. The appellant confirms that it has not been consulted on the circumstances surrounding the infringement and that it has not been kept informed of the progress of the infringement proceedings. The appellant has only been asked for information, but no oral or written explanations have been provided as to what facts are to be established using that information, the aim of collecting the information or the consequences of the conclusions drawn. Annexes 3 and 4 to Enterprise Estonia's reply of 15 June 2020 do not refer at all to the exchange of information with the appellant, and the appellant was not aware that the alleged infringement had been identified in an internal exchange of information within the respondent, because the appellant had not been informed of it. The first time the appellant was informed that the State aid could be unlawful was in Enterprise Estonia's letter dated 22 January 2013, but by then the limitation period for recovery had expired and thus the appeal must be upheld.

9. In **additional replies** dated 15 June 2020 and 19 June 2020, **Enterprise Estonia** expressed the view that, in accordance with Article 3(1) of Regulation No 2988/95, the limitation period for recovery had not expired. The communication between the appellant and the respondent in 2012 met the criteria for interruption of the limitation period, as explained by the Court of Justice, since it was evident from the communication that Enterprise Estonia's monitoring unit had investigated whether there had been an infringement of the incentive effect criterion as regards the State aid, identified that there had been such an infringement, and considered requesting authorisation from the European Commission for the State aid as a measure to avoid recovery (i.e. assessing the substantive incentive effect of the aid). Even if it cannot be inferred from some individual documents that the limitation period had been interrupted, it is unequivocally clear when looking at the evidence as a whole that the respondent had notified the appellant before 31 December 2012 of the circumstances relating to the investigation and of the transactions concerned by the infringement proceedings, and that the consequences of the infringement and any subsequent action had been explained to the appellant. These were not acts relating to general checks, but explanations provided to the appellant during the proceedings concerning the circumstances that were being investigated and the suspected infringement. There has been active communication between the parties concerning the investigation of the State aid infringement. Meetings were held with the appellant to discuss issues surrounding the infringement in November 2012 and also later, and the appellant was informed of the progress of the infringement proceedings. The infringement that was to be investigated, the transactions concerned by the infringement and the consequences of the monitoring procedure have thus been clear to the appellant from the outset of the investigation. The circumstances that were investigated in relation to the infringement and the evidence provided by the appellant to be verified in conjunction with the investigation are clear from the evidence provided by Enterprise Estonia. It is evident from

Enterprise Estonia's internal correspondence on 16 August 2012 that an infringement had been identified in the project on the basis of the evidence submitted, and thus any references to the infringement or to monitoring in subsequent communication with AS Metaprint are to be understood in the context of an infringement of the incentive effect criterion for State aid. The evidence also shows that in December 2012 Enterprise Estonia, in cooperation with the appellant and an external legal adviser, attempted to resolve the situation by, if the appellant so wished, considering requesting authorisation from the European Commission for the State aid as an alternative to immediate recovery of the State aid.

As regards the calculation of interest, the respondent agrees that AS SEB Liising's statement of 11 June 2020 submitted by the appellant indicates the interest rate applied to lease agreements at around the same time as the aid was paid (17 February 2010) and that the rate can therefore be considered as the interest rate corresponding to the market rate for a loan equivalent to the aid. If the interest rate indicated in AS SEB Liising's statement is applied to the EUR 440 990.37 of aid from when it was paid out (17 February 2010) until the recovery decision was taken (22 September 2014), the total interest would amount to EUR 49 640.45, which Enterprise Estonia accepts as the market interest. Where the appellant has produced evidence for the application of an interest rate and Enterprise Estonia does not contest the content thereof, and where the amount of interest can be determined on the basis of that evidence, it is not necessary to annul the part of the recovery decision concerning the calculation of interest. The provisions of Section 28(1) and (5) of the 2007–2013 Structural Assistance Act as regards the calculation of interest can be applied from the entry into force of the recovery decision, since the national rules in this regard are clear and compatible with EU law.

10. In its procedural document dated 15 June 2020, **the European Commission, as the administrative body involved,** stood by its previous opinions and did not submit any additional observations.

THE DISTRICT COURT'S REASONING

11. The district court will firstly define the scope of the dispute for this re-examination of the case (I), consider the requests made by the parties for additional evidence to be admitted (II), then consider AS Metaprint's appeal (III), and finally present a summary and apportion costs (IV).

I
Disputed issues in the re-examination of the case

12. Inasmuch as under Section 233(1) of the Code of Administrative Court Procedure the opinions expressed in the Supreme Court's judgment of 19 December 2019 concerning the interpretation and application of the law are binding on the district court conducting a new hearing on the same matter, it can no longer be disputed in the re-examination of the case that the State aid granted to AS Metaprint was unlawful and that Enterprise Estonia was obliged to recover it. Nor can it be disputed that the recovery of the aid is subject to the 4-year limitation

period referred to in Article 3(1) of Regulation No 2988/95, or that this limitation period began to run when the decision was taken to approve the aid application, i.e. in this case on 31 December 2008. Since Enterprise Estonia's decision requiring AS Metaprint to repay the aid was dated 22 September 2014 (items 190–207 in the list of documents and evidence; Annex 1 – items 208–215 in the list of documents and evidence), the important question in ruling on this case is whether the limitation period had been interrupted before those 4 years had passed (i.e. before 31 December 2012) or not. In the opinion of the Supreme Court (see paragraphs 18–21 of the judgment), the courts had failed to examine significant facts as regards the interruption of the limitation period. Above all, the precise content of the communication between the appellant and the respondent in 2012 had not been ascertained (i.e. whether this amounted to an act relating to investigation within the meaning of the third subparagraph of Article 3(1) of Regulation No 2988/95, or just to an act relating to general checks which would not affect the limitation period).

13. As regards the interest rate, the Supreme Court (see paragraphs 22–28 of the judgment) directed the district court in its re-examination of the case to investigate the terms on which AS Metaprint could have borrowed an amount equivalent to that of the aid (EUR 440 990.37) on the market and the interest rate at which this would have been justified in order to offset the appellant's advantageous position (i.e. the unlawful State aid). The Supreme Court noted that the legal grounds for this are Section 28(1) and (2) of the 2007–2013 Structural Assistance Act, bearing in mind that the amount of interest should be limited to what is justified for that particular beneficiary. The Supreme Court also explained that if it were to prove unreasonable to investigate and assess the circumstances concerning the appellant's borrowing capacity in the court proceedings, the district court could also annul the part of the respondent's decision concerning the interest on the basis of incorrect legal grounds and the respondent would then have the option of calculating the interest again.

II
Admission and collection of new evidence

14. The issue raised by the Supreme Court in paragraph 21 of its judgment of 19 December 2019 as regards admitting the evidence submitted in the appeal in cassation with which the parties wished to substantiate their claims concerning the limitation period (Annex 1 to AS Metaprint's statement of 14 November 2019 – AS Metaprint's declaration No 487/1-5 of 28 December 2009 – items 694–695 in the list of documents and evidence; Annexes 1–3 to Enterprise Estonia's statement of 18 November 2019 – emails from the period from 26 July 2012 to 10 December 2012 – items 701–706 in the list of documents and evidence) was settled by the district court by a ruling on 27 May 2020.

Using AS Metaprint's declaration No 487/1-5 of 28 December 2009, the appellant sought to demonstrate that Enterprise Estonia's decision No 1.1-5.1/10/414 of 2 February 2010 amended Enterprise Estonia's decision No 1.1-5.1/08/2114 of 31 December 2018 only as regards AS Metaprint's own financial contribution but not as regards the amount of aid, and that therefore this decision could not have had any effect on the limitation period. Inasmuch as Enterprise Estonia acknowledged in its statement of 18 November 2019 that, in the light of

the Court of Justice's judgment of 5 March 2019 in Case C-349/17 *Eesti Pagar* (paragraph 124), the limitation period should be deemed to have started on 31 December 2008, AS Metaprint noted in its statement of 22 November 2019 (paragraph 1.6) that it was not necessary to add its declaration of 28 December 2009 to the case file. Since the appellant had withdrawn its request for admission of the evidence it submitted on 14 November 2019, it was not necessary for the district court to rule on its admissibility. However, AS Metaprint's declaration of 28 December 2009 is already in the case file (see Annex 5 to the appeal – items 156–157 in the list of documents and evidence).

Using the emails from the period from 26 July 2012 to 10 December 2012 which were appended to its procedural document dated 18 November 2019, Enterprise Estonia sought to demonstrate that it had informed the appellant of the beginning of the investigation before 31 December 2012 and that this interrupted the limitation period. The district court found that the evidence submitted by the respondent should be added to the material in the case file on the basis of Section 198(2)(2) and Section 198(3) of the Code of Administrative Court Procedure, because the courts had not explained to the respondent the need to demonstrate the time at which the limitation period was interrupted. Since this is the fundamental issue in resolving this case, that evidence is likely to be necessary in order to resolve the case more appropriately.

15. In its ruling of 27 May 2020, the district court gave the parties to the proceedings the opportunity, if they so wished, to submit additional evidence by 15 June 2020 demonstrating the contents of their communication in 2012 and which could therefore be relevant in determining whether the limitation period had been interrupted. In order to resolve the question of the amount of interest to be paid on the aid recovered from the appellant, the district court gave AS Metaprint the opportunity to submit evidence by 15 June 2020 on the terms on which it could have obtained a loan equivalent to the aid (EUR 440 990.37) on the market for the period from 17 February 2010 to 22 September 2014 (i.e. for the period from when the aid was paid out until it was recovered). The district court also considered it possible for the appellant, if it was of the opinion that it could not (because of having insufficient collateral or an already sizeable level of debt) have obtained a loan of that size on the market on more favourable terms than those set out in Section 28(1) of the 2007–2013 Structural Assistance Act (i.e. the 6-month Euribor rate + 5% per annum), not to be required to submit the aforementioned evidence since there would in any case be no legal grounds for the respondent to set an interest rate higher than that referred to in the same provision.

16. Enterprise Estonia submitted the following evidence as annexes to its procedural document of 15 June 2020:

1) an email sent by AS Metaprint's accountant on 30 July 2012, with attachments (Annexes 1–1.3 – items 750–792 in the list of documents and evidence). This was a reply to the email of 26 July 2012 from a monitoring specialist at Enterprise Estonia, in which the appellant was asked additional questions and requested to send documents. Although this is the same email as had already been submitted to the Supreme Court as Annex 1 to Enterprise Estonia's procedural document of 18 November 2019 (items 701–702 in the list of documents

and evidence) and which the district court added to the case file by means of its ruling of 27 May 2020, the evidence should be added to the case file because the reply referred to above is currently in the case file without attachments, even though the documents sent with the email may also provide information on how the appellant understood the respondent's request;

2) an email sent by AS Metaprint's accountant on 15 August 2012, with an attachment (Annexes 2 and 2.1 – items 793–796 in the list of documents and evidence). This was a reply to the additional enquiry of 15 August 2012 from a monitoring specialist at Enterprise Estonia, requesting information on when the deposit had been paid and requesting a copy of the payment order to be sent. Since the evidence constitutes communication between the appellant and the respondent, it is relevant and the district court will add it to the case file on the basis of Section 198(2)(2) and Section 198(3) of the Code of Administrative Court Procedure. The appellant's objections concern the assessment of the evidence, not its relevance;

3) an exchange of emails between staff members at Enterprise Estonia on 15–16 August 2012 (Annex 3 – items 797–799 in the list of documents and evidence), from which it is apparent that an infringement had been identified in the appellant's project since the deposit had been paid before the aid application was submitted. Although the evidence does not constitute communication between the appellant and the respondent, it may serve as the basis for assessing the significance of other acts by the respondent and it should therefore be added to the case file on the basis of Section 198(2)(2) and Section 198(3) of the Code of Administrative Court Procedure;

4) an email sent by a member of staff at Enterprise Estonia on 20 December 2012 to a colleague, including the attachment consisting of the supplementary information sheet on AS Metaprint as prepared by a law firm (Annexes 4 and 5 – items 800–811 in the list of documents and evidence), from which it is apparent that Enterprise Estonia had identified an infringement of the incentive effect criterion when granting the aid and was planning to request authorisation for the State aid from the European Commission. Although this evidence, too, does not constitute direct communication between the appellant and the respondent, it may be significant in assessing other evidence in this case and it should therefore be added to the case file on the basis of Section 198(2)(2) and Section 198(3) of the Code of Administrative Court Procedure.

17. AS Metaprint submitted AS SEB Liising's statement No SEBEELS/20/CR58 of 11 June 2020 (item 818 in the list of documents and evidence) as an annex to its procedural document of 15 June 2020, from which it is apparent that AS Metaprint and AS SEB Liising signed six lease agreements in 2010 amounting to EUR 2 132 080, for a duration of 5 years and at an interest rate of 1.45% per annum + the 6-month Euribor rate. The appellant thereby seeks to demonstrate the terms on which it would have been able to obtain a loan on the market equivalent to the aid for the period from when the aid was paid out until it was recovered. In its statement of 19 June 2020, the respondent agreed that the evidence submitted by the appellant is relevant and that the figure contained therein could be regarded as an interest rate

corresponding to the market interest rate for a loan equivalent to the aid. Thus the respondent does not argue against adding the evidence to the case file. The district court will add the evidence submitted by the appellant to the case file on the basis of Section 198(2)(2) and Section 198(3) of the Code of Administrative Court Procedure. The evidence was submitted within the time limit and, inasmuch as it may demonstrate a fact that is disputed in this case, it is also relevant (Section 62(2) of the Code of Administrative Court Procedure).

III
Consideration of AS Metaprint's appeal

18. The district court will firstly consider whether Enterprise Estonia's decision of 22 September 2014 to recover the aid was taken after the limitation period had expired or not. This is because if the respondent's claim is time-barred, AS Metaprint's appeal must be upheld in full and the contested decision must be annulled, which means that it will not be necessary for the district court to analyse the calculation of interest any further. Since the 4-year limitation period referred to in Article 3(1) of Regulation No 2988/95 began to run on 31 December 2008 and the recovery decision was adopted on 22 September 2014, the principal question is whether the limitation period had been interrupted before 31 December 2012 or not.

19. The Court of Justice explained in its judgment of 5 March 2019 in Case C-349/17 *Eesti Pagar* (paragraph 128) that, in circumstances similar to those in the case in question here, the 4-year limitation period referred to in Article 3(1) of Regulation No 2988/95 is to be applied. Enterprise Estonia on the other hand, in its decision of 22 September 2014 (paragraph 6) and in the earlier court proceedings, has expressed the view that recovery of State aid is subject to the 10-year limitation period referred to in Article 15(1) of Regulation No 659/1999 that applied previously or in Article 17(1) of Regulation No 2015/1589 that replaced it (see paragraph 2.5 of the reply of 22 March 2015, paragraph 2.6 of the reply of 23 July 2015 and paragraph 1.4 of its additional observations of 19 September 2016). In its judgment of 25 May 2015 (paragraphs 18 and 18.1), the administrative court stated that Article 3(1) of Regulation No 2988/95 should be taken as the starting point and that the claim was not time-barred, since on 11 June 2012 Enterprise Estonia had commenced checks to verify whether the State aid had an incentive effect, which interrupted the limitation period.

20. The judgment in Case C-349/17 (paragraph 126) sets out that, in accordance with the third subparagraph of Article 3(1) of Regulation No 2988/95, interruption of the limitation period requires the competent authority to have made the economic operator suspected of having committed the irregularities aware of any act relating to investigation or legal proceedings, which means any act which sets out with sufficient precision the transactions to which the suspicions of irregularities relate. In addition, the set of facts taken as a whole must lead to the conclusion that the person in question has effectively been made aware of those acts relating to investigation or legal proceedings. On the basis of both the third subparagraph of Article 3(1) of Regulation No 2988/95 and Court of Justice case-law (e.g. the judgment of 11 June 2015 in Case C-52/14, *Pfeifer & Langen*, paragraphs 36–39 and 41–43; the judgment of 21 December 2011 in Case C-465/10, *Chambre de commerce*, paragraphs 60–62; the

judgment of 28 October 2010 in Case C-367/09, *SGS Belgium and others*, paragraphs 63 and 69), it can be concluded that notification of an act relating to investigation or legal proceedings must always include an assessment by the competent authority that the operator has committed a particular irregularity when conducting the transaction. If the competent authority has not referred to these suspicions when addressing the operator, but instead merely requests additional information about a particular transaction, this is an act relating to a general check, which in accordance with Article 3(1) of Regulation No 2988/95 does not interrupt the limitation period. Similarly, any act relating to investigation or legal proceedings must refer to the possibility that a particular penalty or administrative measure may be imposed.

21. AS Metaprint has stressed (see paragraph 3.72 of the appeal of 25 June 2015; paragraph 1.26 of the points presented on 22 March 2016; paragraph 2.53 of the additional observations of 5 September 2016; paragraph 2.75 of the appeal in cassation of 16 June 2017; paragraph 2.5 of the additional observations of 22 November 2017; paragraph 1.12 of the additional observations of 14 November 2019; paragraph 2.5 of the additional observations of 22 November 2019; paragraph 2.8 of the additional observations of 22 June 2020) that the respondent first informed it of the infringement and that the aid may be recovered by letter dated 22 January 2013 (items 456–458 in the list of documents and evidence), to which the appellant replied by letter on 31 January 2013 (mistakenly dated 31 January 2012 – items 383–383 in the list of documents and evidence).

The respondent has explained (see the decision of 22 September 2014; the replies of 22 March 2015 and 23 July 2015; the observations of 18 November 2019 and 25 November 2019) that Enterprise Estonia's monitoring unit carried out checks between 11 June 2012 and 14 September 2012 to verify whether the State aid had an incentive effect, and that there was regular communication with the appellant as part of that, including an email sent on 26 July 2012 (items 701–702 in the list of documents and evidence) informing the appellant that the project was being monitored and requesting additional information about the infringement. In the respondent's view, the limitation period was interrupted at the latest when a member of staff at Enterprise Estonia sent an email on 3 December 2012 (item 703 in the list of documents and evidence), to which AS Metaprint replied by email on 10 December 2012 (items 704–706 in the list of documents and evidence).

22. The district court notes firstly that if Enterprise Estonia had sent the letter of 22 January 2013 to the appellant before 31 December 2012, i.e. before the expiry of the 4-year limitation period, it could not reasonably be denied that the limitation period had been interrupted, since that notification clearly satisfied all the conditions laid down in Article 3(1) of Regulation No 2988/95 as they have been defined in the case-law of the Court of Justice. The district court refers at this point to the fact that Enterprise Estonia sent equivalent notices to several operators in similar circumstances on the same date (22 January 2013), and that Tallinn District Court has also indicated in its judgments of 27 June 2019 in case No 3-14-387 (*AS Eesti Pagar*, entry into force 18 December 2019, see paragraphs 20–23) and case No 3-15-113 (*PharmaEstica Manufacturing OÜ*, entry into force 13 January 2020, see paragraphs 14–16) that Enterprise Estonia's letter of 22 January 2013 was sufficiently clear to

be considered an act relating to investigation, in line with the third subparagraph of Article 3(1) of Regulation No 2988/95.

23. The earlier communication between the appellant and the respondent is, on the other hand, much less clear. The administrative court found that the limitation period had been interrupted on 11 June 2012, i.e. when the respondent commenced the checks to verify whether the State aid had an incentive effect, and noted that a new 4-year limitation period had begun to run on 14 September 2012 when those checks ended. That approach cannot be commended, since firstly it is an interruption of the limitation period and not a suspension (see Sections 158(1) and 168(1) of the General Part of the Civil Code Act [*tsiviilseadustiku üldosa seadus*]), which means that in the absence of any specific rules the limitation period begins to run again as soon as the event causing the interruption has taken place (see paragraph 17.2 of the Supreme Court's ruling No 2-17-12525 of 10 October 2018), and secondly the limitation period is not interrupted when the checks are commenced but rather when the infringing party is notified. On the basis of the evidence supplied, Enterprise Estonia's first contact with AS Metaprint in respect of monitoring the project was by email on 26 July 2012. It is thus not possible for the limitation period for recovery of the aid to have been interrupted before 26 July 2012.

24. The email of 26 July 2012 from a monitoring specialist at Enterprise Estonia explained to the appellant that the respondent was monitoring the project and that further questions had arisen as a result. The appellant was asked to send documents demonstrating that the invoices issued for the equipment purchased had been paid. AS Metaprint's accountant sent the proofs of purchase by email on 30 July 2012. On 15 August 2012, Enterprise Estonia also asked the appellant when the deposit had been paid and requested it, if possible, to send a copy of the payment order. AS Metaprint's accountant sent the payment order by email on 15 August 2012. Regardless of the fact that this correspondence referred to checks on specific transactions and that the appellant was asked to submit additional documents, the emails did not contain any reference to a possible infringement by the appellant or to the possibility of measures being taken against it. Therefore these emails did not interrupt the limitation period. It is evident from an internal exchange of emails within Enterprise Estonia that the respondent itself only considered the appellant's actions to be an irregularity on 16 August 2012, i.e. after information had been received that AS Metaprint had paid a 30% deposit for the equipment on 14 August 2008 while submitting an application for aid only on 24 October 2008.

25. In its procedural document dated 15 June 2020, the respondent also claimed that there had been active communication between the parties during and after the process of verifying the incentive effect of the State aid and that the circumstances surrounding the suspected infringement had been explained to the appellant. Meetings were also said to have been held with the appellant in November 2012 to discuss the issues surrounding the infringement. In its procedural document dated 22 June 2020, the appellant categorically denied that any meetings had been held with it in 2012 to discuss the issues surrounding the infringement and that it had been informed of the progress of the infringement proceedings. The appellant confirms that it was not provided with any oral or written explanations as to what facts were to be

established using the information it was asked to provide or concerning the aim of collecting the information and the consequences of the conclusions drawn.

26. The district court agrees with the appellant that Enterprise Estonia's claim concerning the meeting in November 2012 to discuss the issues surrounding the infringement is a mere assertion and is not supported by the evidence. Under Section 59(1) of the Code of Administrative Court Procedure, in general all parties to proceedings must prove the factual assertions on which their submissions are founded. Under Section 59(4) of the Code, where a party fails to prove a factual assertion the court may assess that assertion to the detriment of the party. It can be assumed that if a meeting is held to discuss the circumstances surrounding an infringement with the person concerned, minutes would be taken or the outcome of the meeting would be recorded in some other way (e.g. a written summary). Ordinarily it ought also to be possible to prove afterwards that a meeting has taken place, for instance by means of the invitation sent and the reply received. The respondent, as an administrative body that has also been represented in the court proceedings by lawyers, must clearly have been aware of the need to substantiate its claim and of the possibilities for collecting evidence. In a situation in which the respondent has failed to provide any evidence that the meeting took place and the appellant denies that the meeting took place, and since there are only limited possibilities for proving a negative circumstance, which means that the appellant cannot be required to provide evidence that the meeting did not take place (e.g. paragraph 17 of Supreme Court ruling No 3-2-1-83-16 of 3 February 2017), it must be concluded that there was no meeting between the parties in November–December 2012 to discuss issues relating to the infringement.

27. The email from Enterprise Estonia's lawyer on 3 December 2012 requested AS Metaprint to provide information relating to the additional analysis of its project. More specifically, the appellant was asked whether, had the aid application been rejected, it would have abandoned the project or continued with it even without the aid, and also whether it had taken additional action and made additional investments as a result of the aid which it would not have done without the aid (and if so, then what action and investments and on what scale). The appellant was asked to compare the situation resulting from the grant of the aid with the situation that would have arisen had the aid not been granted. It was also noted in the request that Enterprise Estonia needed the information in order to analyse the substantive incentive effect of the project, which would make it possible for a State aid application for AS Metaprint's project to be submitted to the European Commission. AS Metaprint provided its explanations by email on 10 December 2012, noting that the project would have been abandoned had the aid application been rejected and that the aid had resulted in a significant increase in production capacity and sales volumes (including that the objectives as regards the profitability of the project had been exceeded). As a continuation of that correspondence and in cooperation with an external legal adviser, Enterprise Estonia drew up a supplementary information sheet on AS Metaprint's project on 20 December 2012 (see section 4 of Part III of the version of Regulation No 794/2004 valid from 24 November 2009 to 2 May 2014), and on 22 January 2013 it asked by letter for the appellant's position on how it wished to proceed in the situation that had arisen (i.e. whether to ask the European Commission to assess the compatibility of the aid and to authorise it retroactively).

28. Although it is plausible during proceedings of more than six months for an operator in receipt of aid to have questions concerning the grounds for further analysis of its project and the possible consequences, and having regard to the extensive media coverage in October 2012 of the potential follow-up to the European Commission's audit (for instance the following news items posted on the ERR [Estonian Public Broadcasting) website on 22 October 2012: *EAS-i prohmakas võib tuua kaasa 10,5 miljoni euro suuruse tagasinõude* [Blunder by Enterprise Estonia could mean recovery of 10.5 million euro], *EAS: püüame teha nii, et ettevõtjad ei peaks toetust tagasi maksma* [Enterprise Estonia: we'll try to make sure that businesses don't have to repay aid] and *Ministeerium: EASil pole palju muid võimalusi peale tagasinõuete* [Ministry: Enterprise Estonia has few options other than recovery]), there is currently no specific information indicating that the appellant had been unequivocally notified before 22 January 2013 that the aid awarded to it was unlawful and that it may be recovered. Under the third subparagraph of Article 3(1) of Regulation No 2988/96, media speculation and the operator's own understanding of the possible infringement and its consequences have no effect on the limitation period. Nor do the contents of Enterprise Estonia's letter of 22 January 2013 or AS Metaprint's reply of 31 January 2013 make it possible to conclude that there had already been any meaningful communication between the parties concerning the unlawfulness of the aid granted for the project and the possible recovery of that aid. There is also an indirect suggestion to the contrary, in that the reply of 31 January 2013 was submitted on behalf of the appellant by a lawyer, although the appellant had not previously considered it necessary to use the services of a legal practitioner.

29. Account must also be taken of the fact that Enterprise Estonia's follow-up checks did not concern AS Metaprint's project alone, but their focus was much broader. It is also evident from the respondent's correspondence with the European Commission that it was not at that point clear to Enterprise Estonia itself how precisely to define the incentive effect criterion and the project as a whole (see the European Commission's replies of 1 June 2012 and 6 November 2012 – items 401–403 in the list of documents and evidence). It is therefore conceivable that the respondent was not necessarily ready to notify recipients immediately of the infringements or to start the process of recovering the aid, but rather that it took that step only after finalisation of the State aid analysis commissioned from a law firm and preparation of a 'positive' programme (i.e. submission of applications for State aid authorisations). This is all the more likely in view of the fact that, until the Court of Justice ruled in Case C-349/17, Enterprise Estonia had held the view that the 10-year limitation period referred to in Article 15(1) of Regulation No 659/1999 was to be applied. Under Article 15(2) of the Regulation, it was to begin to run as of the entry into force of the decision approving the aid application, i.e. from 13 July 2010. This explains why Enterprise Estonia did not pay as sufficient attention to the possible expiry of the claim as may normally be expected of an administrative body. Another fact worthy of note is that, although the issue of the limitation period was not as critical in administrative cases Nos 3-14-387 and 3-15-113 as in this case (there the 4-year limitation periods would have expired on 10 March 2013 and 13 July 2014 respectively), the district court nevertheless did not consider it possible in those cases to link the interruption of the limitation periods to earlier notifications from Enterprise Estonia,

which were not comparably specific as regards the existence of an infringement and the possible consequences of its detection.

30. To sum up, the district court is of the opinion that no evidence has been submitted in this case which would allow the conclusion to be drawn that the limitation period for recovering the aid paid to AS Metaprint had been interrupted before 31 December 2012 in accordance with the conditions laid down in the third subparagraph of Article 3(1) of Regulation No 2988/95. As a result, Enterprise Estonia's recovery decision of 22 September 2014 was time-barred.

31. Since Enterprise Estonia's decision of 22 September 2014 on recovery of the aid paid to the appellant was taken after the expiry of the limitation period and the contested decision must therefore be annulled in its entirety, there is no need to address the issue of the calculation of interest.

IV

Summary and costs

32. In line with the above and on the basis of Section 200(3) of the Code of Administrative Court Procedure, the district court upholds AS Metaprint's appeal and annuls Tallinn Administrative Court's judgment of 25 May 2015. The district court issues a new judgment in this case, upholding AS Metaprint's appeal and annulling Enterprise Estonia's decision of 22 September 2014.

33. Under Section 108(1) of the Code of Administrative Court Procedure, the costs of proceedings are to be borne by the party against whom the judgment is given. If a higher court issues a ruling without referring the case for a new hearing, it is to change the apportionment of the costs (Section 109(4) of the Code of Administrative Court Procedure). Under Section 109(1) of the Code of Administrative Court Procedure, in order for costs to be awarded, the court must be provided with a list of procedural costs and also expenditure documents. If these are not provided, costs will not be awarded. The court will only award necessary and justifiable costs (Section 109(6) of the Code of Administrative Court Procedure).

34. AS Metaprint has paid State fees for its appeals totalling EUR 30 (items 246 and 386 in the list of documents and evidence) and has incurred the following representation costs: EUR 1 204 in the proceedings in the court of first instance (items 286–303), EUR 5 333.99 in the first hearing of the case in the district court (items 532–544 and 553–556), EUR 4 406.50 in the Supreme Court hearing (items 679–683 and 711–713), and EUR 1 023 in the re-examination of the case in the district court (items 814–816 and 827–829). AS Metaprint has also incurred translation costs of EUR 17.75 at the appeal stage (items 536–538). The fact that a total of EUR 12 015.24 has been incurred in procedural costs (including the state fees of EUR 30) and that those costs are linked to the hearing of this case at all instances has been duly established. Since the appeals have been upheld, under Section 108(1) of the Code of Administrative Court Procedure the procedural costs must be borne by the respondent.

35. The district court's opinion is that, in view of the scope of the case and the complexity of the issues involved, the procedural costs incurred by the appellant are justified as a whole. In this case, there are also no grounds for following the case-law pursuant to which procedural costs cannot generally be greater in a court of higher instance than in a lower court (e.g. paragraph 19.2 of the Supreme Court's judgment No 3-15-2058 of 17 November 2017; paragraph 31 of its judgment No 3-3-1-84-15 of 10 June2016; paragraph 28 of its judgment No 3-3-1-82-14 of 3 March 2015), since the appeal was heard in the administrative court by written procedure, while at subsequent stages there was both a court hearing and the European Commission also became involved in the proceedings. The proceedings have also been suspended on two occasions at the stages of the appeal and the appeal in cassation (in connection with case No 3-3-1-8-16 and Case C-349/17), and the parties have repeatedly had to submit additional observations. Although AS Metaprint was late in submitting the list of procedural costs and the expenditure documents to the administrative court (in accordance with the administrative court's ruling of 24 March 2015 the documents were to be submitted by 9 April 2015, whereas they were actually submitted on 13 April 2015), there were compelling reasons for this (the representative fell ill), and even had they been taken into account there would still have been no need to postpone notification of the decision of 25 May 2015. Those expenditure documents must therefore also be taken into account in the appeal proceedings. Consequently, the district court orders the respondent to pay the appellant's procedural costs in full.

36. Enterprise Estonia has not provided any information about the procedural costs it has incurred, and thus the respondent must bear any possible procedural costs itself in accordance with Sections 108(1) and 109(1) of the Code of Administrative Court Procedure.

37. On the basis of Sections 24(2) and 108 of the Code of Administrative Court Procedure, the European Commission as the administrative body involved must also bear itself any procedural costs it has incurred.

(signed digitally)