Reports of Cases

OPINION OF ADVOCATE GENERAL
WATHELET
delivered on 25 September 2018 [1]

Case C-349/17

Eesti Pagar AS
v
Ettevõtluse Arendamise Sihtasutus,
Majandus- ja Kommunikatsiooniministeerium

(Request for a preliminary ruling from the Tallinna Ringkonnakohus (Court of Appeal, Tallinn, Estonia))

(Reference for a preliminary ruling — State aid — Regulation (EC) No 800/2008 — Aid having an incentive effect — Application for aid before work on the project has started — Assessment of that requirement — Competence of the national authorities — Article 108(3) TFEU — Whether or not the national authorities have a duty to recover aid found to be unlawful — EU law general principle of legitimate expectations — Limitation — Absence of a decision by the European Commission or a national court — Determining the time limit for a national authority to recover unlawful aid — Legal basis — Interest — Existence of an obligation to claim interest — Legal basis — Detailed rules for application)

1. This reference for a preliminary ruling, from the Tallinna Ringkonnakohus (Court of Appeal, Tallinn, Estonia), raises a series of significant and sensitive issues concerning State aid.

2. Specifically, it concerns (i) the interpretation of Article 8(2) of Regulation (EC) No 800/2008; [2] (ii) the Member States' obligation to recover unlawful aid; (iii) the EU law general principle of legitimate expectations; (iv) the limitation period applicable to recovery of unlawful aid by a Member State; and (v) the Member States' obligation to claim interest when recovering unlawful aid.

3. The reference has been made in proceedings between Eesti Pagar AS, on the one hand, and Ettevõtluse Arendamise Sihtasutus (Enterprise Estonia, 'EAS') and the Majandus- ja Kommunikatsiooniministeerium (Ministry of Economic Affairs and Communications, 'the Ministry'), on the other, concerning whether a decision by EAS, confirmed by the Ministry following a complaint by Eesti Pagar, ordering the recovery of EUR 526 300, together with interest, from that company, representing aid previously paid by EAS to Eesti Pagar, is lawful.

1 Original language: French.

2 Commission Regulation of 6 August 2008 declaring certain categories of aid compatible with the [internal] market in application of Articles [107] and [108] of the [FEU] Treaty (General Block Exemption Regulation) (OJ 2008 L 214, p. 3), 'the General Block Exemption Regulation'.

I. Legal context

A. EU law

4. The first subparagraph of Article 3(1) of Regulation (EC, Euratom) No 2988/95[3] provides:

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

5. Under Article 14(1) and (2) of Regulation (EC) No 659/1999:[4]

'1. Where negative decisions are taken in cases of unlawful aid, the Commission shall decide that the Member State concerned shall take all necessary measures to recover the aid from the beneficiary (hereinafter referred to as a "recovery decision"). The Commission shall not require recovery of the aid if this would be contrary to a general principle of [EU] law.

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

6. Article 15(1) of that regulation provides:

'The powers of the Commission to recover aid shall be subject to a limitation period of 10 years.'

7. Article 9 of Regulation (EC) No 794/2004[5] provides:

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

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

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

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

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

3 Council Regulation of 18 December 1995 on the protection of the [European Union] financial interests (OJ 1995 L 312, p. 1).

4 Council Regulation of 22 March 1999 laying down detailed rules for the application of Article [108] of the [FEU] Treaty (OJ 1999 L 83, p. 1).

5 Commission Regulation of 21 April 2004 implementing Council Regulation (EC) No 659/1999 laying down detailed rules for the application of Article [108] of the [FEU] Treaty (OJ 1999 L 140, p. 1).

8. Article 11 of that regulation states:

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

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

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

9. Article 101 of Regulation (EC) No 1083/2006[6] states:

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

10. Recital 28 of the General Block Exemption Regulation states:

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

11. Under Article 8(1) and (2) of that regulation:

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

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

12. According to paragraphs (4) and (5) of Article 125 of Regulation (EU) No 1303/2013[7], that article being headed ‘Functions of the managing authority’:

‘4. As regards the financial management and control of the operational programme, the managing authority shall:

(a) verify that the co-financed products and services [comply] with applicable law, the operational programme and the conditions for support of the operation;

…

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

7 Regulation of the European Parliament and of the Council of 17 December 2013 laying down common provisions on the European Regional Development Fund, the European Social Fund, the Cohesion Fund, the European Agricultural Fund for Rural Development and the European Maritime and Fisheries Fund and laying down general provisions on the European Regional Development Fund, the European Social Fund, the Cohesion Fund and the European Maritime and Fisheries Fund and repealing Council Regulation (EC) No 1083/2006 (OJ 2013 L 347, p. 320).

(c) put in place effective and proportionate anti-fraud measures taking into account the risks identified;

…

5. Verifications pursuant to point (a) of the first subparagraph of paragraph 4 shall include the following procedures:

(a) administrative verifications in respect of each application for reimbursement by beneficiaries;

(b) on-the-spot verifications of operations.

The frequency and coverage of the on-the-spot verifications shall be proportionate to the amount of public support to an operation and to the level of risk identified by such verifications and audits by the audit authority for the management and control system as a whole.'

13. Article 143(1) and (2) of that regulation, that article being headed 'Financial corrections by Member States' provides:

'1. The Member States shall in the first instance be responsible for investigating irregularities and for making the financial corrections required and pursuing recoveries. …

2. Member States shall make the financial corrections required in connection with individual or systemic irregularities detected in operations or operational programmes. Financial corrections shall consist of cancelling all or part of the public contribution to an operation or operational programme. …'

14. Article 2(23) of Regulation (EU) No 651/2014[8] contains the following definition:

'"start of works" means the earlier of either the start of construction works relating to the investment, or the first legally binding commitment to order equipment or any other commitment that makes the investment irreversible. Buying land and preparatory works such as obtaining permits and conducting feasibility studies are not considered start of works. For take-overs, "start of works" means the moment of acquiring the assets directly linked to the acquired establishment.'

15. Article 29(1) of Regulation (EU) 2015/1589,[9] that article being headed 'Cooperation with national courts', states:

'For the application of Article 107(1) and Article 108 TFEU, the courts of the Member States may ask the Commission to transmit to them information in its possession or its opinion on questions concerning the application of State aid rules.'

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

'It is important to ensure that regional aid produces a real incentive effect to undertake investments which would not otherwise be made in the assisted areas. Therefore aid may only be granted under aid schemes if the beneficiary has submitted an application for aid and the authority responsible for administering the scheme has subsequently confirmed in writing([39]) that, subject to detailed

8 Commission Regulation of 17 June 2014 declaring certain categories of aid compatible with the internal market in application of Articles 107 and 108 of the [FEU] Treaty (OJ 2014 L 187, p. 1).

9 Council Regulation 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 2015 L 248, p. 9).

verification, the project in principle meets the conditions of eligibility laid down by the scheme before the start of work on the project([40]). An express reference to both conditions([41]) must also be included in all aid schemes. In the case of ad hoc aid, the competent authority must have issued a letter of intent, conditional on Commission approval of the measure, to award aid before work starts on the project. If work begins before the conditions laid down in this paragraph are fulfilled, the whole project will not be eligible for aid.'

17. Footnote 40 (39 in the Estonian version) to those guidelines states:

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

18. Paragraphs 16, 20 and 41 of the Commission Notice on the enforcement of State aid law by national courts (2009/C 85/01) (OJ 2009 C 85, p. 1) indicate that:

'16. National court proceedings in State aid matters may sometimes concern the applicability of a Block Exemption Regulation or an existing or approved aid scheme, or both. Where the applicability of such a Regulation or scheme is at stake, the national court can only assess whether all the conditions of the Regulation or scheme are met. It cannot assess the compatibility of an aid measure where this is not the case, since that assessment is the exclusive responsibility of the Commission.

…

20. The Commission's main role is to examine the compatibility of proposed aid measures with the [internal] market, based on the criteria laid down in Article [107](2) and (3) of the [FEU] Treaty. This compatibility assessment is the exclusive responsibility of the Commission, subject to review by the Community courts. According to settled ECJ jurisprudence, national courts do not have the power to declare a State aid measure compatible with Article [107](2) or (3) of the [FEU] Treaty.

…

41. In order to comply with their recovery obligation as regards illegality interest, national courts need to determine the interest amount to be recovered. The following principles apply in this respect:

(a) The starting point is the nominal aid amount.

(b) When determining the applicable interest rate and calculation method, national courts should take account of the fact that recovery of illegality interest by a national court serves the same purpose as the Commission's interest recovery under Article 14 of [Regulation No 659/1999]. In addition, claims for the recovery of illegality interest are [EU] law claims based directly on Article [108(3) TFEU]. …

(c) In order to ensure consistency with Article 14 of [Regulation No 659/1999] and to comply with the effectiveness requirement, the Commission considers that the method of interest calculation used by the national court may not be less strict than that foreseen in the Implementing Regulation. Consequently, illegality interest must be calculated on a compound basis and the applicable interest rate may not be lower than the reference rate.

(d) Moreover, in the Commission's view, it follows from the principle of equivalence that, where the interest rate calculation under national law is stricter than that laid down in the Implementing Regulation, the national court will have to apply the stricter national rules also to claims based on Article [108(3) TFEU].

(e) The start date for the interest calculation will always be the day on which the unlawful aid was put at the disposal of the beneficiary. The end date depends on the situation at the time of the national judgment. ...'

B. Estonian law

19. Paragraph 26(5) and (6) of the Perioodi 2007-2013 struktuuritoetuse seadus (Law on structural aid for the period 2007-2013; 'the STS'),[10] that paragraph being headed 'Recovery of aid', provided:

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

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

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

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

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

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

(3) Interest shall be calculated until the date of repayment of the financial support however not beyond the date laid down for repayment and, in the event of deferral, until the definitive date laid down for repayment. ...'

10 Adopted on 7 December 2006, which entered into force on 1 January 2007 (RT I 2006, 59, 440; RT I, 3.2.2011, 3), in the version applicable from 1 January 2012 to 30 June 2014.

21. Under Paragraph 11(1) of the määrus nr 278 'Toetuse tagasinõudmise ja tagasimaksmise ning toetuse andmisel ja kasutamisel toimunud rikkumisest teabe edastamise tingimused ja kord' (Decree No 278 of 22 December 2006 on the conditions and procedures for recovery and repayment of financial support and for the provision of information concerning an infringement occurring on the grant and use of the financial support),[11] that paragraph being headed 'Recovery of aid':

'The decision on recovery of financial support is a discretionary one: it is to be issued within 45 calendar days, and, in the event of recovery of more than EUR 127 823, within 90 calendar days, calculated from the date on which knowledge is acquired of the grounds for recovery of the aid. Where a good reason exists, the period for the issue of the decision may be extended by a reasonable period.'

22. Paragraph 1, headed 'Scope', of the määrus nr 44 'Tööstusettevõtja tehnoloogiainvesteeringu toetamise tingimused ja kord' (Ministerial Decree No 44 of 4 June 2008 on the conditions and procedures for the promotion of investment in technology by industrial undertakings (which entered into force on 15 June 2008) (RTL 2008, 48, 658; RT I, 4.1.2013, 9; 'Decree No 44')), provides, inter alia:

'(1) The conditions and procedures for the promotion of investment in technology by industrial undertakings ("the measure") are laid down in order to pursue the "innovative capacity and business growth" objectives of the priority axis in the "improving the economic environment" operational programme.

(2) The following can be granted under the measure: 1) regional aid, awarded in accordance with the provisions of the [General Block Exemption Regulation], subject to the provisions of that regulation and Paragraph 34^2 of the [konkurentsiseadus (Law on competition)]; …'

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

23. On 28 August 2008 Eesti Pagar entered into a sale contract under which it undertook to acquire a production line for tin loaf bread and sandwich bread loaves from the company Kauko-Telko OY at a price of EUR 2 770 000. In accordance with the provisions of that agreement, it became effective once an initial down payment of 5% was made, which occurred on 3 September 2008.

24. On 29 September 2008 Eesti Pagar entered into a leasing agreement with the company Nordea Finance Estonia AS, and subsequently, on 13 October 2008, the parties entered into a tripartite sale contract under which Kauko-Telko undertook to sell that bread production line to Nordea Finance Estonia, which undertook to lease it to Eesti Pagar. That agreement was effective from when it was signed.

25. On 24 October 2008 Eesti Pagar applied to EAS, under Paragraph 1 of Decree No 44, for aid to acquire and install that bread production line. By decision of 10 March 2009 EAS approved that application for an amount of EUR 526 300.

26. On 8 January 2014 EAS issued a decision to recover from Eesti Pagar the amount of the aid, together with EUR 98 454 by way of compound interest for the period from the date on which the aid was paid until the date of the recovery decision. According to that decision an *ex post* review conducted in December 2012 had discovered the sale contract of 28 August 2008, entered into before the aid application to EAS, and the incentive effect required by Article 8(2) of the General Block Exemption Regulation was therefore not demonstrated.

11 Which entered into force on 1 January 2007 (RT I 2006, 61, 463; RT I, 5.7.2011, 20) and was adopted on the basis of, inter alia, Paragraph 26(6) of the STS, in the version in force from 1 January 2012 to 28 August 2014.

27. On 10 February 2014 Eesti Pagar filed an administrative complaint with the Ministry challenging that recovery decision, that complaint being rejected by the Majandus- ja Kommunikatsiooniministeeriumi käskkiri nr 14-0003 Vaideotsus (Ministerial Decision No 14-0003) of 21 March 2014.

28. On 21 April 2014 Eesti Pagar brought an action before the Tallinna Halduskohus (Administrative Court, Tallinn, Estonia) for annulment of the EAS recovery decision and the Ministry's decision confirming it and, in the alternative, for a declaration that those decisions were unlawful, in so far as they concerned the recovery of the aid, and, in the further alternative, for annulment of those decisions with regard to the interest claimed. That court dismissed the action in its entirety by a judgment of 17 November 2014.

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

30. On 26 October 2015 Eesti Pagar lodged an appeal on a point of law, which the Riigikohus (Supreme Court, Estonia) partially upheld, by a judgment of 9 June 2016, setting aside the judgment of the referring court, paragraph 1.1 of the operative part of the recovery decision and the part of paragraph 1.2 relating to interest, which was to be set on the basis of the total compound interest calculated under paragraph 1.1. For the remainder, the Riigikohus (Supreme Court) referred the matter back to the referring court for re-examination. The Riigikohus (Supreme Court) based that judgment on the following findings in particular:

– a firm undertaking to purchase equipment before applying for aid does not preclude an incentive effect where the purchaser can without excessive difficulty resile from the agreement in the event of the aid being refused, something which cannot be ruled out in the present case;

– in so far as no provision of EU law expressly and imperatively obliges the Member States to recover aid in the absence of a Commission decision, recovering such aid on the initiative of the Member State is at the discretion of the authorities of that State;

– in the event of aid being recovered on the initiative of a Member State, that discretion should be exercised taking into account any legitimate expectation on the part of the beneficiary, which can arise from the conduct of a national authority;

– although it is not clear, in the present case, whether the 4-year limitation period laid down in Article 3(1) of Regulation No 2988/95 is applicable in the event of recovery of structural aid paid by a Member State, the 10-year limitation period under Article 15(1) of Regulation No 659/1999 cannot in any event apply in the absence of a Commission decision on the recovery of aid;

– neither Estonian law nor EU law provides any legal basis for claiming interest for the period between the payment of aid and its recovery inasmuch as, amongst other matters, according to the first sentence of Article 14(2) of Regulation No 659/1999, Articles 9 and 11 of Regulation No 794/2004 concern only interest incurred in respect of aid to be recovered under a Commission decision and inasmuch as Article 4(2) and Article 5(1)(b) of Regulation No 2988/95 lay down no obligation to pay interest but proceed on the supposition that such obligation is provided for by legal provisions of the Union or of the Member State.

31. In the proceedings resumed before the referring court, Eesti Pagar argues in particular that the contracts it entered into on 28 August, 29 September and 13 October 2008 were not binding in so far as, if the aid were refused, it could easily have terminated them, with only very low termination costs. The project would not have been realised without the aid applied for and EAS ought to have assessed the substance of whether the aid had an incentive effect.

32. Eesti Pagar also claims that EAS was aware that those contracts had been entered into at the time the aid application was made and that a representative of EAS had recommended that it should enter into them before applying for the aid. By granting the aid applied for, EAS caused Eesti Pagar to entertain a legitimate expectation that the aid was lawful.

33. Furthermore, Eesti Pagar submits that there is no obligation on EAS to recover the aid, that, in the alternative, recovery of the aid is time-barred under Paragraph 11(1) of Decree No 278 and Paragraph 26(6) of the STS, and indeed Article 3(1) of Regulation No 2988/95, and that the interest claimed is contrary to Paragraphs 27(1) and 28(1) to (3) of the STS.

34. EAS and the Ministry contend that the aid application did not satisfy the requirements under Article 8(2) of the General Block Exemption Regulation and that, under Article 101 of Regulation No 1083/2006 in particular, EAS was obliged to seek recovery of the aid from Eesti Pagar.

35. EAS denies that it was aware, at the time it examined the application, of the contracts that Eesti Pagar had entered into on 28 August, 29 September and 13 October 2008 or that it had recommended that Eesti Pagar should conclude them. It therefore did not cause that company to entertain any legitimate expectation. The Ministry is of the view that, in any event, neither the good faith of the aid recipient nor the conduct of an administrative body can provide an exemption from the requirement to repay unlawful aid.

36. According to EAS and the Ministry, the 10-year limitation period under Article 15(1) of Regulation No 659/1999 does apply, at least by analogy, in the present case, and the requirement to pay interest follows from Article 11(2) and Article 14(2) of that regulation.

37. On 30 December 2016 the Commission, in the capacity of an *amicus curiae*, lodged an opinion with the referring court, in accordance with Article 29(1) of Regulation 2015/1589.

38. The referring court observes, first, that although, under a rule of domestic law according to which courts not ruling at last resort are bound by a higher court's assessment of a point of law, it is bound by the judgment of 9 June 2016 of the Riigikohus (Supreme Court) to the extent that the latter states its position on the interpretation and application of the law, it is apparent from the case-law of the Court of Justice that a national provision of that nature cannot deprive the referring court of the right under Article 267 TFEU to refer questions on the interpretation of EU law to the Court of Justice.

39. Secondly, the referring court is uncertain whether the finding of the Riigikohus (Supreme Court) that it was possible to assess whether the person applying for aid could, without excessive difficulties, have resiled from the contracts if the aid had been refused, also applies to the Member State's assessment of the incentive effect under the General Block Exemption Regulation, and whether the Member State authority is authorised to assess the substance of whether the aid has an incentive effect.

40. Thirdly, according to the referring court it is not clear from the Court of Justice's case-law that, where a Member State decides to recover unlawful aid without a corresponding Commission decision, the Member State is authorised to proceed on the basis of national principles of administrative procedural law and to take into consideration a legitimate expectation entertained by the aid recipient which has been created by the national authority.

41. Fourthly, the referring court believes it remains uncertain whether, in the case of a decision issued by a Member State authority to recover unlawful aid, it is the 4-year limitation period laid down in Article 3(1) of Regulation No 2988/95 or the 10-year limitation period laid down in Article 15(1) of Regulation No 659/1999 that should apply.

42. Fifthly, that court finds that, although the Riigikohus (Supreme Court) partly determined the dispute about interest and annulled the decision recovering the aid to the extent to which Eesti Pagar was required to pay interest, it remains necessary in order to adjudicate on the case to ascertain the requirements under EU law regarding payment of interest where unlawful aid is recovered by a Member State on its own initiative.

43. In the view of the referring court, the case-law of the Court of Justice does not establish sufficiently clearly whether the Member State authority, where it recovers unlawful aid on its own initiative, is obliged to proceed on the basis of the objectives of Article 108(3) TFEU, irrespective of the rules on the claiming of interest laid down in national law, and to calculate interest in accordance with Articles 9 and 11 of Regulation No 794/2004.

44. In those circumstances the Tallinna Ringkonnakohus (Court of Appeal, Tallinn), stayed the proceedings and referred the following questions to the Court of Justice for a preliminary ruling:

'(1) Is Article 8(2) of [the General Block Exemption Regulation] to be interpreted as meaning that, in the context of that provision, where the activity to be supported is, for example, the acquisition of equipment, "work on the project or activity" has started when the agreement for the purchase of that equipment has been entered into? Are the Member State authorities authorised to assess an infringement of the criterion mentioned in that provision in light of the costs of withdrawal from an agreement which contravenes the requirement of an incentive effect? If the Member State authorities have such authority, what level of costs (in percentage terms) incurred by withdrawal from the agreement may be deemed to be sufficiently marginal from the aspect of meeting the requirement of the incentive effect?

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

(3) Can a Member State authority which decides to grant an aid — on the erroneous assumption that it is an aid that accords with the block exemption requirements, but which is in fact an unlawful aid — engender a legitimate expectation on the part of the aid recipients? Is, in particular, the fact that the Member State authority is aware, on granting the unlawful aid, of the circumstances causing the aid not to be covered by the block exemption sufficient to give rise to a legitimate expectation on the part of the recipients?

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

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

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

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

III. Procedure before the Court

45. Eesti Pagar, the Estonian and Greek Governments and the Commission submitted written observations. EAS and all the foregoing parties, with the exception of the Greek Government, made oral representations at the hearing, which was held on 18 June 2018.

IV. Analysis

A. Background to the dispute in the main proceedings

1. Summary of the observations of the parties

46. The Commission notes that the referring court has not made any conclusive finding on, first, whether the contracts entered into were binding or, second, whether, at the time it assessed the aid application, EAS was aware that those contracts had been entered into or, last, whether EAS had recommended to Eesti Pagar that it should enter into those contracts.

47. The Commission states that it infers from the judgment of 9 June 2016 of the Riigikohus (Supreme Court) and from the request for a preliminary ruling that, on the one hand, at least the tripartite sale contract of 13 October 2008 was a firm commitment and that, on the other, the referring court proceeded on the assumption that EAS was aware that those contracts had been entered into but had not recommended to Eesti Pagar that it should enter into them.

48. According to Eesti Pagar, the agreement entered into on 28 August 2008 was essentially only a preliminary agreement rather than a definitively binding contract in so far as, according to both parties, it was not to enter into force unless EAS granted the aid applied for. It is common ground, Eesti Pagar asserts, that the costs it would incur for withdrawing from the relationship arising from that preliminary agreement were limited to 5% of the total price under the agreement, the sum that Eesti Pagar had paid before applying for the aid.

49. According to Eesti Pagar, it is apparent from the terms of the leasing agreement entered into on 29 September 2008 that, contrary to what is said by the referring court, the obligations under that agreement were to take effect only when a series of conditions were satisfied. Given those conditions, that agreement only took effect, Eesti Pagar asserts, on 7 November 2008, and therefore after the aid application had been made.

50. Eesti Pagar states that the agreement entered into on 13 October 2008 did not give rise to any obligations on Eesti Pagar and that its sole subject matter was the subject matter of the agreement entered into on 28 August 2008. Furthermore, EAS did not refer to that agreement either in the recovery decision or in the proceedings before the referring court.

51. Eesti Pagar submits, moreover, that it is apparent from various pieces of evidence that EAS was aware of those contracts and had recommended that it should enter into them before it filed the aid application.

2. Assessment

52. In a reference for a preliminary ruling it is clearly for the referring court alone to make findings of fact, which the Court of Justice cannot review (as Eesti Pagar seems to want in the present case).

53. However, I am of the view (as is the Commission) that the referring court seems not yet to have made any conclusive finding on, first, whether or not the contracts entered into on 28 August, 29 September and 13 October 2008 were binding [12] or, second, whether, at the time it assessed the aid application, EAS was aware that those contracts had been entered into previously or, last, whether EAS had recommended to Eesti Pagar that it should enter into those contracts before it filed the aid application. [13]

54. That obviously does not make the Court's task any easier since, as can be seen from the case-law, it is desirable and 'might be convenient, in certain circumstances, for the facts in the case to be established and for questions of purely national law to be settled at the time the reference is made to the Court of Justice'. [14]

55. In any event, in order to provide answers of use to the referring court, I will look at each of those hypotheses including, in particular, those based on the assumption that EAS was aware of those contracts and recommended that Eesti Pagar should enter into them before making its application.

B. Admissibility of the questions referred

1. Summary of the observations of the parties

56. Eesti Pagar submits that, by its judgment of 9 June 2016, the Riigikohus (Supreme Court) substantially disposed of the dispute at national level, and that the questions referred, given the stage of the proceedings at which they occur, are therefore inadmissible and irrelevant, with the exception of the fourth question, and that the Riigikohus (Supreme Court) itself stated in that judgment that a reference to the Court of Justice for a preliminary ruling could only be relevant in relation to the matter of time-bar.

57. Furthermore, Eesti Pagar argues that the first question, as it is posed, is irrelevant and is based on the misconception that incentive effect was disregarded, that the second question should relate instead to whether there is a legal basis for an obligation on a Member State to recover aid on its own initiative, that the third is derived from an incomplete account of the facts, in so far as EAS did recommend that Eesti Pagar should enter into the contracts entered into on 28 August, 29 September and 13 October 2008, and that the fourth question should be supplemented to include recovery of aid on the initiative of a national authority, and is based on an incorrect assumption that Article 108(3) TFEU gives rise to an obligation to recover aid.

12 According to paragraph 20 of the judgment of the Riigikohus (Supreme Court), 'the adjudicating bodies have stated sufficient reasons for their finding that the applicant, before filing an aid application on 24 October 2008, had entered into a firm commitment to acquire equipment. Even taking the view that the bilateral sale agreement of 28 August 2008 was conditional on the basis of the earlier exchange of correspondence between the parties [reference to the case file], in relation to the tripartite agreement entered into on 13 October 2008 involving the lessor, no reference was made to any condition whatsoever'.

13 The referring court examined the witnesses at the hearing on 11 April 2017 but did not make any conclusive finding on that issue (see the report of the hearing on 11 April 2017).

14 See judgments of 10 March 1981, *Irish Creamery Milk Suppliers Association and Others* (36/80 and 71/80, EU:C:1981:62, paragraph 6), and of 16 July 1992 (*Meilicke*, C-83/91, EU:C:1992:332, paragraph 26). See also judgment of 30 March 2000, *JämO* (C-236/98, EU:C:2000:173, paragraph 31).

2. Assessment

58. I would note that, in its judgment of 9 June 2016, the Riigikohus (Supreme Court) set aside the referring court's earlier judgment and partially annulled the contested decision on the basis, inter alia, of an interpretation of several provisions of EU law, without however requesting any preliminary ruling from the Court of Justice. The Commission, which acted in the main proceedings as *amicus curiae*, pursuant to the referring court's request under Article 29(1) of Regulation 2015/1589, disputed almost all the analyses of EU law by the Riigikohus (Supreme Court), both before the referring court and before the Court of Justice.

59. Although the referring court states that, under Estonian law, it is bound by the interpretation and application of the law by the Riigikohus (Supreme Court), it believes that it cannot thereby be deprived of the right under Article 267 TFEU to refer questions on the interpretation of EU law to the Court of Justice. Its request is therefore based essentially on the uncertainties it has about how the Riigikohus (Supreme Court) has interpreted EU law.

60. A lower court is indeed, in principle, still entitled in such a situation to refer questions to the Court of Justice for a preliminary ruling,[15] but, lest the questions referred be hypothetical, the dispute must not yet have been finally disposed of by the highest Estonian court.

61. It is in my view clearly apparent from the order for reference that the dispute in the main proceedings is still in all respects before the referring court for assessment as regards the matters addressed in the first to the fourth questions.

62. In relation to the fifth question, concerning interest, the referring court itself has noted that the Riigikohus (Supreme Court) partially resolved the dispute in the main proceedings, by annulling the recovery decision to the extent that it obliged Eesti Pagar to pay interest. According to the referring court, in order to determine the case pending before it, it is nevertheless still necessary to ascertain the requirements under EU law regarding the payment of interest where unlawful aid is recovered on a Member State's own initiative.

63. In any event, I believe (in common with the Commission) that in its judgment of 9 June 2016 the Riigikohus (Supreme Court) emphasised that the referring court still had to determine the matter of how interest is calculated, which therefore does not prevent a further determination of the interest that has been annulled, if ever the Commission decided to recover the aid.

C. The first question, on the incentive effect of the aid

1. Summary of the observations of the parties

64. Eesti Pagar submits that it is clearly apparent from the circumstances of the case and the evidence produced that the aid did have an incentive effect. It argues that it would not have realised the project without the aid, that it had not entered into a firmly binding agreement before it applied for the aid and that, when assessing whether an agreement is binding, an authority should take account of the fact that a party can withdraw and the marginal costs of doing so.

65. On the other hand, a footnote in the Guidelines, which are not binding, cannot be relied upon to support an assertion that the aid had no incentive effect. In any event, the assessment cannot be based on a formal approach and there should be a detailed analysis of whether or not it is difficult to resile from the contracts.

15 See, to that effect, judgment of 5 October 2010, *Elchinov* (C-173/09, EU:C:2010:581, paragraphs 25 to 32).

66. According to the working paper on the Commission's 'frequently asked questions' forum aimed at the national authorities responsible for implementing the General Block Exemption Regulation, it is for those authorities to carry out that detailed analysis of whether the work has started, and that analysis, moreover, differs from that of whether aid is compatible with the internal market. The Greek Government shares that view.

67. In consequence, according to Eesti Pagar, when the Commission claims in the present case that the working paper cannot be used as an authority, its argument is contrary to the general legal principles of legitimate expectations, clarity and legal certainty and is in breach of that company's right to good administration under Article 41 of the Charter of Fundamental Rights of the European Union.

68. Last, Eesti Pagar questions whether the objective pursued by Article 8(2) of the General Block Exemption Regulation could be achieved if the national authority's competence was limited to making a purely factual finding on whether or not an agreement had been concluded before the aid application was made.

69. The Estonian Government is of the view that, when assessing incentive effect, the competent Member State authority can have regard only to the timing of the incentive effect referred to in Article 8(2) of the General Block Exemption Regulation, that is to say, the requirement that work on the project or activity must have started only after the aid application was made. That authority is not entitled to assess any other circumstances, in particular the amount of the withdrawal costs. According to the Estonian Government, that is the only way to ensure uniform application of the block exemption requirements and to protect the Commission's exclusive responsibility for assessing incentive effect on the merits, a view confirmed, it asserts, by paragraph 16 of the Commission Notice on the enforcement of State aid law by national courts.

70. As regards the concept of whether 'work on the project … has started', the Estonian Government considers that, for the incentive effect requirement not to be satisfied, it is sufficient that the aid beneficiary has made the first firm commitment to order equipment before filing the aid application. It argues that this can be inferred from footnote 40 to the Guidelines on national regional aid for 2007-2013 and is corroborated by Article 2(23) of Regulation No 651/2014.

71. The Commission observes that recital 28 of the General Block Exemption Regulation defines the start of work on the project or activity as being when 'the activities relating to the implementation of the aided project or activities are initiated', and is of the view that conclusion of the contracts of 28 August, 29 September and 13 October 2008 amounts to an activity relating to implementation of the aided project. It is therefore evident, the Commission submits, that the aid at issue in the main proceedings does not meet the requirements under Article 8(2) of the General Block Exemption Regulation and is therefore unlawful, since it was granted in breach of the notification obligation under Article 108(3) TFEU.

72. That finding is not rebutted either by the assertions in paragraphs 106 to 109 of the judgment of 13 June 2013, *HGA and Others* v *Commission* (C-630/11 P to C-633/11 P, EU:C:2013:387), or by Eesti Pagar's argument that it could have terminated the agreements without difficulty and with marginal withdrawal costs, or by the working paper on the Commission's 'frequently asked questions' forum.

73. First, according to the Commission, the Court did indeed find in those paragraphs that criteria other than the fact that the aid application preceded the start of work could be used to establish that the aid was necessary. Nevertheless, that finding was made in relation to the Commission's evaluation of whether aid was compatible, under Article 107(3) TFEU, and is therefore not relevant in the present case, in which the question arises in relation to implementation of the General Block Exemption Regulation by a national authority. That is because the rules relating to the block exemption must be clear, not subject to discretion and easy to apply by the Member State authorities.

74. Further, the Commission argues, the wording of Article 8(2) of the General Block Exemption Regulation and of recital 28 of that regulation rule out any possible interpretation based on the ability to terminate the contracts or on the amount of the withdrawal costs, in so far as those provisions refer to the time at which 'work on the project or activity has started' and when 'the activities relating to the implementation of the aided project or activities are initiated'. Whilst the Commission can have regard to the difficulty of terminating the contracts or of withdrawal costs when assessing the incentive effect criterion under Article 107(3) TFEU, the same is not true of the Member State authorities when they apply Article 8(2) of the General Block Exemption Regulation.

75. Lastly, the Commission contends that 'frequently asked questions' drawn up by the Commission's staff cannot alter the contents of a regulation, that the paper referred to above is neither binding on nor relevant to the national authorities and courts and that, since it does not express the Commission's official position, nor is it binding on the Commission. In any event, according to the Commission, that paper relates only to the conclusion of preliminary agreements such as preliminary feasibility studies, and not that of agreements relating to the acquisition of equipment that is the subject of aid.

2. Assessment

76. By its first question, the referring court asks the Court of Justice to interpret the concept of when 'work on the project … has started' in Article 8(2) of the General Block Exemption Regulation and to clarify the powers of the national authorities when applying that provision. Indeed, as the referring court itself agrees in paragraph 29 of the request for a preliminary ruling, the principal issue in the present case is whether the regional aid awarded to Eesti Pagar complied with the incentive effect requirement under that article. [16]

77. I am of the view at the outset that if the national authorities are authorised to assess whether the aid they grant actually has an incentive effect, that does not conflict with the Commission's exclusive responsibility for assessing whether aid is compatible with the internal market.

78. I note that, since the General Block Exemption Regulation system does not provide for any intervention by the Commission, it makes sense that such an analysis should be within the competence of the national authorities responsible for implementing that regulation.

79. Secondly, I agree with the Estonian Government and the Commission that the underlying rationale of the General Block Exemption Regulation requires that the criteria to be applied should be clear and simple in order to ensure consistent application across the European Union.

80. As regards the concept of when 'work on the project … has started', the Commission clarified in its Guidelines on national regional aid for 2007-2013 that 'the first firm commitment to order equipment, excluding preliminary feasibility studies' constituted a start of work.

81. Even though guidelines of that nature are not binding on the Court, to my mind the Court can use that definition as a starting point, a fortiori given that, as the Greek Government correctly observes, the Commission used it again, in Article 2(23) of its new general block exemption regulation, Regulation No 651/2014, according to which the 'start of works' can be, inter alia, 'the first legally binding commitment to order equipment or any other commitment that makes the investment *irreversible*' (emphasis added).

16 It was confirmed at the hearing that the funds in question in the present case were from the European Regional Development Fund (ERDF). This is one of the European Structural Funds, which aims to strengthen economic and social cohesion in the European Union by correcting imbalances between the regions.

82. If a firm contractual commitment alone can amount to the start of work, it is necessary, in my view, to verify on a case-by-case basis the nature of any commitments entered into before an aid application is made by a potential beneficiary.

83. Furthermore, the working paper on the Commission's 'frequently asked questions' forum corroborates that thinking. Indeed, I completely agree with what emerges from that paper, drawn up by the Commission services for the purposes of implementing the General Block Exemption Regulation, that is to say, that the 'start of work' criterion within the meaning, in particular, of the footnote to the guidelines, referred to above, must be interpreted as meaning that, *even if agreements have been entered into and payments made before an aid application is made, a purely formal approach is insufficient* and there must be detailed analysis, from an economic perspective, of whether or not and at what price the aid beneficiary can resile from the agreements signed, or whether the beneficiary would lose a considerable sum of money if it had to terminate the agreements in the event of not being awarded the aid.[17]

84. As Eesti Pagar notes, the objective of Article 8(2) of the General Block Exemption Regulation could not be achieved if the national authority's competence were limited to making a purely factual finding on whether or not an agreement had been concluded before the aid application was made. In particular, incentive effect could very probably be absent in a situation in which, the day after filing an aid application, an applicant entered into a firm agreement with the intention of performing it, irrespective of whether or not he was granted the aid.

85. At this stage, as the Riigikohus (Supreme Court) had quite correctly already done (in paragraph 21 of its judgment of 9 June 2016), we need to look at the *HGA*[18] case-law, which supports the foregoing analysis and has an interesting history.

86. First, in that case, the General Court of the European Union[19] examined the plea in law alleging manifest error of assessment as to the existence of an incentive effect. After observing, in paragraph 215 of its judgment, that the requirement that the application for aid must be submitted before work on the investment project commences was a simple, relevant and suitable criterion which enabled the Commission to presume that an aid scheme had incentive effect, the General Court stated, in paragraph 226 of that judgment, that it was necessary to ascertain whether the applicants at first instance had demonstrated that the scheme was suitable for ensuring the incentive effect *even when the application for aid had not been submitted prior to the commencement of work on the investment project*.

87. According to Advocate General Bot,[20] 'the General Court erred in law in so far as what it ought to have found was not, as it did in paragraphs 215 and 226 of the judgment under appeal, that the criterion of a prior application is a simple, relevant and adequate criterion enabling the Commission to presume an incentive effect, but that the condition that an application for aid is made before a project is implemented, after approval by the Commission, is an imperative prerequisite of the aid being necessary. That imperative could be called into question and could permit consideration of

17 The document in English 'General Block Exemption Regulation (GBER) — Frequently Asked Questions' is available on the Commission's website at: http://ec.europa.eu/competition/state_aid/legislation/gber_practical_faq_en.pdf and answers the question 'is it contrary to the incentive effect requirement of Art. 8 to conclude agreements and make payments based on them, in particular preliminary contracts for purchase options and pre-contracts of sale, before the aid application is submitted?' as follows: 'Footnote 40 of the Regional Aid Guidelines defines "start of work" as either the start of construction work or the first firm commitment to order equipment, excluding preliminary feasibility studies. Whether the agreements and payments made on the basis of these agreements can be considered a "first firm commitment" to start the project does not necessarily depend on the formal classification of the agreements in question, but on the terms of those agreements. If contractual obligations make it difficult from an economic standpoint to abandon the project in a given case, particularly because a considerable sum of money would be lost, work will be deemed to have started within the meaning of Art. 8. A more detailed examination of the specific circumstances of the case would be needed to see if this is indeed the case.'

18 Judgment of 13 June 2013, *HGA and Others* v *Commission* (C-630/11 P to C-633/11 P, EU:C:2013:387, paragraphs 106 to 109).

19 Judgment of 20 September 2011, *Regione autonoma della Sardegna and Others* v *Commission* (T-394/08, T-408/08, T-453/08 and T-454/08, EU:T:2011:493).

20 Opinion in Joined Cases *HGA and Others* v *Commission* (C-630/11 P to C-633/11 P, EU:C:2013:194, point 66).

other circumstances only in the event that, in the course of examining the compatibility of a particular aid scheme, documents originating from the Commission alone (correspondence, declarations, decisions, notifications, etc.) had been misleading with regard to the applicability or the conditions for the applicability to the scheme in question of the last paragraph of point 4.2 of the 1998 Guidelines. That conclusion [seemed] to be confirmed by the additional precautions laid down by the Commission in the Guidelines on national regional aid for 2007-2013'.

88. The Court of Justice did not follow that approach.

89. The Court held essentially (see paragraph 106 et seq. of its judgment of 13 June 2013, *HGA and Others* v *Commission*, C-630/11 P to C-633/11 P, EU:C:2013:387), that the requirement that the application for aid must be submitted before work on the investment project commences *was merely a rebuttable presumption*, which therefore allowed aid beneficiaries to provide alternative evidence showing that the measure in question did indeed have an incentive effect.

90. Moreover, according to the academic literature,[21] 'in the light of the [*HGA*] case-law it may … be concluded that where soft law guidelines purport to introduce a legal obligation to submit a specific application form in order to be considered as eligible for an aid scheme it is highly questionable that if an applicant has failed to do so, the Commission could conclude that the aid would be incompatible without more. It is submitted that, in the light of [that case-law], the failure to comply with such formalities should not establish a non-rebuttable presumption that the aid has no incentive effect and is incompatible — the Commission should look at the circumstances of the case to assess whether the (potential) beneficiary has an incentive to change its behaviour. It will of course be for the Member States [or the beneficiaries] to provide sufficient evidence to support this claim'.

91. It can be seen from the foregoing that, first, the authority that grants the aid cannot hide behind formalities and must assess the substance of whether the work has started within the meaning intended by the General Block Exemption Regulation as I have set out above.

92. Even though the Commission has intervened both before the referring court and before the Court of Justice, with a line of argument disputing that the national authorities have any discretion,[22] I believe — in so far as the working paper, to which I referred in point 83 of this Opinion, is aimed in particular at the national authorities responsible for implementing the General Block Exemption Regulation — that there can be no reasonable doubt that those authorities have a duty to carry out the aforementioned detailed analysis of whether the work has started, which moreover differs from any analysis of whether aid is compatible with the internal market, whilst, for the avoidance of doubt, an undertaking that envisages applying for aid is obviously authorised to take account of that working paper.

93. Indeed, the right to assess whether aid is compatible with the internal market, which lies with the Commission alone, does not rule out the fact that the national authority can and must assess the substance of whether the aid is compatible with the General Block Exemption Regulation, and must not take a purely formal approach.

21 See Werner, P., and Verouden, V. (eds.), *EU State Aid Control: Law and Economics*, Wolters Kluwer, Alphen-sur-le-Rhin, 2017, p. 208.

22 According to the Commission, the General Block Exemption Regulation is self-implementing.

94. Accordingly, as regards the unjustified doubts expressed in paragraph 29 of the order for reference as to whether the Member State authority is competent to assess the substance of whether there is an incentive effect, in my view it has been demonstrated with sufficient clarity that the Member State authority is competent to assess the substance of whether there is an incentive effect. To take the opposite approach would undermine implementation of the General Block Exemption Regulation and the grant of aid under it, because the Member State authority would be unable to verify whether the incentive effect criterion was met.

95. Even more significantly, the national authority has to verify whether there is an incentive effect in so far as it has to comply with that regulation when deciding to grant or refuse aid.

96. Nevertheless, if the national authority or the beneficiary, both of which are jointly responsible for ensuring that the regulation is complied with, have serious doubts as to whether or not there is an incentive effect, they can refer to the Commission in so far as the Commission is accustomed to carrying out complex analyses in this area.

97. To conclude discussion of this issue, although an assessment of whether the commitments made by Eesti Pagar before it filed the aid application amounts — in fact — to a 'firm commitment' within the meaning of Article 8(2) of the General Block Exemption Regulation (which does not include 'preliminary' or, more significantly, 'reversible' commitments) does, without doubt, fall within the competence of the referring court, the Court of Justice must provide it with interpretative guidance on that article which may be of use to it.

98. A situation such as that in the main proceedings, involving a set of contracts entered into by three parties, must, in principle, be appraised in the light of the contractual relationships as a whole rather than by analysing each agreement individually, although clearly that depends on the factual analysis of those contracts that only the referring court can carry out. [23]

99. When assessing whether the contracts were binding with regard to the incentive effect, it is also necessary to take into consideration the fact that Eesti Pagar could withdraw and the marginal costs it would incur as a result, having regard to the total cost of the project.

100. As the Greek Government observes, in determining whether the agreement in question and the corresponding payments made in performance of it constitute a 'first firm commitment' to order equipment and whether they therefore constitute the 'start of work', the fact that an agreement is expressly described as final is largely irrelevant. Conversely, where the withdrawal terms are extremely onerous compared with the economic transaction as a whole, particularly as a result of the sum payable in the event of termination, work should be found to have started within the meaning of Article 8(2) of the General Block Exemption Regulation. In contrast, if the contracting parties agreed, for example, that their contract would only enter into force if a loan was obtained and if the aid application was granted, or if the cost of withdrawal is low, the view can be taken that work has not started within the meaning of that article. If it were proved that the national authority advised Eesti Pagar to sign the undertakings before the aid application, that circumstance should be taken into account.

101. Accordingly, in order to answer the question whether aid granted on the basis of the General Block Exemption Regulation has an incentive effect, there must be a detailed analysis of the contractual terms and the factual circumstances surrounding conclusion of the relevant agreements.

23 EAS argued at the hearing that in the present case there are in fact three separate agreements which should be assessed individually, not as a whole.

D. The second question, on whether a State is obliged to recover unlawful aid in the absence of a decision by the Commission

1. Summary of the observations of the parties

102. Eesti Pagar submits that there is no legal provision that clearly obliges the authorities of a Member State to recover aid on their own initiative, in the absence of a Commission decision ordering them to do so, where they granted that aid under the General Block Exemption Regulation, and refers to the discretion which, in its view, Estonian law gives the national authorities in that matter.

103. The Greek Government notes that, under Article 14(1) of Regulation No 659/1999, the Commission has the power to recover unlawful aid and that it follows from Article 107 and Article 108(2) TFEU that the Member State courts can order that recovery. Accordingly, in the absence of a recovery decision adopted either by the Commission or by a Member State court, there is effectively no general direct obligation on the administrative authorities in the Member States to require that aid be repaid. However, according to that government, in the specific case of aid granted from Structural Fund resources, Article 125(4) and (5) and Article 143 of Regulation No 1303/2013 create an obligation on the competent national authorities to endeavour to recover funds granted in breach of the applicable law.

104. The Estonian Government considers that the Member States must recover unlawful aid such as that at issue in the main proceedings, granted in breach of Article 8(2) of the General Block Exemption Regulation and Article 108(3) TFEU, irrespective of any decision by the Commission. Article 107(1) TFEU and the principle of sincere cooperation oblige a Member State to take all appropriate measures to ensure the effectiveness of EU law.

105. The Commission submits, in essence, that unlawful aid must be recovered by all national authorities, both courts and administrative authorities.

2. Assessment

106. Although there appears to be no precedent in the case-law of the Court for finding that such an obligation exists, since the Court has ruled only on decisions by the Commission and on national court proceedings, I agree with the Estonian Government that an obligation on the national authorities to recover unlawful aid on their own initiative can be inferred from Article 107(1) and Article 108(3) TFEU and the principle of sincere cooperation enshrined in Article 4 TEU.[24]

107. I am of the view (in common with the Commission) that aid that is not in line with the provisions of the General Block Exemption Regulation is unlawful aid, and is contrary to the prohibition on putting aid into effect under Article 108(3) TFEU, which has direct effect. The resulting obligation to recover the aid is also binding on the administrative authorities. It will therefore be for the national authorities (and courts) to take all appropriate action in response to an infringement of Article 108(3) TFEU, in accordance with their national law, both as regards the validity of acts giving effect to aid measures and the recovery of financial support granted in disregard of that provision.

24 The obligation to recover unlawful aid is moreover binding on all national authorities, both courts and administrative authorities, as emerges from the Court's case-law (see, for example, judgment of 22 June 1989, *Fratelli Costanzo* v *Comune di Milano*, 103/88, EU:C:1989:256, paragraphs 30 and 31).

108. In the present case, if the incentive effect criterion under Article 8(2) of the General Block Exemption Regulation was not satisfied at the time the aid was granted, the aid does not meet the requirements of the General Block Exemption Regulation. Furthermore, the aid was not approved by the Commission under the procedure in Article 108(3) TFEU or in Article 108(2) TFEU. Under those circumstances, it is therefore aid that is incompatible with the internal market, under Article 107(1) TFEU.

109. The Member State must therefore, on its own initiative and as soon as possible, recover the aid that is incompatible with the internal market, thereby remedying the unlawfulness and restoring the situation which should have prevailed had EU law been complied with. That obligation falls on the Member State under the principle of sincere cooperation (Article 4 TEU), under which the Member State must take all appropriate measures to ensure the scope and effectiveness of EU law.

110. Does this 'new route' for recovering aid found to be unlawful nevertheless require the aid to be manifestly unlawful? If the competent national authorities were merely to have some doubts as to whether the aid is lawful, that would then be insufficient to give rise to an obligation to recover the aid.

111. To my mind, if the recovery must be based on unlawfulness being demonstrated (by a competitor of the beneficiary or by the national authority itself),[25] mere uncertainty as to whether aid is lawful is not sufficient ground for the national authority to recover the aid, where the aid is granted under the General Block Exemption Regulation and is, therefore, purportedly exempt aid, but this does not mean that infringement of that regulation must necessarily be manifest.

112. It follows that the reply to the second question must therefore be that, in accordance with Article 108(3) TFEU, a Member State authority is obliged to recover unlawful aid that it has granted in breach of the General Block Exemption Regulation, where it finds that the aid in question was granted unlawfully, whether or not the Commission has made a recovery decision to that effect and whether or not infringement of that regulation is manifest. Mere doubt cannot however be sufficient for that purpose.

E. The third question, on the principle of legitimate expectations

1. Summary of the observations of the parties

113. Eesti Pagar contends that the general principle of legitimate expectations is an integral part of the EU legal order and is binding on the Commission and the national authorities when exercising their respective powers, including when implementing the General Block Exemption Regulation. Accordingly, since, as part of implementing that regulation, it is the competent national authority that rules on an aid application, with no intervention by the Commission, it is indeed the national authority that can engender a legitimate expectation on the part of the applicant.

114. Moreover, according to Eesti Pagar, the principle of the operator who exercises due care cannot, in the present case, preclude a finding that it had a legitimate expectation, since the General Block Exemption Regulation does not provide for any intervention by the Commission. Applying that principle cannot extend to requiring Eesti Pagar to have greater expertise than EAS about the requirements of that regulation, or, a fortiori, to review the conduct of EAS, which, moreover, according to Eesti Pagar, changed its interpretation of that regulation after it granted the aid.

115. The Greek Government did not address that question in its written observations.

25 Unless the Commission decides to open an investigation into the compatibility of aid.

116. The Estonian Government and the Commission are of the view that, for a legitimate expectation to arise, a competent authority must have given the operator specific assurances that cannot conflict with the applicable EU law and have given rise to a reasonable expectation on the part of an operator exercising due care. Moreover, the weighing up of public and private interests must favour private interests. According to the Estonian Government and the Commission, none of those requirements are satisfied in the present case.

117. First, since the alleged legitimate expectation is based on interpretation of Article 8(2) of the General Block Exemption Regulation, the Estonian Government and the Commission argue that EAS is not a competent authority to interpret that provision, under which the aid beneficiary is responsible for ensuring that the prescribed conditions are complied with. The national authorities are therefore not competent to give the beneficiary an opinion on whether financial support complies with the requirements of that provision. The national authorities therefore, in their view, cannot cause aid beneficiaries to entertain legitimate expectations.

118. Secondly, the Estonian Government and the Commission contend that silence by an administrative authority, whether or not it is aware of particular circumstances, is not equivalent to precise, unconditional and consistent information. Such silence therefore cannot give rise to a legitimate expectation.

119. Thirdly, the Commission submits that, in the context of weighing up public and private interests, it is irrelevant whether or not the Commission made a decision declaring the aid in question to be incompatible with the internal market. Since State aid is prima facie prohibited, under EU law unlawful State aid cannot, the Commission argues, be left in the hands of the beneficiary, in so far as a distortion of competition of that nature would be contrary to the general interest.

2. Assessment

120. The third question referred, on legitimate expectation, is closely linked to the second limb of the first question (that is to say, the competence of the national authorities when implementing the General Block Exemption Regulation).

121. First of all, it is hard to understand the thesis that the Commission advances in relation to the first question referred, which relies on a criterion requiring a degree of assessment (that is to say, on the incentive effect) whilst at the same time disputing in the present proceedings that the national authorities have any competence to carry out that assessment.

122. In so far as what the General Block Exemption Regulation does is precisely to exempt the national authorities from the obligation to notify the aid if its conditions are met, it is to my mind difficult to infer anything from non-compliance with the procedure under Article 108(3) TFEU where the beneficiary and the competent national authority consider that those conditions are met.

123. Secondly, as a general rule, for a legitimate expectation to arise, a competent authority must have given the beneficiary specific assurances that must not conflict with the applicable EU law and have given rise to a reasonable expectation on the part of an operator exercising due care. Moreover, the weighing up of public and private interests must favour private interests.

124. On the basis of the documents produced before the Court, I am of the view (as are the Estonian Government and the Commission) that none of those conditions appears to be met in the present case, a fortiori given that it is apparent from the case-law that even a national court cannot create a legitimate expectation that there is no State aid.[26]

125. If the referring court considers, on the basis of the answer to the first question, that the aid was granted in breach of Article 8(2) of the General Block Exemption Regulation, EAS will as a result have infringed Article 108(3) TFEU, thereby precluding any legitimate expectation on which the beneficiary might rely.

126. Moreover, a prudent and well-informed operator in Eesti Pagar's position also had to check that the conditions of Article 8(2) of the General Block Exemption Regulation were[27] satisfied. Furthermore, the obligation on the aid beneficiary to verify that the procedure under Article 108(3) TFEU has been complied with does not depend on the conduct of the national authority, a finding that applies 'even if the latter were responsible for the illegality of the aid decision to such a degree that revocation appears to be a breach of good faith'.[28]

127. That might be the situation in the present case in which Eesti Pagar believes that it was treated unfairly and unjustly because the national authority encouraged it to enter into the contract or contracts or, at the very least, was aware of that contract or those contracts at the time of the grant application.

128. Whilst the mere fact that EAS staff were aware of the contracts entered into earlier by that company does not in itself amount to providing specific assurances, it cannot be ruled out automatically that the situation could be different if EAS recommended to Eesti Pagar that it should enter into those contracts. However, were that found to be so, the only issue that could arise would be one of State liability, rather than of any legitimate expectation capable of avoiding recovery of the aid.

129. The answer to the third question should therefore be that a Member State authority that grants aid under the misconception that the aid meets the block exemption requirements, thereby grants unlawful aid and cannot create a legitimate expectation on the part of the recipient of that aid. The fact that the authority was aware in advance that one of those requirements was not met, or even that it gave the recipient bad advice is irrelevant in that regard.

F. The fourth question (applicable limitation period) and the fifth question (obligation to claim interest)

130. It is appropriate to address these two questions together because they raise the same key question (namely which rule should apply in a situation such as that in the main proceedings).[29]

26 Judgment of 1 March 2017, *SNCM* v *Commission* (T-454/13, EU:T:2017:134, paragraph 299); see also in that regard judgment of 16 July 2014, *Zweckverband Tierkörperbeseitigung* v *Commission* (T-309/12, EU:T:2014:676, paragraphs 237 to 241), and judgment of 16 May 2000, *France* v *Ladbroke Racing and Commission* (C-83/98 P, EU:C:2000:248, paragraphs 58 to 61), and the Opinion of Advocate General Cosmas (EU:C:1999:577, points 53 to 98).

27 Especially in the context of a block exemption, the beneficiary must be aware that it is taking a risk, in so far as the aid is not notified to the Commission.

28 Judgment of 20 March 1997, *Land Rheinland-Pfalz* v *Alcan Deutschland* (C-24/95, EU:C:1997:163, paragraph 41).

29 A potentially similar question also seems to arise in Case C-387/17, *Fallimento Traghetti del Mediterraneo* (likewise pending before the Court of Justice) in an action for damages by a competitor of an aid recipient against the Italian State alleging loss suffered as a result of the aid being paid prematurely.

1. Summary of the observations of the parties

(a) The fourth question

131. Eesti Pagar claims essentially that the 10-year limitation period under Article 15(1) of Regulation No 659/1999 applies only to actions brought by the Commission and believes there is nothing to say that a national institution such as EAS can be treated in the same way as the Commission. In contrast, either the four-year period under Article 3(1) of Regulation No 2988/95 or the relevant national legislation can apply to an action for recovery of that nature.

132. The Greek Government believes that the 10-year limitation period under Article 15(1) of Regulation No 659/1999 applies.

133. The Estonian Government and the Commission are of the view that, where a national authority or court, by means of a decision to recover aid, gives direct effect to the prohibition on putting aid into effect under Article 108(3) TFEU, the national procedural rules should be applied. However, national law should be applied having regard for the principle of the effectiveness of EU law. In order to protect the Commission's exclusive competence to approve or prohibit aid before it is put into effect, national law must, they contend, allow unlawful aid to be recovered for at least 10 years from the time unlawful aid is granted to its recipient, the period that is laid down in Article 15 of Regulation No 659/1999.

134. As regards the limitation period of four years from the time when the irregularity was committed established in Article 3(1) of Regulation No 2988/95 for structural aid, the Estonian Government and the Commission submit that that regulation is irrelevant in the present case, since the rules on State aid comprise a specific regime, flowing directly from a higher ranking provision than Regulation No 2988/95, that is to say, Article 108(3) TFEU. That view, they argue, is moreover confirmed by Article 101 of Regulation No 1083/2006, according to which Article 14 of Regulation No 659/1999 applies to the recovery of State aid.

(b) The fifth question

135. Eesti Pagar notes that, in its judgment of 9 June 2016, which has the force of *res judicata*, the Riigikohus (Supreme Court) held that this case did not fall within the scope of Articles 9 and 11 of Regulation No 794/2004 and, on those grounds, annulled the recovery decision in respect of interest.

136. Nor, according to Eesti Pagar, can those articles apply by analogy in the present case, in so far as their wording relates only to interest under Commission recovery decisions and that Regulation No 794/2004 was adopted in order to implement Regulation No 659/1999, which concerns only actions brought by the Commission, to the exclusion of those brought by the Member State authorities. Accordingly, neither any basis for demanding interest when recovering aid, nor any right of or obligation on a Member State institution to do so can be inferred from Article 108(3) TFEU.

137. The Greek Government argues that, where unlawful aid is repaid pursuant to the decision of a national court, national law applies, in particular in relation to provisions relating to the rate of interest on sums owed to the State. Nevertheless, in order to achieve the objective of the State aid provisions, the method of calculating interest must not be less strict than that under Article 14(2) of Regulation No 659/1999 or Articles 9 to 11 of Regulation No 794/2004. National law must, according to the Greek Government, ensure that the objective of the State aid provisions in the FEU Treaty is achieved, that is to say, that the economic advantage obtained by the beneficiary is completely eliminated by recovering the entire benefit gained, which includes statutory interest.

138. The Estonian Government and the Commission believe that the national courts and authorities should in the first instance apply the national procedural rules as regards the applicable rate, the method of applying it and determination of the time from which interest accrues.

139. However, when claiming interest, the national courts and authorities should have regard to the principle of the effectiveness of EU law. Accordingly, they argue, the method established in Article 14(2) of Regulation No 659/1999 and Articles 9 and 11 of Regulation No 794/2004 should not be applied by analogy, but should be used to verify that, when calculating interest, the applicable national law complies with that principle of effectiveness.

2. Assessment

(a) Limitation period applicable to recovery by a national authority

140. In paragraph 41 of its Notice on the enforcement of State aid law by national courts, the Commission refers, in respect of the interest to be claimed, to Regulation No 659/1999, and advocates essentially that the national courts should apply that regulation by analogy. In these proceedings, likewise, the Commission invokes the principle of effectiveness to argue that the rules in that regulation should apply both to the limitation period for the recovery of aid by a national authority and to the interest to be claimed where aid is recovered.

141. That reasoning arises from the Commission's fear, on the one hand, that limitation periods under national law that are shorter than that provided for in Article 15(1) of Regulation No 659/1999 would undermine the powers it has under that regulation and, on the other hand, that national provisions less strict than those under that regulation relating to the interest to be claimed would jeopardise the full recovery of unlawfully granted aid that Article 107(1) and article 108(3) TFEU require.

142. That reasoning reveals the tension between the subject matter of Regulation No 659/1999, which is limited to the procedure before the Commission alone, and the notion of extending its application by analogy to national procedures, in order to safeguard the objectives pursued by those primary law provisions.

143. As regards limitation, there is also an issue of regulatory consistency, since the aid granted to Eesti Pagar falls under Regulations No 1083/2006 and No 2988/95, the latter of which establishes a four-year limitation period.

144. In its written observations the Commission argued that Regulation No 659/1999 has priority because it was adopted under primary law. In response to the Court's comment at the hearing that the same was true of the other two regulations, the Commission stated that it needed to 'clarify and adjust' its written observations, acknowledging that all three regulations were secondary law instruments occupying the same place in the hierarchy of norms and that the method or source of funding had no part to play in the rules on limitation.

145. Nevertheless, according to the Commission, although the three regulations are prima facie applicable in the present case, they pursue different ends and both the fact that Article 108(3) TFEU is directly applicable and the need to protect the Commission's competence dictate that Regulation No 659/1999 should apply (even 'indirectly'), and the principle of effectiveness therefore precludes a limitation period of less than 10 years.

146. I do not share that view.

147. Indeed, I do not see how applying a limitation period of less than 10 years under a different regulation or under national legislation where a national authority recovers aid on its own initiative prevents the Commission making a decision to recover that aid. The Commission can 'still' open proceedings to examine suspected aid for 10 years, even though the limitation period applied in the national proceedings has expired, a situation that the Commission acknowledged at the hearing.

148. Therefore, as the Riigikohus (Supreme Court) stated, Regulation No 659/1999 should not be applied 'indirectly' or by analogy in the present case. According to its wording, Regulation No 659/1999 applies only to actions brought by the Commission and an action brought by a national authority cannot be equated with one brought by the Commission.

149. In that respect, in paragraphs 34 and 35 of its judgment of 5 October 2006, *Transalpine Ölleitung in Österreich* (C-368/04, EU:C:2006:644), the Court clarified that, although Regulation No 659/1999 contains rules of a procedural nature that apply to all administrative procedures in the matter of State aid pending before the Commission, it is nevertheless clear from recital 2 and all the provisions of that regulation that it does not contain any provision relating to the powers and obligations of the national courts, which continue to be governed by the provisions of the Treaty as interpreted by the Court. To my mind, that thinking applies, a fortiori, to the powers and obligations of national administrative authorities.

150. The Estonian Government and the Commission nevertheless argue that, under the principle of effectiveness, Article 14 of Regulation No 659/1999 and Articles 9 and 11 of Regulation No 794/2004 should be taken into account.

151. However, since Regulations No 1083/2006 and No 2988/95 are directly applicable, there is to my mind no place for Regulations No 659/1999 and No 794/2004 to be taken into consideration.

152. Furthermore, I am of the view (in common with Eesti Pagar) that applying the 10-year period under Regulation No 659/1999 by analogy to the recovery of aid initiated by a national authority, where there is no corresponding recovery decision by the Commission, infringes the principles of good administration, legitimate expectations (legal clarity) and legal certainty. The rules governing limitation must be clearly determined and individuals must not find themselves, in relation to a decision by a national authority, subject to a limitation period laid down by a provision that relates only to a Commission decision.

153. In a case such as that in the main proceedings — concerning recovery of structural aid paid by the Member State — the period applicable should therefore be the four-year period under the first subparagraph of Article 3(1) of Regulation No 2988/95, on the protection of the [European Union's] financial interests.

154. Indeed, the aid in question was granted to Eesti Pagar under Decree No 44, adopted under the Law on structural aid for the period 2007-2013 (STS). According to Paragraph 1(2), the STS applies to the grant and use of resources allocated to structural aid under an operational programme approved by the Commission in accordance with Article 32(5) of Regulation No 1083/2006. The aid awarded to Eesti Pagar is therefore financial aid from EU Structural Funds, and Regulation No 2988/95 therefore governs the aspects of that aid relevant to the regulation.

155. Under Article 1(2) of Regulation No 2988/95, '"irregularity" shall mean any infringement of a provision of [EU] law resulting from an act or omission by an economic operator, which has, or would have, the effect of prejudicing the general budget of the [European Union] or budgets managed by them, either by reducing or losing revenue accruing from own resources collected directly on behalf of the [European Union], or by an unjustified item of expenditure'.

156. It is apparent from the foregoing that the limitation period applicable to the recovery of the unlawful aid in question by the Member State authority is four years, as established in the first subparagraph of Article 3(1) of Regulation No 2988/95. [30]

(b) Interest on aid recovered by a national authority

157. According to the Court, 'the application of compound interest is a particularly appropriate means of neutralising the competitive advantage granted unlawfully to undertakings benefiting from that State aid'. [31] The purpose of recovering interest is to remove 'from the aid recipient's point of view, the undue advantage [that] will have consisted, first, in the non-payment of the interest which it would have paid on the amount in question of the compatible aid, had it had to borrow that amount on the market pending the Commission's decision, and, second, in the improvement of its competitive position as against the other operators in the market while the unlawfulness lasts'. That is why, according to the Court, 'a measure which consisted only in an obligation of recovery without interest would not be appropriate, as a rule, to remedy the consequences of the unlawfulness'. [32]

158. Since I propose applying Regulation No 2988/95 in relation to limitation, the question arises whether interest can also be claimed under that regulation.

159. Under Article 4(1) and (2) of that regulation, 'as a general rule, any irregularity shall involve withdrawal of the wrongly obtained advantage … by an obligation to … repay the amounts due or wrongly received … Application of the measures referred to in paragraph 1 shall be limited to the withdrawal of the advantage obtained plus, *where so provided for*, interest which may be determined on a flat-rate basis' (emphasis added).

160. Article 5(1)(b) of that regulation provides that 'intentional irregularities or those caused by negligence *may* lead to the following administrative penalties: … (b) payment of an amount greater than the amounts wrongly received or evaded, plus interest *where appropriate*; …'.

161. Regulation No 2988/95 therefore does not provide for the unconditional payment of interest.

162. It is obviously not the Court's role to interpret national law, but, according to the judgment of 9 June 2016 of the Riigikohus (Supreme Court), Estonian law does not allow interest to be claimed from the applicant for the period between the date on which the aid is paid and the date on which it is recovered.

163. Nevertheless, to my mind, as the Court's aforementioned case-law on State aid requires, interest can be claimed directly under Article 108(3) TFEU in order to neutralise the competitive advantage unlawfully given to undertakings that are the beneficiaries of State aid.

164. Although when calculating the interest owed the national courts and authorities apply primarily the national procedural rules on the applicable rate, on the calculation method (whether simple or compound) and on setting the starting point for the interest payment period, I believe (as does the Commission) that when claiming interest on the recovery of aid, those authorities must pursue the same objective as the Commission, with due regard for the principle of the effectiveness of EU law. Upholding that principle involves disapplying a national provision that would not ensure the effectiveness of the State aid rules. [33]

30 Nevertheless, if national law establishes a longer period, that longer period will apply (see, in footnote 35 below, the same principle for calculation of interest).

31 Judgment of 3 September 2015, *A2A SpA* v *Agenzia delle Entrate* (C-89/14, EU:C:2015:537, paragraph 42).

32 Judgment of 12 February 2008, *CELF and ministre de la Culture et de la Communication* (C-199/06, EU:C:2008:79, paragraphs 50 to 54).

33 Judgment of 5 October 2006, *Commission* v *France* (C-232/05, EU:C:2006:651, paragraph 53).

165. If the Commission had to make that decision in a case before it, it would apply Article 14(2) of Regulation No 659/1999 and Articles 9 and 11 of Regulation No 794/2004.

166. The purpose of a national decision to recover unlawful aid is in fact the same as that of a recovery decision by the Commission, namely to deprive the beneficiary of the aid of the undue advantage in its entirety, including interest.[34]

167. Accordingly, the method established in Article 14(2) of Regulation No 659/1999 and Articles 9 and 11 of Regulation No 794/2004 should not be applied by analogy, as the Riigikohus (Supreme Court) holds in paragraph 41 of its judgment of 9 June 2016, but should be used to verify that, when calculating interest, the applicable national law complies with the principle of effectiveness,[35] anticipating in a way what the Commission would do in such a case.

168. The Member State authorities must therefore ensure that the interest rate, the method to be used and the period covered eliminate any unlawful competitive advantage.

169. In the case of unlawful aid, the unlawful competitive advantage occurs as soon as the aid is granted. Were interest to be calculated only from the recovery decision, the unlawful competitive advantage would persist for the period between when the aid was granted and when the recovery decision was adopted, during which the aid beneficiary was able to take advantage of the aid in breach of the prohibition on putting the aid into effect. Inaction by the Member State authorities could in such a case compromise the application of EU law and the interests of other persons, thereby failing to uphold the effectiveness of EU law.

170. In paragraph 41 of its judgment of 9 June 2016, the Riigikohus (Supreme Court) found that the objective of removing an established distortion of competition justifies calculating interest from the grant of the aid and that the only problem was that there was no proper legal basis for doing so. To my mind, the legal basis for calculating interest is Article 108(3) TFEU, interpreted in conjunction with the principle of effectiveness.

171. The reply to the fifth question should therefore be that where a national authority recovers unlawful aid, the interest it decides to add must be calculated in accordance with the applicable national law, with due regard to the principle of the effectiveness of EU law. This means that in order to ensure that the undue advantage caused by the aid in question is removed completely, interest must be calculated in accordance with Article 14(2) of Regulation No 659/1999, according to which interest runs from the date on which the aid was granted, and with Articles 9 and 11 of Commission Regulation No 794/2004, according to which interest must be calculated on a compound basis, and the applicable interest rate must not be lower than the reference interest rate.

34 That is because giving effect to unlawful advance aid means that, depending on the circumstances, competitors suffer the effects of the aid earlier. The aid beneficiary has therefore obtained an undue advantage (judgment of 12 February 2008, *CELF and ministre de la Culture et de la Communication*, C-199/06, EU:C:2008:79, paragraphs 50 to 52 and 55). The Court held that the national court must order the payment of interest even after the Commission has adopted a positive decision (*CELF*, paragraphs 52 and 55). Where that occurs, the interest relates only to the period during which there was a competitive advantage, when the aid was available prematurely to the beneficiary (that is to say, before the Commission's positive decision).

35 If national law provides for higher interest than the interest guaranteed by EU law, those stricter provisions should be applied. See judgment of 11 November 2015, *Klausner Holz Niedersachsen* (C-505/14, EU:C:2015:742, paragraph 40).

V. Conclusion

172. For those reasons, I propose that the Court should reply as follows to the questions referred by the Tallinna Ringkonnakohus (Court of Appeal, Tallinn, Estonia) for a preliminary ruling:

(1) Article 8(2) of Commission Regulation (EC) No 800/2008 of 6 August 2008 declaring certain categories of aid compatible with the [internal] market in application of Articles [107] and [108] of the [FEU] Treaty (General Block Exemption Regulation) must be interpreted as meaning that, in the context of that provision, 'work on the project or activity' has started where the activity to be supported is, for example, the acquisition of equipment, and where contracts for the purchase of that equipment have been entered into, the conclusion of those contracts constituting initiation of the activities relating to implementation of the project.

Nevertheless, in order to answer the question whether aid granted under that regulation has incentive effect, the contractual terms and the factual circumstances surrounding conclusion of the relevant contracts must be analysed in detail.

The Member State authorities are competent to assess infringement of the incentive effect criterion laid down by Article 8(2) of that regulation, particularly in light of the costs of resiling from the agreement in question.

(2) Under Article 108(3) TFEU, a Member State authority is obliged to recover unlawful aid that it has granted in breach of Regulation No 800/2008 where it finds that the aid in question was granted unlawfully, whether or not the Commission has made a recovery decision to that effect and whether or not the infringement of that regulation is manifest. However, mere doubt cannot be sufficient for that purpose.

(3) A Member State authority that grants aid under the misconception that it meets the block exemption requirements, thereby grants unlawful aid and cannot cause the beneficiary of that aid to entertain a legitimate expectation. The fact that the authority was aware in advance that one of those requirements was not met, or even that it gave the beneficiary bad advice is irrelevant for that purpose.

(4) The limitation period applicable to the recovery of the unlawful aid in question by the Member State authority is four years, as established in the first subparagraph of Article 3(1) of Council Regulation (EC, Euratom) No 2988/95 of 18 December 1995 on the protection of the [European Union] financial interests.

(5) Where a national authority recovers unlawful aid, the interest it decides to add must be calculated in accordance with the applicable national law, with due regard to the principle of the effectiveness of EU law. This means that in order to ensure that the undue advantage caused by the aid in question is removed completely, interest must be calculated in accordance with Article 14(2) of Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article [108] of the [FEU] Treaty, according to which interest runs from the date on which the aid was granted, and with Articles 9 and 11 of 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 [108] of the [FEU] Treaty, according to which interest must be calculated on a compound basis and the applicable interest rate must not be lower than the reference rate.