Reports of Cases

JUDGMENT OF THE COURT (Tenth Chamber)

8 May 2019*

(Reference for a preliminary ruling — Common agricultural policy — Support for rural development by the European Agricultural Fund for Rural Development (EAFRD) — Regulation (EC) No 1698/2005 — Applicability *ratione temporis* — Article 72 — Durability of investment operations — Substantial modification to a co-financed investment operation — Asset acquired by means of an investment operation co-financed by the EAFRD and leased by the beneficiary of the funding to another — Financing, management and monitoring of the common agricultural policy — Regulation (EC) No 1306/2013 — Articles 54 and 56 — Obligation of the Member States to recover sums unduly paid as a result of irregularity or negligence — Concept of 'irregularity' — Initiation of recovery proceedings)

In Case C-580/17,

REQUEST for a preliminary ruling under Article 267 TFEU from the Riigikohus (Supreme Court, Estonia), made by decision of 27 September 2017, received at the Court on 4 October 2017, in the proceedings

Mittetulundusühing Järvelaev

v

Põllumajanduse Registrite ja Informatsiooni Amet (PRIA),

THE COURT (Tenth Chamber)

composed of K. Lenaerts, President of the Court, acting as President of the Tenth Chamber, F. Biltgen and E. Levits (Rapporteur), Judges,

Advocate General: M. Wathelet,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

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

– the European Commission, by J. Aquilina and E. Randvere, acting as Agents,

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,

* Language of the case: Estonian.

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Article 72 of Council Regulation (EC) No 1698/2005 of 20 September 2005 on support for rural development by the European Agricultural Fund for Rural Development (EAFRD) (OJ 2005 L 277, p. 1), of Article 33(1) of Council Regulation (EC) No 1290/2005 of 21 June 2005 on the financing of the common agricultural policy (OJ 2005 L 209, p. 1), of Article 71(1) of Regulation (EU) No 1303/2013 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) and of Article 56 of Regulation (EU) No 1306/2013 of the European Parliament and of the Council of 17 December 2013 on the financing, management and monitoring of the common agricultural policy and repealing Council Regulations (EEC) No 352/78, (EC) No 165/94, (EC) No 2799/98, (EC) No 814/2000, (EC) No 1290/2005 and (EC) No 485/2008 (OJ 2013 L 347, p. 549).

2 The request has been made in proceedings between Mittetulundusühing Järvelaev ('Järvelaev') and the Põllumajanduse Registrite ja Informatsiooni Amet (Agriculture Register and Information Office, Estonia) ('the PRIA') concerning the recovery of amounts paid to the former as part of an operation co-financed by the European Agricultural Fund for Rural Development (EAFRD) under the Leader axis referred to in Regulation No 1698/2005.

Legal context

European Union law

Regulation No 1698/2005

3 According to recitals 61 and 62 of Regulation No 1698/2005:

'(61) In accordance with the principle of subsidiarity and subject to exceptions, there should be national rules on the eligibility of expenditure.

(62) To ensure the effectiveness, fairness and sustainable impact of the assistance from the EAFRD, there should be provisions guaranteeing that investment-related operations are durable and avoiding this fund being used to introduce unfair competition.'

4 Under the heading 'Definitions', Article 2 of Regulation No 1698/2005 provides:

'For the purposes of this Regulation, the following definitions shall apply:

…

(h) "beneficiary": an operator, body or firm, whether public or private, responsible for implementing operations or receiving support;

…'

5 Under the heading ‘Eligibility of expenditure’, the first paragraph of Article 71(3) of Regulation No 1698/2005 states:

‘The rules on eligibility of expenditure shall be set at national level, subject to the special conditions laid down by this Regulation for certain rural development measures.’

6 Under the heading ‘Durability of investment-related operations’, Article 72 of Regulation No 1698/2005 provides:

‘1. Without prejudice to the rules relating to the freedom of establishment and the free provision of services within the meaning of Articles 43 and 49 of the Treaty, the Member State shall ensure that an investment operation retains the EAFRD contribution if that operation does not, within five years of the Managing Authority’s funding decision, undergo a substantial modification that:

(a) affects its nature or implementation conditions or gives undue advantage to a firm or public body;

(b) results either from a change in the nature of ownership of an item of infrastructure, or the cessation or relocation of a productive activity.

2. Amounts unduly paid out shall be recovered in accordance with Article 33 of Regulation [No 1290/2005].’

7 Under the heading ‘Responsibilities of the Member States’, Article 74 of Regulation No 1698/2005 provides:

‘1. Member States shall adopt all the legislative, statutory and administrative provisions in accordance with Article 9(1) of Regulation [No 1290/2005] in order to ensure that the Community’s financial interests are effectively protected.

2. Member States shall designate, for each rural development programme, the following authorities:

(a) the Managing Authority, which may be either a public or private body acting at national or regional level, or the Member State itself when it carries out that task, to be in charge of the management of the programme concerned;

(b) the accredited paying agency within the meaning of Article 6 of Regulation [No 1290/2005];

(c) the certifying body within the meaning of Article 7 of Regulation [No 1290/2005]. ...’

Regulation No 1290/2005

8 Article 33 of Regulation No 1290/2005 provides:

‘1. Member States shall make financial adjustments where irregularities or negligence are detected in rural development operations or programmes by totally or partially cancelling the Community financing concerned. Member States shall take into consideration the nature and gravity of the irregularities detected and the level of the financial loss to the EAFRD.

2. Where the Community funds have already been paid to the beneficiary, they shall be recovered by the accredited paying agency in accordance with its own recovery procedures and reused in accordance with paragraph 3(c).

…

10. Where the Commission makes a financial adjustment, this shall not affect the obligations of the Member State to recover the sums paid as part of its own financial contribution under Article 14 of Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 93 of the EC Treaty [(OJ 1999 L 83, p. 1)].'

Regulation (EC) No 1974/2006

9 Article 48(1) of Commission Regulation (EC) No 1974/2006 of 15 December 2006 laying down detailed rules for the application of Regulation No 1698/2005 (OJ 2006 L 368, p. 15) provides:

'1. For the purposes of Article 74(1) of Regulation [No 1698/2005] Member States shall ensure that all the rural development measures they intend to implement are verifiable and controllable. To this end, Member States shall define control arrangements that give them reasonable assurance that eligibility criteria and other commitments are respected.'

Regulation No 1303/2013

10 Under the heading 'Durability of operations', Article 71(1) of Regulation No 1303/2013 provides:

'An operation comprising investment in infrastructure or productive investment shall repay the contribution from the [European Structural and Investment Funds] if within five years of the final payment to the beneficiary or within the period of time set out in State aid rules, where applicable, it is subject to any of the following:

(a) a cessation or relocation of a productive activity outside the programme area;

(b) a change in ownership of an item of infrastructure which gives to a firm or a public body an undue advantage;

(c) a substantial change affecting its nature, objectives or implementation conditions which would result in undermining its original objectives.

Sums unduly paid in respect of the operation shall be recovered by the Member State in proportion to the period for which the requirements have not been fulfilled.

Member States may reduce the time limit set out in the first subparagraph to three years in cases concerning the maintenance of investments or jobs created by SMEs.'

11 Under the heading 'Transitional provisions', Article 152(1) of Regulation No 1303/2013 states:

'This Regulation shall not affect either the continuation or modification, including the total or partial cancellation of assistance approved by the Commission on the basis of [Council] Regulation (EC) No 1083/2006 [of 11 July 2006 laying down general provisions on the European Regional Development Fund, the European Social Fund and the Cohesion Fund and repealing Regulation (EC) No 1260/1999 (OJ 2006 L 210, p. 25)] or any other legislation applying to that assistance on 31 December 2013. That Regulation or such other applicable legislation shall consequently continue to apply after 31 December 2013 to that assistance or the operations concerned until their closure. For the purposes of this paragraph assistance shall cover operational programmes and major projects.'

Regulation (EU) No 1305/2013

12 Under Article 88 of Regulation (EU) No 1305/2013 of the European Parliament and of the Council of 17 December 2013 on support for rural development by the European Agricultural Fund for Rural Development (EAFRD) and repealing Regulation No 1698/2005 (OJ 2013 L 347, L 487):

'Regulation [No 1698/2005] is repealed.

Regulation [No 1698/2005] shall continue to apply to operations implemented pursuant to programmes approved by the Commission under that Regulation before 1 January 2014.'

Regulation No 1306/2013

13 Article 54(1) of Regulation No 1306/2013 provides:

'For any undue payment following the occurrence of irregularity or negligence, Member States shall request recovery from the beneficiary within 18 months after the approval and, where applicable, reception, by the paying agency or body responsible for the recovery, of a control report or similar document, stating that an irregularity has taken place. The corresponding amounts shall be recorded at the time of the recovery request in the debtors' ledger of the paying agency.'

14 The first paragraph of Article 56 of Regulation No 1306/2013 provides:

'Where irregularities or negligence are detected in rural development operations or programmes, Member States shall make financial adjustments by totally or partially cancelling the Union financing concerned. Member States shall take into consideration the nature and gravity of the irregularities detected and the level of the financial loss to the EAFRD.'

15 Under Article 119 of Regulation No 1306/2013:

'1. [Council] Regulations (EEC) No 352/78 [of 20 February 1978 on the crediting of securities, deposits and guarantees furnished under the common agricultural policy and subsequently forfeited (OJ 1978 L 50, p. 1)], (EC) No 165/94 [of 24 January 1994 concerning the co-financing by the Community of remote sensing checks and amending Regulation (EEC) No 3508/92 establishing an integrated administration and control system for certain Community aid schemes (OJ 1994 L 24, p. 6)], (EC) No 2799/98 [of 15 December 1998 establishing agrimonetary arrangements for the euro (OJ 1998 L 349, p. 1)], (EC) No 814/2000 [of 17 April 2000 on information measures relating to the common agricultural policy (OJ 2000 L 100, p. 7)], [No 1290/2005] and (EC) No 485/2008 [of 26 May 2008 on scrutiny by Member States of transactions forming part of the system of financing by the European Agricultural Guarantee Fund (OJ 2008 L 143, p. 1)] are repealed.

However, Article 31 of Regulation [No 1290/2005] and the relevant implementing rules shall continue to apply until 31 December 2014.

2. References to the repealed Regulations shall be construed as references to this Regulation and shall be read in accordance with the correlation table set out in Annex III.'

16 Under Article 121 of Regulation No 1306/2013:

'1. This Regulation shall enter into force on the day of its publication in the *Official Journal of the European Union*.

It shall apply from 1 January 2014.

2. However, the following provisions shall apply as follows:

(a) Articles 7, 8, 16, 25, 26 and 43 from 16 October 2013;

(b) Articles 18 and 40, for expenditure effected, from 16 October 2013;

(c) Article 52 from 1 January 2015.'

17 According to Article 119(2) of Regulation No 1306/2013 read in conjunction with the correlation table in Annex III thereto, reference to Article 33 of Regulation No 1290/2005 must be read as reference to Articles 54 and 56 of Regulation No 1306/2013.

Estonian law

18 Paragraph 111(1) of the Euroopa Liidu ühise põllumajanduspoliitika rakendamise seadus (Law implementing the European Union Common Agricultural Policy) of 19 November 2014 (RT I 2014, 3) states:

'Where it transpires, following payment of funding, that the funds were paid unduly as a result of irregularities or negligence, inter alia if they were not used for their intended purpose, the funds shall be recovered from the beneficiary — selected, where necessary, in a selection procedure — partially or totally, in accordance with the requirements and time limits laid down in Regulations [Nos 1303/2013 and 1306/2013] or in other relevant EU regulations.'

19 Paragraph 131 of that law provides:

'Funds which were granted pursuant to the Law implementing the European Union Common Agricultural Policy, as in force prior to 1 January 2015, shall be recovered in accordance with the requirements and procedures laid down in the present Law.'

20 Paragraph 35(2) of Põllumajandusministri määrus nr 92 — Leader-meetme raames antava kohaliku tegevusgrupi toetuse ja projektitoetuse saamise nõuded, toetuse taotlemise ja taotluse menetlemise täpsem kord (Decree No 92 of the Minister for Agriculture on requirements for the award of funding granted as part of a Leader measure by a local action group and for project funding, more precise procedure for applying for funding and processing the application') of 27 September 2010 (RT I 2010, 71, 538, 'Decree No 92') states:

'From the submission of the application for project funding until after the expiry of five years following the payment of the final instalment of the funding by the PRIA, the applicant or beneficiary shall inform the PRIA and the local action group without delay in writing of any changes to his postal address and contact details and, in order to obtain the consent of the PRIA and the local action group, the following:

(1) Changes associated with the operation or the asset. Where the PRIA or the local action group deems it necessary, a copy of the new price offer or a calculation of the estimated costs of the planned operation, inter alia, shall be submitted;

(2) Other circumstances associated with the retention or use of the project funding as a result of which the details in the application are no longer complete or correct;

…'

21 Paragraph 36(3)(1) of the decree provides:

‘A beneficiary of project funding shall be obliged to retain and use for its intended purpose an asset acquired by means of the project funding for at least five years from the payment of the final instalment of the funding by the PRIA.’

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

22 Järvelaev is a not-for-profit association whose object is to preserve traditional sailing on Lake Võrtsjärv (Estonia). That association applied for funding under the Leader axis referred to in Regulation No 1698/2005 for the purposes of acquiring a traditional fishing sailing boat and related equipment.

23 In its application for funding, Järvelaev also expressed its desire, after acquiring the sailing boat in question, to create jobs in the region, employ a crew and inform the PRIA and the local action group of any change of use of the sailing boat. It is clear from the case file before the Court that, although the creation of new jobs was not a regulatory requirement, it was included in the criteria used to rank the applications for the award of funding.

24 The funding applied for was granted to Järvelaev by decision of the Director General of the PRIA of 6 September 2011.

25 During an inspection carried out on 4 December 2014 on Järvelaev’s premises, the PRIA discovered that, under a contract concluded on 1 July 2014, Järvelaev had leased the fishing sailing boat acquired by means of the funding to another not-for-profit association, namely Mittetulundusühing Kaleselts (‘Kaleselts’), for a term of five years.

26 Accordingly, by decision of 27 January 2015, the PRIA sought to recover, from Järvelaev, the funding actually paid on the ground that the funding had not been used for its intended purpose and objective. In particular, the PRIA took the view that, under Paragraph 36(3)(1) of Decree No 92, Järvelaev was required, at least for five years from the payment of the final instalment of the funding, to retain and use the asset acquired by means of the co-financed investment operation.

27 The objection lodged by Järvelaev against that decision was rejected in a decision of the PRIA of 14 April 2015.

28 Järvelaev brought an action before the Tartu Halduskohus (Administrative Court, Tartu, Estonia) for the annulment of the decision of the PRIA of 27 January 2015. Järvelaev claimed, first, that the national legislation did not require a beneficiary of funding to use a financed asset exclusively for its own use and, second, that the objective of creating jobs set out in the funding application was secondary to the principal objective, namely the use of the sailing boat for the purposes of developing and advertising rural tourism services, so that it was not necessary to achieve the former of those objectives. Järvelaev also claimed that, due to difficulties which it had faced in recruiting employees itself, the fact that it had leased the fishing sailing boat to another association ensured that the boat continued to be used in accordance with the funding contract whilst still satisfying the requirements of Decree No 92.

29 On 11 January 2016, the Tartu Halduskohus (Administrative Court, Tartu) dismissed the action on the ground that the discrepancy between Järvelaev’s undertakings in the funding application and the actual use of the fishing sailing boat justified the PRIA in seeking recovery of the sums paid under the funding.

30 Järvelaev brought an appeal before the Tartu Ringkonnakohus (Court of Appeal, Tartu, Estonia). Before that court, Järvelaev produced, as supplementary evidence, three employment contracts concluded in the course of the appeal proceedings and maintained that the secondary objective of the five-year project, namely job creation, could be achieved within that five-year period.

31 On 20 October 2016, the Tartu Ringkonnakohus (Court of Appeal, Tartu) did not admit that supplementary evidence, dismissed the appeal and upheld the decision of the Tartu Halduskohus (Administrative Court, Tartu).

32 Järvelaev brought an appeal on a point of law before the Riigikohus (Supreme Court, Estonia) for the judgments of the Tartu Halduskohus (Administrative Court, Tartu) and of the Tartu Ringkonnakohus (Court of Appeal, Tartu) to be set aside.

33 Having noted that it is not possible to infer with certainty from the wording of Paragraph 36(3)(1) of Decree No 92 that the beneficiary of a funding project must itself use the asset acquired by means of that funding, Järvelaev claims that, in the present case, the lessee was not given exclusive possession of the fishing sailing boat and that the applicant itself issued invoices in connection with the use of the sailing boat. In addition, Järvelaev submits that it was under no obligation to create jobs and that such job creation, mentioned in the funding application, was a forecast relating to the possible outcomes arising from the approval of the application, not a fixed commitment.

34 Lastly, Järvelaev maintains that, in the course of the court proceedings, it had terminated the lease agreement over the sailing boat.

35 In those circumstances, the Riigikohus (Supreme Court) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

‘(1) In the event of the recovery of project funding awarded as part of a Leader measure, if the funding was approved on 6 September 2011, the final instalment was paid on 19 November 2013, the infringement was established on 4 December 2014 and the recovery decision was issued on 27 January 2015, must Article 72 of Regulation [No 1698/2005] or Article 71(1) of Regulation [No 1303/2013] be applied in relation to the requirement concerning the durability of the project? In those circumstances, does Article 33(1) of Regulation [No 1290/2005] or Article 56 of Regulation [No 1306/2013] form the basis for the recovery?

(2) (a) If the answer to Question 1 is that Regulation No 1698/2005 is applicable, must the leasing of an asset (a sailing boat) acquired by means of project funding granted as part of a Leader measure by the not-for-profit association which received the funding to another not-for-profit association, which uses the sailing boat for the same operation for which the funding was granted to the beneficiary, be regarded as a substantial modification within the meaning of Article 72(1)(a) of Regulation No 1698/2005, which affects the nature or implementation conditions of the operation or gives undue advantage to a firm? Must the payment body of a Member State determine what the advantage specifically is in order for the condition relating to undue advantage to be satisfied? If the answer is in the affirmative, can the undue advantage lie in the fact that the actual user of the asset would not have obtained the project funding if it had itself submitted an application with the same content?

(b) If the answer to Question 1 is that Regulation No 1303/2013 is applicable, must the leasing of an asset (a sailing boat) acquired by means of project funding granted as part of a Leader measure by the not-for-profit association which received the funding to another not-for-profit association which uses the sailing boat in the same manner for which the funding was granted to the beneficiary be regarded as a substantial change within the meaning of Article 71(1)(c) of Regulation No 1303/2013, which affects its nature, objectives or implementation conditions in a manner which would result in undermining its original objectives?

(3) (a) If the answer to Question 1 is that Regulation No 1698/2005 is applicable, must the leasing of an asset (a sailing boat) acquired by means of project funding granted as part of a Leader measure by the beneficiary to another not-for-profit association which uses the sailing boat for the same operation for which the funding was granted to the beneficiary be regarded as a substantial modification within the meaning of Article 72(1)(b) of Regulation No 1698/2005, which results either from a change in the nature of ownership of an item of infrastructure, or the cessation or relocation of a productive activity, having regard to the fact that the ownership of the sailing boat has remained unchanged but the beneficiary is now the indirect, rather than the direct, possessor of that sailing boat and obtains rental income rather than income derived from the provision of the service described in the application?

(b) If the answer to Question 1 is that Regulation No 1303/2013 is applicable, must the leasing of an asset (a sailing boat) acquired by means of project funding granted as part of a Leader measure by the not-for-profit association which received the funding to another not-for-profit association which uses the sailing boat for the same operation for which the funding was granted to the beneficiary be regarded as a change in ownership of an item of infrastructure which gives to a firm an undue advantage within the meaning of Article 71(1)(b) of Regulation No 1303/2013, having regard to the fact that the ownership of the sailing boat has remained unchanged but the beneficiary is now the indirect, rather than the direct, possessor of that sailing boat and obtains rental income rather than income derived from the provision of the service described in the application? Must the payment body of a Member State determine what the advantage specifically is in order for the requirement relating to undue advantage to be satisfied? If the answer is in the affirmative, can the undue advantage lie in the fact that the actual user of the asset would not have obtained the project funding if it had itself submitted an application with the same content?

(4) May a national decree governing a Leader measure impose on the beneficiary the obligation to retain the asset for five years with stricter requirements than those laid down in Article 72(1) of Regulation No 1698/2005 or in Article 71(1) of Regulation No 1303/2013?

(5) If the answer to Question 4 is in the negative, are the provision of a national decree under which the beneficiary of project funding is obliged to retain and use for its intended purpose the asset acquired by means of the project funding for at least five years following the payment of the last instalment of the funding, and the interpretation of that provision as meaning that the beneficiary must use that asset personally, consistent with Article 72(1) of Regulation No 1698/2005 and/or Article 71(1) of Regulation No 1303/2013?

(6) Must it be regarded as an irregularity within the meaning of Article 33(1) of Regulation No 1290/2005 and/or Article 56 of Regulation No 1306/2013 if the beneficiary has not carried out an operation which, under a national decree governing a Leader measure, was not obligatory but to which the beneficiary had referred in the "Summary of the objectives and activities of the operation and the investment" set out in its funding application and which was one of the criteria on the basis of which the applications were assessed for the purpose of ranking them?

(7) If the answer to Question 6 is in the affirmative, is the recovery rendered unlawful due to the fact that it is sought before the expiry of the period of five years from the time of the final payment and the beneficiary remedies the infringement in the course of the judicial proceedings concerning recovery?'

Consideration of the questions referred

Question 1

36 By Question 1, the referring court asks, in essence, whether the durability of an investment operation which, as in the case in the main proceedings, was approved and co-financed by the EAFRD in the 2007-2013 programming period must be assessed according to Article 72 of Regulation No 1698/2005 or Article 71(1) of Regulation No 1303/2013. It also asks whether the recovery of sums unduly paid under that operation must, where recovery takes place after the programming period has come to an end, namely after 1 January 2014, be based on Article 33(1) of Regulation No 1290/2005 or on Article 56 of Regulation No 1306/2013.

37 In the first place, as far as concerns the provisions according to which the durability of an investment operation approved and co-financed by the EAFRD in the 2007-2013 programming period must be assessed, it should be noted that funding paid under an operation of that nature was awarded for the purposes of achieving the objectives referred to in Regulation No 1698/2005, which contains the general provisions on the functioning of the EAFRD during that period. It follows that the durability of such an operation must necessarily be assessed according to the provisions of that regulation.

38 That conclusion cannot be called into question by the fact that, as of 1 January 2014, Regulation No 1698/2005 was repealed by Regulation No 1305/2013. According to the second paragraph of Article 88 of Regulation No 1305/2013, Regulation No 1698/2005 continued to apply to operations implemented pursuant to programmes approved by the Commission under that regulation before 1 January 2014.

39 In the second place, as regards which regulation is applicable to the recovery of sums unduly paid under an investment operation approved and co-financed by the EAFRD in the 2007-2013 programming period, if such recovery takes place, as in the case in the main proceedings, after 1 January 2014, it should be made clear that Regulation No 1306/2013, which repealed Regulation No 1290/2005, entered into force, under the first paragraph of Article 121(1), on the day of its publication in the *Official Journal of the European Union*, that is on 20 December 2013, and applied from 1 January 2014 in accordance with the second paragraph of Article 121(1).

40 Indeed, by way of derogation from those provisions, the second paragraph of Article 119(1) of Regulation No 1306/2013 made clear that Article 31 of Regulation No 1290/2005 and the relevant implementing rules were to continue to apply until 31 December 2014. Similarly, Article 121(2) of Regulation No 1306/2013 laid down a later entry into force of certain articles thereof.

41 However, the recovery of sums unduly paid under operations approved and co-financed by the EAFRD in the 2007-2013 programming period does not fall within the scope of any of those derogations.

42 The answer to Question 1 is therefore that the durability of an investment operation which, as in the case in the main proceedings, was approved and co-financed by the EAFRD in the 2007-2013 programming period must be assessed according to Article 72 of Regulation No 1698/2005. Where the recovery of sums unduly paid under that operation takes place after the programming period has come to an end, namely after 1 January 2014, recovery must be based on Article 56 of Regulation No 1306/2013.

Questions 2(a) and 3(a)

43 By Questions 2(a) and 3(a) which it is appropriate to consider together, the referring court asks, in essence, whether a lease by the beneficiary of funding, such as that at issue in the main proceedings, which was paid as part of an investment operation co-financed by the EAFRD under the Leader axis referred to in Regulation No 1698/2005, of an asset acquired by means of that funding to another who uses it in connection with the same activity as that which the beneficiary of the funding was to exercise amounts to a substantial modification to that co-financed investment operation, within the meaning of Article 72(1)(a) and (b) of Regulation No 1698/2005. It also wishes to know if, for the purposes of finding that there has been undue advantage within the meaning of Article 72(1)(a) of that regulation, it is necessary that the competent national authority determine what the undue advantage specifically is. Lastly, it asks whether the undue advantage can lie in the fact that the actual user of the asset would not have obtained the funding if it had itself submitted a funding application.

44 It should be stated at the outset that it is not for the Court to characterise specifically the modifications at issue in the main proceedings. That falls within the exclusive jurisdiction of the national court. The Court's role is confined to providing an interpretation of EU law which will be useful to that court for the purposes of adjudicating the dispute before it. That said, the Court may determine the relevant factors capable of assisting the referring court in its assessment (see, by analogy, as regards Article 30(4) of Council Regulation (EC) No 1260/1999 of 21 June 1999 laying down general provisions on the Structural Funds (OJ 1999 L 161, p. 1), judgment of 14 November 2013, *Comune di Ancona*, C-388/12, EU:C:2013:734, paragraph 19 and the case-law cited).

45 Furthermore, although the two conditions laid down in Article 30(4)(a) and (b) of Regulation No 1260/1999 were combined by way of the coordinating conjunction 'and', that is not the case of the two conditions referred to in Article 72(1)(a) and (b) of Regulation No 1698/2005, so that it is not required, in order for there to be a substantial modification to the investment operation in question, within the meaning of the latter provision, that both conditions laid down be satisfied together.

46 Thus, Article 72(1) of Regulation No 1698/2005 lists, in reality, a series of alternative conditions, two in Article 72(1)(a) and two in Article 72(1)(b), each of which is capable of supporting, where relevant, the conclusion that the co-financed investment operation underwent substantial modification within the meaning of that provision within the five-year period that it lays down.

47 The Court notes, in that context, that, in view of the fact that in Article 72(1) of Regulation No 1698/2005 the EU legislature took care to add the qualification 'substantial' in order to indicate the kind of modification covered, it follows that a modification must, if it is to fall within the scope thereof, be fairly significant (see, by analogy, judgment of 14 November 2013, *Comune di Ancona*, C-388/12, EU:C:2013:734, paragraph 35).

48 Thus, the first step is to consider whether the modification in question meets the conditions laid down in Article 72(1)(b) of Regulation No 1698/2005, under which the modification must result either from a change in the nature of ownership of an item of infrastructure or a cessation or relocation of a productive activity. In checking that those conditions are met, it is necessary to assess the factors which gave rise to the modification in question and which can therefore be said to constitute its causes (see, by analogy, judgment of 14 November 2013, *Comune di Ancona*, C-388/12, EU:C:2013:734, paragraph 21).

49 In the present case, it is not stated in the order for reference that there has been cessation or relocation of a productive activity. Even after having been leased, the asset acquired under the investment operation at issue in the main proceedings continued to be used in connection with the same activity as that foreseen in the funding application.

50 Furthermore, as to whether there has been any modification in the nature of the ownership of an item of infrastructure, it should be noted that that condition, in contrast to the condition considered in the previous paragraph above, does not concern the use to which the infrastructure in question is put but the capacity under which its owner possesses it. Thus, the grant by an owner to another, under a contractual relationship, of certain rights over infrastructure, including, where relevant, the right to use it exclusively during a certain term, does not in itself imply a modification of the nature of the ownership in that infrastructure.

51 In the present case, it is clear from the request for a preliminary ruling, which is, however, for the referring court to ascertain, that the rights granted by Järvelaev to Kaleselts under the lease concluded between them, were of a purely contractual nature.

52 The second step is to consider whether the modification in question is covered by one of the cases referred to in Article 72(1)(a) of the regulation, that is to say, whether it affects the nature or implementation conditions of the operation concerned or gives undue advantage to a firm or public body, those being cases which relate to the effects of the modification (see, by analogy, judgment of 14 November 2013, *Comune di Ancona*, C-388/12, EU:C:2013:734, paragraph 22).

53 Therefore, before making a finding as to the existence or not of a substantial modification, it is necessary to determine whether the modification in question has given rise to undue advantage and/or whether it has affected the nature or implementation conditions of the operation (see, by analogy, judgment of 14 November 2013, *Comune di Ancona*, C-388/12, EU:C:2013:734, paragraph 32).

54 As regards the condition relating to the nature or implementation conditions of the investment operation in question, account must be taken of the objective of the measure under which that operation was financed, namely developing and advertising rural tourism services.

55 That objective follows a more general objective of the Leader axis consisting in promoting regional development in rural regions. In that regard, it should be noted that, according to Article 61 of Regulation No 1698/2005, that programme was intended inter alia to finance local development strategies intended for well-identified rural territories. It follows that modifications which affected the operation at issue in the main proceedings must be assessed in the light of that perspective, namely to ensure above all the development of a predetermined territory through the promotion of rural tourism services.

56 In so far as the funding at issue in the main proceedings principally pursued an objective of developing a predetermined territorial area, the mere fact that, in the course of the implementation of the project concerned by the co-financed investment operation at issue in the main proceedings, the entity in charge of that project, namely Järvelaev, was replaced by another, namely Kaleselts, does not in itself imply that the objective in question was not achieved nor, therefore, that there was a fairly significant modification to that operation.

57 Thus, it cannot be concluded from the mere fact that the asset acquired as part of a co-financed investment operation was leased that there was a modification in the nature or implementation of the investment operation within the meaning of Article 72(1)(a) of Regulation No 1698/2005.

58 However, such a substitution of the owner by a lessee for the purposes of achieving an operation, as well as the lack of the job creation initially foreseen during the selection procedure for awarding the funding, as referred to by the referring court in Question 6, are circumstances capable of justifying the conclusion that the nature or implementation conditions of an operation have undergone such a modification if they significantly reduce the capacity of that operation to attain its designated objective, which is for that court to ascertain (see, to that effect and by analogy, judgment of 14 November 2013, *Comune di Ancona*, C-388/12, EU:C:2013:734, paragraph 37).

59 Lastly, as to the condition laid down in Article 72(1)(a) of Regulation No 1698/2005, according to which the durability of a co-financed investment operation assumes, inter alia, that undue advantage has not been given to a firm or public body, it should be made clear that that provision refers to an advantage given to a firm, so that, in a case such as that in the main proceedings, the creation of such advantage, either for the owner of the item of infrastructure or for the association which uses it under a lease granted by that owner, would amount to a substantial modification to the operation in question within the meaning of that provision.

60 Nevertheless, even where prima facie evidence shows that there has been undue advantage, the beneficiary of the funding must be given the possibility of showing that the asset acquired by means of the funding did not give it or its actual user any advantage.

61 As regards the beneficiary of the funding, the existence and significance of such an advantage must be assessed against any difference between the advantages, pecuniary or other, that that beneficiary was to derive from the operation as initially envisaged and those which it derives from the operation as modified. Thus, in the present case, it is for the referring court to ascertain, inter alia, whether the pecuniary income which Järvelaev could have earned from operating the sailing boat acquired by means of the co-financing in question would have been comparable to the amounts paid to it by Kaleselts as consideration for Kaleselts' possession of the sailing boat in question, given that only a fairly significant modification, within the meaning of the case-law set out in paragraph 47 above, would amount to a substantial modification to the operation within the meaning of Article 72(1) of Regulation No 1698/2005.

62 Furthermore, it is not inconceivable that the lease of the asset in question may give undue advantage to its actual user, since such a possessor would be able, through possession of an asset acquired by another association by means of funding, earn income which it would not have earned had it not been in possession of that asset. In addition, undue advantage may also be found where the amount of consideration was not determined according to market prices. It is therefore for the referring court to ascertain whether the consideration paid by Kaleselts was determined at a substantially different level from that which it would have paid, where relevant, to lease a similar boat from an owner other than Järvelaev.

63 As for whether, for the purposes of finding that there has been undue advantage, within the meaning of Article 72(1)(a) of Regulation No 1698/2005, it is necessary that the competent national authority determine what the undue advantage specifically is, it should be noted, first of all, that, according to Article 74(1) and (2) of Regulation No 1698/2005, Member States are to adopt all the legislative, statutory and administrative provisions in order to ensure that the European Union's financial interests are effectively protected and are to designate, for each rural development programme, the competent authorities, whilst allocating the functions between the managing authority and other bodies.

64 In addition, Article 48(1) of Regulation No 1974/2006 provides that, for the purposes of Article 74(1) of Regulation No 1698/2005, in order to satisfy their responsibilities, Member States are to ensure that all the rural development measures they intend to implement are verifiable and controllable and that, to that end, Member States are to define control arrangements that give them reasonable assurance that the eligibility criteria and the other commitments are respected.

65 It should be noted that it would be impossible for a competent national authority to check in an appropriate manner whether there had been undue advantage in an individual case if it were unable to determine what the undue advantage specifically was. More particularly, it would be impossible for an authority to determine whether an advantage was justified or not without such detail.

66 It follows that, where a competent national authority is called upon to investigate whether undue advantage was given to a firm or public body within the meaning of Article 72(1)(a) of Regulation No 1698/2005, that authority must necessarily determine what the undue advantage specifically is.

67 As for how much importance should be attributed to the fact that the actual user of the asset acquired as part of the co-financed investment operation in question would not have obtained the funding if it had itself submitted a funding application, it should be made clear that such a fact cannot be conclusive in making a finding, as referred to in the preceding paragraph, on whether or not an advantage earned by an entity which replaces the beneficiary of funding for the purposes of performing the operation by using an item of infrastructure co-financed by that funding is justified. If the finding is made, which will be for the referring court to ascertain in the present case, that that entity could have obtained the same funding by applying for funding, such a fact could show that there was no undue advantage. Nevertheless, the fact remains that whether there has been such an advantage must be determined in the light of the finding referred to in the preceding paragraph.

68 The answer to Questions 2(a) and 3(a) is that a lease by the beneficiary of funding, such as that at issue in the main proceedings, which was paid as part of an investment operation co-financed by the EAFRD under the Leader axis referred to in Regulation No 1698/2005, of an asset acquired by means of that funding to another who uses it in connection with the same activity as that which the beneficiary of the funding was to exercise may amount to a substantial modification to the co-financed investment operation within the meaning of Article 72(1) of that regulation, which is for the referring court to ascertain in the light of all the elements of fact and of law at issue against the alternative conditions referred to in Article 72(1)(a) and (b) thereof. For the purposes of finding that there has been undue advantage given to a firm or public body within the meaning of Article 72(1)(a) of that regulation, it is for the competent national authority, to determine, subject to review by the relevant national courts, what the undue advantage specifically is. Whilst relevant, whether or not, in the light of the factual and legal situation, the actual user of the funding would have obtained the funding if it had itself submitted a funding application is not conclusive for the purposes of applying Article 72(1)(a) thereof.

Questions 2(b) and 3(b)

69 In the light of the answer to Question 1, it is not necessary to answer Questions 2(b) and 3(b).

Questions 4 and 5

70 By Questions 4 and 5, which it is appropriate to consider together, the referring court asks, in essence, whether Article 72(1) of Regulation No 1698/2005 must be interpreted as precluding national legislation, such as that at issue in the main proceedings, which requires the beneficiary of funding paid as part of an investment operation co-financed by the EAFRD to retain and use itself the asset acquired by means of that investment operation for at least five years from the payment of the final instalment of the funding.

71 As a preliminary matter, it should be noted, first, that the Estonian Government considers that the rule precluding a beneficiary of funding from making any substantial modification to the investment operation for five years from the date of the funding decision, laid down in Article 72(1) of Regulation No 1698/2005, is not sufficient, in every case, to ensure an effective investigation of the implementation of the operation or of the intended use of that funding. According to the Estonian Government, that five-year period often begins before the beneficiary of the funding is in possession of the asset acquired as part of the co-financed investment operation. It also considers that the EU

legislature has given the Member States a certain degree of latitude, since it cannot be inferred from that provision that the period for conducting investigations cannot exceed five years from the date of the funding decision.

72 Second, although Article 72(1) of Regulation No 1698/2005 does not expressly provide that the beneficiary of the funding must itself use the asset acquired by means of that funding during that five-year period, it appears that it is also for the purposes of ensuring effective and continued surveillance of that asset that the Republic of Estonia requires the beneficiary of the funding to retain and use that asset itself during the relevant time.

73 In that regard, as regards, in the first place, the requirement for the beneficiary of the funding to which Regulation No 1698/2005 refers to retain and use itself an asset, such as the fishing sailing boat at issue in the main proceedings, acquired as part of that funding, during a certain time, it should be noted that, in accordance with Article 72(1) of that regulation, the contribution from the EAFRD is not maintained if, within the period referred to, the co-financed investment operation undergoes a substantial modification falling within the conditions referred to in Article 72(1)(a) and (b) of that regulation.

74 It must be examined on a case-by-case basis whether, under Article 72(1) of Regulation No 1698/2005, the lease of such an asset by a beneficiary of funding leads to the removal of the contribution from the EAFRD. As follows from the Court's answer to Questions 2(a) and 3(a), it must be ascertained whether the lease is capable of leading to a modification of the co-financed investment operation falling within one of the conditions referred to in Article 72(1)(a) or (b) of that regulation and, if so, whether that modification is significant.

75 It follows that national legislation which subjects, in every case, the final acquisition of funding to the beneficiary's own factual possession and use of the asset financed by that funding, without enabling it to be determined whether, in a particular case, the lease of that asset amounts to a substantial modification to a co-financed investment operation within the meaning of Article 72(1) of Regulation No 1698/2005 does not comply with that provision.

76 Article 74(1) of Regulation No 1698/2005 does empower the Member States to adopt all the legislative, statutory and administrative provisions in order to ensure that the European Union's financial interests are effectively protected as regards the rural development support financed by the EAFRD. In addition, it is clear from the first paragraph of Article 71(3) of that regulation that the Member States are responsible for setting the relevant rules on eligibility of expenditure.

77 However, neither of those provisions is relevant for the purposes of determining whether the requirement to which Questions 4 and 5 relate complies with Article 72(1) of Regulation No 1698/2005.

78 Article 74 of Regulation No 1698/2005, which forms part of Title VI of that regulation entitled 'Management, control and information', relates to the investigations which the Member States are required to carry out in order to ensure compliance with the provisions governing the proper conduct of operations co-financed by the EAFRD, including Article 72 of that regulation.

79 As for Article 71 of Regulation No 1698/2005, that article relates to the eligibility conditions against which expenditure must be assessed for a contribution from the EAFRD, those conditions being distinct from those laid down in Article 72 of that regulation relating to the durability of investment operations. Accordingly, since Article 72 does not contain any rule similar to that in Article 71(3) of Regulation No 1698/2005, it must be found that it is in fact that regulation itself, and in particular Article 72 thereof, rather than national law, which exclusively determines the conditions for the durability of those operations.

80 That interpretation of Article 72 is not called into question by the fact that the concept of a 'beneficiary' is defined in Article 2(h) of Regulation No 1698/2005 as an 'operator, body or firm, whether public or private, responsible for implementing operations or receiving support'. The wording 'responsible for implementing' in that provision must be considered together with the relevant legal framework and the objective of the measure of which the investment operation forms a part, which concerns the development of predetermined territories. Thus, it is in respect of the conditions laid down in Article 72(1) of the regulation, and in particular of the condition relating to the nature and appropriate implementation of the operation in question, for the purposes of attaining the objective in question, that the durability of the operation in question must be assessed in a case such as that in the main proceedings.

81 In the second place, as regards the duration, of at least five years from the payment of the final instalment of the funding, during which the beneficiary is required, under the national legislation, to retain and use itself the asset in question, failing which the funding paid must be reimbursed, it must be found that, in accordance with Article 72(1) of Regulation No 1698/2005, the contribution from the EAFRD is to be maintained if the operation for which that contribution has been made does not undergo any substantial modification, within the meaning of that provision, within five years of the national managing authority's funding decision, since that period of time is thus ordinarily shorter than the period laid down in that national legislation.

82 In those circumstances, the answer to Questions 4 and 5 is that Article 72(1) of Regulation No 1698/2005 must be interpreted as precluding national legislation, such as that at issue in the main proceedings, which requires the beneficiary of funding paid as part of an investment operation co-financed by the EAFRD to retain and use itself the asset acquired by means of that investment operation for at least five years from the payment of the final instalment of the funding.

Question 6

83 By Question 6, the referring court asks, in essence, whether the first paragraph of Article 56 of Regulation No 1306/2013 must be interpreted as meaning that failure, by the beneficiary of funding awarded as part of an investment operation co-financed by the EAFRD falling within the Leader axis referred to in Regulation No 1698/2005, to carry out a part of the operation set out by the beneficiary in its application for funding which was one of the criteria on the basis of which the applications for funding were assessed for the purpose of ranking them, despite the fact that that criterion was not required by the relevant national legislation, amounts to an irregularity within the meaning of that provision.

84 In the present case, as referred to in paragraph 23 above, whereas job creation was one of the criteria against which the applications for funding were ranked, it is common ground that Järvelaev expressed its intention, in its own application, to create jobs creation in the region and to hire a crew for its fishing sailing boat.

85 In that regard, it must be found that job creation was not a condition for the award of funding under Regulation No 1698/2005 or, according to the referring court, under Estonian law. In addition, the order for reference does not state that job creation was a contractual condition agreed as part of the funding at issue in the main proceedings, which is, however, for the referring court, where relevant, to ascertain.

86 Accordingly, a failure to create jobs in carrying out an investment operation co-financed by the EAFRD cannot per se amount to an irregularity within the meaning of the first paragraph of Article 56 of Regulation No 1306/2013.

87 However, the Estonian Government maintains in its observations that, by signing the funding contract, Järvelaev undertook to carry out the project as set out in the application for funding. As stated in paragraphs 23 and 84 above, job creation in the region and the employment of a crew for the fishing sailing boat were mentioned in that application for funding.

88 It is for the referring court to ascertain, where relevant, whether, under the relevant provisions of national law, Järvelaev did in fact undertake to achieve both aspects, namely job creation in the region and hiring a crew for its fishing sailing boat.

89 In any event, in accordance with what the Court has held in paragraph 58 above, it is not inconceivable that a failure to carry out a part of the application for funding would amount, if it were fundamental in the light of the objective pursued, to a substantial modification, within the meaning of Article 72(1) of Regulation 1698/2005, to the investment operation as accepted for co-funding. If relevant, it will be for the referring court to examine the significance of such failure in the light of the conditions laid down in that provision.

90 If, following such an examination, it is found that the failure to carry out the criterion at issue in the main proceedings amounted to such a substantial modification, that failure must be regarded as an irregularity within the meaning of the first paragraph of Article 56 of Regulation No 1306/2013.

91 Whereas under Article 72(2) of Regulation No 1698/2005 the sums unduly paid for an investment operation which underwent a substantial modification must be recovered in accordance with Article 33 of Regulation No 1290/2005, it follows from Article 119 of Regulation No 1306/2013, read in conjunction with Annex III thereto, that reference to Article 33 of Regulation No 1290/2005 is to be read as referring, inter alia, to Article 56 of Regulation No 1306/2013.

92 In the light of the foregoing, the answer to Question 6 is that the first paragraph of Article 56 of Regulation No 1306/2013 must be interpreted as meaning that failure, by the beneficiary of funding awarded as part of an investment operation co-financed by the EAFRD falling within the Leader axis referred to in Regulation No 1698/2005, to carry out a part of the operation set out by the beneficiary in its application for funding which was one of the criteria on the basis of which the applications for funding were assessed for the purpose of ranking them, despite the fact that that criterion was not required by the relevant national legislation, amounts to an irregularity within the meaning of that provision, provided that the failure to perform such a factor resulted in a substantial modification within the meaning of Article 72(1) of Regulation No 1698/2005 to the investment operation, which is for the referring court to ascertain.

Question 7

93 As a preliminary matter, in the light of what the Court has found in paragraphs 81 and 82 above, it must be held that, by referring to a five-year period from the final instalment in Question 7, the referring court is referring to the period laid down in Article 72(1) of Regulation No 1698/2005.

94 Therefore, by Question 7, the referring court asks, finally, whether the first paragraph of Article 56 of Regulation No 1306/2013 must be interpreted as precluding the initiation of a recovery procedure for funding unduly paid before the end of the five-year period from the managing authority's financing decision. That court also asks whether that provision must be interpreted as precluding continuing such a recovery procedure where, in the course of the procedure, the beneficiary of the funding remedies the failure which justified the initiation of that procedure.

95 In the first place, as regards the possibility for a Member State to initiate a recovery procedure for funding unduly paid before the end of the five-year period from the payment of the final instalment of the funding, it should be noted that, in accordance with Article 54(1) and with the first paragraph of

Article 56 of Regulation No 1306/2013, a Member State which detects an irregularity is required to recover the funding unduly paid. In particular, the Member State must request recovery from the beneficiary within 18 months after the approval and, where applicable, reception, by the paying agency or body responsible for the recovery of a control report or of a similar document, stating that an irregularity has taken place.

96 It follows that the Member States may and, in the interests of sound financial management of EU resources, must enforce recovery as soon as possible. In those circumstances, the fact that reimbursement is requested before the end of the five-year period starting from the funding decision by the managing authority is irrelevant to that recovery.

97 In the second place, as to whether EU law precludes continuing a recovery procedure where, in the course of the procedure, the beneficiary of the funding remedies the failure which justified the initiation of that procedure, it should be noted, as the Commission states, that, if the beneficiary of funding were afforded the opportunity of remedying, in the course of court proceedings relating to recovery, an irregularity relating to the implementation of the operation, such an opportunity could encourage failure in other beneficiaries, since they would be able to rely on a posteriori remedy after detection thereof by the competent national authorities. Accordingly, the fact that the beneficiary of the funding endeavours to, or does in fact, remedy that failure in the course of court proceedings relating to recovery is irrelevant to the recovery.

98 The answer to Question 7 is that Article 56 of Regulation No 1306/2013 must be interpreted as not precluding a recovery procedure for funding unduly paid from being initiated before the end of the five-year period from the managing authority's financing decision. That provision must also be interpreted as not precluding such a recovery procedure from being continued where, in the course of the procedure, the beneficiary of the funding remedies the failure which justified the initiation of that procedure.

Costs

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

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

1. **The durability of an investment operation which, as in the case in the main proceedings, was approved and co-financed by the European Agricultural Fund for Rural Development (EAFRD) in the 2007-2013 programming period must be assessed according to Article 72 of Council Regulation (EC) No 1698/2005 of 20 September 2005 on support for rural development by the European Agricultural Fund for Rural Development. Where the recovery of sums unduly paid under that operation takes place after the programming period has come to an end, namely after 1 January 2014, recovery must be based on Article 56 of Regulation (EU) No 1306/2013 of the European Parliament and of the Council of 17 December 2013 on the financing, management and monitoring of the common agricultural policy and repealing Council Regulations (EEC) No 352/78, (EC) No 165/94, (EC) No 2799/98, (EC) No 814/2000, (EC) No 1290/2005 and (EC) No 485/2008.**

2. **A lease by the beneficiary of funding, such as that at issue in the main proceedings, which was paid as part of an investment operation co-financed by the European Agricultural Fund for Rural Development (EAFRD) under the Leader axis referred to in Regulation No 1698/2005, of an asset acquired by means of that funding to another who uses it in connection with the same activity as that which the beneficiary of the funding was to**

exercise may amount to a substantial modification to the co-financed investment operation within the meaning of Article 72(1) of that regulation, which is for the referring court to ascertain in the light of all the elements of fact and of law at issue against the alternative conditions referred to in Article 72(1)(a) and (b) thereof. For the purposes of finding that there has been undue advantage given to a firm or public body within the meaning of Article 72(1)(a) of that regulation, it is for the competent national authority, to determine, subject to review by the relevant national courts, what the undue advantage specifically is. Whilst relevant, whether or not, in the light of the factual and legal situation, the actual user of the funding would have obtained the funding if it had itself submitted a funding application is not conclusive for the purposes of applying Article 72(1)(a) thereof.

3. **Article 72(1) of Regulation No 1698/2005 must be interpreted as precluding national legislation, such as that at issue in the main proceedings, which requires the beneficiary of funding paid as part of an investment operation co-financed by the European Agricultural Fund for Rural Development (EAFRD) to retain and use itself the asset acquired by means of that investment operation for at least five years from the payment of the final instalment of the funding.**

4. **The first paragraph of Article 56 of Regulation No 1306/2013 must be interpreted as meaning that failure, by the beneficiary of funding awarded as part of an investment operation co-financed by the European Agricultural Fund for Rural Development (EAFRD) falling within the Leader axis referred to in Regulation No 1698/2005, to carry out a part of the operation set out by the beneficiary in its application for funding which was one of the criteria on the basis of which the applications for funding were assessed for the purpose of ranking them, despite the fact that that criterion was not required by the relevant national legislation, amounts to an irregularity within the meaning of that provision, provided that the failure to perform such a factor resulted in a substantial modification within the meaning of Article 72(1) of Regulation No 1698/2005 to the investment operation, which is for the referring court to ascertain.**

5. **Article 56 of Regulation No 1306/2013 must be interpreted as not precluding a recovery procedure for funding unduly paid from being initiated before the end of the five-year period from the managing authority's financing decision. That provision must also be interpreted as not precluding such a recovery procedure from being continued where, in the course of the procedure, the beneficiary of the funding remedies the failure which justified the initiation of that procedure.**

[Signatures]