



Reports of Cases

JUDGMENT OF THE COURT (Third Chamber)

1 October 2020*

(Reference for a preliminary ruling – Structural Funds – European Regional Development Fund (ERDF) – Regulation (EC) No 1083/2006 – Article 2(7) – Concept of ‘irregularity’ – Infringement of a provision of EU law resulting from an act or omission on the part of an economic operator – Prejudice caused to the general budget of the European Union – Insolvency of the beneficiary’s sole business partner)

In Case C-743/18,

REQUEST for a preliminary ruling under Article 267 TFEU from the Rēzeknes tiesa (Rēzekne City Court, Latvia), made by decision of 20 November 2018, received at the Court on 28 November 2018, in the proceedings

LSEZ SIA ‘Elme Messer Metalurgs’

v

Latvijas Investīciju un attīstības aģentūra,

THE COURT (Third Chamber),

composed of A. Prechal, President of the Chamber, L.S. Rossi, J. Malenovský (Rapporteur), F. Biltgen and N. Wahl, Judges,

Advocate General: E. Sharpston,

Registrar: M. Aleksejev, Head of Unit,

having regard to the written procedure and further to the hearing on 11 December 2019,

after considering the observations submitted on behalf of:

- LSEZ SIA ‘Elme Messer Metalurgs’, by L. Rasnačs, advokāts, and E. Petrocka-Petrovska, juriste,
- the Latvijas Investīciju un attīstības aģentūra, by A. Pavlovs, A. Šļakota and I. Šate,
- the Latvian Government, initially by V. Kalniņa and I. Kucina, and subsequently by V. Kalniņa and V. Soņeca, acting as Agents,
- the Czech Government, by M. Smolek, J. Vláčil and J. Očková, acting as Agents,
- the Estonian Government, by N. Grünberg, acting as Agent,

* Language of the case: Latvian.

– the European Commission, by S. Pardo Quintillán and E. Kalniņš, acting as Agents,
after hearing the Opinion of the Advocate General at the sitting on 23 April 2020,
gives the following

Judgment

- 1 This request for a preliminary ruling concerns the interpretation of Article 2(7) 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), as amended by Regulation (EU) No 539/2010 of the European Parliament and of the Council of 16 June 2010 (OJ 2010 L 158, p. 1) ('Regulation No 1083/2006').
- 2 The request has been made in proceedings between LSEZ SIA 'Elme Messer Metalurgs' ('EMM') and the Latvijas Investīciju un attīstības aģentūra (Investment and Development Agency of Latvia; 'the Agency') concerning the termination of a contract that the Agency had concluded with EMM, relating to the award of a grant co-financed by the European Regional Development Fund (ERDF), on the grounds of serious irregularities committed by EMM.

Legal context

EU law

Regulation (EC, Euratom) No 2988/95

- 3 The fifth recital of Council Regulation (EC, Euratom) No 2988/95 of 18 December 1995 on the protection of the European Communities' financial interests (OJ 1995 L 312, p. 1) states that 'irregular conduct, and the administrative measures and penalties relating thereto, are provided for in sectoral rules in accordance with this Regulation'.
- 4 According to Article 1(2) of that regulation:

"Irregularity" shall mean any infringement of a provision of Community law resulting from an act or omission by an economic operator, which has, or would have, the effect of prejudicing the general budget of the Communities or budgets managed by them, either by reducing or losing revenue accruing from own resources collected directly on behalf of the Communities, or by an unjustified item of expenditure.'
- 5 Article 4 of that regulation provides:

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

– by an obligation to pay or repay the amounts due or wrongly received,

...

2. Application of the measures referred to in paragraph 1 shall be limited to the withdrawal of the advantage obtained plus, where so provided for, interest ...

...

4. The measures provided for in this Article shall not be regarded as penalties.’

6 Under Article 5(1) of that regulation:

‘Intentional irregularities or those caused by negligence may lead to the following administrative penalties ...’

Regulation No 1083/2006

7 Recitals 60, 65 and 66 of Regulation No 1083/2006 are worded as follows:

‘(60) In accordance with the principle of subsidiarity and subject to exceptions provided for in Regulation (EC) No 1080/2006 of the European Parliament and of the Council of 5 July 2006 on the European Regional Development Fund [and repealing Regulation (EC) No 1783/1999 (OJ 2006 L 210, p. 1)], Regulation (EC) No 1081/2006 of the European Parliament and of the Council of 5 July 2006 on the European Social Fund [and repealing Regulation (EC) No 1784/1999 (OJ 2006 L 210, p. 12)] and Council Regulation (EC) No 1084/2006 of 11 July 2006 on the Cohesion Fund [and repealing Regulation (EC) No 1164/94 (OJ 2006 L 210, p. 79)], there should be national rules on the eligibility of expenditure.

...

(65) In accordance with the principles of subsidiarity and proportionality, Member States should have the primary responsibility for the implementation and control of the interventions.

(66) The obligations on the Member States as regards management and control systems, the certification of expenditure, and the prevention, detection and correction of irregularities and infringements of Community law should be specified to guarantee the efficient and correct implementation of operational programmes. ...’

8 Article 1 of that regulation, entitled ‘Subject matter’, provides:

‘This Regulation lays down the general rules governing the [ERDF], the European Social Fund (ESF) (hereinafter referred to as the Structural Funds) and the Cohesion Fund, without prejudice of the specific provisions laid down in Regulations [No 1080/2006], [No 1081/2006] and [No 1084/2006].

This Regulation defines the objectives to which the Structural Funds and the Cohesion Fund (hereinafter referred to as the Funds) are to contribute, the criteria for Member States and regions to be eligible under those Funds, the financial resources available and the criteria for their allocation.

This Regulation defines the context for cohesion policy, including the method for establishing the Community strategic guidelines on cohesion, the national strategic reference framework and the process for examination at Community level.

To this end, this Regulation lays down the principles and rules on partnership, programming, evaluation, management, including financial management, monitoring and control on the basis of responsibilities shared between the Member States and the Commission.’

9 Article 2 of that regulation states:

‘For the purposes of this Regulation, the following terms shall have the meanings assigned to them here:

- (1) “operational programme”: document submitted by a Member State and adopted by the Commission setting out a development strategy with a coherent set of priorities to be carried out with the aid of a Fund, or, in the case of the Convergence objective, with the aid of the Cohesion Fund and the ERDF;
- (2) “priority axis”: one of the priorities of the strategy in an operational programme comprising a group of operations which are related and have specific measurable goals;
- (3) “operation”: a project or group of projects selected by the managing authority of the operational programme concerned or under its responsibility according to criteria laid down by the monitoring committee and implemented by one or more beneficiaries allowing achievement of the goals of the priority axis to which it relates;
- (4) “beneficiary”: an operator, body or firm, whether public or private, responsible for initiating or initiating and implementing operations. ...

...

- (7) “irregularity”: any infringement of a provision of Community law resulting from an act or omission by an economic operator which has, or would have, the effect of prejudicing the general budget of the European Union by charging an unjustified item of expenditure to the general budget.’

10 Article 56(4) of that regulation provides:

‘The rules on the eligibility of expenditure shall be laid down at national level subject to the exceptions provided for in the specific Regulations for each Fund. They shall cover the entirety of the expenditure declared under the operational programme.’

11 Under Article 58 of Regulation No 1083/2006:

‘The management and control systems of operational programmes set up by Member States shall provide for:

...

- (h) reporting and monitoring procedures for irregularities and for the recovery of amounts unduly paid.’

12 Article 60 of that regulation is worded as follows:

‘The managing authority shall be responsible for managing and implementing the operational programme in accordance with the principle of sound financial management and in particular for:

- (a) ensuring that operations are selected for funding in accordance with the criteria applicable to the operational programme and that they comply with applicable Community and national rules for the whole of their implementation period;

(b) verifying that the co-financed products and services are delivered and that the expenditure declared by the beneficiaries for operations has actually been incurred and complies with Community and national rules; ...

...'

13 Article 70 of that regulation provides:

'1. Member States shall be responsible for the management and control of operational programmes, in particular through the following measures:

(a) ensuring that management and control systems for operational programmes are set up in accordance with Articles 58 to 62 and function effectively;

(b) preventing, detecting and correcting irregularities and recovering amounts unduly paid together with interest on late payments where appropriate. They shall notify these to the Commission and keep the Commission informed of the progress of administrative and legal proceedings.

2. When amounts unduly paid to a beneficiary cannot be recovered, the Member State shall be responsible for reimbursing the amounts lost to the general budget of the European Union, when it is established that the loss has been incurred as a result of fault or negligence on its part.

...'

14 Under Article 98(1) and (2) of Regulation No 1083/2006:

'1. The Member States shall in the first instance bear the responsibility for investigating irregularities, acting upon evidence of any major change affecting the nature or the conditions for the implementation or control of operations or operational programmes and making the financial corrections required.

2. The Member State shall make the financial corrections required in connection with the individual or systemic irregularities detected in operations or operational programmes. The corrections made by a Member State shall consist of cancelling all or part of the public contribution to the operational programme. The Member State shall take into account the nature and gravity of the irregularities and the financial loss to the Funds.

...'

Regulation (EC) No 1828/2006

15 Under Article 1 of Commission Regulation (EC) No 1828/2006 of 8 December 2006 setting out rules for the implementation of Regulation No 1083/2006 and Regulation No 1080/2006 (OJ 2006 L 371, p. 1, and corrigendum OJ 2007 L 45, p. 3):

'This Regulation lays down rules for the implementation of Regulation [No 1083/2006] and Regulation [No 1080/2006] as regards the following:

...

(d) irregularities;

...'

16 Article 13(1) of that regulation provides:

‘For the purposes of the selection and approval of operations pursuant to Article 60(a) of Regulation [No 1083/2006], the managing authority shall ensure that beneficiaries are informed of the specific conditions concerning the products or services to be delivered under the operation, the financing plan, the time-limit for execution and the financial and other information to be kept and communicated.

It shall satisfy itself that the beneficiary has the capacity to fulfil these conditions before the approval decision is taken.’

17 Article 27 of that regulation, which forms part of Section 4 thereof, entitled ‘Irregularities’, provides:

‘For the purposes of this section, the following definitions shall apply:

(a) “economic operator” means any natural or legal person or other entity taking part in the implementation of assistance from the Funds, with the exception of a Member State exercising its prerogatives as a public authority;

...

(c) “suspected fraud” means an irregularity giving rise to the initiation of administrative or judicial proceedings at national level in order to establish the presence of intentional behaviour, in particular fraud, as referred to in Article 1(1)(a) of the Convention drawn up on the basis of Article K.3 of the Treaty on European Union, on the protection of the European Communities’ financial interests[, signed in Brussels on 26 July 1995 (OJ 1995 C 316, p. 48)];

...’

18 Under Article 28(1) of that regulation:

‘Without prejudice to the other obligations pursuant to Article 70 of Regulation [No 1083/2006], within two months following the end of each quarter, Member States shall report to the Commission any irregularities which have been the subject of a primary administrative or judicial finding.

In that report Member States shall in all cases give details concerning the following:

...

(b) the provision which has been infringed;

...

(d) the practices employed in committing the irregularity;

(e) where appropriate, whether the practice gives rise to a suspicion of fraud;

...’

Latvian law

- 19 Article 16.1 of the Ministru kabineta noteikumi Nr. 200 ‘Noteikumi par darbības programmas “Uzņēmējdarbība un inovācijas” papildinājuma 2.1.2.4. aktivitātes “Augstas pievienotās vērtības investīcijas” projektu iesniegumu atlases pirmo kārtu’ (Decree No 200 of the Council of Ministers relating to ‘Regulations on the first stage of project application selection in the activity “High added value investments” in Annex 2.1.2.4 to the operational programme “Entrepreneurship and Innovations”’), of 24 February 2009 (*Latvijas Vēstnesis*, 2009, No 41), provides that long-term investments will be eligible ‘only if they are used in the place of performance of the project mentioned in the application and in the context of the economic activity of the beneficiary’.
- 20 Under Article 17.1 of that decree, the following, inter alia, is considered eligible: ‘expenditure relating to the purchase of new equipment (and facilities) which are directly linked to the process of production or the provision of services in the sector in which the project is to be implemented’.
- 21 Under Article 2.1 of the Ministru kabineta noteikumi Nr. 740 ‘Kārtība, kādā ziņo par Eiropas Savienības struktūrfondu un Kohēzijas fondu ieviešanā konstatētajām neatbilstībām, pieņem lēmumu par piešķirtā finansējuma izlietojumu un atgūt neatbilstošos izdevumus’ (Decree No 740 of the Council of Ministers on the ‘Procedures for reporting irregularities detected in the implementation of the European Union Structural Funds and Cohesion Fund, taking decisions on utilisation of the financing granted, and recovering irregular expenditure’), of 10 August 2010 (*Latvijas Vēstnesis*, 2010, No 128), an ‘irregularity’, within the meaning of that decree, is ‘any act which infringes any provision of Latvian or EU law, within the meaning of Article 2(7) of [Regulation No 1083/2006]’.
- 22 Article 1774 of the Civil Code provides:
- ‘An accidental loss is not required to be compensated by anyone. Therefore, if an unforeseen obstacle prevents a person from performing an obligation that he or she has undertaken, that person shall be considered to have performed the obligation, unless he or she has accepted in a contract the risk of accidental loss.’

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

- 23 On 7 April 2010, EMM concluded a contract with the Agency under which EMM was to receive a grant, co-financed by the ERDF, for the creation of, as part of the operation of the AS ‘Liepājas Metalurgs’ production plant, a production unit for industrial gases which are used in, inter alia, metallurgy (‘the contract’). For the purposes of implementing the contract, EMM was required, inter alia, to assure the production and supply of industrial gases to the plant operated by Liepājas Metalurgs, without which the latter could not operate.
- 24 The implementation of the project eligible for funding (‘the project’) commenced on the same day and was scheduled to end on 6 December 2012.
- 25 To that end, EMM acquired and installed the necessary production equipment, experts were hired and trained, and the production unit commenced operations. EMM invested EUR 12 283 579.00 from its own funds and EUR 2 212 511.14 corresponding to the co-financing granted by the ERDF under the contract.
- 26 On 3 January 2013, EMM submitted a final performance report on the project to the Agency, which it supplemented on 7 February 2013, requesting that the balance payment of EUR 737 488.86 by way of ERDF assistance be transferred to it in accordance with the contract.

- 27 Since Liepājas Metalurgs began to experience cash-flow problems in early 2013, and because the operation of EMM was directly dependent on that of Liepājas Metalurgs, the Agency raised concerns about EMM's possible inability to fulfil its contractual obligations, which consisted of maintaining production of industrial gases at no less than approximately 50.5 million m³ per annum, as well as ensuring an average increase in turnover of at least 20% during the first two years following completion of the project. The Agency therefore suspended payment of the financial assistance.
- 28 On 12 November 2013, insolvency proceedings were initiated against Liepājas Metalurgs.
- 29 By a letter dated 28 July 2014, the Agency requested EMM to supply to it documents containing information about the implementation of the project, indicating that it might terminate the contract.
- 30 The activity of Liepājas Metalurgs was taken over by AS 'KVV Liepājas Metalurgs', with the result that EMM was able to resume its activity, of which it informed the Agency.
- 31 On 31 March 2016, the Agency sent a letter to EMM in which, having pointed out the situation of Liepājas Metalurgs, it notified EMM of the unilateral termination of the contract, on the ground that, during the course of implementation of the project, EMM had committed serious irregularities, including substantial departures from its commitments by reason of the fact that it did not maintain the regular production activity to which it had committed itself.
- 32 EMM brought an action against the Agency before the referring court, the Rēzeknes tiesa (Rēzekne City Court, Latvia), requesting that the notice terminating the contract be declared invalid in regard to it. EMM submits that the Agency's decision unilaterally to terminate the contract is contrary to the principle of good faith since EMM did not breach its contractual obligations and it is not disputed that EMM used the financial assistance that it received for the purpose of tasks associated with the implementation of the project.
- 33 The Agency claims that the financial problems of Liepājas Metalurgs and the suspension of its activity cannot be regarded as an unforeseen obstacle within the meaning of Article 1774 of the Civil Code.
- 34 According to the Agency, the situation at issue in the main proceedings is covered by the concept of 'irregularity' within the meaning of Article 2(7) of Regulation No 1083/2006 and Article 2(1) of Decree No 740 of the Council of Ministers of 10 August 2010, which therefore permits the Agency to recover the funding already granted in accordance with the procedures laid down by that decree.
- 35 Consequently, the Agency filed a counterclaim against EMM before the referring court, whereby it sought to recover from EMM the entirety of the financial assistance already paid to it, namely EUR 2 212 511.14, as well as the default interest that had accrued over the period from 18 April 2016 to 14 February 2017 and which came to a total amount of EUR 670 390.53.
- 36 EMM, for its part, contends that Regulation No 1083/2006, which states that an irregularity is 'any infringement of a provision of [EU] law resulting from an act or omission by an economic operator', cannot be applied in the present case. It claims that the situation which rendered it unable to use the production unit as part of its economic activity did not occur as a result of an act or omission attributable to it, but was the consequence of the suspension of the activity of Liepājas Metalurgs.
- 37 The referring court considers that there is some doubt as to the exact scope of the concept of 'irregularity', within the meaning of Article 2(7) of Regulation No 1083/2006.

38 In those circumstances, the Rēzeknes tiesa (Rēzekne City Court) decided to stay the proceedings and to refer the following question to the Court of Justice for a preliminary ruling:

‘Must Article 2(7) of Regulation No 1083/2006 be interpreted as meaning that a situation in which the beneficiary of funding is unable to achieve the expected level of turnover during the relevant period because, during that period, the business of its sole partner has been suspended or that partner has become insolvent to be considered an act or omission by an economic operator (the beneficiary of funding) which has, or would have, the effect of prejudicing the general budget of the European Union?’

Consideration of the question referred

Admissibility

39 Without expressly raising an objection of inadmissibility with regard to the request for a preliminary ruling, the Estonian Government and the European Commission submit that certain elements of the factual and legal context of the main proceedings, as described by the referring court, lack precision. In particular, they submit, it is not sufficiently clear from the order for reference whether EMM actually carried out the activity planned under the project, or even what conditions had to be met in order for the project to be regarded as completed.

40 In that regard, it is appropriate to note that, in accordance with settled case-law of the Court, the procedure provided for by Article 267 TFEU is an instrument of cooperation between the Court of Justice and national courts and tribunals, by means of which the former provides the latter with an interpretation of such EU law as is necessary for them to give judgment in cases upon which they are called to adjudicate (judgment of 5 July 2016, *Ognyanov*, C-614/14, EU:C:2016:514, paragraph 16 and the case-law cited).

41 According to equally settled case-law, and also in line with Article 94 of the Rules of Procedure of the Court of Justice, the need to provide an interpretation of EU law which will be of use to the national court makes it necessary for that court to define the factual and legal context of the questions it is asking or, at the very least, to explain the factual circumstances on which those questions are based. The order for reference must also set out the precise reasons why the national court is unsure as to the interpretation of EU law and considers it necessary to refer a question to the Court for a preliminary ruling (judgment of 30 April 2020, *Blue Air – Airline Management Solutions*, C-584/18, EU:C:2020:324, paragraph 43 and the case-law cited).

42 However, in view of the spirit of judicial cooperation which governs relations between national courts and the Court of Justice in the context of preliminary-ruling proceedings, the fact that the referring court did not make certain initial findings does not necessarily mean that the request for a preliminary ruling is inadmissible if, in spite of those deficiencies, the Court, in the light of the information contained in the case file, considers that it is in a position to provide a useful answer to the referring court (judgment of 27 October 2016, *Audace and Others*, C-114/15, EU:C:2016:813, paragraph 38 and the case-law cited).

43 In the present case, although it would certainly have been useful for the referring court to identify more precisely the exact legal or contractual provision which constitutes the source of the obligation referred to in its question and relates to the attainment by EMM of a certain turnover during a relevant period, the fact remains that, having regard to the nature and scope of the provision of EU law whose interpretation is sought, this lack of precision does not preclude a sufficient understanding of the context in which that question arises. It is apparent, in particular, from the information before the Court that the outcome of the dispute in the main proceedings depends on whether an

irregularity, within the meaning of Article 2(7) of Regulation No 1083/2006, may be attributed to EMM. Notwithstanding the abovementioned imprecision, the information provided by the referring court, relating to the factual and regulatory framework, makes it possible to assess the scope of that question and to provide that court with an answer which is likely to prove useful to it, as is confirmed, moreover, by the written observations lodged by the Latvian and Estonian Governments and by the Commission.

44 Consequently, the request for a preliminary ruling is admissible.

Substance

45 By its question, the referring court asks, in essence, whether Article 2(7) of Regulation No 1083/2006 must be interpreted as meaning that a situation in which the beneficiary of ERDF funding is unable to achieve, during the relevant period, the level of turnover expected as part of the project eligible for financing because the business of its sole partner has been suspended or that partner has become insolvent is to be regarded as an ‘irregularity’ within the meaning of that provision.

46 At the outset, it should be noted that Article 1 of Regulation No 1083/2006 lays down, inter alia, the principles on management, monitoring and control of operations receiving funding from the ERDF on the basis of responsibilities shared between the Member States and the Commission (judgment of 26 May 2016, *Județul Neamț and Județul Bacău*, C-260/14 and C-261/14, EU:C:2016:360, paragraph 39).

47 Moreover, recital 65 of Regulation No 1083/2006 specifies that, in accordance with the principles of subsidiarity and proportionality, the implementation and control of assistance from the Funds provided for in that regulation are primarily the responsibility of the Member States.

48 By taking responsibility for such control, the Member States are the primary guarantors of the efficient and correct use of EU funds and thus contribute to proper implementation of the general budget of the European Union (see, by analogy, judgment of 3 September 2014, *Baltlanta*, C-410/13, EU:C:2014:2134, paragraph 44).

49 To that end, in accordance with Article 70(1) of Regulation No 1083/2006, the Member States are, in particular, responsible for the management and control of operational programmes and for the detection of irregularities.

50 As regards the concept of ‘irregularity’, this is defined in Article 2(7) of Regulation No 1083/2006 as 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 by charging an unjustified item of expenditure to the general budget.

51 The existence of such an irregularity presupposes, therefore, the combination of three elements, namely, first, the existence of an infringement of EU law, second, the fact that that infringement is the result of an act or omission on the part of an economic operator and, third, the existence of prejudice, actual or potential, caused to the budget of the European Union.

52 As regards, in the first place, the existence of an infringement of EU law, it must be noted at the outset that Article 2(7) of Regulation No 1083/2006 covers not only breaches of a provision of EU law as such, but also breaches of the provisions of national law which are applicable to operations supported by the Structural Funds and thus contribute to ensuring the correct application of EU law relating to the management of projects financed by those funds (see, to that effect, judgment of 26 May 2016, *Județul Neamț and Județul Bacău*, C-260/14 and C-261/14, EU:C:2016:360, paragraphs 37 and 43).

- 53 On the one hand, Article 56(4) of Regulation No 1083/2006 provides that, subject to the exceptions provided for in the regulations specific to each Fund, the rules of eligibility of expenditure are to be established at national level. On the other hand, Article 60(a) of that regulation provides that it is the responsibility of the managing authority to ensure that operations selected for funding comply with applicable EU and national rules for the whole of their implementation period (judgment of 6 December 2017, *Compania Națională de Administrare a Infrastructurii Rutiere*, C-408/16, EU:C:2017:940, paragraph 55).
- 54 Moreover, it should be borne in mind that the system of subsidies developed by EU rules is based on, inter alia, compliance by the recipient with a series of conditions for entitlement to financial assistance. Therefore, in the context of the procedures provided for by the national management and control arrangements, it is for the competent national authorities to ensure that the recipient of the Funds commits itself to complying with those conditions. To that end, those national authorities are permitted to require that such a commitment be made by that recipient for the purpose of carrying out its project, before that project is included in the assistance concerned (see, to that effect, judgment of 3 September 2014, *Baltlanta*, C-410/13, EU:C:2014:2134, paragraphs 56 to 58 and the case-law cited). Furthermore, it follows from Article 60(b) of Regulation No 1083/2006 that the managing authority must verify that the co-financed products and services are delivered.
- 55 In the main proceedings, as is indicated by the very wording of the question referred for a preliminary ruling, the beneficiary of the ERDF subsidy did not, over the reference period, achieve the level of turnover expected in the context of the project declared eligible for co-financing.
- 56 Thus, it appears that, contrary to what is assumed in Article 60(b) of Regulation No 1083/2006, the co-financed products or services were not delivered in their entirety and that, consequently, the beneficiary would not have fulfilled the obligation entitling it to receive the financial assistance provided for in accordance with EU law and the applicable national law.
- 57 As regards, in the second place, the fact that such an infringement of EU law or applicable national law must be the result of ‘an act or omission by an economic operator’, it should be noted that the wording of Article 2(7) of Regulation No 1083/2006 does not specify whether the subjective element of intention or negligence attributable to the economic operator concerned constitutes such an act or omission, and ultimately an ‘irregularity’, within the meaning of that provision.
- 58 In that regard, it must be recalled that, in accordance with settled case-law of the Court, in interpreting a provision of EU law it is necessary to consider not only its wording but also the context in which it occurs and the objectives pursued by the rules of which it is part (judgment of 2 July 2020, *Magistrat der Stadt Wien (European hamster)*, C-477/19, EU:C:2020:517, paragraph 23 and the case-law cited).
- 59 As regards the context of which Article 2(7) of Regulation No 1083/2006 forms part, it should be borne in mind that the wording of that provision is very similar to that of Article 1(2) of Regulation No 2988/95. In that context, as those two regulations form part of the same mechanism designed to ensure the proper management of EU funds and the safeguarding of the European Union’s financial interests, the Court has held that the term ‘irregularity’ within the meaning of Article 1(2) of Regulation No 2988/95 and Article 2(7) of Regulation No 1083/2006 must be interpreted in a uniform manner (judgment of 26 May 2016, *Județul Neamț and Județul Bacău*, C-260/14 and C-261/14, EU:C:2016:360, paragraph 34).
- 60 However, Articles 4 and 5 of Regulation No 2988/95 draw a distinction between, on the one hand, the general concept of ‘irregularity’ and, on the other hand, that of ‘intentional irregularities or those caused by negligence’, namely serious irregularities which may lead to administrative penalties (see, to that effect, judgment of 5 March 2019, *Eesti Pagar*, C-349/17, EU:C:2019:172, paragraph 122 and the case-law cited).

- 61 Similarly, Article 28(1)(e) of Regulation No 1828/2006, read in conjunction with Article 27(c) of that regulation, which lays down detailed rules for the implementation of Regulation No 1083/2006 and therefore constitutes a whole with the latter, insists on the ‘intentional’ nature of the conduct at the root of the irregularity consisting of a suspicion of fraud, that concept thus constituting another example of a serious irregularity, following the example of the irregularity referred to in the previous paragraph.
- 62 Having regard, first, to that distinction made at legislative level and, second, to the fact that the definition of the concept of ‘irregularity’ in Article 2(7) of Regulation No 1083/2006 does not contain any specification as regards the intentional or negligent nature of the conduct of the beneficiary concerned, conduct of such a nature cannot be regarded as an essential element for the finding of an irregularity within the meaning of that provision.
- 63 That interpretation is supported by the objective pursued by Regulation No 1083/2006, referred to in paragraph 48 of the present judgment, which is to ensure the correct and efficient use of the Funds in order to protect the financial interests of the European Union. In the light of such an objective, the concept of ‘irregularity’ referred to in Article 2(7) of Regulation No 1083/2006 must be interpreted broadly.
- 64 In that regard, it should also be noted that the Court has already stated, on numerous occasions, that the obligation to give back an advantage improperly received by means of an irregularity is not a penalty, but simply the consequence of a finding that the conditions required to obtain the advantage derived from EU rules have not been observed, with the result that that advantage becomes an advantage wrongly received (judgment of 26 May 2016, *Județul Neamț and Județul Bacău*, C-260/14 and C-261/14, EU:C:2016:360, paragraph 50 and the case-law cited).
- 65 It follows from these considerations that, even if an economic operator, such as that at issue in the main proceedings, has failed to comply with the obligation giving it entitlement to the contribution from the Funds by reason of the insolvency or suspension of the activities of its sole business partner, that circumstance does not in itself constitute an obstacle to such a breach being regarded as an ‘irregularity’ within the meaning of Article 2(7) of Regulation No 1083/2006, in so far as a demonstration of intentional or negligent conduct on the part of the beneficiary is not necessary for the existence of such an irregularity.
- 66 In the third place, as regards the existence of prejudice caused to the EU budget as a result of such an omission, it follows from Article 2(7) of Regulation No 1083/2006 that an infringement of EU law, or of national law applicable to operations supported by the Funds, constitutes an ‘irregularity’ within the meaning of that provision if it has, or would have, the effect of prejudicing the general budget of the European Union by charging an unjustified item of expenditure to that budget.
- 67 In that respect, the Court has held that a demonstration of the existence of a specific financial impact is not required. It is sufficient that the possibility of an impact on the budget of the funds concerned is not excluded (see, to that effect, judgment of 6 December 2017, *Compania Națională de Administrare a Infrastructurii Rutiere*, C-408/16, EU:C:2017:940, paragraphs 60 and 61 and the case-law cited).
- 68 In the present case, the beneficiary’s failure to provide the minimum level of activity required of it, and to which the question referred for a preliminary ruling refers, implies that the co-financing granted by the European Union in return for the provision of such a minimum level has necessarily been paid, at least in part, in an undue manner. Consequently, such an infringement of EU law or of the applicable national law, which is due to an omission attributable to the beneficiary, is capable of prejudicing the general budget of the European Union.

- 69 It follows from the foregoing that, in the present case, subject to verification by the referring court, an ‘irregularity’ within the meaning of Article 2(7) of Regulation No 1083/2006 may be attributed to EMM. Where an irregularity has been established, this results, as a general rule, in withdrawal of the advantage unduly obtained, in accordance with Article 4(1) of Regulation No 2988/95.
- 70 In the main proceedings, as is apparent from paragraph 33 of the present judgment, it appears that reference was made to the existence of an unforeseen obstacle, the recognition of which, under national law, could have the effect of preventing the repayment of sums unduly paid to the beneficiary by the ERDF.
- 71 Without it being necessary to give a ruling in that regard, it should be noted that, first, under Article 70(1)(b) of Regulation No 1083/2006, it is for the Member States to recover sums unduly paid, where appropriate together with default interest, and, second, under Article 70(2) of that regulation, the Member State concerned is responsible for reimbursing to the general budget of the European Union amounts unduly paid to a beneficiary, where those amounts cannot be recovered, when it is established that the loss has been incurred as a result of fault or negligence on the part of that Member State.
- 72 Furthermore, where an irregularity significantly affects the nature or conditions of implementation of an operation, Member States are required, pursuant to Article 98(1) of Regulation No 1083/2006, to make a financial correction. As the Advocate General states in point 88 of her Opinion, under Article 98(2) of Regulation No 1083/2006, that correction consists of cancelling all or part of the public contribution to the operational programme and, when calculating that financial correction, the Member States are required to take into account the nature of the irregularities, their gravity and the resulting financial loss to the Funds.
- 73 In the light of all of the foregoing considerations, the answer to the question referred is that Article 2(7) of Regulation No 1083/2006 must be interpreted as meaning that a situation in which the beneficiary of ERDF funding fails to achieve, during the relevant period, the level of turnover expected as part of the project eligible for financing because the activities of its sole business partner have been suspended or because that partner has become insolvent may be regarded as an ‘irregularity’ within the meaning of that provision.

Costs

- 74 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the referring 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 (Third Chamber) hereby rules:

Article 2(7) 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, as amended by Regulation (EU) No 539/2010 of the European Parliament and of the Council of 16 June 2010, must be interpreted as meaning that a situation in which the beneficiary of European Regional Development Fund funding fails to achieve, during the relevant period, the level of turnover expected as part of the project eligible for financing because the activities of its sole business partner have been suspended or because that partner has become insolvent may be regarded as an ‘irregularity’ within the meaning of that provision.

[Signatures]