Reports of Cases

JUDGMENT OF THE COURT (Fifth Chamber)

26 May 2016*

[Text rectified by order of 29 June 2016]

(Reference for a preliminary ruling — Protection of the financial interests of the European Union — Regulation (EC, Euratom) No 2988/95 — European Regional Development Fund (ERDF) — Regulation (EC) No 1083/2006 — Award of a contract by the beneficiary of funds acting as contracting authority for the performance of the action eligible for funding — Definition of 'irregularity' — Criterion relating to 'breach of EU law' — Tendering procedures contrary to national law — Nature of financial corrections adopted by Member States — Administrative measures or penalties)

In Joined Cases C-260/14 and C-261/14,

REQUESTS for a preliminary ruling under Article 267 TFEU from the Curtea de Apel Bacău (Appeal Court, Bacău, Romania), made by decisions of 8 May 2014, received at the Court on 30 May 2014, in the proceedings

Județul Neamț (C-260/14),

Județul Bacău (C-261/14)

v

Ministerul Dezvoltării Regionale și Administrației Publice,

THE COURT (Fifth Chamber),

composed of J.L. da Cruz Vilaça, President of the Chamber, F. Biltgen, A. Borg Barthet, E. Levits (Rapporteur) and M. Berger, Judges,

Advocate General: Y. Bot,

Registrar: A. Calot Escobar,

after considering the observations submitted on behalf of:

— [as rectified by order of 29 June 2016] the Romanian Government, by R.H. Radu, V. Angelescu, and D.M. Bulancea, acting as Agents,

— the Hungarian Government, by Z. Fehér, G. Koós and A. Pálfy, acting as Agents,

— the Netherlands Government, by M. Bulterman and B. Koopman, acting as Agents,

* Language of the case: Romanian.

— the European Commission, by B.-R. Killmann and A. Ștefănuc, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 14 January 2016,

gives the following

Judgment

1 These requests for a preliminary ruling concern the interpretation of Article 1(2) and (4) and Article 5(c) 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) and Article 2(7) and Article 98 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).

2 The requests have been made in two sets of proceedings between the Județul Neamț (County of Neamț) and the Județul Bacău (County of Bacău), respectively, and the Ministerul Dezvoltării Regionale și Administrației Publice (Ministry for Regional Development and Public Administration) concerning the validity of two administrative measures addressed to them by that ministry requiring them, in their capacity as contracting authorities which had organised public procurement procedures relating to operations eligible for grants, to repay part of the grants they had received.

Legal context

EU law

3 Article 1 of Regulation No 2988/95 provides as follows:

'1. For the purposes of protecting the European Communities' financial interests, general rules are hereby adopted relating to homogenous checks and to administrative measures and penalties concerning irregularities with regard to Community law.

2. "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.'

4 Article 2 of Regulation No 2988/95 states as follows:

'1. Administrative checks, measures and penalties shall be introduced in so far as they are necessary to ensure the proper application of Community law. They shall be effective, proportionate and dissuasive so that they provide adequate protection for the Communities' financial interests.

2. No administrative penalty may be imposed unless a Community act prior to the irregularity has made provision for it. In the event of a subsequent amendment of the provisions which impose administrative penalties and are contained in Community rules, the less severe provisions shall apply retroactively.

3. Community law shall determine the nature and scope of the administrative measures and penalties necessary for the correct application of the rules in question, having regard to the nature and seriousness of the irregularity, the advantage granted or received and the degree of responsibility.

4. Subject to the Community law applicable, the procedures for the application of Community checks, measures and penalties shall be governed by the laws of the Member States.'

5 Article 4 of Regulation No 2988/95 is worded as follows:

'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,

— by the total or partial loss of the security provided in support of the request for an advantage granted or at the time of the receipt of an advance.

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 which may be determined on a flat-rate basis.

3. Acts which are established to have as their purpose the obtaining of an advantage contrary to the objectives of the Community law applicable in the case by artificially creating the conditions required for obtaining that advantage shall result, as the case shall be, either in failure to obtain the advantage or in its withdrawal.

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

6 Article 5 of Regulation No 2988/95 provides as follows:

'1. Intentional irregularities or those caused by negligence may lead to the following administrative penalties:

(a) payment of an administrative fine;

(b) payment of an amount greater than the amounts wrongly received or evaded, plus interest where appropriate; this additional sum shall be determined in accordance with a percentage to be set in the specific rules, and may not exceed the level strictly necessary to constitute a deterrent;

(c) total or partial removal of an advantage granted by Community rules, even if the operator wrongly benefited from only a part of that advantage;

…'

7 The last paragraph of Article 1 of Regulation No 1083/2006 states as follows:

'… 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.'

8 Article 2(7) of Regulation No 1083/2006 provides as follows:

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

…

(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.'

9 Article 98 of Regulation No 1083/2006 is worded as follows:

‘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. Member States shall take into account the nature and gravity of the irregularities and the financial loss to the Fund.

The resources from the Funds released in this way may be reused by the Member State until 31 December 2015 for the operational programme concerned in accordance with the provisions referred to in paragraph 3.

3. The contribution cancelled in accordance with paragraph 2 may not be reused for the operation or operations that were the subject of the correction, nor, where a financial correction is made for a systemic irregularity, for existing operations within the whole or part of the priority axis where the systemic irregularity occurred.

…’

10 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) replaced Regulation No 1083/2006 with effect from 1 January 2014.

11 Article 2(36) of Regulation No 1303/2013 reads as follows:

‘For the purposes of this Regulation, the following definitions apply:

…

(36) “irregularity” means any breach of Union law, or of national law relating to its application, resulting from an act or omission by an economic operator involved in the implementation of the (European Structural and Investment) Funds, which has, or would have, the effect of prejudicing the budget of the Union by charging an unjustified item of expenditure to the budget of the Union.’

12 Recital 2 of Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts (OJ 2004 L 134, p. 114), as amended by Commission Regulation (EC) No 1422/2007 of 4 December 2007 (OJ 2007 L 317, p. 34) (‘Directive 2004/18’), states as follows:

‘The award of contracts concluded in the Member States on behalf of the State, regional or local authorities and other bodies governed by public law entities, is subject to the respect of the principles of the Treaty and in particular to the principle of freedom of movement of goods, the principle of freedom of establishment and the principle of freedom to provide services and to the principles deriving therefrom, such as the principle of equal treatment, the principle of non-discrimination, the

principle of mutual recognition, the principle of proportionality and the principle of transparency. However, for public contracts above a certain value, it is advisable to draw up provisions of Community coordination of national procedures for the award of such contracts which are based on these principles so as to ensure the effects of them and to guarantee the opening-up of public procurement to competition. These coordinating provisions should therefore be interpreted in accordance with both the above-mentioned rules and principles and with other rules of the Treaty.'

13 Article 7 of Directive 2004/18, entitled 'Threshold amounts for public contracts', provides as follows:

'This Directive shall apply to public contracts which are not excluded in accordance with the exceptions provided for in Articles 10 and 11 and Articles 12 to 18 and which have a value exclusive of value-added tax (VAT) estimated to be equal to or greater than the following thresholds:

(a) EUR 133 000 for public supply and service contracts other than those covered by point (b), third indent, awarded by contracting authorities which are listed as central government authorities in Annex IV; …

(b) EUR 206 000

— for public supply and service contracts awarded by contracting authorities other than those listed in Annex IV,

— for public supply contracts awarded by contracting authorities which are listed in Annex IV and operate in the field of defence, where these contracts involve products not covered by Annex V,

— for public service contracts awarded by any contracting authority in respect of the services listed in Category 8 of Annex IIA, Category 5 telecommunications services the positions of which in the [Common Procurement Vocabulary] are equivalent to reference Nos 7524, 7525 and 7526 and/or the services listed in Annex IIB;

(c) EUR 5 150 000 for public works contracts.'

Romanian law

14 Article 1 of Ordonanță Guvernului nr. 79/2003 privind controlul şi recuperarea fondurilor comunitare, precum și a fondurilor de cofinanțare aferente utilizate necorespunzător (Government Ordinance No 79/2003 on the control and recovery of Community funds and associated co-financing funds that have been misused) (*Monitorul Oficial al României*, Part I, No 622, 30 August 2003), in the version at the time of the funding agreements and the procurement procedures organised for the performance of the actions eligible for grants at issue in the main proceedings ('OG No 79/2003') states as follows:

'This ordinance regulates the establishment and recovery of sums wrongly paid from the financial contribution allocated to Romania on an unsecured basis by the European Community and/or related co-financing funds, as a result of irregularities.'

15 Article 2 of OG No 79/2003 provides as follows:

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

(a) "irregularity" means any breach of legality, regularity and compliance, in relation to the provisions of national and/or Community law, and of the terms of agreements or contracts, or of any other legal commitment entered into on the basis of such provisions which, as a result of the charging

of an unjustified item of expenditure, has an adverse effect on the general budget of the European Communities and/or the budgets managed by or on behalf of the Communities, and the budgets from which the related co-funding derives;

…

(d) "credit entries resulting from irregularities" means sums to be restored to the general budget of the European Communities and/or the budgets managed by the European Communities or on their behalf, or the budgets from which the related co-financing derives, as a consequence of the improper use of Community funds and the related co-financing amounts and/or as a consequence of the fact that sums have been received which were not due under measures forming part of the system for financing such funds in whole or in part;

…'

16 Article 4 of OG No 79/2003 states as follows:

'1. Amounts unduly paid from Community funds and/or associated co-financing, banking costs, including incidental charges, and other amounts imposed on the debtor by law shall be the subject of recovery of credit entries deriving from irregularities.

…'

17 At the time of the checks carried out by the competent authorities of the actions eligible for grants in question, Ordonanță de urgență a Guvernului nr. 66/2011 privind prevenirea, constatarea și sancționarea neregulilor apărute în obținerea și utilizarea fondurilor europene și/sau a fondurilor publice naționale aferente acestora (Government Emergency Ordinance No 66/2011 regarding prevention, ascertainment and penalisation of irregularities associated with the collection and use of European funds and/or national public funds relating thereto) (*Monitorul Oficial al României*, Part I, No 461, 30 June 2011) ('OUG No 66/2011') had replaced OG No 79/2003.

18 Article 2 of OUG No 66/2011 provides as follows:

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

(a) "irregularity" means any breach of legality, regularity and compliance, in relation to the provisions of national and/or European law, and of the terms of agreements or contracts, or of any other legal commitment entered into on the basis of those provisions resulting from an action or an omission on the part of the beneficiary or of the authority competent to manage the European funds which, as a result of the charging of an unjustified item of expenditure, has had or may have an adverse effect on the general budget of the European Union, the budgets of public international contributors and/or related national public funds;

…

(h) "activity of ascertaining irregularities" means activities of control/investigation undertaken by the competent authorities in accordance with the provisions of the present ordinance, in order to ascertain the existence of any irregularity;

(i) "activity of determining credit entries deriving from irregularities" means the activity by means of which the obligation to pay resulting from the irregularities ascertained is established and described in detail, with the issue of a credit instrument;

…

(o) “application of financial corrections” means administrative measures adopted by the competent authorities, in conformity with the provisions of the present ordinance, which consist of excluding from financing out of European funds and/or national public funds relating thereto expenditure in relation to which an irregularity has been established;

…’

19 Article 27(1) of OUG No 66/2011 is worded as follows:

‘If irregularities are ascertained in the application by beneficiaries of the provisions concerning public procurement procedures, either with regard to the national rules in force regarding public contracts or with regard to specific contract procedures applicable to private beneficiaries, a note shall be issued recording the irregularities and determining financial corrections, in accordance with the provisions of Articles 20 and 21.’

20 Article 28 of OUG No 66/2011 provides as follows:

‘The value of the credit entry established on the basis of Article 27 shall be calculated by determining the financial corrections in accordance with the provisions in the Annex.’

21 In the table in the Annex to OUG No 66/2011 relating to contracts which have a value below the threshold established by national public procurement legislation for the purpose of determining whether it is necessary to publish a notice in the *Official Journal of the European Union*, point 2.3 provides, in respect of breaches consisting in applying unlawful criteria for qualification and selection or unlawful assessment factors, for the application of corrections/reductions of 10% of the value of the contract in question or of a 5% reduction in line with the seriousness of the non-compliance.

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

22 As part of Regional Operational Programme 2007-2013, two neighbouring Romanian local authorities, Județul Neamț (County of Neamț) (Case C-260/14) and Județul Bacău (County of Bacău) (Case C-261/14), received funding from the European Regional Development Fund (ERDF). The funding was granted by means of a funding agreement between the Ministerul Dezvoltarii Regionale și Turismului (Ministry for Regional Development and Tourism), as authority responsible for managing Regional Operational Programme 2007-2013, and the two respective local authorities.

23 In Case C-260/14, the funding agreement relates to the refurbishment, extension and modernisation of a school centre in Roman (Romania), a town situated about 40 kilometers north of Bacău (Romania). Bacău is approximately 300 km to the north of Bucharest (Romania), 370 km from the border with Bulgaria, beyond the eastern Carpathians, and close to the borders with Moldavia to the east and Ukraine to the north. The County of Neamț, which received the funds in its capacity as contracting authority, organised a tendering procedure for the award of a public audit services contract with an estimated value of EUR 20264.18, as a result of which a contract for the provision of audit services with a value of EUR 19410.12 was concluded.

24 In Case C-261/14, the funding agreement concerns the refurbishment of a municipal road. The County of Bacău organised an open tendering procedure for the award of a public works contract with a value of EUR 2 820 515, as a result of which a works contract was concluded on 17 September 2009.

25 It is apparent from the information provided to the Court that, in both those tendering procedures, the Ministry for Regional Development and Public Administration considered that the conditions imposed by both the County of Neamț and the County of Bacău were unlawful under national public procurement law. In those circumstances, the Ministry applied a financial correction representing 5% of the respective amounts of the contracts in question.

26 The County of Neamț and the County of Bacău subsequently lodged appeals against the decisions applying the respective financial corrections. As the Ministry for Regional Development and Public Administration rejected the appeals, the applicants in the main proceedings brought actions before the referring court seeking the annulment of those decisions.

27 In those proceedings, the referring court is required to rule, inter alia, on whether there is an 'irregularity' within the meaning of Regulation No 2988/95 or Regulation No 1083/2006 and, if appropriate, on the nature of the financial corrections applied by the ministry in question.

28 In those circumstances, the Curtea de Apel Bacău (Appeal Court, Bacău, Romania) decided to stay proceedings and to refer to the Court for a preliminary ruling the following questions, the first of which relates to Case C-260/14 alone, and the second to fourth of which are, for all essential purposes, the same in Case C-260/14 and C-261/14.

'(1) Does the failure of a contracting authority, the beneficiary of a Structural Fund grant, to comply with rules concerning the award of a public contract of an estimated value lower than the threshold provided for by Article 7(a) of Directive 2004/18 in connection with the award of a contract for the performance of the action eligible for the grant, constitute an "irregularity" within the meaning of Article 1 of Regulation No 2988/95 or an "irregularity" within the meaning of Article 2(7) of Regulation No 1083/2006?

(2) Must the second sentence of the first subparagraph of Article 98(2) of Regulation No 1083/2006 be interpreted as meaning that financial corrections by Member States, if applied to co-financed expenditure under Structural Funds for failure to comply with rules concerning public contracts, are administrative measures within the meaning of Article 4 of Regulation No 2988/95 or administrative penalties within the meaning of Article 5(c) of that regulation?

(3) If the answer to the second question is to the effect that financial corrections by Member States are administrative penalties, should the principle of retroactive application of the less severe penalty referred to in the second sentence of Article 2(2) of Regulation No 2988/95 be applied?

(4) In circumstances in which financial corrections have been applied to co-financed expenditure under Structural Funds for failure to comply with rules on public contracts, does Article 2(2) of Regulation No 2988/95 in conjunction with the second sentence of the first subparagraph of Article 98(2) of Regulation No 1083/2006, having regard also to the principles of legal certainty and protection of legitimate expectations, prevent a Member State from applying financial corrections governed by an internal legislative measure which entered into force after the alleged infringement of the rules on public contracts occurred?'

29 By decision of the President of the Court of 16 July 2014, Cases C-260/14 and C-261/14 were joined for the purposes of the written and oral procedure and judgment.

Consideration of the questions referred

The first question in Case C-260/14

30 By its first question in Case C-260/14, the referring court seeks to ascertain, in essence, whether Article 1(2) of Regulation No 2988/95 and Article 2(7) of Regulation No 1083/2006 are to be interpreted as meaning that failure to comply with national provisions by a contracting authority, the beneficiary of a Structural Fund grant, in connection with the award of a public contract of an estimated value below the threshold laid down in Articled 7(a) of Directive 2004/18 may constitute, at the time the contract is awarded, an 'irregularity' within the meaning of Article 1(2) of Regulation No 2988/95 or Article 2(7) of Regulation No 1083/2006.

31 It should be noted, as a preliminary point, that as the value of the contract at issue in the main proceedings is below the threshold set in Article 7(a) and (c) of Directive 2004/18, that contract falls outside the scope of the procedures laid down by the directive.

32 It must be noted that Regulation No 2988/95 merely lays down general rules for supervision and penalties for the purpose of safeguarding the European Union's financial interests. Misused funds must be recovered on the basis of other provisions, that is to say, where appropriate, on the basis of sector-specific provisions (see judgment of 18 December 2014 in *Somvao*, C-599/13, EU:C:2014:2462, paragraph 37 and the case-law cited).

33 Those sector-specific provisions are covered, as the Advocate General observed at point 46 of his Opinion, by Regulation No 1083/2006.

34 However, as Regulation Nos 2988/95 and 1083/2006 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 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.

35 That said, it should be borne in mind that, according to the Court's settled case-law, 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 forms part (see, to that effect, judgment of 3 September 2015 in *Sodiaal International*, C-383/14, EU:C:2015:541, paragraph 20 and the case-law cited).

36 Accordingly, while it is apparent from the wording of Article 1(2) of Regulation No 2988/95 and of Article 2(7) of Regulation No 1083/2006 that a breach of EU law constitutes an irregularity, the possibility cannot be ruled out that such an irregularity may also arise as a result of a breach of national law.

37 In that regard, as the operations concerned in the main proceedings benefited from EU funding, those operations are subject to the application of EU law. It follows 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 as covering not only any breach of EU law but also any breach of the provisions of national law which contribute to ensuring that EU law relating to the management of projects financed by EU funds is properly applied.

38 Such an interpretation of the term 'irregularity' is confirmed by an examination of the legislative context of Article 2(7) of Regulation No 1083/2006 and by the objective of that regulation.

39 As regards, first, the legislative context of Article 2(7) of Regulation No 1083/2006, the objective of that regulation, as set out in Article 1, is, inter alia, to lay down 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.

40 Those management, monitoring and control tasks are specified in Title VI of Regulation No 1083/2006, whereas tasks relating to financial management are covered by the provision of Title VII of the regulation, Chapter 2 of which deals specifically with financial corrections. It is clear from this that it is incumbent on the Member State in the first instance to make the necessary financial corrections, if appropriate, and, therefore, to ensure that the operations in question comply with all the rules applicable at both EU and national level.

41 As regards, second, the objective of Regulation No 1083/2006, the purpose of the rules laid down in that regulation is, inter alia, as noted in paragraph 34 above, to ensure that Structural Funds are used properly and effectively in order to safeguard the financial interests of the European Union.

42 Given that it cannot be ruled out that breaches of the provisions of national law may jeopardise the effective intervention of the funds concerned, an interpretation to the effect that such breaches cannot amount to an 'irregularity' within the meaning of Article 2(7) of Regulation No 1083/2006 would fail to guarantee the full attainment of the objective pursued by the EU legislature in this area.

43 In the light of the foregoing considerations, the term 'irregularity' as defined in Article 2(7) of Regulation No 1083/2006 and Article 1(2) of Regulation No 2988/95 must be interpreted as also referring to breaches of provisions of national law applicable to operations funded under the Structural Funds.

44 That interpretation is also confirmed by the definition of 'irregularity' in Article 2(36) of Regulation No 1303/2013, which repealed Regulation No 1083/2006 with effect from 1 January 2014.

45 That definition, which is set out in paragraph 11 above, now refers expressly to any breach of EU law or national law relating to its application. Read in the light of the foregoing considerations, that elucidation concerning breaches of national law clarifies the scope of the term 'irregularity' in Article 2(7) of Regulation No 1083/2006 (see, to that effect, a contrario, judgment of 7 April 2016 in *PARTNER Apelski Dariusz*, C-324/14, EU:C:2016:214, paragraphs 90 and 91).

46 Accordingly, the answer to the first question in Case C-260/14 is that Article 1(2) of Regulation No 2988/95 and Article 2(7) of Regulation No 1083/2006 must be interpreted as meaning that failure to comply with national provisions by a contracting authority, the beneficiary of Structural Funds, in connection with the award of a public contract of an estimated value below the threshold laid down in Article 7(a) of Directive 2004/18 may constitute, at the time the contract is awarded, an 'irregularity' within the meaning of Article 1(2) of Regulation No 2988/95 or Article 2(7) of Regulation No 1083/2006, if that breach has, or would have, the effect of prejudicing the general budget of the European Union by charging an unjustified item of expenditure.

The second question in Case C-260/14 and the first question in Case C-261/14

47 By its second question in Cases C-260/14 and its first question in C-261/14, the referring court seeks to ascertain, in essence, whether the second sentence of the first subparagraph of Article 98(2) of Regulation No 1083/2006 is to be interpreted as meaning that financial corrections by Member States, if applied to co-financed expenditure under Structural Funds for failure to comply with rules concerning the award of public contract, are administrative measures within the meaning of Article 4 of Regulation No 2988/95 or, on the other hand, administrative penalties within the meaning of Article 5(c) of that regulation.

48 It should be noted, first of all, that the first subparagraph of Article 98(2) of Regulation No 1083/2006 provides that the financial corrections which Member States must make if they detect irregularities in operations or operational programmes consist of cancelling all or part of the public contribution to the operational programme concerned. Furthermore, according to the second subparagraph of Article 98(2) of the regulation, the resources from the Funds released in this way may, under certain conditions, be reused by the Member State concerned.

49 Next, it is clear from the very wording of that provision, read in conjunction with the first indent of Article 4(1) of Regulation No 2988/95, that the purpose of the financial corrections which Member States are required to make if they detect irregularities in operations or operational programmes is to secure the withdrawal of an advantage improperly received by the economic operator concerned, inter alia by obliging the operator to repay the sums wrongly paid.

50 Lastly, as the Advocate General observed in point 105 of his Opinion, the Court has previously held on many 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, so that that advantage becomes an advantage wrongly received (see, to that effect, judgments of 4 June 2009 in *Pometon*, C-158/08, EU:C:2009:349, paragraph 28; 17 September 2014 in *Cruz & Companhia*, C-341/13, EU:C:2014:2230, paragraph 45 and the case-law cited, and 18 December 2014 in *Somvao*, C-599/13, EU:C:2014:2462, paragraph 36). The fact pointed out by the referring court that the full amount to be repaid may, in any individual case, not coincide exactly with the loss actually incurred by the Structural Funds cannot alter that conclusion.

51 It is therefore apparent from the foregoing that the answer to the second question in Case C-260/14 and the first question in Case C-261/14 is that the second sentence of the first subparagraph of Article 98(2) of Regulation No 1083/2006 is to be interpreted as meaning that financial corrections by Member States, if applied to co-financed expenditure under Structural Funds for failure to comply with rules concerning the award of public contract, are administrative measures within the meaning of Article 4 of Regulation No 2988/95.

The third question in Case C-260/14 and the second question in Case C-261/14

52 In the light of the answer given to the referring court in paragraph 51 above, there is no need to answer the third question in Case C-260/14 or the second question in C-261/14.

The fourth question in Case C-260/14

53 By its fourth question in Case C-260/14, the referring court asks, in essence, whether, in the circumstances of the main proceedings, the principles of legal certainty and protection of legitimate expectations must be interpreted as precluding a Member State from applying financial corrections governed by an internal legislative measure which entered into force after the alleged breach of rules governing public contracts occurred.

54 In that regard, it is established case-law that where Member States adopt measures by which they implement EU law, they are required to respect the general principles of that law, which include, inter alia, the principles of legal certainty and protection of legitimate expectations (see, inter alia, judgment of 3 September 2015 in *A2A*, C-89/14, EU:C:2015:537, paragraphs 35 and 36 and the case-law cited).

55 Moreover, it should also be borne in mind that, according to that same line of case-law, whilst the principle of legal certainty precludes a regulation from being applied retroactively, namely to a situation which arose prior to the entry into force of that regulation, and irrespective of whether such application might produce favourable or unfavourable effects for the person concerned, the same

principle requires that any factual situation should normally, in the absence of any express contrary provision, be examined in the light of the legal rules existing at the time when the situation obtained. However, if the new law is thus valid only for the future, it also applies, save for derogation, to the future effects of situations which came about during the period of validity of the old law (see, inter alia, judgment of 3 September 2015 in *A2A*, C-89/14, EU:C:2015:537, paragraph 37 and the case-law cited).

56 Likewise, as is apparent from that same line of case-law, the scope of the principle of protection of legitimate expectations cannot be extended to the point of generally preventing new rules from applying to the future effects of situations which arose under the earlier rules (see, inter alia, judgment of 3 September 2015 in *A2A*, C-89/14, EU:C:2015:537, paragraph 38 and the case-law cited).

57 It follows from the foregoing that the answer to the fourth question in Case C-260/14 is that the principles of legal certainty and protection of legitimate expectations must be interpreted as not precluding a Member State from applying financial corrections governed by an internal legislative measure which entered into force after an alleged breach of the rules governing public contracts occurred, provided that it is a question of the application of new rules to the future effects of situations which arose under the earlier rules, which is a matter to be determined by the national court, taking into account all the relevant circumstances of the proceedings before it.

Costs

58 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 (Fifth Chamber) hereby rules:

1. **Article 1(2) of Council Regulation (EC, Euratom) No 2988/95 of 18 December 1995 on the protection of the European Communities' financial interests and 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 must be interpreted as meaning that failure to comply with national provisions by a contracting authority, the beneficiary of Structural Funds, in connection with the award of a public contract of an estimated value below the threshold laid down in Article 7(a) of Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts, as amended by Commission Regulation (EC) No 1422/2007 of 4 December 2007, may constitute, at the time the contract is awarded, an 'irregularity' within the meaning of Article 1(2) of Regulation No 2988/95 or Article 2(7) of Regulation No 1083/2006, if that breach has, or would have, the effect of prejudicing the general budget of the European Union by charging an unjustified item of expenditure.**

2. **The second sentence of the first subparagraph of Article 98(2) of Regulation No 1083/2006 is to be interpreted as meaning that financial corrections by Member States, if applied to co-financed expenditure under Structural Funds for failure to comply with rules concerning the award of public contract, are administrative measures within the meaning of Article 4 of Regulation No 2988/95.**

3. **The principles of legal certainty and protection of legitimate expectations must be interpreted as not precluding a Member State from applying financial corrections governed by an internal legislative measure which entered into force after an alleged breach of the rules governing**

public contracts occurred, provided that it is a question of the application of new rules to the future effects of situations which arose under the earlier rules, which is a matter to be determined by the national court, taking into account all the relevant circumstances of the proceedings before it.

[Signatures]