

Summary of the judgment

In its judgment of 5 March 2019 on a request for a preliminary from the Court of Appeal of Tallinn, Estonia, the CoJ (Grand Chamber) confirmed that GBER conditions must be interpreted strictly, and that the incentive effect criterion in GBER is formalistic and if not all conditions are fulfilled the aid is unlawful and must be recovered. Therefore, the conclusion of any contract prior to making the request for the aid deprives the aid of its incentive effect, when an unconditional and legally binding commitment has been made.

All national authorities, not only national courts, must recover unlawful State aid also in cases where the aid is granted wrongfully under the GBER as regional investment aid and the Commission has not adopted any decision. The CoJ clarified that the beneficiary may not rely on the principle of protection of legitimate expectations even if the granting authority had recommended to the beneficiary to apply for aid knowing that work on the project had begun before the aid application was submitted.

The CoJ also clarified that the prescription is governed by national law and in case of structural funds by the applicable EU law, and interest is to be calculated based on national law, but applying the principle of effectiveness.

Note: *In this judgment the CoJ confirmed the literal reading of the GBER already applied in its previous Dilly's Wellnesshotel judgment of 21 July 2016 in case C-493/14. However, the CoJ went one step further and extended the entire case-law on cases brought by competitors before national courts to all parts of the national administrations and concluded that any national authority having granted unlawful State aid is under an obligation to recover the aid.*

Factual background

Eesti Pagar, an Estonian baking company, signed a contract for the purchase of a bread production line. After the signature of the contract, Eesti Pagar applied for investment aid, which was co-financed by the ERDF, and the application was approved by the administrative authority ("EAS"). After an audit, EAS discovered that the contract had been signed prior to the application for aid, and informed Eesti Pagar that the aid lacked incentive effect, was unlawful, and had to be repaid. Eesti Pagar challenged the recovery decision first before the administration and later before the national courts, but the appeal was rejected. The Estonian Supreme Court partially upheld the appeal setting aside the judgment of the Court of appeal and the operative part of the recovery decision. The Court of appeal of Tallin, to which the case was referred back, ('finally') requested a preliminary ruling to the CoJ.

Main findings of the CoJ

1. Nature and interpretation of the GBER: incentive effect

According to the CoJ rules in the GBER must be clear, precise and simple, and cannot involve a complex economic assessment by national authorities. Based on those principles, the incentive effect criterion in the GBER is formalistic: the conclusion of any contract prior to making the request for the aid deprives the aid of its incentive effect. More precisely, according to the CoJ, Article 8(2) of GBER must be interpreted as meaning that 'work on the project or activity', started when a first order of equipment required for that project or that activity was made by means of entering into an unconditional and legally binding commitment before the submission of the aid application, regardless of any costs of resiling from that commitment.

2. Obligation for national administration to recover ex officio any unlawful aid

Article 108(3) TFEU must be interpreted as meaning that that provision requires the national authority to recover on its own initiative aid that it has granted pursuant to GBER when it finds, subsequently, that the conditions laid down by that regulation were not satisfied.

3. No legitimate expectation can be created by national authorities

EU law must be interpreted as meaning that a national authority cannot, where it grants aid while misapplying GBER, cause the beneficiary of that aid to hold a legitimate expectation that that aid is lawful.

4. The prescription is governed by national law and in case of structural funds by the applicable EU law

EU law must be interpreted as meaning that, where a national authority has granted aid from a structural fund while misapplying GBER, the limitation period applicable to the recovery of the unlawful aid is, if the conditions for the application of Council Regulation (EC, Euratom) No 2988/95 of 18 December 1995 on the protection of the European Communities financial interests are satisfied, four years, in accordance with Article 3(1) of the latter regulation or, if not, the period laid down by the applicable national law, and not the 10 years prescription according to Article 17.1 of Regulation 2015/1589.

5. Interest is to be calculated based on national law, but applying the principle of effectiveness

EU law must be interpreted as meaning that, where a national authority undertakes on its own initiative to recover aid which it has wrongly granted under GBER, it is the duty of that authority to claim interest from the beneficiary of that aid in accordance with the rules of the applicable national law. In that regard, Article 108(3) TFEU requires that those rules should be such as to ensure full recovery of the unlawful aid and that, therefore, the beneficiary of that aid must be ordered to pay, *inter alia*, interest for the whole of the period over which it benefited from that aid and at a rate equivalent to that which would have been applied if the beneficiary had had to borrow the amount of the aid at issue on the market within that period.

Quotation of relevant paragraphs:

The first question, on the incentive effect of the aid

55. By its first question, the referring court seeks, in essence, to ascertain whether Article 8(2) of Regulation No 800/2008 must be interpreted as meaning that ‘work on the project or activity’, within the meaning of that provision, has started when the first order of equipment intended for that project or that activity has been made by means of concluding a sale contract before the submission of an aid application, so that aid cannot be deemed to have had an incentive effect within the meaning of that provision, or whether, notwithstanding the conclusion of such a contract, the competent national authorities must determine whether, having regard to the costs of withdrawal from the contract, the requirement of an incentive effect, within the meaning of that provision, is or is not satisfied.

56 In that regard, it should be recalled that the notification requirement is one of the fundamental features of the system of control put in place by the FEU Treaty in the field of State aid. Within that system, Member States are under an obligation, first, to notify to the Commission each measure intended to grant new aid or alter aid for the purposes of Article 107(1) TFEU and,

secondly, not to implement such a measure, in accordance with Article 108(3) TFEU, until that institution has taken a final decision on the measure (judgment of 21 July 2016, Dilly's Wellnesshotel, C-493/14, EU:C:2016:577, paragraphs 31 and 32 and the case-law cited).

57 In accordance with Article 109 TFEU, the Council of the European Union is authorised to make any appropriate regulations for the application of Article 107 TFEU and Article 108 TFEU and may in particular determine the conditions in which Article 108(3) TFEU is to apply and the categories of aid exempt from the procedure under that provision. In addition, as provided for in Article 108(4) TFEU, the Commission may adopt regulations relating to the categories of State aid that the Council has, pursuant to Article 109 TFEU, determined may be exempt from the procedure provided for in Article 108(3) TFEU (judgment of 21 July 2016, Dilly's Wellnesshotel, C-493/14, EU:C:2016:577, paragraphs 33 and 34).

58 Consequently, Regulation No 994/98, in accordance with which Regulation No 800/2008 was subsequently adopted, had itself been adopted pursuant to Article 94 of the EC Treaty (subsequently Article 89 EC and now Article 109 TFEU) (judgment of 21 July 2016, Dilly's Wellnesshotel, C-493/14, EU:C:2016:577, paragraph 35).

59 It follows that, notwithstanding the obligation of prior notification of each measure intended to grant or alter new aid, which is incumbent on the Member States under the Treaties and is one of the fundamental features of the system of monitoring in the field of State aid, if an aid measure adopted by a Member State fulfils the relevant conditions provided for in Regulation No 800/2008, that Member State may rely on its being exempted, as laid down in Article 3 of that regulation, from the notification requirement. Conversely, it is apparent from recital 7 of that regulation that State aid not covered by that regulation should remain subject to the notification requirement laid down in Article 108(3) TFEU (judgment of 21 July 2016, Dilly's Wellnesshotel, C-493/14, EU:C:2016:577, paragraph 36).

60 Further, as a qualification of the general rule that notification is required, the provisions of Regulation No 800/2008 and the conditions laid down by it must be interpreted strictly. While the Commission is authorised to adopt regulations for block exemptions of aid, with a view to ensuring efficient supervision of the competition rules concerning State aid and simplifying administration, without weakening Commission monitoring in that area, the aim of such regulations is also to increase transparency and legal certainty. Fulfilling the conditions laid down by those regulations, including, therefore, those laid down by Regulation No 800/2008 enables those aims to be fully achieved (judgment of 21 July 2016, Dilly's Wellnesshotel, C-493/14, EU:C:2016:577, paragraphs 37 and 38).

61 As argued by the Estonian Government and by the Commission, the objectives of ensuring efficient supervision of the competition rules concerning State aid, simplifying administration and increasing transparency and legal certainty, no less than the necessity of ensuring a consistent application throughout the European Union of the prescribed conditions for exemption, mean that the criteria for the application of an exemption must be clear and easily enforceable by the national authorities.

62 Under Article 8(2) of Regulation No 800/2008, aid granted to SMEs, within the scope of that regulation, is to be considered to have an incentive effect if, before work on the project or activity in question has started, the beneficiary has submitted an application for the aid to the Member State concerned.

63 In that regard, first, it is clear from recital 28 of that regulation that the Commission laid down the criterion that such an application must precede the work on the project at issue in order to ensure that the aid is necessary and acts as an incentive to develop further activities or

further projects, and, therefore, to ensure that that regulation should not apply to aid for activities in which the beneficiary would already engage under market conditions alone.

64 The criterion that the aid application must precede the start of work on the investment project is simple, pertinent and adequate, enabling the Commission to presume that the proposed aid has an incentive effect.

65 Second, it follows from, *inter alia*, recitals 1, 2 and 5 of Regulation No 800/2008 and from Article 3 thereof that the Commission, in essence, exercised *ex ante*, by adopting that regulation, all the powers conferred on it by Article 107(3) TFEU with respect to all such aid as satisfied the criteria laid down by that regulation, and only with respect to such aid.

66 In that regard, it is clear from, in particular, recital 28 and Article 8(3) and (6) of Regulation No 800/2008, that it is the duty of the national authorities to verify, before granting aid pursuant to that regulation, that the conditions, relating to whether that aid acts as an incentive for SMEs, laid down in Article 8(2) of that regulation are satisfied.

67 Last, in the first place, there is nothing in Regulation No 800/2008 to indicate that the Commission, by adopting that regulation, intended to transfer to the national authorities the task of determining whether or not there exists a genuine incentive effect. On the contrary, Article 8(6) of Regulation No 800/2008, in stating that the entire aid measure is not to be exempted if the conditions laid down in Article 8(2) and (3) of that regulation are not fulfilled, is intended to confirm that, with respect to the condition specified in Article 8(2), the role of those authorities is confined to verifying whether the aid application has been submitted before the start of work on the project or activity in question and, for that reason, whether the aid is or is not to be considered to have an incentive effect.

68 In the second place, it is plain that whether or not such an effect exists cannot be regarded as being a criterion that is clear and easily applicable by the national authorities, since, *inter alia*, its verification would necessitate, on a case-by-case basis, complex economic assessments. Such a criterion would consequently not comply with the requirements identified in paragraph 61 of the present judgment.

69 In those circumstances, it must be held that Regulation No 800/2008 confers on the national authorities not the task of verifying whether or not the aid at issue has a genuine incentive effect, but the task of verifying whether or not the applications for aid that are submitted to them satisfy the conditions, laid down in Article 8 of that regulation, that govern whether aid can be considered to act as an incentive.

70 It is therefore the task of the national authorities to determine, *inter alia*, whether the condition laid down in Article 8(2) of Regulation No 800/2008, namely that the aid application was submitted 'before work on the project or activity has started', is satisfied, failing which the entire aid measure is not to be exempted, as laid down in Article 8(6) of that regulation.

71 As regards the interpretation of that condition, the Commission has stated, in paragraph 38 of the Guidelines, that 'aid may only be granted under aid schemes if the beneficiary has submitted an application for aid and the authority responsible for administering the scheme has subsequently confirmed in writing ... that subject to detailed verification, the project in principle meets the conditions of eligibility laid down by the scheme before the start of the work on the project'.

72 The Commission, moreover, defined in paragraph 38 the latter concept of 'start of work' as meaning 'either the start of construction work or the first firm commitment to order equipment, excluding preliminary feasibility studies'.

73 As stated by the Advocate General in point 81 of his Opinion, that definition, albeit that the Guidelines are not binding, is relevant in that it meets the objectives and requirements set out in paragraph 61 of the present judgment.

74 It follows that, in a situation such as that in the main proceedings, the task of the national authorities is confined, with respect to the condition laid down in Article 8(2) of Regulation No 800/2008, to verifying whether it was indeed before the first order of equipment by means of entering into a legally binding commitment that the potential beneficiary submitted its aid application.

75 In that regard, it is the duty of the competent national authorities, as the Advocate General stated in point 82 of his Opinion, to examine on a case-by-case basis the precise nature of the commitments that may have been given before the submission of an aid application by a potential beneficiary.

76 From that perspective, while a contract for the purchase of equipment concluded subject to the condition that the aid to be applied for is obtained may be considered, as correctly argued by EAS and the Estonian Government at the hearing before the Court, not to be a legally binding commitment, with a view to the application of Article 8(2) of Regulation No 800/2008, the same cannot be said of an unconditional commitment, which must, as a general rule, be considered to be legally binding irrespective of any costs of resiling from the contract.

77 In accordance with the structure and the objectives of that provision, economic considerations such as those associated with the costs of resiling cannot be taken into account by a national authority when an unconditional and legally binding commitment has been made.

[...]

The second question [...] on the obligation to recover unlawful aid

83 By its second question and the second part of its fourth question, which can be examined together, the referring court seeks, in essence, to ascertain whether EU law must be interpreted as meaning that it is the task of the national authority to recover on its own initiative aid that it has granted pursuant to Regulation No 800/2008 when it finds, subsequently, that the conditions laid down by that regulation were not satisfied and is uncertain as to the required legal basis for such recovery where the aid was co-financed from a structural fund.

84 It must at the outset be recalled that Article 108(3) TFEU establishes a prior control of plans to grant new aid. The aim of that system of prior control is therefore that only compatible aid may be implemented. In order to achieve that aim, the implementation of planned aid is to be deferred until doubt as to its compatibility is resolved by the Commission's final decision (judgment of 21 November 2013, *Deutsche Lufthansa*, C-284/12, EU:C:2013:755, paragraphs 25 and 26 and the case-law cited).

85 It has been stated above, in paragraph 56 of the present judgment, that the notification requirement is one of the fundamental features of that system of control, and that the Member States are under an obligation, first, to notify to the Commission each measure intended to grant new aid or alter aid and, secondly, not to implement such a measure until such time as the Commission has taken a final decision on that measure.

86 It has also been stated, in paragraph 59 of the present judgment, that only if an aid measure adopted by a Member State fulfils the relevant conditions provided for in Regulation No 800/2008 may that Member State rely on its being exempted, as laid down in Article 3 of that

regulation, from the notification requirement, and conversely, State aid not covered by that regulation is to remain subject to the notification requirement laid down in Article 108(3) TFEU.

87 It follows that, if aid has been granted pursuant to Regulation No 800/2008 although the conditions laid down to qualify for exemption under that regulation were not satisfied, the granting of that aid was in breach of the notification requirement and must, therefore, be considered to be unlawful.

88 In that regard, the Court has stated that the prohibition on implementation of planned aid laid down in the last sentence of Article 108(3) TFEU has direct effect and that the immediate enforceability of the prohibition on implementation referred to in that provision extends to all aid which has been implemented without being notified (see, to that effect, judgment of 21 November 2013, *Deutsche Lufthansa*, C-284/12, EU:C:2013:755, paragraph 29 and the case-law cited).

89 The Court has concluded that it is the task of the national courts to ensure that all appropriate action, in accordance with their national law, to address the consequences of an infringement of the last sentence of Article 108(3) TFEU, particularly as regards both the validity of measures giving effect to the aid and the recovery of financial support granted in disregard of that provision, the essence of their task being, consequently, to adopt the appropriate measures to cure the unlawfulness of implementation of the aid, so that the aid does not remain freely available to the beneficiary until such time as the Commission's decision is made (see, to that effect, judgment of 21 November 2013, *Deutsche Lufthansa*, C-284/12, EU:C:2013:755, paragraphs 30 and 31 and the case-law cited).

90 Any provision of EU law that satisfies the conditions required to have direct effect is binding on all the authorities of the Member States, that is to say, not merely the national courts but also all administrative bodies, including decentralised authorities, and those authorities are required to apply it (see, to that effect, judgment of 24 May 2012, *Amia*, C-97/11, EU:C:2012:306, paragraph 38 and the case-law cited).

91 In accordance with the Court's settled case-law, both the administrative authorities and the national courts that are called upon, within the exercise of their respective powers, to apply provisions of EU law are under a duty to give full effect to those provisions (judgment of 14 September 2017, *The Trustees of the BT Pension Scheme*, C-628/15, EU:C:2017:687, paragraph 54 and the case-law cited).

92 It follows that, where a national authority finds that aid which it has granted pursuant to Regulation No 800/2008 does not satisfy the conditions laid down to qualify for the exemption provided for by that regulation, it is the duty of that authority, *mutatis mutandis*, to comply with the same obligations as those referred to in paragraph 89 of the present judgment, including that of recovering on its own initiative the aid that was unlawfully granted.

The third question, on the principle of the protection of legitimate expectations

96 By its third question, the referring court seeks, in essence, to ascertain whether EU law must be interpreted as meaning that the national authority may, where it grants aid while misapplying Regulation No 800/2008, cause the beneficiary of that aid to hold a legitimate expectation that that aid is lawful; whether, if the answer is that it can, it is then necessary to weigh the public interest against the interest of the individual party, and whether, in that regard, it is of any relevance whether or not there is a decision of the Commission on the compatibility of that aid with the internal market.

97 In accordance with the Court's settled case-law, the right to rely on the principle of the protection of legitimate expectations presupposes that precise, unconditional and consistent assurances originating from authorised, reliable sources have been given to the person concerned by the competent authorities of the European Union. That right applies to any individual in a situation in which an EU institution, body or agency, by giving that person precise assurances, has led him to entertain well-founded expectations. Information which is precise, unconditional and consistent, in whatever form it is given, constitutes such assurances (judgment of 13 June 2013, *HGA and Others v Commission*, C-630/11 P to C-633/11 P, EU:C:2013:387, paragraph 132).

98 It is also in accordance with the Court's settled case-law that, in view of the mandatory nature of the supervision of State aid by the Commission pursuant to Article 108 TFEU, undertakings to which aid has been granted may not, in principle, entertain a legitimate expectation that the aid is lawful unless it has been granted in compliance with the procedure laid down in that article, and furthermore, an economic operator exercising due care should normally be able to determine whether that procedure has been followed. In particular, where aid is implemented without prior notification to the Commission, with the result that it is unlawful under Article 108(3) TFEU, the recipient of the aid cannot have at that time a legitimate expectation that its grant is lawful (judgments of 15 December 2005, *Unicredito Italiano*, C-148/04, EU:C:2005:774, paragraph 104, and of 19 March 2015, *OTP Bank*, C-672/13, EU:C:2015:185, paragraph 77).

99 The finding has already been made, in paragraphs 59 and 87 of the present judgment, that only if an aid measure adopted by a Member State satisfies the relevant conditions laid down by Regulation No 800/2008 is that Member State exempted from its obligation to notify aid and that, conversely, the granting of aid pursuant to that regulation, although the conditions laid down for eligibility with respect to that regulation were not satisfied, was a breach of the notification requirement, and such aid must be considered to be unlawful.

100 Further, it has been stated, in paragraphs 89 to 92 of the present judgment, that, in such a situation, it is the duty of both the national courts and the administrative bodies of the Member States to ensure that all appropriate action is taken to address the consequences of an infringement of the last sentence of Article 108(3) TFEU, particularly as regards the validity of measures giving effect to the aid and the recovery of financial support granted in disregard of that provision.

101 It follows, first, that a national authority granting aid pursuant to Regulation No 800/2008 cannot be regarded as being vested with the power to adopt a final decision finding that there is no obligation to notify the aid applied for to the Commission, under Article 108(3) TFEU.

102 Since the Commission, in essence, itself exercised *ex ante*, by adopting Regulation No 800/2008, the powers conferred on it by Article 107(3) TFEU with respect to all such aid as satisfies the criteria laid down by that regulation, and only with respect to such aid, as stated in paragraph 65 of the present judgment, the Commission did not confer any decision-making power on the national authorities with respect to the extent of the exemption from notification, those authorities being in the same position as the potential beneficiaries of aid and being required, as was stated in paragraph 93 of the present judgment, to ensure that their decisions are in conformity with that regulation, failing which the consequences mentioned in paragraph 100 of this judgment are set in motion.

103 It follows, second, that, where a national authority grants aid while misapplying Regulation No 800/2008, its doing so is an infringement of both the provisions of that regulation and of Article 108(3) TFEU.

104 Following the Court's settled case-law, the principle of the protection of legitimate expectations cannot be relied upon against an unambiguous provision of EU law; nor can the conduct of a national authority responsible for applying EU law, which acts in breach of that law, give rise to a legitimate expectation on the part of an economic operator of beneficial treatment contrary to EU law (judgments of 20 June 2013, *Agroferm*, C-568/11, EU:C:2013:407, paragraph 52 and the case-law cited, and of 7 August 2018, *Ministru kabinets*, C-120/17, EU:C:2018:638, paragraph 52).