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**JUDGMENT OF THE COURT OF JUSTICE
(GRAND CHAMBER) OF 5 MARCH 2019
IN C-349/17 *EESTI PAGAR AS V ETTEVÕTLUSE
ARENDAMISE SIHTASUTUS AND MAJANDUS- JA
KOMMUNIKATSIOONIMINISTEERIUM***

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CASE COMMENTARY

I. Introduction

This case commentary, or a *glossa* if the reader would be so inclined, relates to the judgment of the Court of Justice, made on 5 March 2019 in a case referred to as C-349/17 *Eesti Pagar AS v Ettevõtluse Arendamise Sihtasutus and Majandus- ja Kommunikatsiooniministeerium*.¹ Thereunder, among other things, a Grand Chamber of the Court of Justice ruled on certain issues of EU law on State aid. As such, this case commentary belongs to the field of state aid, itself a part of EU law on competition. As the rules of competition under EU law are uniform and subject to exclusive competence of the European Union, the decision put to analysis here is important for all Member States and all of their national legal orders. The issues thus alluded to above include, but are not limited to, the direct effect of Article 108(3), third sentence TFEU, i.e. the prohibition of unlawful State aid, also known as the “standstill obligation”, the (im)possibility of a plea of legitimate expectations to defend against repayment of aid, and the limitation period applicable to the recovery of unlawful aid. These issues form part of the broader issue of private enforcement of EU State aid law, carried out through national courts of Member States by individuals. This com-

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¹ Judgment of the Court of 5 March 2019, case C-349/17 *Eesti Pagar AS v Ettevõtluse Arendamise Sihtasutus and Majandus- ja Kommunikatsiooniministeerium*, EU:C:2019:172, hereinafter “C-349/17 *Eesti Pagar*”.

mentary is, therefore, intended to recount the hitherto state of EU law in that regard, and to provide insight for those individuals into the development of case-law caused by C-349/17 *Eesti Pagar*. To that end, this paper includes *inter alia* an overview of case-law of the Court on 108(3) TFEU and the general principle of the protection of legitimate expectations. The law of the European Union is stated as it stood on 15 July 2019, with some important later developments added.

II. The standstill obligation, as it was prior to C-349/17 *Eesti Pagar*

The main thrust of the case at issue is aimed at the so-called standstill obligation, found under Article 108(3) TFEU. This provision reads: “The Commission shall be informed, in sufficient time to enable it to submit its comments, of any plans to grant or alter aid. If it considers that any such plan is not compatible with the internal market having regard to Article 107, it shall without delay initiate the procedure provided for in paragraph 2. The Member State concerned shall not put its proposed measures into effect until this procedure has resulted in a final decision”. The obligation is contained in the last sentence of that paragraph and is preventive in nature. In essence, Member States may not grant State aid unless and until it is approved by the Commission – or that the aid at issue is exempt from the obligation to notify and to refrain from granting it in the first place.²

The practical importance of the standstill obligation, the centrepiece of the system of the private enforcement of EU State aid law, cannot be overstated. It might be recalled that the standstill obligation has featured in what is now EU law since the days of the decision in *Costa v ENEL*.³ The Court has affirmed its direct effect as early as in *Lorenz*.⁴ However, the addressees of that obligation and its extent were unclear. In particular, the Court was insisting that a beneficiary of aid – naturally, the one who would be forced to repay unlawful aid – had no special position within the framework of state aid control, the said framework being “bilateral” between the Commission and Member States. Therefore, purportedly, a beneficiary was not subject to “any specific” obligation under Article 108(3) TFEU, last sentence included,⁵ was not obliged

² This may be, for example, because the aid at issue is subject to a general block exemption, or to a Commission decision no. 2012/21/EU (OJ L 7, 11.1.2012, p. 3–10) in the scope of a SGEI.

³ Judgment of the Court of 15 July 1964, case 6-64 *Flaminio Costa v E.N.E.L.*, EU:C:1964:66: “(...) by so expressly undertaking to inform the commission ‘in sufficient time’ of any plans for aid, and by accepting the procedures laid down in article 93 [EEC], the states have entered into an obligation with the community, which binds them as states but creates no individual rights **except in the case of the final provision of article 93(3)** [emphasis added], which is not in question in the present case”.

⁴ Judgment of the Court of 11 December 1973, case 120-73 *Gebrüder Lorenz GmbH v Federal Republic of Germany and Land Rheinland-Pfalz*, EU:C:1973:152, para. 8 and 9.

⁵ See Judgment of the Court of 11 July 1996, case C-39/94 *Syndicat français de l'Express international (SFEI) and others v La Poste and others*, EU:C:1996:285, para. 73; judgment of the Court of 1 June 2006, joined cases *P & O European Ferries (Vizcaya) SA (C-442/03 P) and Diputación Foral de Vizcaya (C-471/03 P) v Commission of the European Communities*, EU:C:2006:356, para. 103.

to notify him- or herself, and that he or she could not incur civil liability solely on the basis of what is now EU law.⁶ Furthermore, the Court was reluctant to find the very notion of state aid (now enshrined in Article 107(1) TFEU) directly effective. Instead, what is now Article 107(1) TFEU was supposed to work through “the framework” of Articles 107 to 109 TFEU, “where they have been put in concrete form by acts having general application provided for by [Article 109 TFEU] or by decisions in particular cases envisaged by [Article 108(2) TFEU]”.⁷

Nevertheless, in spite of the above, there have been a growing number of cases whose results cannot be explained by any such “bilateral framework” between the Commission and Member States. First of all, there may be, as regards any aid, an indeterminate number of persons both public and private, who may be adversely affected by a grant of state aid. Those persons are referred to as the “parties concerned” under Article 108(2) TFEU or as “interested parties” for the purposes of the Council Regulation (EU) 2015/1589 of 13 July 2015 laying down detailed rules for the application of Article 108 of the Treaty on the Functioning of the European Union.⁸ There have been cases where the standstill obligation has been found to work to the benefit of the private interested parties invoking it (in particular, to the benefit of competitors of the beneficiary), and to the detriment of a beneficiary (or beneficiaries). This happened vis-à-vis a grantor of aid that could be a body that was either public or private (provided there was imputability to a Member State),⁹ as a defence against a claim of a beneficiary where it was a public body that invoked the standstill obligation to cancel a guarantee given under civil law¹⁰ or to void a contract for services,¹¹ in a civil dispute between a private bank, an independent banking body partially governed by public law and a natural person (and therefore, essentially, in a horizontal dispute) to exclude the application of national provisions establishing the unlawful civil-law privileges of that banking body,¹² and in a dispute between two competitors, one of whom was granted unlawful aid and was co-defending a claim for repayment of aid

⁶ See C-39/94 *SFEI* above, para. 76.

⁷ See judgment of the Court of 19 June 1973, case 77-72 *Carminie Capolongo v Azienda Agricola Maya*, EU:C:1973:65, para. 5 and 6.

⁸ See judgment of the Court of 14 November 1984., case 323/82 *SA Intermills v Commission of the European Communities*, EU:C:1984:345, para. 16; see also Art. 1(h) under Reg. no 2015/1589, published in OJ L 248, 24.9.2015, p. 9–29 (hereinafter: “Regulation no. 2015/1589” or “the Procedural Regulation”).

⁹ See e.g. judgment of the Court of 22 March 1977, case 78-76 *Steinike & Weinlig v Federal Republic of Germany*, EU:C:1977:52, para. 21; judgment of the Court of 21 November 2013, case C-284/12 *Deutsche Lufthansa AG v Flughafen Frankfurt-Hahn GmbH*, EU:C:2013:755, para. 14.

¹⁰ See judgment of the Court of 8 December 2011, case C-275/10 *Residex Capital IV CV v Gemeente Rotterdam*, EU:C:2011:814, para. 17, 37, 43 and 48; judgment of the Court of 19 September 2018, case C-438/16 P *European Commission v French Republic and IFP Énergies nouvelles*, EU:C:2018:737, para. 141.

¹¹ See judgment of the Court of 11 November 2015, case C-505/14 *Klausner Holz Niedersachsen GmbH v Land Nordrhein-Westfalen*, EU:C:2015:742, para. 27.

¹² See judgment of the Court of 16 April 2015, case C-690/13 *Trapeza Eurobank Ergasias AE v Agrotiki Trapeza tis Ellados AE (ATE) and Pavlos Sidiropoulos*, EU:C:2015:235, para. 29 and 53.

(and the Court added that the beneficiary may be ordered, by way of *applying what is now EU law*, to pay interest¹³). The standstill obligation has also been found capable to nullify the principle of *res judicata* in civil proceedings¹⁴ and to operate regardless of the delay on part of the Commission in taking a decision on the disputed aid.¹⁵ The Court's position began to generally include the fact that national courts must offer to individuals in a position to rely on a breach of the last sentence of Article 108(3), TFEU, the certain prospect that all the necessary inferences will be drawn, in accordance with their national law, as regards the validity of measures giving effect to the aid, the recovery of financial support granted in disregard of that provision, and possible interim measures.¹⁶ The Commission has adopted a notice on the enforcement of state aid law by national courts¹⁷ which recounts the ways in which Article 108(3) TFEU may be applied by those courts.

However, the cases that involved the last sentence of Article 108(3), TFEU, have not decisively answered the question whether that part of Article 108(3) TFEU may be “inversely vertically directly effective” and therefore capable of forcing the beneficiary to repay unlawful aid on its own. “Inverse vertical direct effect” is understood here as a capability of a rule of EU law to be invoked by a Member State against an individual. It might be pointed out that in *Residex Capital IV* and *Klausner Holz* the standstill obligation was invoked as a defence, and not as a basis of a claim in law by a Member State against an individual. In other words, the Court has not yet clearly stated that a (potential) beneficiary, as a (potential) recipient of unlawful aid, has a substantive, directly effective, directly applicable and immediately enforceable obligation to abstain from accepting unlawful aid, and where that aid was accepted, is obliged to repay it, with interest, where a Member State so claims against him or her pursuant to the last sentence of Article 108(3), TFEU. The Commission Notice on enforcement of State aid law by national courts does not consider that all Member State authorities are supposed to apply Article 108(3) TFEU, the inverse vertical application of it included.

As such, the decision in C-349/17 *Eesti Pagar* has many ramifications for individuals subjected to EU State aid law, and in particular for beneficiaries of aid. This is because the issue whether the last sentence of Article 108(3) TFEU could be “inversely” vertically invoked directly against the beneficiary was precisely one of the issues the Court has had the occasion to answer. In addition, the Court touched upon the is-

¹³ See judgment of the Court of 12 February 2008, case C-199/06 *Centre d'exportation du livre français (CELF) and Ministre de la Culture et de la Communication v Société internationale de diffusion et d'édition (SIDE)*, EU:C:2008:79, para. 52.

¹⁴ Case 505/14 *Klausner Holz Niedersachsen* above, para. 46.

¹⁵ See judgment of the Court of 11 March 2010, case 1/09 *Centre d'exportation du livre français (CELF) and Ministre de la Culture et de la Communication v Société internationale de diffusion et d'édition (SIDE)*, EU:C:2010:136, para. 29 and 36.

¹⁶ See judgment of the Court of 21 November 1991, case C-354/90 *Fédération Nationale du Commerce Extérieur des Produits Alimentaires and Syndicat National des Négociants et Transformateurs de Saumon v French Republic*, EU:C:1991:440, para. 12.

¹⁷ OJ C 85, 9.4.2009, p. 1–22, no. 2009/C 85/01.

sues of, first, any possible legitimate expectations as to the grant of unlawful aid, and second, of the impact of the general block exemption on the standstill obligation.¹⁸

III. The decision of the Court in C-349/17 *Eesti Pagar*

The decision at issue was made pursuant to an order for reference of the Tallinna Ringkonnakohus (Court of Appeal, Tallinn, Estonia).¹⁹ It was also preceded by an opinion of Advocate General Wathelet, delivered on 25 September 2018.²⁰ A number of issues were addressed when the Court made its decision, although it only sparsely referred to the work of the AG.

The Court began with the first question asked by the national court, namely what is to be understood as the “incentive effect” for the purposes of Article 8(2) of the GBER, and whether there was any such effect when the first order of equipment intended for a project or an activity to be financed by block-exempted aid has been made by means of concluding a sale contract before the submission of an aid application.²¹ The Court differentiated between non-binding and binding legal commitments for the purchase of equipment, saying that where there are unconditional and legally binding commitments entered into, there is a “start of work” for the purposes of Article 8(2) GBER. Consequently, there is no incentive effect on part of the beneficiary, who is ineligible for block-exempted aid under Regulation no 800/2008.²²

1. The direct effect of the standstill obligation

The Court then moved on to the main issue here, i.e. that of the standstill obligation. In essence, the Court has had 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. The Court began by reiterating that ostensibly block-exempted aid not actually covered by the GBER (and, implicitly, otherwise not exempt from the standstill obligation) is unlawful aid where granted.²³

¹⁸ The Court ruled on the Commission Regulation (EC) No 800/2008 of 6 August 2008 declaring certain categories of aid compatible with the common market in application of Articles 87 and 88 of the Treaty (General block exemption Regulation; OJ L 214, 9.8.2008, p. 3–47, hereinafter “GBER”). It has been replaced with the current Regulation no 651/2014 (GBER II).

¹⁹ OJ C 269, 14.8.2017, p. 12–12.

²⁰ EU:C:2018:768.

²¹ It might be added here that in practice it is common for aid applicants to secure contractual obligations from potential suppliers prior to the grant of aid and prior to the submission of their applications. The decision in *C-349/17 Eesti Pagar* may therefore have a certain impact on the review of prior grants of aid, as to whether there actually had been any incentive effect.

²² See *C-349/17 Eesti Pagar*, para. 76 and 82.

²³ See *C-349/17 Eesti Pagar*, para. 87.

Having recalled that 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, and 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,²⁴ the Court has had to deal with the unspoken issue of the so-called "inverse vertical direct effect" of the last sentence of Article 108(3), TFEU. It should be added here that the last sentence of Article 108(3) TFEU is being considered here where there is, as a main issue, a breach thereof on part of a Member State. It may not be forgotten that it is the Member State itself which grants aid. Therefore, in a way, the issue of an "inverse vertical direct effect" of the standstill obligation as regards unlawful aid is the one of a Member State "relying on its own failure" to notify aid, against an individual (i.e. a beneficiary of that aid). The act of a Member State "relying on one's own failure" against an individual has been long deemed unacceptable, especially in the context of rules addressed to the Member States.²⁵

Nevertheless, in para. 90 of C-349/17 *Eesti Pagar*, the Court stresses in the context of the last sentence of Article 108(3), TFEU, that "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*". *Against whom* are the national authorities supposed to *apply it*, since they are not asked to merely *interpret* it or that it is to be applied *to them*? It is clear that the rule at issue impacts upon the beneficiary, because the repayment of aid has to come from somewhere (and from someone). If the national authorities, and in particular national courts, are per the Court's words supposed to *apply* the last sentence of Article 108(3), TFEU, then they must apply it in an inverse vertical manner against the beneficiary, who then gets to be the target of the rule at issue and the addressee of the obligation to repay unlawful aid. The authorities are also under a duty to give full effect to the last sentence of Article 108(3), TFEU.²⁶ The Court also takes note of "the consequences that such recovery of the aid may have

²⁴ See C-349/17 *Eesti Pagar*, para. 88 and 89.

²⁵ Perhaps most famously, see judgment of the Court of 5 April 1979, case 80/86 *Criminal proceedings against Tullio Ratti*, EU:C:1987:431, para. 22, judgment of the Court of 8 October 1987, case 80/86 *Criminal proceedings against Kolpinghuis Nijmegen BV*, EU:C:1987:431, para. 8 and 14.

²⁶ See C-349/17 *Eesti Pagar*, para. 91.

for the undertaking concerned,²⁷ which reinforces the conclusion that the beneficiary is bound by the application of the last sentence of Article 108(3), TFEU, (and not merely by the application of national law interpreted in accordance with the standstill obligation) to recover unlawful aid. The last sentence of Article 108(3), TFEU, and associated rules under secondary law – and not national law – are further highlighted as legal bases for such recovery by the Court.²⁸ The Court’s conclusion at para. 95 is that “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 Regulation No 800/2008 when it finds, subsequently, that the conditions laid down by that regulation were not satisfied”, which amounts to inverse vertical effect of the standstill obligation. The addendum of “subsequently” in the Court’s conclusion makes it clear that the initial failure – on the part of the Member State to observe the standstill obligation in order to refrain from granting aid – is legally irrelevant. The end result of this decision for the purposes of the standstill obligation is that Member States are obliged under the last sentence of Article 108(3), TFEU, to recover unlawful aid from the beneficiary thereof, on their own initiative, where they have previously granted such unlawful aid. Apparently, a self-standing inversely vertical application of the last sentence of Article 108(3), TFEU, against the beneficiary is required, and he or she must suffer the consequences. In addition, the Court confirmed that all national authorities are expected to apply the last sentence of Article 108(3) TFEU (the grantors of aid included), and not “merely” national courts that rule on claims for recovery of unlawful aid. Nevertheless, the judgment at issue has not expressly addressed the possibility (or rather, an obligation) of revoking a decision granting aid that has been deemed unlawful. Such an obligation expressly exists in regard to unlawful aid deemed incompatible with the internal market and subject to a recovery decision.²⁹ One of the ways to apply the last sentence of Article 108(3), TFEU is to have national courts rule on the validity of measures giving effect to the aid (the effect of which is to remove the effects of aid along with the measure),³⁰ and hence have them affect the continued existence of aid. Thus, the Court should have addressed the obligations of an administrative authority as to the further existence of an aid measure, if they are to apply Article 108(3) TFEU as well. Presumably, the administrative authorities are also under an obligation to revoke their decisions granting aid, because having them recover the aid and letting them maintain the aid measure (allowing the recipient to retain a legal right to aid) seem impossible to reconcile.

²⁷ See C-349/17 *Eesti Pagar*, para. 93: “(...) taking into consideration not only the consequences that such recovery of the aid may have for the undertaking concerned (...)”.

²⁸ See C-349/17 *Eesti Pagar*, para. 94.

²⁹ See C-24/95 *Alcan Deutschland*, para. 43.

³⁰ See e.g. judgment of the Court of 5 October 2006, case C-368/04 *Transalpine Ölleitung in Österreich GmbH and Others v Finanzlandesdirektion für Tirol and Others*, EU:C:2006:644, para. 15; judgment of the Court of 21 July 2005, case C-71/04 *Administración del Estado v Xunta de Galicia*, EU:C:2005:493, para. 49.

2. Legitimate expectations as a defence to recovery

The decision continues here to address the issue of any legitimate expectations such a recipient of unlawful aid may have. It might transpire that aid purportedly subject to a block exemption turns out to be unlawful aid at some point in time after the granting thereof. In particular, this may happen due to the development of the case-law of the Court, whose decisions given in a preliminary ruling procedure generally apply *ex tunc*, unless there are special circumstances to the contrary, especially where the Court itself limits their temporal application.³¹ A finding that state aid is unlawful may be temporally remote from the date on which it was granted. Does this affect the position of the beneficiary of such aid and create any legitimate expectations on their part? Earlier case-law accepted that a beneficiary might invoke the principle of legitimate expectations to resist recovery even where the Commission has not made a decision on the aid at issue.³² However, current case-law has severely limited, for the beneficiary and the Member States alike, the possibility of invoking that principle to resist repayment of aid. In the wake of *C-349/17 Eesti Pagar*, a beneficiary – a diligent economic operator – might not have, in principle, entertained legitimate expectations to unlawful aid³³ barring exceptional circumstances.³⁴ Legitimate expectations must have been created by an institution, body or agency of the European Union, giving precise, unconditional and consistent assurances, originating from authorised, reliable sources.³⁵ In addition, the Court has already found that a Member

³¹ See M. Bromberg, N. Fenger, *Preliminary References to the European Court of Justice*, Oxford 2014, p. 455 et seq.

³² See judgment of the Court of 24 November 1987, case 223/85 *Rijn-Schelde-Verolme (RSV) Machinefabrieken en Scheepswerven NV v Commission of the European Communities*, EU:C:1987:502, para. 16 and 17. In particular, at para. 16 the Court added that a legitimate expectation was formed inter alia because the beneficiary and the sector as a whole were in receipt of other aid granted by a Member State. As such, the behaviour of a Member State was capable of at least contributing to the emergence of legitimate expectations, as the law stood then.

³³ Judgment of the Court of 20 March 1997, case C-24/95 *Land Rheinland-Pfalz v Alcan Deutschland GmbH*, EU:C:1997:163, para. 25. It may be added here that the Court found that a Member State must revoke its decision granting unlawful aid and a beneficiary may not use a defence that a gain therefrom no longer exists. The Court further noted that “the recipient’s obligation to ensure that the procedure set out in Article [108(3)] of the Treaty has been complied with cannot, in fact, depend on the conduct of the state authorities, even if the latter were responsible for the illegality of the aid decision to such a degree that revocation appears to be a breach of good faith (para. 41)”.

³⁴ Judgment of the Court of 13 June 2013, joined cases *HGA Srl and Others (C-630/11 P)*, *Regione autonoma della Sardegna (C-631/11 P)*, *Timsas srl (C-632/11 P)* and *Grand Hotel Abi d’Oru SpA (C-633/11 P) v European Commission*, EU:C:2013:387, para. 134.

³⁵ Judgment of the Court of 19 July 2016, case C-526/14 *Tadej Kotnik and Others v Državni zbor Republike Slovenije*, EU:C:2016:570, para. 62. Even where such assurances have been given, an overriding public interest may preclude transitional measures from being adopted in respect of situations which arose before the new rules came into force, but which are still subject to change (para. 68). In any event, lack of exercising discretion on part of EU authorities may not create legitimate expectations (para. 66). The field of state aid in the banking sector was particularly singled out for that statement from the Court.

State and its public bodies may not refuse to recover unlawful aid given by them due to their alleged legitimate expectations, as that principle cannot be relied on by a person who has infringed the legislation in force.³⁶ On a related note, limitation periods from Regulation no 659/1999 pertaining to the powers of the Commission have been found to be inapplicable to the powers of national courts ruling on actions for damages against a Member State granting unlawful aid.³⁷ A beneficiary may not also plead that recovery infringes the principle of legal certainty, since a claim under Article 108(3) TFEU to recover aid in national proceedings is foreseeable where that aid is granted unlawfully.³⁸

Against that background, the Court recalled in C-349/17 *Eesti Pagar* that “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”³⁹. A Member State thus does not count as a “EU authority” for the purposes of the principle of the protection of legitimate expectations and cannot cause a beneficiary to hold any legitimate expectations to a wrongly granted, allegedly block-exempt aid that is in fact unlawful. As such, the Court ruled out any automatic “safe harbour” effect that the GBER might have had for the purposes of the legitimate expectations of beneficiaries.

3. Limitation periods applicable to the recovery of unlawful aid

The case at issue moves to the national court’s doubts as to the application of limitation periods that may be applicable to inversely vertical application of the standstill obligation by the Member State concerned. As the reference originated in the context of structural funds paid out of the budget of the Union, the national court was uncertain which limitation period was applicable to a claim for repayment of unlawful aid brought before national court. The options therefor included a 10-year limitation period from the Regulation no 659/1999, a limitation period of four years from the Council Regulation (EC, EURATOM) no 2988/95 of 18 December 1995 on the protection of the European Communities financial interests,⁴⁰ or any other applicable limitation period under national law, subject to the principles of equivalence and effectiveness. It is perhaps surprising that the Court in C-349/17 *Eesti Pagar* has not expressly re-

³⁶ Judgment of the Court of 23 January 2019, case C-387/17 *Presidenza del Consiglio dei Ministri v Fallimento Traghetti del Mediterraneo SpA*, EU:C:2019:51, para. 68.

³⁷ See C-387/17 *Traghetti del Mediterraneo*, para. 66 and 73–76. The Court stressed that the previous Procedural Regulation “does not contain any provision relating to the powers and obligations of the national courts, which continue to be governed by the provisions of the Treaty as interpreted by the Court”.

³⁸ See judgment of the Court of 15 December 2005, case C-148/04 *Unicredito Italiano SpA v Agenzia delle Entrate, Ufficio Genova 1*, EU:C:2005:774, para. 104.

³⁹ C-349/17 *Eesti Pagar*, para. 104.

⁴⁰ OJ L 312, 23.12.1995, p. 1–4, as amended, hereinafter “Regulation no 2988/95”.

called its own findings from C-387/17 *Traghetti del Mediterraneo*, in that limitation periods from the Procedural Regulation do not apply to claims for compensation under 108(3) TFEU against a Member State, brought before national courts, and that the Procedural Regulation does not contain “any provision” relating to the obligations of the national courts. Nevertheless, the finding in C-349/17 *Eesti Pagar* is, likewise, that the Procedural Regulation does not contain any provision relating to the powers and obligations of the national courts, which “continue to be governed” by the provisions of the Treaty as interpreted by the Court. Those findings are “no less valid with respect to the powers and obligations of the national administrative authorities”.⁴¹

However, the Court adds that Regulation no 2988/95 may be applicable to an inversely vertical application of Article 108(3) last sentence TFEU. According to the Court (para. 120 in C-349/17 *Eesti Pagar*), “it is primarily the duty of the applicant for aid to ensure that it satisfies the conditions laid down by Regulation No 800/2008 so that it can qualify for aid that is exempted under that regulation, and consequently the granting of aid that is contrary to those conditions cannot be regarded as being exclusively the result of an error committed by the national authority concerned”. This is used to justify the fact that Regulation no 2988/95 is capable of being applied at all; it applies to “irregularities” which, according to Article 1(2) of the Regulation no 2988/95, are constituted by 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.

This dictum from the Court clashes with what was said at para. 93, in that Member States – and not beneficiaries of aid – are under a duty “to examine carefully, taking account of the information submitted to it, whether the aid applied for meets all the relevant conditions” laid down by the GBER, and “to reject that application if one of those conditions is not satisfied”. It is patently not in line with the alleged “bilateralism” of the last sentence of Article 108(3), TFEU, yet it aligns with the notion that the beneficiary is legally bound by the standstill obligation. Perhaps even more controversially, Regulation no 800/2008 does not contain any such express duty on part of the applicant to ensure that his or her application for aid qualifies therefor.⁴² It also does not conform to the literal wording of Article 108(3) TFEU, which is explicitly addressed to the Member States, the obligation on the beneficiary being corollary and implicit. As such, this dictum from the Court appears to be per incuriam, or, at the very least, very poorly reasoned.⁴³

⁴¹ C-349/17 *Eesti Pagar*, para. 110 and 111.

⁴² See <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:02008R0800-20131201> (available as of 15.07.2019).

⁴³ It does not help that the Court previously held under Regulation no 2988/95 that Member States are under a general obligation of diligence when verifying the legality of payments made by it that are borne by the European Union budget (Ssee judgment of the Court of 6 October 2015, case C-59/14 *Firma Ernst Kollmer Fleischimport und -export v Hauptzollamt Hamburg-Jonas*, EU:C:2015:660, para. 28).

The Court's approach to the general application of Regulation no 2988/95 over national law⁴⁴ is also at odds with that Regulation itself. It explicitly provides under its Article 3(3) that Member States retain the possibility of applying a period which is longer than that provided for in its Article 3(1) and 3(2). As such, while the rule on the limitation periods from Article 3(1) of the Regulation is indeed directly effective,⁴⁵ the Regulation does no more than establish a minimum threshold for limitation periods as far as "irregularities" subject thereto are concerned. It does not establish a peremptory rule curtailing national law that would provide for longer limitation periods. Member States retain a broad discretion to set longer limitation periods, and without any EU supervision.⁴⁶ Yet, there is nothing in C-349/17 *Eesti Pagar* to suggest that it is national law that would have priority over that Regulation had it established⁴⁷ longer limitation periods.⁴⁸ In addition, the omission of any such national law in the Court's reasoning on Regulation no 2988/95 does not help to reconcile the position of a claimant before a national court with the application of Regulation no 2988/95. The latter is concerned with administrative measures, whereas national courts apply judicial measures. Barring unusual circumstances,⁴⁹ in its primary capacity, a national court is also not going to *be* a national authority granting aid at all, much less an *administrative* grantor of State aid. Furthermore, the decision does not explain how does applying Regulation no 2988/95 to unlawful aid, without distinction where the aid is unlawful aid allegedly in the scope of GBER, relate to the fact that unlawful

⁴⁴ See the Court's conclusion as to applicable limitation periods at para. 128 is that "EU law must be interpreted as meaning that, where a national authority has granted aid from a structural fund while misapplying Regulation No 800/2008, the limitation period applicable to the recovery of the unlawful aid is, if the conditions for the application of Regulation No 2988/95 are satisfied, four years, in accordance with Article 3(1) of that regulation or, if not, the period laid down by the applicable national law". This conclusion is preceded by a dictum that "the European Union legislature decided to establish a general rule on limitation which was applicable in that area, whereby it intended, first, to define a minimum period applied in all the Member States and, secondly, to waive the possibility of bringing proceedings concerning an irregularity that is detrimental to the European Union's financial interests after the expiry of a four-year period after the irregularity was committed (para. 116)".

⁴⁵ See judgment of the Court of 24 June 2004, case C-278/02 *Herbert Handlbauer GmbH*, EU:C:2004:388, para. 25 and 27.

⁴⁶ See judgment of the Court of 22 December 2010, case C-131/10 *Corman SA v Bureau d'intervention et de restitution belge (BIRB)*, EU:C:2010:825, para. 54 and 55.

⁴⁷ One may add here that Polish law does at times provide for longer limitation periods. See Article 66a(1) of the Act of 27 August 2009 on Public Finances (*Ustawa o finansach publicznych*; 5 years).

⁴⁸ The Court also seems to forget at para. 127, where it states that the grantor interrupted the limitation period by its letter to the beneficiary, that the investigating "competent authority" capable of interrupting limitation periods and the authority that granted and/or recovered aid is not necessarily the same under Regulation no 2988/95 (See judgment of the Court of 11 June 2015, case C-349/17 *Pfeifer & Langen GmbH & Co. KG v Bundesanstalt für Landwirtschaft und Ernährung*, EU:C:2015:484, para. 125).

⁴⁹ See judgment of the Court of 26 October 2016, case C-590/14 P *Dimosia Epicheirisi Ilektrismou AE (DEI) v European Commission*, EU:C:2016:797, para. 59 (a judicial interim order as a State aid measure).

aid exists as to the totality of support granted in contravention of the standstill obligation. The Court has noted that the EU budget co-financed the measure at issue from the European Regional Development Fund.⁵⁰ However, there is no explanation why Regulation 2988/95 is supposed to apply to the aid as a whole (national co-financing included), and not only to the EU budgetary contribution. National (co-)financing is largely irrelevant for any actual or potential prejudice for the EU budget, but may well constitute State aid. There may be financial instruments where national co-financing is separate from EU financing. There also may be State aid measures that are subject to GBER but wholly financed by Member States. Last but not least, the ruling in C-349/17 *Eesti Pagar* does not explain why the Court deems it necessary to conflate the concepts of “irregularity” for the purposes of Regulation no 2988/95 (which is secondary law) and unlawful State aid, which is grounded in primary law. Perhaps most strikingly, the Court does not explain why the concept of “irregularity” is relevant to unlawful State aid, where the former does not include any criterion of imputability to a Member State, per Article 107(1) TFEU. Irregularity may exist without imputability to a Member State (and State resources being used), whereas unlawful State aid may not. The decision is silent on those issues. As such, it should be then suggested that the applicable limitation period is either set by national law subject to the principles of equivalence and effectiveness, or at the very least is the period mandated by Regulation no 2988/95, where EU funds are concerned and where there is inverse vertical application of the last sentence of Article 108(3), TFEU by an administrative authority. If it were to be different, the decision would be hard to reconcile with the genuine wording of Regulation no 2988/95 and of the last sentence of Article 108(3), TFEU.

4. Claims for interest as regards unlawful aid

The decision in C-349/17 *Eesti Pagar* concludes with the Court’s position on the so-called “illegality interest” which is a feature of recovery. It is settled case-law that the recovery of unlawful aid must include interest in addition to the nominal sum.⁵¹ Otherwise, the main purpose of the repayment of unlawfully paid state aid, i.e. to eliminate the distortion of competition caused by the competitive advantage afforded by that unlawful aid, would not be fulfilled.⁵² The decision in C-349/17 *Eesti Pagar* points to national law, subject to the principles of equivalence and effectiveness, to set rules on applicable interest rates. Regulation no 2015/1589, alongside Commission Regulation (EC) No 794/2004 of 21 April 2004 implementing Council Regulation (EU) 2015/1589 laying down detailed rules for the application of Article 108 of the Treaty on the Functioning of the European Union,⁵³ are not apply even by analogy.⁵⁴

⁵⁰ C-349/17 *Eesti Pagar*, para. 23.

⁵¹ See case C-199/06 *CELF I* above, para. 52.

⁵² See judgment of the Court of 29 April 2004, case C-277/00 *Federal Republic of Germany v Commission of the European Communities*, EU:C:2004:238, para. 75 and 76.

⁵³ As amended : ELI: <http://data.europa.eu/eli/reg/2004/794/2016-12-22>.

⁵⁴ C-349/17 *Eesti Pagar*, para. 135, 136 and 137.

However, the Court has added that the application of national law must amount to the full recovery of aid, and that “the beneficiary 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”.⁵⁵ It would follow that national law should set the applicable interest rates, provided that they are at least⁵⁶ equivalent to a market rate which would have applied had the beneficiary borrowed the amount of aid. The Court does not specify here how to calculate a “market” borrowing rate therefor. It would then appear that general rules found in the Commission Notice on the notion of State aid as referred to in Article 107(1) of the Treaty on the Functioning of the European Union⁵⁷ and the Communication from the Commission on the revision of the method for setting the reference and discount rates,⁵⁸ alongside the Court’s case-law on the Market Economy Investor Principle (MEIP), apply accordingly.

The Court’s reasoning on applicable interest seems to omit Regulation no 2988/95, which at some points does refer to interest rates.⁵⁹ It is not very consistent with the Court’s repeated references thereto as far as limitation periods were concerned. No reasons are given for this.⁶⁰ The result is, however, that national law is to govern the rate and calculation of interest applicable to the recovery of unlawful aid on the basis of Article 108(3), last sentence TFEU.

IV. Later developments and conclusions

Despite the fact that the decision at issue is relatively new as of the time of writing, it has already managed to influence the development of the European Union law on State aid. The European Commission has recently adopted a Communication from the Commission – Commission Notice on the recovery of unlawful and incompatible state aid.⁶¹ While the Communication primarily addresses the duties of the Member States when they are implementing recovery decisions of the Commission, the decision in C-349 *Eesti Pagar* is cited thereunder to illustrate some general features of

⁵⁵ C-349/17 *Eesti Pagar*, para. 141.

⁵⁶ It may be assumed here that a rate greater than a market rate applicable to the amount of aid would also be acceptable from the point of view of full recovery of aid.

⁵⁷ OJ C 262, 19.7.2016, p. 1–50, para. 111 and 113.

⁵⁸ OJ C 14, 19.1.2008, p. 6–9, http://ec.europa.eu/competition/state_aid/legislation/base_rates2019_08_en.pdf.

⁵⁹ At 4(2) and 5(1)(b) of that Regulation.

⁶⁰ The AG seemed to notice in his Opinion that Regulation No 2988/95 does not provide for the unconditional payment of interest (see para. 159–161 therein), but gave no reasons for abandoning that Regulation in the case of interest, having previously supported its application as far as limitation periods were at issue.

⁶¹ OJ C 247, 23.7.2019, p. 1–23, no. C/2019/5396, [https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52019XC0723\(01\)&qid=1565096904021&from=EN](https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52019XC0723(01)&qid=1565096904021&from=EN).

unlawful aid and the recovery thereof.⁶² One of the features of the decision at issue, in that the competent authority or court is under a duty to give full effect to European Union law in the context of recovery, is mentioned in para. 73.

In sum, the decision in C-349/17 *Eesti Pagar*, while not without its faults, is an important step in the development of Union law on state aid. Prior to the decision at issue, it was not immediately clear from the case-law that the last sentence of Article 108(3), TFEU, is supposed to be applied by other bodies than national courts. There have been, however, some among the academia who did say that it applied to all authorities of a Member State.⁶³ As the law now stands, the logic employed by the Court in *Ciola*⁶⁴ and *Fratelli Costanzo*⁶⁵ found its way into the law on state aid, confirming that the standstill obligation binds all authorities of a Member State. It reinforces the nature of the direct effect of the last sentence of Article 108(3), TFEU, is held to have. The decision also further dissociates Article 108(3) TFEU and the powers of national courts from the Procedural Regulation. Additionally, C-349/17 *Eesti Pagar* highlights the fact that a beneficiary is subject to the standstill obligation, and that the reality of state aid enforcement is not as “bilateral” as some dicta from the case-law would have it. It may be safely expected of the Court that the decision at issue will be followed by subsequent case-law, and one should hope that the Court would clarify the interplay between Article 108(3) TFEU and the principles of equivalence and effectiveness. While the substantive element is already there due to C-349/17 *Eesti Pagar*, it would greatly help any interested parties if the Court decided to develop the procedural dimension of the standstill obligation.

SUMMARY

This case commentary relates to the decision of the Court (Grand Chamber) of 5 March 2019 in C-349/19 *Eesti Pagar v Ettevõtluse Arendamise Sihtasutus and Majandus- ja Kommunikatsiooniministeerium*, the direct effect of the third sentence of Article 108(3), TFEU, the protection of legitimate expectations, limitation periods for recovery of unlawful aid, and to the position of the beneficiary of that aid. The novelty found in the judgment at issue is the possibility – and the requirement – to apply the third sentence of Article 108(3), TFEU by the national authorities which granted unlawful aid, in order to recover that aid ex officio (the so-called inverse vertical direct effect).

⁶² That is, at para. 13, 46, 69, and 73. However, the Commission takes certain liberties with the decision. It is for one puzzling why the decision at issue is invoked to illustrate binding effects of the Commission’s recovery decisions, where the present case relates to Article 108(3), last sentence TFEU.

⁶³ See D. Grenspan, A. Pelin [in:] N. Pesaresi, K. van der Castele, L. Flynn, C. Siaterli, *EU Competition Law*, vol. IV: *State Aid, Book Two*, Leuven 2016, p. 1490.

⁶⁴ Judgment of the Court of 29 April 1999, case C-224/97 *Erich Ciola v Land Vorarlberg*, EU:C:1999:212, para. 33.

⁶⁵ Judgment of the Court of 22 June 1989, case 103/88 *Fratelli Costanzo SpA v Comune di Milano*, EU:C:1989:256, para. 31.

STRESZCZENIE

GŁOSA DO WYROKU TRYBUNAŁU (WIELKA IZBA) Z DNIA 5 MARCA 2019 R. W SPRAWIE C-349/17, *EESTI PAGAR AS* *PRZECIWKO ETTEVÕTLUSE ARENDAMISE SIHTASUTUS* *I MAJANDUS- JA KOMMUNIKATSIOONIMINISTEERIUMS*

Niniejsza glosa dotyczy wyroku Trybunału (Wielka Izba) z dnia 5 marca 2019 r., wydanego w sprawie C-349/17, *Eesti Pagar AS przeciwko Ettevõtluse Arendamise Sihtasutus i Majandus- ja Kommunikatsiooniministeerium*. Omawiane orzeczenie dotyczy skutku bezpośredniego art. 108 ust. 3 zdanie trzecie TFUE, ochrony uzasadnionych oczekiwań, terminów przedawnienia odzyskania pomocy niezgodnej z prawem, a także sytuacji beneficjenta. Głównym *novum* wyroku jest możliwość i zarazem konieczność stosowania art. 108 ust. 3 zdanie trzecie TFUE przez organy, które przyznały pomoc niezgodną z prawem, w celu odzyskania tej pomocy z ich własnej inicjatywy (tzw. odwrócony skutek wertykalny).

Słowa kluczowe: niezgodna z prawem pomoc państwa, prawo Unii Europejskiej, obowiązek zawieszenia przyznawania pomocy, art. 108 ust. 3 TFUE

Key words: unlawful state aid, European Union law, standstill obligation, Article 108(3) TFEU