

**JUDGMENT OF THE COURT (Fifth Chamber)**

3 September 2015 (\*)

(Reference for a preliminary ruling — State aid — Determination of the calculation of interest relating to the recovery of aid that is incompatible with the common market — Simple or compound interest — National legislation referring, for the calculation of interest, to Regulation (EC) No 794/2004 — Recovery decision notified before that regulation entered into force)

In Case C-89/14,

REQUEST for a preliminary ruling under Article 267 TFEU from the Corte suprema di cassazione (Italy), made by decision of 14 November 2013, received at the Court on 21 February 2014, in the proceedings

**A2A SpA**

v

**Agenzia delle Entrate,**

THE COURT (Fifth Chamber),

composed of T. von Danwitz (Rapporteur), President of the Chamber, C. Vajda, A. Rosas, E. Juhász and D. Šváby, Judges,

Advocate General: M. Wathelet,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

- A2A SpA, by A. Santa Maria, G. Russo Corvace, G. Pizzonia, G. Zoppini and E. Gambaro, avvocati,
- the Italian Government, by G. Palmieri, acting as Agent, and by G. De Bellis, avvocato dello Stato,
- the European Commission, by D. Grespan and B. Stromsky, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 26 March 2015,

gives the following

**Judgment**

1 This request for a preliminary ruling concerns the interpretation of Article 14 of Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 93 of the EC Treaty (OJ 1999 L 83, p. 1), and Articles 9, 11 and 13 of Commission Regulation (EC) No 794/2004 of 21 April 2004 implementing Council Regulation (EC) No 659/1999

(OJ 2004 L 140, p. 1 and corrigendum OJ 2004 L 286, p. 3).

2 The request has been made in proceedings between A2A SpA ('A2A') and the Agenzia delle Entrate (Revenue Authority) concerning the recovery, with compound interest, of State aid declared incompatible with the common market by Commission Decision 2003/193/EC of 5 June 2002 on State aid granted by Italy in the form of tax exemptions and subsidised loans to public utilities with a majority public capital holding (OJ 2002 L 77, p. 21).

## **Legal context**

### *EU law*

Regulation No 659/1999

3 Recital 13 in the preamble to Regulation No 659/1999 is worded as follows:

'Whereas in cases of unlawful aid which is not compatible with the common market, effective competition should be restored; whereas for this purpose it is necessary that the aid, including interest, be recovered without delay; whereas it is appropriate that recovery be effected in accordance with the procedures of national law; whereas the application of those procedures should not, by preventing the immediate and effective execution of the Commission decision, impede the restoration of effective competition; whereas to achieve this result, Member States should take all necessary measures ensuring the effectiveness of the Commission decision.'

4 Article 14 of that regulation, entitled 'Recovery of aid', provides:

'(1) Where negative decisions are taken in cases of unlawful aid, the Commission shall decide that the Member State concerned shall take all necessary measures to recover the aid from the beneficiary (hereinafter referred to as a "recovery decision"). The Commission shall not require recovery of the aid if this would be contrary to a general principle of Community law.

(2) The aid to be recovered pursuant to a recovery decision shall include interest at an appropriate rate fixed by the Commission. Interest shall be payable from the date on which the unlawful aid was at the disposal of the beneficiary until the date of its recovery.

(3) Without prejudice to any order of the Court of Justice of the European Communities pursuant to Article 185 of the [EC] Treaty, recovery shall be effected without delay and in accordance with the procedures under the national law of the Member State concerned, provided that they allow the immediate and effective execution of the Commission's decision. To this effect and in the event of a procedure before national courts, the Member States concerned shall take all necessary steps which are available in their respective legal systems, including provisional measures, without prejudice to Community law.'

The Commission Communication on the interest rates to be applied when aid granted unlawfully is being recovered

5 The Commission communication on the interest rates to be applied when aid granted unlawfully is being recovered published in the *Official Journal of the European Union* of 8 May 2003 (OJ 2003 C 110, p. 21) states:

' ...

As part of the process of loyal collaboration between the Commission and Member States during the execution of certain recovery decisions, the question has arisen whether this interest rate

should be applied on a simple basis or on a compound basis ... . The Commission accordingly considers it necessary to clarify urgently its position on the matter, having regard to the objectives of the recovery of unlawful aid and its place in the system of State aid control laid down by the Treaty.

...

In market practice, simple interest would normally be calculated where the beneficiary of the funds does not have use of the interest amount before the end of the period, for example where interest is only paid at the end of the period. Compound interest would normally be calculated if each year (or period) the amount of interest can be considered as being paid to the beneficiary and so accruing to the initial capital amount. In this case, the beneficiary would earn interest on the interest paid for each period.

... Thus despite the variety of situations, it appears that the effects of an unlawful aid are to provide funding to the beneficiary on similar conditions to a medium term non-interest bearing loan. Accordingly, the use of compound interest appears necessary to ensure that the financial advantages resulting from this situation are fully neutralised.

Accordingly, the Commission wishes to inform the Member States and interested parties that in any future decisions it may adopt ordering the recovery of aid unlawfully granted, it will apply the reference rate used for calculating the net grant equivalent of regional aids on a compound basis. In accordance with normal market practice, compounding should take place on an annual basis. Likewise, the Commission will expect the Member States to apply compound interest in the execution of pending recovery decisions, unless this would be contrary to a general principle of Community law.'

#### Regulation No 794/2004

6 Articles 9 and 11 of Regulation No 794/2004, in Chapter V, concern interest rates applicable to the recovery of unlawful aid.

7 Article 9 of that regulation, entitled 'Method for fixing the interest rate', provides:

'(1) Unless otherwise provided for in a specific decision the interest rate to be used for recovering State aid granted in breach of Article 88(3) of the Treaty shall be an annual percentage rate fixed for each calendar year.

It shall be calculated on the basis of the average of the five-year inter-bank swap rates for September, October and November of the previous year, plus 75 basis points. In duly justified cases, the Commission may increase the rate by more than 75 basis points in respect of one or more Member States.

(2) If the latest three-month average of the five-year inter-bank swap rates available, plus 75 basis points, differs by more than 15% from the State aid recovery interest rate in force, the Commission shall recalculate the latter.

The new rate shall apply from the first day of the month following the recalculation by the Commission. The Commission shall inform Member States by letter of the recalculation and the date from which it applies.

(3) The interest rate shall be fixed for each Member State individually, or for two or more Member States together.

(4) In the absence of reliable or equivalent data or in exceptional circumstances the Commission may, in close co-operation with the Member State(s) concerned, fix a State aid recovery interest rate, for one or more Member States, on the basis of a different method and on the basis of the information available to it.'

8 Article 11 of Regulation No 794/2004, entitled 'Method for applying interest', states in paragraph 2 thereof:

'The interest rate shall be applied on a compound basis until the date of the recovery of the aid. The interest accruing in the previous year shall be subject to interest in each subsequent year.'

9 The first subparagraph of Article 13 of Regulation No 794/2004 provides that it is to enter into force on the 20th day following its publication in the *Official Journal of the European Union*. Since that regulation was published in the *Official Journal of the European Union* on 30 April 2004, it entered into force on 20 May 2004. Moreover, under the fifth paragraph of Article 13 of that regulation, Article 11 thereof is to apply in relation to any recovery decision notified after the date of entry into force of that regulation.

#### Decision 2003/193

10 On 5 June 2002, the Commission adopted Decision 2003/193, which was notified to the Italian Republic on 7 June 2002. The Commission stated in Article 2 of that decision that the exemption from corporation tax granted by the Italian Republic to joint stock companies with majority public shareholdings, referred to in that article, constituted State aid within the meaning of Article 87(1) of the EC Treaty, incompatible with the common market.

11 According to Article 3 of that decision:

'Italy shall take all necessary measures to recover from the beneficiaries the aid granted under the schemes referred to in Article 2 and unlawfully made available to the beneficiaries.

Recovery shall be effected without delay and in accordance with the procedures of national law provided that they allow the immediate and effective execution of the Decision.

The aid to be recovered shall include interest from the date on which it was at the disposal of the beneficiaries until the date of its recovery. Interest shall be calculated on the basis of the reference rate used for calculating the grant equivalent of regional aid.'

#### *Italian law*

12 Article 1283 of the Civil Code provides:

'Save where contrary practice applies, the interest which has fallen due may itself generate interest only from the date of the application to the court or as a result of an agreement concluded after the interest maturity date, and always provided that the interest has been owed for at least six months.'

13 Article 24 of Decree-Law No 185 on urgent measures to support families, work, employment and business, and to restructure the national strategic framework to combat the crisis (decreto-legge n. 185 — Misure urgenti per il sostegno a famiglie, lavoro, occupazione e impresa e per ridisegnare in funzione anti-crisi il quadro strategico nazionale), of 29 November 2008, converted into law, with amendments, by Law No 2 of 28 January 2009 ('Decree-Law No 185/2008'), entitled 'Implementation of European decisions concerning the recovery of unlawful aid', provides, in

paragraph 4 thereof, that:

‘The interest referred to in paragraph 2 shall be determined on the basis of Chapter V of Regulation ... No 794/2004 ... .’

14 Article 36 of that decree-law establishes that that decree-law is to enter into force on the day of its publication in the *Gazzetta ufficiale della Repubblica italiana*. That publication took place on 29 November 2008.

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

15 A2A is a company incorporating ASM Brescia SpA and AEM SpA. The latter companies benefitted from a three-year exemption from corporation tax granted by the Italian Republic to joint stock companies with majority public shareholdings. In Decision 2003/193, notified to the Italian Republic on 7 June 2002, the Commission considered that such an exemption constituted State aid incompatible with the common market.

16 In the judgment in *Commission v Italy* (C-207/05, EU:C:2006:366, paragraph 54), the Court held that, by failing to adopt, within the prescribed period, the necessary measures to recover from the recipients aid declared unlawful and incompatible with the common market by Decision 2003/193, the Italian Republic had failed to fulfil its obligations under that decision.

17 Following that judgment, in order to regulate actions for recovery of the aid at issue, the Italian Republic adopted Article 1 of Decree-Law No 10 containing measures to implement Community and international obligations (decreto-legge n. 10 — Disposizioni volte a dare attuazione ad obblighi comunitari ed internazionali), of 15 February 2007, converted into law with amendments by Law No 46 of 6 April 2007 (‘Decree-Law No 10/2007’), entitled ‘Enforcement of the judgment of the Court of Justice of the European Communities of 1 June 2006 in Case C-207/05. Implementation of Commission Decision 2003/193/EC of 5 June 2002. Infringement proceedings No 2006/2456 under Article 228 of the EC Treaty’, Article 24 of Decree-Law No 185/2008 and Article 19 of Decree-Law No 135 laying down urgent measures for the implementation of Community obligations and enforcement of judgments of the Court of Justice of the European Communities (decreto-legge n. 135 — Disposizioni urgenti per l’attuazione di obblighi comunitari e per l’esecuzione di sentenze della Corte di giustizia delle Comunità europee), of 25 September 2009, converted into law, with amendments, by Law No 166 of 20 November 2009.

18 In 2009, the Agenzia delle Entrate sent to A2A tax assessments so as to recover sums owed by way of corporation tax that ASM Brescia SpA and AEM SpA had not paid in accordance with the exemption granted by the Italian Republic. Those tax assessments required payment, in addition to the sum of EUR 170 million in the form of capital, of the sum of EUR 120 million in the form of interest calculated on a compound basis.

19 A2A brought an action against those tax assessments. Before the referring court, the Corte suprema di cassazione (Court of Cassation), it claims that Article 24(4) of Decree-Law No 185/2008 is contrary to EU law. For the purpose of calculating interest, that provision refers to Articles 9 and 11 of Regulation No 794/2004, although, under the fifth paragraph of Article 13 thereof, that regulation is not applicable *ratione temporis* to Decision 2003/193, since that decision was notified to the Italian Republic before that regulation entered into force.

20 In its request for a preliminary ruling, the referring court notes in that regard, referring to the judgment in *Commission v Département du Loiret* (C-295/07 P, EU:C:2008:707, paragraph 46), that neither EU law nor the Court’s case-law specified, at the time of adoption of Decision

2003/193, that the interest to be applied during the recovery of the State aid covered by that decision should be calculated on a compound basis. The referring court adds that the Commission's practice consisted at the time in referring to provisions of national law. In accordance with Article 1282 of the Civil Code, Italian law applies simple interest and allows the application of compound interest to financial obligations only in accordance with the conditions laid down in Article 1283 of the Civil Code, conditions which are not satisfied as regards the recovery of the aid at issue in the main proceedings.

21 In those circumstances, the Corte suprema di cassazione is uncertain whether EU law precludes a national provision, such as Article 24(4) of Decree-Law No 185/2008, or whether it allows the application of compound interest to the recovery of State aid, even though the recovery decision was notified before the entry into force of Regulation No 794/2004.

22 In the light of those considerations, that court decided to stay the proceedings and to refer the following question to the Court for a preliminary ruling:

'Must Article 14 of Council Regulation ... No 659/1999 ... and Articles 9, 11 and 13 of Commission Regulation ... No 794/2004 ... be interpreted as precluding national legislation which, in relation to the recovery of State aid pursuant to a Commission decision notified on 7 June 2002, provides that the interest is to be determined on the basis of Chapter V of Regulation No 794/2004 (that is to say, on the basis of Articles 9 and 11 thereof, in particular) and, in consequence, that an interest rate based on the system of compound interest is to be applied?'

### **Consideration of the question referred for a preliminary ruling**

23 By its question, the referring court asks, in essence, whether EU law, in particular Article 14 of Regulation No 659/1999 and Articles 11 and 13 of Regulation No 794/2004, precludes national legislation, such as Article 24(4) of Decree-Law No 185/2008, which, by means of a reference to Regulation No 794/2004, provides for the application of compound interest to the recovery of State aid declared incompatible with the common market, even though the decision declaring that aid incompatible with the common market and ordering its recovery was adopted and notified to the Member State concerned before that regulation entered into force.

24 First of all, it should be noted that the request for a preliminary ruling refers not only to Article 24(4) of Decree-Law No 185/2008, but also to Article 1 of Decree-Law No 10/2007 and to Article 19 of Decree-Law No 135 of 25 September 2009 referred to in paragraph 17 of the present judgment. The referring court notes that, in so far as is relevant to the main proceedings, Article 1(3) of Decree-Law No 10/2007 of 15 February 2007 and Article 24(4) of Decree-Law No 185/2008 are drafted in identical terms.

25 The request for a preliminary ruling does not state clearly which of those provisions is applicable in the main proceedings. It notes merely that the judgment which is the subject of the proceedings before the referring court is based on the view that 'the calculation of the interest on a compound basis is correct, in so far as it is in accordance with Article 24(4) of Decree-Law No 185/2008'. In those circumstances, it must be assumed that that provision is applicable to the main proceedings, which is a matter for the referring court to determine.

26 Under Article 14(1) of Regulation (EC) No 659/1999, where negative decisions are taken in case of unlawful aid, the Commission is to decide that the Member State concerned must take all necessary measures to recover the aid from its beneficiary. The aid to be recovered pursuant to a recovery decision includes, in accordance with Article 14(2) of that regulation, interest. However, the latter provision does not state whether that interest is to be applied on a simple or on a compound basis.

27 In that regard, it should be noted, in the first place, that, although Article 11(2) of Regulation No 794/2004 states that the interest rate is to be applied on a compound basis until the date of the recovery of the aid and that the interest accruing in the previous year is to be subject to interest in each subsequent year, it is nevertheless necessary to note that that provision is, in accordance with the fifth paragraph of Article 13 of that regulation, applicable only to recovery decisions notified after the date that regulation entered into force, namely after 20 May 2004.

28 Therefore, given that Decision 2003/193, declaring the aid which is subject to recovery in the main proceedings to be incompatible with the common market, was notified to the Italian Republic on 7 June 2002, that is to say before Regulation No 794/2004 entered into force, Article 11(2) of that regulation is not, as such, applicable *ratione temporis* to the main proceedings.

29 As regards, in the second place, the question of which regulation was applicable before the entry into force of Regulation No 794/2004 in order to determine whether the interest must be simple or compound, it should be noted that, in the judgment in *Commission v Département du Loiret*, C?295/07 P, EU:C:2008:707, paragraph 46, the Court held that, at the time the decision at issue in the case giving rise to that judgment was adopted, namely on 12 July 2000, neither Community law nor the case-law of the Court or of the General Court specified whether the necessary interest on aid to be recovered was to be calculated on a simple or on a compound basis. In the absence of a provision under EU law on that subject, the Court held that the Commission's practice, set out *inter alia* in its letter to the Member States SG (91) D/4577, of 4 March 1991, linked the question of charging interest to the procedural rules for recovery and referred, in that regard, to national law (judgment in *Commission v Département du Loiret*, C?295/07, EU:C:2008:707, paragraphs 82 to 84).

30 It is only in its Communication on the interest rates to be applied when aid granted unlawfully is being recovered, published on 8 May 2003, that the Commission expressly stated that it would apply a compound interest rate in any decision ordering the recovery of unlawful aid that it might adopt in the future (judgment in *Commission v Département du Loiret*, C?295/07, EU:C:2008:707, paragraph 46) and that it expected the Member States to apply compound interest during the execution of recovery decisions.

31 Article 3(2) of Decision 2003/193 requires recovery to be effected without delay and in accordance with the procedures of national law, without however providing further information concerning whether that interest must be applied on a simple or on a compound basis.

32 Since that decision was notified to the Italian Republic on 7 June 2002, that is to say before the change in the Commission's practice stated in its Communication on the interest rates to be applied when aid granted unlawfully is being recovered, it must be concluded, on the basis of the case-law developed in the judgment in *Commission v Département du Loiret*, C?295/07, EU:C:2008:707, that it is for national law to determine whether, in this case, the interest rate must be applied on a simple or on a compound basis.

33 In that regard, the referring court finds in the order for reference that the wording of Article 24(4) of Decree-Law No 185/2008 refers only to Chapter V of Regulation No 794/2004, and not to

Chapter VI thereof, which contains the transitional provision of Article 13, so that national law does not make that reference subject to the temporal limit set out in that article.

34 Article 24(4) of Decree-Law No 185/2008, as interpreted by the referring court, cannot be regarded as contrary to Article 13 of Regulation No 794/2004. Although that article determines, in its first subparagraph, the date that regulation entered into force and states, in its fifth subparagraph, that Article 11(2) of that regulation, concerning the calculation of interest on a compound basis, is applicable only to recovery decisions notified after the date that regulation entered into force, a principle prohibiting the Member States — which, at the date Decision 2003/193 was adopted were solely competent to determine the basis of calculation of interest — from legislating in one way rather than in another cannot however be deduced from such a limitation of the applicability *ratione temporis* of Regulation No 794/2004. Article 13 of Regulation No 794/2004 therefore does not introduce a rule of non-retroactivity applicable to national legislation before the entry into force of Regulation No 794/2004.

35 In the third place, it should be noted that, by governing the method for calculating interest to be applied in the recovery of State aid declared incompatible with the common market, Decree-Law No 185/2008 seeks *inter alia* to implement Article 3 of Decision 2003/193. Therefore, it implements Article 14(1) of Regulation No 659/1999. It is settled 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 (judgment in *Ålands Vindkraft*, C?573/12, EU:C:2014:2037, paragraph 125).

36 Those general principles include, *inter alia*, the principles of legal certainty and protection of legitimate expectations.

37 In that regard, it should be noted that, according to the Court's settled 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 applications 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, to that effect, judgment in *Bavaria*, C?120/08, EU:C:2010:798, paragraphs 40, 41 and the case-law cited).

38 Likewise, as is apparent from the Court's settled case-law, the scope of the principle of the 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 (judgment in *Stadt Papenburg*, C?226/08, EU:C:2010:10, paragraph 46 and the case-law cited).

39 In this case, it should be noted that the application of compound interest was introduced by the national legislation referred to in paragraphs 24 and 25 of the present judgment. Before the entry into force of that regulation, Italian law applied simple interest, in accordance with Article 1282 of the Civil Code.

40 By providing for the application of compound interest for the recovery of aid declared incompatible with the common market by Decision 2003/193, Decree-Law No 185/2008 has no retroactive effect and only applies new rules to the future effects of situations which arose under the earlier rules.

41 First, Article 36 of Decree-Law No 185/2008 establishes that it is to enter into force on the day of publication in the *Gazzetta ufficiale della Repubblica italiana*, which took place on 29



November 2008, so that that decree-law did not enter into force before the date of its publication. Secondly, the tax assessments providing for the application of interest on a compound basis were notified to A2A after the entry into force of that decree-law. Since the aid declared incompatible with the common market, at issue in the main proceedings, had not been recovered or even set out in a tax assessment on the date that decree-law entered into force, the latter cannot be considered to affect a situation which arose earlier.

42 Moreover, in the light of the long delay between the adoption, on 5 June 2002, of Decision 2003/193, by which the Commission requested the recovery of the State aid at issue in the main proceedings, and the issue, in 2009, of the tax assessment designed to ensure the effective recovery of that aid, it must be considered that the application of compound interest is a particularly appropriate means of neutralising the competitive advantage granted unlawfully to undertakings benefitting from that State aid.

43 Consequently, the general principles of legal certainty and protection of legitimate expectations do not preclude national legislation such as Decree-Law No 185/2008 at issue in the main proceedings.

44 As regards, in the last place, the question, raised by A2A in its written observations, whether Decree-Law No 185/2008 infringes the principle of equal treatment, it should be noted that, according to settled case-law, it is not necessary to examine questions submitted to the Court by the parties to the main proceedings other than those that were the subject of the national court's order for reference (see, to that effect, judgment in *Kersbergen-Lap and Dams-Schipper*, C?154/05, EU:C:2006:449, paragraphs 21 and 22 and the case-law cited).

45 It is not disputed that in its request for a preliminary ruling, the referring court did not raise that question.

46 In any event, the Court has no information with which it could determine whether A2A is attempting to invoke the benefit of a national decision-making practice which could run counter to the due process of law. According to the Court's settled case-law, the principle of equal treatment must be reconciled with the principle of legality, according to which a person may not rely, to his benefit, on an unlawful act committed in favour of a third party (judgment in *The Rank Group*, C?259/10 and C?260/10, EU:C:2011:719, paragraph 62 and the case-law cited).

47 The Court is therefore not in a position to examine the argument raised by A2A relating to a possible difference in treatment contrary to the principle of non-discrimination.

48 In the light of all the foregoing considerations, the answer to the question referred is that Article 14 of Regulation No 659/1999 and Articles 11 and 13 of Regulation No 794/2004 do not preclude national legislation, such as Article 24(4) of Decree-Law No 185/2008, which, by means of a reference to Regulation No 794/2004, provides for the application of compound interest to the recovery of State aid, even though the decision declaring that aid incompatible with the common market and ordering its recovery was adopted and notified to the Member State concerned before that regulation entered into force.

## **Costs**

49 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:

**Article 14 of Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 93 of the EC Treaty, and Articles 11 and 13 of Commission Regulation (EC) No 794/2004 of 21 April 2004 implementing Regulation No 659/1999, do not preclude national legislation, such as Article 24(4) of Decree-Law No 185/2008 of 29 November 2008, on urgent measures to support families, work, employment and business, and to restructure the national strategic framework to combat the crisis, converted into law, with amendments, by Law No 2 of 28 January 2009, which, by means of a reference to Regulation No 794/2004, provides for the application of compound interest to the recovery of State aid, even though the decision declaring that aid incompatible with the common market and ordering its recovery was adopted and notified to the Member State concerned before that regulation entered into force.**

[Signatures]

\* Language of the case: Italian.