Reports of Cases

JUDGMENT OF THE COURT (Tenth Chamber)

16 January 2025 *

(Reference for a preliminary ruling – Recovery of unlawful and incompatible aid – Regulation (EU) 2015/1589 – Article 16 – Beneficiary of individual aid identified in the European Commission recovery decision – Implementation of the recovery decision – Transfer of the aid to another undertaking after the recovery decision – Economic continuity – Assessment – Competent authority – Extension of the recovery obligation to the actual beneficiary – *Audi alteram partem* rule – Articles 41 and 47 of the Charter of Fundamental Rights of the European Union)

In Case C-588/23,

REQUEST for a preliminary ruling under Article 267 TFEU from the Tribunale amministrativo regionale della Campania (Regional Administrative Court, Campania, Italy), made by decision of 18 September 2023, received at the Court on 25 September 2023, in the proceedings

Scai Srl

v

Regione Campania,

THE COURT (Tenth Chamber),

composed of D. Gratsias, President of the Chamber, I. Jarukaitis, President of the Fourth Chamber, and Z. Csehi (Rapporteur), Judge,

Advocate General: A. Rantos,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

– Scai Srl, by A. Raviele and L. Visone, avvocati,

– the Italian Government, by G. Palmieri, acting as Agent, and by S. Fiorentino, avvocato dello Stato,

* Language of the case: Italian.

– the European Commission, by A. Steiblytė, B. Stromsky and F. Tomat, acting as Agents,

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Articles 108, 263 and 288 TFEU, Articles 41 and 47 of the Charter of Fundamental Rights of the European Union ('the Charter') and Articles 16 and 31 of Council Regulation (EU) 2015/1589 of 13 July 2015 laying down detailed rules for the application of Article 108 [TFEU] (OJ 2015 L 248, p. 9).

2 The request has been made in proceedings between Scai Srl and the Regione Campania (Region of Campania, Italy) concerning the obligation imposed on Scai to repay the amount corresponding to aid which was unlawful and incompatible with the internal market and from which another company had originally benefited.

Legal context

European Union law

Regulation 2015/1589

3 Recital 25 of Regulation 2015/1589 states:

'In cases of unlawful aid which is not compatible with the internal market, effective competition should be restored. For this purpose it is necessary that the aid, including interest, be recovered without delay. It is appropriate that recovery be effected in accordance with the procedures of national law. The application of those procedures should not, by preventing the immediate and effective execution of the [European] Commission decision, impede the restoration of effective competition. To achieve this result, Member States should take all necessary measures ensuring the effectiveness of the Commission decision.'

4 In Chapter II of that regulation, entitled 'Procedure regarding notified aid', Article 9 thereof, itself entitled 'Decisions of the Commission to close the formal investigation procedure', provides, in paragraph 5:

'Where the Commission finds that the notified aid is not compatible with the internal market, it shall decide that the aid shall not be put into effect ("negative decision").'

5 Chapter III of that regulation, relating to procedures regarding unlawful aid, includes, inter alia, Articles 16 and 17 thereof.

6 Article 16 of that same 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 ("recovery decision"). The Commission shall not require recovery of the aid if this would be contrary to a general principle of Union law.

…

3. Without prejudice to any order of the Court of Justice of the European Union pursuant to Article 278 TFEU, 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 Union law.'

7 Article 31 of Regulation 2015/1589, entitled 'Addressee of decisions', states:

'1. The decisions taken pursuant to Article 7(7), Article 8(1) and (2), and Article 9(9) shall be addressed to the undertaking or association of undertakings concerned. The Commission shall notify the decision to the addressee without delay and shall give the addressee the opportunity to indicate to the Commission which information it considers to be covered by the obligation of professional secrecy.

2. All other decisions of the Commission taken pursuant to Chapters II, III, V, VI and IX shall be addressed to the Member State concerned. …'

8 The provisions of Regulation 2015/1589 referred to in paragraphs 4 to 7 above reproduced those set out in Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 108 [TFEU] (OJ 1999 L 83, p. 1), as amended by Council Regulation (EU) No 734/2013 of 22 July 2013 (OJ 2013 L 204, p. 15), which Regulation 2015/1589 repealed.

The recovery notice

9 Section 4.3 of the Commission notice of 23 July 2019 on the recovery of unlawful and incompatible State aid (OJ 2019 C 247, p. 1; 'the recovery notice'), relating to the 'identification of the beneficiaries from whom the aid must be recovered', states, in paragraph 83:

'Unlawful aid found to be incompatible with the internal market must be recovered from the beneficiaries that actually benefited from it … When the aid beneficiaries are not identified in the recovery decision, the Member State concerned must look at the individual situation of each undertaking concerned …'

10 Section 4.3.2 of the recovery notice, entitled 'Extension of the recovery order; economic continuity', contains the following passage:

'89. If, at the implementation stage of a recovery decision, the aid cannot be recovered from the original beneficiary and it was transferred to another undertaking, the Member State should extend recovery to the undertaking that effectively enjoys the advantage following the transfer of activities and ensure that the recovery obligation is not circumvented …

90. The Court of Justice has drawn a distinction between two means to transfer the activities of an undertaking. These are (i) the sale of all or part of its assets, following which the activity is no longer carried out by the same legal entity ("asset deal"); and (ii) the sale of its shares, following which the undertaking which has benefited from the aid retains its legal personality and continues to carry out its activities ("share deal") …

4.3.2.1 Asset deal

91. Where the beneficiary of incompatible aid creates a new company or transfers its assets to another undertaking to continue some or all of its activities, the continuation of those activities may prolong the distortion of competition brought about by the aid. Accordingly, the newly created company or the buyer of the assets may, if it retains that advantage, be required to pay back the aid in question.

92. In an asset deal scenario, the Commission assesses the existence of economic continuity between undertakings on a case-by-case basis, using an open set of non-cumulative criteria. In particular, the Commission may take into account the following criteria …: (i) the scope of the transfer (assets … and liabilities, maintenance of the workforce and/or management); (ii) the price of the transfer …; (iii) the identity of the shareholders or the owners of the seller and of the buyer; (iv) the time at which the transfer takes place (during the preliminary investigation pursuant to Article 4 of the Procedural Regulation or the formal investigation pursuant to Article 6 of [that regulation], or after adoption of the recovery decision); (v) the economic logic of the operation …'

Italian law

11 Article 48 of legge n. 234 – Norme generali sulla partecipazione dell'Italia alla formazione e all'attuazione della normativa delle politiche dell'Unione europea (Law No 234 on the general rules on the participation of Italy in the development and implementation of the legislation and policies of the European Union) of 24 December 2012 (GURI No 3 of 4 January 2013), in the version applicable to the facts in the main proceedings ('Law No 234/2012'), entitled 'Recovery procedures', states, in paragraphs 1 to 3 thereof:

'1. Equitalia SpA shall collect the amounts due as a result of the recovery decisions referred to in Article 16 of Regulation [2015/1589], irrespective of the form of the aid and of the entity which granted it.

2. Following the notification of a recovery decision referred to in paragraph 1, by a decree to be adopted within 45 days of the date of notification of the decision, the competent minister shall, where appropriate, designate the persons required to repay the aid, establish the amounts due and determine the arrangements and time limits for payment. Where there is more than one competent authority, the President of the Council of Ministers shall, by decree, within 15 days of the date of notification of the recovery decision, appoint an extraordinary administrator to identify the authorities which granted the aid which is the subject of the recovery decision or those which are territorially affected by the aid measures, and shall lay down the rules for implementing the recovery decision referred to in paragraph 1. The extraordinary administrator shall identify, by means of his or her own decision, within 45 days of the appointment decree, the persons required to repay the aid, establish the amounts due and determine the arrangements and time limits for payment. The authorities which granted the aid that is the subject of the recovery

procedure shall provide the extraordinary administrator without delay, at his or her request, with the data and any other information necessary for the proper implementation of the recovery decision referred to in paragraph 1. The extraordinary administrator shall not be entitled to any remuneration. The extraordinary administrator shall carry out the activities relating to the task entrusted to him or her with the human, financial and material resources of the competent authorities provided for by the legislation in force. The decree of the competent minister, the decision of the extraordinary administrator and the decision referred to in paragraph 3 shall be enforceable against those to whom they are addressed.

3. In cases where the competent authority is not the State, the decision identifying the persons required to repay the aid, establishing the amounts due and determining the arrangements and time limits for payment shall be adopted by the region, the autonomous province or the competent territorial authority. The activities referred to in paragraph 1 shall be carried out by the concessionaire for the collection of the revenue of the territorial entity concerned.'

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

12 Buonotourist Srl was a private company that provided local public transport services based on regional and municipal concessions.

13 By decision of 7 November 2012, the Consiglio di Stato (Council of State, Italy) recognised Buonotourist's right to receive additional public service compensation for the provision of passenger transport services by bus on the basis of concessions granted by the Region of Campania for the years 1996 to 2002, quantified at EUR 1 111 572.00 with interest.

14 On 5 December 2012, the Italian authorities notified the Commission, in accordance with Article 108(3) TFEU, of State aid consisting of the grant to Buonotourist of the additional compensation referred to in the preceding paragraph, pursuant to the decision of the Consiglio di Stato (Council of State) of 7 November 2012. The aid was paid to Buonotourist by the Region of Campania on 21 December 2012.

15 By letter of 20 February 2014, the Commission notified the Italian Republic of its decision to open the formal investigation procedure laid down in Article 108(2) TFEU.

16 On 19 January 2015, the Commission adopted Decision (EU) 2015/1075 on State aid SA.35843 (2014/C) (ex 2012/NN) implemented by Italy – Additional public service compensation for Buonotourist (OJ 2015 L 179, p. 128), by which it found that the additional compensation granted to Buonotourist, pursuant to the decision of the Consiglio di Stato (Council of State) of 7 November 2012, constituted State aid within the meaning of Article 107(1) TFEU that was incompatible with the internal market and was granted to that company in breach of Article 108(3) TFEU, and ordered the Italian authorities to recover it from Buonotourist ('the Commission decision of 19 January 2015').

17 Buonotourist brought an action before the General Court of the European Union for annulment of the Commission decision of 19 January 2015. That action was dismissed by judgment of 11 July 2018, *Buonotourist* v *Commission* (T-185/15, EU:T:2018:430). The appeal brought by Buonotourist was dismissed by judgment of the Court of Justice of 4 March 2020, *Buonotourist* v *Commission* (C-586/18 P, EU:C:2020:152).

18 Pursuant to a partial division of undertakings on 21 July 2011, Buonotourist TPL replaced Buonotourist in a 'provisional award' contract relating to a regional bus service. Pursuant to another division of undertakings on 21 October 2013, Autolinee Buonotourist TPL Srl replaced Buonotourist TPL under that contract. On the basis of a lease agreement concluded on 10 May 2019, which ended on 1 July 2021, Autolinee Buonotourist TPL leased to Scai the branch of the business comprising, inter alia, service contracts, staff and buses for the operation of minimum local public transport services. In order to continue the local public transport service, the Region of Campania entrusted the operation of the service to AIR Campania, which it owns in part. That company purchased from Scai the means necessary to operate the service.

19 Buonotourist, Buonotourist TPL and Autolinee Buonotourist TPL were declared insolvent in the period from 2018 to 2020.

20 After attempting unsuccessfully to recover the State aid referred to in the Commission decision of 19 January 2015 from Buonotourist, from Buonotourist TPL and from Autolinee Buonotourist TPL, the Region of Campania ordered Scai, by decree of 7 February 2023, to repay that aid, on the basis of the existence of economic continuity between Buonotourist and Scai ('the recovery order').

21 Scai brought an action against the recovery order before the Tribunale amministrativo regionale della Campania (Regional Administrative Court, Campania, Italy), which is the referring court, alleging, inter alia, infringement of Articles 108, 109 and 288 TFEU, infringement of Article 48 of Law No 234/2012, misuse of powers and infringement of the recovery notice.

22 In support of its action, Scai submitted, first of all, that, by issuing the recovery order, the Region of Campania had unlawfully exercised the powers conferred on the Commission. Although the Commission decision of 19 January 2015 was addressed, according to Scai, to specific addressees, namely the Italian Republic and Buonotourist, the Region of Campania had extended its scope, thus infringing Article 288 TFEU and the recovery notice.

23 Scai added that, in so doing, the recovery order had been adopted by reference to a procedure which had taken place before the Commission and in which it had not participated. In addition, Scai considered that it had been deprived of the right to effective judicial protection, since it had not been entitled to bring an action before the General Court against the Commission decision of 19 January 2015, of which it was not an addressee. Scai emphasised that the Commission was unable to rule on the existence of the aid at issue in the main proceedings, on the compatibility of that aid with the internal market or on the lawfulness of the extension of the recovery order.

24 Next, Scai denied the existence of economic continuity between itself and Autolinee Buonotourist TPL, since, in its view, such continuity could not be inferred from the fact that that company had leased to it a branch of the business.

25 Scai also challenged the idea that it had obtained an anti-competitive advantage through the lease agreement, since no purchase of goods or services on more favourable terms than those of the market could be established. In particular, the lease of Autolinee Buonotourist TPL's business, which had already ended in 2021, was concluded for a reasonable rent, in view of the limited purpose of the lease, and, at the end of the agreement, Scai did not retain any tangible or intangible assets of the lessor.

26 In its defence, the Region of Campania submits before the referring court that it had the power to adopt the recovery order in respect of the applicant in the main proceedings, since there was objective and subjective evidence establishing the existence of economic continuity between the companies concerned previously and Scai, as is apparent from its exchanges with the Commission. Under the lease agreement, Scai obtained the right to use all the tangible and intangible assets necessary for carrying on the business of the company which initially benefited from the aid, as well as a right of option and pre-emption, which would have guaranteed it preference, under certain conditions, in the event of the sale of Autolinee Buonotourist TPL.

27 The Region of Campania stated that it was entitled to extend the subjective scope of the Commission decision of 19 January 2015 since it follows from Article 48(2) and (3) of Law No 234/2012 that, following a recovery decision by the Commission, the competent minister or the competent territorial authority is to designate, where appropriate, the persons required to repay the aid.

28 The referring court questions, in the first place, the compatibility with Articles 108 and 288 TFEU and Regulation 2015/1589 of national legislation, such as that at issue in the main proceedings, which allows the competent national authorities, where the Commission has identified in its recovery decision the undertaking required to repay the aid in question, to extend the status of beneficiary of the aid on the ground that economic continuity exists between the undertaking identified in the recovery decision and the undertaking in respect of which that extension is applied. Such national legislation would encroach on the powers of the Commission as provided for by EU law, since, where that institution has addressed a recovery decision to a specific addressee, only that institution can decide on a possible extension that may be justified by economic continuity.

29 The referring court adds that, if the adoption of the extension decision were left to the competence of the national authorities, in cases in which the addressee of the recovery decision has been precisely identified by the Commission, that possibility would go beyond the mere implementation of Commission decisions, so that the national court, which is responsible for reviewing the legality of the national recovery measure, would indirectly have to review matters falling within the exclusive competence of the Commission.

30 According to the referring court, the judgments of the Court of Justice have thus far dealt with the principle of economic continuity, but not with the question as to which authority is competent to assess the existence of such economic continuity. Nevertheless, the referring court makes reference to certain decisions adopted by the Commission which extend the scope of the beneficiaries due to a transfer of assets, and notes, in that regard, that those decisions show that, where economic continuity is inferred, as it is here, from an asset transfer agreement, the corresponding extension decision has always been adopted by the Commission. In addition, the referring court states that it does not question whether the condition of economic continuity is satisfied in the present case.

31 The referring court observes that, in the present case, the fact that there were exchanges between the competent national authority and the Commission does not mean that the Commission exercised its discretion, since those exchanges took the form not of binding acts, but of mere notes, drafted, moreover, in somewhat sceptical terms and referring to the need for a more in-depth factual investigation.

32 In the second place, the referring court questions the compatibility of national legislation such as that at issue in the main proceedings with the procedural safeguards provided for by EU law, in particular with the *audi alteram partem* rule and with respect for the rights of the defence, enshrined in its view in Article 41 of the Charter, and with the right to effective judicial protection, enshrined in Article 47 thereof. It points out that Scai argued before it that, as a result of the failure to respect the Commission's powers, Scai was deprived of procedural safeguards, both as regards the Commission's initial decision and when Scai was itself subject to the obligation to recover the aid, as its only interlocutor was the national authority. The referring court takes the view that the possibility, for a party in Scai's situation, of challenging the acts of the national authority before the national court is not sufficient to ensure that the person concerned enjoys the procedural safeguards enshrined in EU law and effective judicial protection, since that would entail a ruling on the existence of economic continuity, which falls within the discretion of the Commission alone.

33 In those circumstances the Tribunale amministrativo regionale della Campania (Regional Administrative Court, Campania) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

'(1) Do Articles 108 and 288 TFEU and Articles 16 and 31 of Regulation 2015/1589 preclude national legislation, such as Article 48 of [Law No 234/2012], which allows the national authority, during the implementation stage of recovery, to broaden the circle of persons required to repay the unlawful aid, by means of an assessment concerning economic continuity between undertakings, without excluding that power where the Commission has already identified the direct beneficiaries, thereby excluding the Commission's competence in relation to State aid?

(2) Do Articles 263 and 288 TFEU, Articles 41 and 47 of the [Charter] and Articles 16 and 31 of Regulation 2015/1589 preclude national legislation, such as Article 48 of [Law No 234/2012] on State aid, in so far as – in providing that the State, when implementing a recovery decision, is to identify, where necessary, the persons required to repay the aid – it also permits the decision to be implemented with regard to a person other than the addressees of the decision who is autonomous, did not participate in the procedure before the Commission, did not have the right to be heard and, consequently, does not have legal standing to contest that decision before the General Court of the European Union?'

Consideration of the questions referred

34 By its two questions, which it is appropriate to examine together, the referring court asks, in essence, whether Article 108 and the fourth paragraph of Article 288 TFEU, Articles 16 and 31 of Regulation 2015/1589 and Articles 41 and 47 of the Charter must be interpreted as meaning that, in a situation where a Commission decision orders the recovery of State aid from a beneficiary which it identifies, those provisions preclude national legislation under which the competent national authorities, in the context of their task of implementing that decision, may order the recovery of that aid from another undertaking on account of the existence of economic continuity between that undertaking and the beneficiary of the aid identified in that decision.

35 In the first place, it should be noted that the fourth paragraph of Article 288 TFEU provides that a decision 'shall be binding in its entirety' and that, where it 'specifies those to whom it is addressed', it is to be binding only on them.

36 Furthermore, it follows from Article 31 of Regulation 2015/1589 that decisions finding the notified aid to be incompatible with the internal market ('negative decisions'), adopted pursuant to Article 9(5) of that regulation, and decisions ordering the recovery of the aid, adopted pursuant to Article 16 of that regulation, are to be addressed to the Member State concerned, which is also clear from the case-law of the Court (see, to that effect, judgment of 24 September 2002, *Falck and Acciaierie di Bolzano* v *Commission* (C-74/00 P and C-75/00 P, EU:C:2002:524, paragraphs 81 to 83).

37 It follows from the foregoing considerations that, in the present case, the Commission decision of 19 January 2015 is addressed only to the Italian Republic and that Buonotourist, described in that decision as the beneficiary of the State aid at issue, is not the addressee of that decision.

38 In the second place, it must be borne in mind that, according to settled case-law, the Member State to which a decision requiring recovery of unlawful aid is addressed is obliged under Article 288 TFEU to take all measures necessary to ensure implementation of that decision (judgment of 15 September 2022, *Fossil (Gibraltar)*, C-705/20, EU:C:2022:680, paragraph 39 and the case-law cited).

39 In that regard, it is apparent from recital 25 and the first sentence of Article 16(3) of Regulation 2015/1589 that recovery of aid is to 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 that end, the Member States concerned must, in accordance with the last sentence of Article 16(3) of that regulation, 'take all necessary steps' which are available in their respective legal systems, including provisional measures, without prejudice to EU law (see, to that effect, judgments of 20 May 2010, *Scott and Kimberly Clark*, C-210/09, EU:C:2010:294, paragraph 28, and of 11 September 2014, *Commission* v *Germany*, C-527/12, EU:C:2014:2193, paragraph 38). The Member State must actually recover the sums owed (judgment of 5 May 2011, *Commission* v *Italy*, C-305/09, EU:C:2011:274, paragraph 27).

40 Furthermore, according to the case-law of the Court, given that the main purpose of the repayment of unlawfully paid State aid is to eliminate the distortion of competition caused by the competitive advantage afforded by the unlawful aid, such aid must be recovered from the company which carries on the economic activity of the undertaking which initially benefited from the advantage associated with the grant of State aid and which, therefore, retains the actual benefit thereof (judgment of 7 March 2018, *SNCF Mobilités* v *Commission*, C-127/16 P, EU:C:2018:165, paragraphs 104 and 106 and the case-law cited). That is also stated in the first sentence of paragraph 83 of the recovery notice.

41 The considerations set out in paragraphs 38 to 40 above thus preclude Article 288 TFEU from being interpreted as meaning that the Member States are required to recover State aid that has been declared unlawful and incompatible by a Commission decision solely from the beneficiary of the aid at issue identified in that decision.

42 As regards a recovery decision specifically identifying, as in the present case, the beneficiary of individual aid, it should be noted that that identification corresponds only, as the Commission points out in its observations, to an assessment of the situation carried out when that decision was adopted, on the basis of the information available to that institution at that precise time.

43 Accordingly, that identification forms part of the identification of the aid referred to in the Commission decision. Therefore, that decision cannot be interpreted as preventing the Member State concerned from recovering the aid in question from another undertaking where, in accordance with the case-law cited in paragraph 40 above, that other undertaking carries on the economic activity of the beneficiary of the aid and retains the actual benefit of the competitive advantage associated with the grant of the aid.

44 It may occur that the competitive advantage associated with the grant of individual aid is passed on to another undertaking after the adoption of the Commission recovery decision, for example on the occasion of a transfer of assets, as stated in paragraphs 89 to 92 of the recovery notice.

45 Concerning a transfer of assets, economic continuity between companies who are parties to the transfer is assessed in the light of the subject matter of the transfer (assets and liabilities, maintenance of the workforce, bundled assets), the transfer price, the identity of the shareholders or owners of the acquiring undertaking and the original undertaking, the moment when the transfer takes place (after the commencement of the investigation, opening of the procedure or the final decision) and also the economic logic of the operation (judgment of 7 March 2018, *SNCF Mobilités* v *Commission*, C-127/16 P, EU:C:2018:165, paragraph 108 and the case-law cited).

46 Consequently, in the context of their task of recovering the aid, and in order to ensure the full effectiveness of a Commission recovery decision specifically identifying the beneficiary of the aid and to effectively eliminate the distortion of competition caused by the competitive advantage linked to the receipt of the aid, the national authorities and courts are required to identify an undertaking other than that identified in that recovery decision, where the advantage linked to the aid in question has actually been transferred to that other undertaking, after the adoption of that recovery decision.

47 The existence of such an obligation borne by national authorities is confirmed by the settled-case-law of the Court, which recalls that the national courts and the Commission fulfil complementary and separate roles (judgment of 7 December 2023, *RegioJet and STUDENT AGENCY*, C-700/22, (EU:C:2023:960, paragraph 13), and that proceedings may be brought before national courts in matters relating to State aid which require them to interpret and apply the concept of 'aid' referred to in Article 107(1) TFEU, but that national courts do not have jurisdiction to give a decision on whether State aid is compatible with the internal market, that being an assessment which falls within the exclusive competence of the Commission, subject to review by the EU Courts (see, to that effect, judgment of 4 March 2020, *Buonotourist* v *Commission* (C-586/18 P, EU:C:2020:152, paragraph 90 and the case-law cited).

48 As regards the referring court's doubts as to whether or not the notes and informal instructions provided by the Commission's services to the national authorities for the purpose of carrying out the analysis of economic continuity have decision-making character, the Court has held that such statements of position are not among the acts which may be adopted on the basis of Regulation 2015/1589 and cannot be regarded as being binding on the national court. The Court has stated however that, to the extent that such statements of position, as well as the Commission opinions which may be sought by the national court, are intended to facilitate the accomplishment of the task of the national authorities in the immediate and effective execution of the recovery decision, and having regard to the principle of cooperation in good faith laid down in Article 4(3) TEU, the national court must take them into account as a factor in the assessment of the dispute before it

and must state reasons having regard to all the documents in the file submitted to it (see, to that effect, judgment of 13 February 2014, *Mediaset*, C-69/13, EU:C:2014:71, paragraphs 26, 28 and 31).

49 In the third place, in the light of the information provided by the referring court, summarised in paragraph 32 above, it is necessary, as regards Articles 41 and 47 of the Charter, to distinguish between, on the one hand, the possibility, for an undertaking in a situation such as that of the applicant in the main proceedings, of participating in the procedure for the examination of State aid by the Commission and, where appropriate, challenging the Commission decision declaring that aid unlawful and incompatible, and, on the other hand, the possibility for that undertaking of participating in the procedure before a national authority which may lead to a decision finding the existence of economic continuity between that undertaking and the beneficiary of the aid identified in the Commission decision and requiring that undertaking to repay the aid in question, and, where appropriate, the possibility of challenging that national decision.

50 First, as regards the procedure before the Commission, it must be observed that the procedure for reviewing State aid is, in view of its general scheme, a procedure initiated in respect of the Member State responsible, in the light of its obligations under EU law, for granting the aid. Accordingly, in that procedure, interested parties other than the Member State concerned cannot themselves seek to engage in an adversarial debate with the Commission in the same way as is offered to that Member State. That procedure is not a procedure initiated against the recipient or recipients of aid, entailing rights on which it or they could rely which are as extensive as the rights of the defence as such (see, to that effect, judgment of 11 March 2020, *Commission* v *Gmina Miasto Gdynia and Port Lotniczy Gdynia Kosakowo*, C-56/18 P, EU:C:2020:192, paragraphs 73 to 75).

51 As regards the situation in which the actual beneficiary of aid, designated as such in a national recovery measure on account of the existence of economic continuity with the earlier beneficiary, would not have been entitled to bring an action for annulment under Article 263 TFEU against the Commission decision declaring that aid unlawful and incompatible and ordering its recovery, it must be observed that an actual beneficiary of that type is nevertheless guaranteed judicial protection by EU law.

52 It is apparent from the case-law of the Court that the review, by the national court, of a national measure seeking the recovery of unlawful and incompatible State aid must be viewed simply as an expression of the right to effective judicial protection enshrined in Article 47 of the Charter (see, to that effect, judgment of 20 May 2010, *Scott and Kimberly Clark*, C-210/09, EU:C:2010:294, paragraph 25 and the case-law cited).

53 In that context, the actual beneficiary may also challenge before the national courts the validity of the Commission decision declaring the aid unlawful and incompatible, where that actual beneficiary would not, beyond any doubt, have been entitled to bring a direct action under Article 263 TFEU against that decision (see, to that effect, judgments of 17 February 2011, *Bolton Alimentari*, C-494/09, EU:C:2011:87, paragraphs 22 and 23 and the case-law cited, and of 25 July 2018, *Georgsmarienhütte and Others*, C-135/16, EU:C:2018:582, paragraph 17 and the case-law cited). Admittedly, national courts have no jurisdiction themselves to declare such a decision invalid, since only the Court of Justice is empowered to determine that EU acts are invalid (see, to that effect, judgment of 18 July 2007, *Lucchini* (C-119/05, EU:C:2007:434, paragraph 53 and the case-law cited). However, where a national court or tribunal considers that one or more arguments for invalidity of an EU act, put forward by the parties or, as the case may be, raised by it of its own motion, are well founded, it is incumbent upon it to stay proceedings and to make a

reference to the Court for a preliminary ruling on the act's validity, the Court alone having jurisdiction to declare an EU act invalid (judgment of 3 October 2013, *Inuit Tapiriit Kanatami and Others* v *Parliament and Council*, C-583/11 P, EU:C:2013:625, paragraph 96 and the case-law cited).

54 Second, as regards respect for the rights of the actual beneficiary of aid in proceedings before a national authority which may lead to a decision finding the existence of economic continuity and ordering the recovery of the aid from that actual beneficiary, it should be noted at the outset that, as is apparent from paragraph 32 above, the referring court starts from the premiss that the finding of the existence of economic continuity falls within the sole discretion of the Commission. It is clear from paragraphs 41 and 43 above that that premiss is incorrect.

55 In any event, while it follows from the wording of Article 41 of the Charter that it is not addressed to the Member States (judgment of 17 July 2014, *YS and Others*, C-141/12 and C-372/12, EU:C:2014:2081, paragraph 67), the fact remains that, according to the case-law of the Court, when they take measures which come within the scope of EU law, the authorities of the Member States are also, as a rule, subject to the obligation to observe the rights of the defence of addressees of decisions which significantly affect their interests (judgment of 10 September 2013, *G. and R.*, C-383/13 PPU, EU:C:2013:533, paragraph 35). It is therefore for the national authority which intends to adopt a decision to recover aid that has been declared unlawful from the actual beneficiary of that aid to ensure that the latter's rights of defence are observed.

56 In addition, it is apparent from paragraph 52 above that it must be possible for the actual beneficiary of the aid to have such a decision reviewed by a national court, which, if it has doubts as to the interpretation of EU law, may or, as the case may be, must refer the matter to the Court for a preliminary ruling, in accordance with Article 267 TFEU.

57 In the light of the foregoing, the answer to the questions referred is that Article 108 and the fourth paragraph of Article 288 TFEU, Articles 16 and 31 of Regulation 2015/1589 and Articles 41 and 47 of the Charter must be interpreted as meaning that, in a situation where a Commission decision orders the recovery of State aid from a beneficiary which it identifies, those provisions do not preclude national legislation under which the competent national authorities, in the context of their task of implementing that decision, may order the recovery of that aid from another undertaking on account of the existence of economic continuity between that undertaking and the beneficiary of the aid identified in that decision.

Costs

58 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the referring court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Tenth Chamber) hereby rules:

Article 108 and the fourth paragraph of Article 288 TFEU, Articles 16 and 31 of Council Regulation (EU) 2015/1589 of 13 July 2015, laying down detailed rules for the application of Article 108 [TFEU], and Articles 41 and 47 of the Charter of Fundamental Rights of the European Union,

must be interpreted as meaning that in a situation where a decision of the European Commission orders the recovery of State aid from a beneficiary which it identifies, those provisions do not preclude national legislation under which the competent national authorities, in the context of their task of implementing that decision, may order the recovery of that aid from another undertaking on account of the existence of economic continuity between that undertaking and the beneficiary of the aid identified in that decision.

[Signatures]