Reports of Cases

OPINION OF ADVOCATE GENERAL
WATHELET
delivered on 26 March 2015 [1]

**Case C-89/14**

**A2A SpA**
**v**
**Agenzia delle Entrate**

(Request for a preliminary ruling from the Corte suprema di cassazione (Italy))

(Reference for a preliminary ruling — State aid — Decision to recover unlawful aid — Method of calculating the interest applicable to that recovery — Regulation (EC) No 794/2004 — Article 11 — Compound interest — Article 13 — Date of entry into force — National legislation referring to the provisions of Regulation (EC) No 794/2004 and providing for the application of compound interest — Provisions which are non-applicable ratione temporis to the recovery decision — General principles of EU law)

## I – **Introduction**

1. This request for a preliminary ruling, lodged at the Court Registry on 21 February 2014, was made in the context of a dispute between A2A SpA ('A2A') and the Agenzia delle Entrate (Revenue Authority) regarding the recovery from A2A of aid deemed to be unlawful and 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. [2]

2. The 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 [108 TFEU] [3] and of Articles 9, 11 and 13 of Commission Regulation (EC) No 794/2004 of 21 April 2004 implementing Regulation No 659/1999. [4]

3. More specifically, the referring court asks whether those provisions preclude national legislation which, by making reference to Articles 9 and 11 of Regulation No 794/2004, requires the application of the compound interest method when calculating the interest due on the aid to be recovered. However, I would point out from the outset that, pursuant to Article 13 of that regulation, to which the national legislation does not refer, the calculation at issue was not applicable ratione temporis to the aid in question.

1 — Original language: French.
2 — OJ 2003 L 77, p. 21.
3 — OJ 1999 L 83, p. 1.
4 — OJ 2004 L 140, p. 1.

## II – **Legal context**

### A – *EU law*

#### 1. Decision 2003/193

4. On 5 June 2002, the Commission adopted Decision 2003/193, Articles 2 and 3 of which read as follows:

'*Article 2*

The three-year exemption from income tax provided for by Article 3(70) of Law No 549 of 28 December 1995 and by Article 66(14) of Decree-law No 331 of 30 August 1993, converted into Law No 427 of 29 October 1993, and the advantages resulting from loans granted under Article 9a of Decree-law No 318 of 1 July 1986, as converted and amended by Law No 488 of 9 August 1986, to joint stock companies with majority public shareholdings set up in accordance with Law No 142 of 8 June 1990, constitute State aid within the meaning of Article [107(1) TFEU].

Such aid is incompatible with the common market.

*Article 3*

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.'

5. Decision 2003/193 was notified to the Italian Republic on 7 June 2002.

#### 2. Regulation No 659/1999

6. Article 14 of that regulation, entitled 'Recovery of aid', provides as follows:

'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 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 [European Union] law.'

3. Regulation No 794/2004

7. Articles 9 and 11 of Regulation No 794/2004 are contained in Chapter V, entitled 'Interest rate for the recovery of unlawful aid'.

8. 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 [108(3) TFEU] shall be an annual percentage rate fixed for each calendar year.

…'

9. Article 11 of Regulation No 794/2004, entitled 'Method for applying interest', states:

'1. The interest rate to be applied shall be the rate applicable on the date on which unlawful aid was first put at the disposal of the beneficiary.

2. 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.

3. The interest rate referred to in paragraph 1 shall be applied throughout the whole period until the date of recovery. …'

10. Article 13 of Regulation No 794/2004, which is contained in Chapter VI entitled 'Final provisions', concerns the entry into force of that regulation. The first subparagraph of that article provides that '[t]his Regulation shall enter into force on the twentieth day following that of its publication in the *Official Journal of the European Union*'. The fifth subparagraph of that article provides that 'Articles 9 and 11 shall apply in relation to any recovery decision notified after the date of entry into force of this Regulation' (that is 20 May 2004), which is not the case with the Commission Decision at issue in this case, which was notified on 7 June 2002.

B – *Italian law*

11. 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.'

12. Paragraph 24(4) of Decree-Law No 185 of 29 November 2008[5] on urgent measures to support families, work, employment and business and to restructure the national strategic framework to combat the crisis, as amended and converted by Law No 2 of 28 January 2009[6] ('Decree-Law No 185/2008'[7]), provides:

'The interest shall be determined on the basis of Chapter V of … Regulation (EC) No 794/2004 …'

13. According to the Corte suprema di cassazione (Court of Cassation), the reference in Paragraph 24(4) of Decree-Law No 185/2008 to Chapter V of Regulation No 794/2004 only, and not also to Chapter VI thereof, which contains the transitional provision laid down in the fifth subparagraph of Article 13, means that compound interest must be applied to the recovery at issue, even though that recovery relates to a Commission Decision adopted prior to the entry into force of that regulation.[8]

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

14. A2A was borne of the merger between ASM Brescia SpA and AEM SpA.

15. For the period covering the years 1996 to 1999, ASM Brescia SpA and AEM SpA benefited from an exemption from the tax on the income of legal persons and from the local tax on income under a preferential scheme established by national legislation for joint stock companies with a majority public shareholding.

16. That exemption was deemed to constitute unlawful 'State aid' incompatible with the common market by Decision 2003/193 of 5 June 2002, notified on 7 June 2002.

17. In its judgment in *Commission* v *Italy* (C-207/05, EU:C:2006:366), the Court held that 'by failing to adopt, within the prescribed period, the necessary measures to recover aid declared unlawful and incompatible with the common market by Decision [2003/193], the Italian Republic has failed to fulfil its obligations under Articles 3 and 4 of that decision'.

18. In the wake of that judgment, the Italian legislature took steps to regulate the recovery of the aid in question by adopting inter alia Paragraph 24(4) of Decree-Law No 185/2008, under which interest was to be calculated in accordance with Chapter V of Regulation No 794/2004, namely by applying the compound interest method.

5 — Ordinary supplement to GURI No 280 of 29 November 2008.

6 — Ordinary supplement to GURI No 22 of 28 January 2009.

7 — It should be noted that the request for a preliminary ruling also refers to Paragraph 1 of Decree-Law No 10 of 15 February 2007 on the application of Community and international obligations, as amended and converted by Law No 46 of 6 April 2007 ('Decree-Law No 10/2007'), which is entitled 'Execution of the judgment given by the Court of Justice of the European Communities on 1 June 2006 in Case C-207/05. Implementation of Commission Decision 2003/193/EC of 5 June 2002 …'. According to the referring court, the wording of Paragraph 1 of Decree-Law No 10/2007 is identical to that of Paragraph 24(4) of Decree-Law No 185/2008 and that of Paragraph 19 of Decree-Law No 135 of 25 September 2009 laying down urgent provisions for the implementation of Community obligations and the enforcement of judgments of the Court of Justice of the European Communities, as amended and converted by Law No 166 of 20 November 2009 (ordinary supplement to GURI No 274 of 24 November 2009). However, the referring court does not explain the relationship between those three provisions. In any event, it is apparent from the request for a preliminary ruling that the relevant section of judgment No 99/19/10 of the Commissione tributaria regionale della Lombardia (Regional Tax Court, Lombardy) makes reference to Paragraph 24(4) of Decree-Law No 185/2008. I therefore intend to restrict my analysis largely to that provision.

8 — Although Paragraph 24(4) of Decree-Law No 185/2008 unquestionably applies to the aid to be recovered under Decision 2003/193, I would point out that it is not clear from the national legal framework set out by the referring court whether the compound interest method was applied or made applicable only to the aid to be recovered in accordance with that decision, and not to other unlawful aid.

19. A2A brought an action before the Commissione tributaria regionale della Lombardia against the assessment notices [9] which had been notified to it [10] with a view to recovering the taxes which had not been paid by ASM Brescia SpA and AEM SpA pursuant to the exemption from the tax in question deemed to constitute 'unlawful aid'.

20. It is apparent from the request for a preliminary ruling that, by its judgment No 99/19/10, the Commissione tributaria regionale della Lombardia inter alia decided that 'the calculation of the interest on a compound basis [was] correct, since it was done in accordance with Paragraph 24(4) of Decree-Law No 185/2008 …, under which the interest [was to] be calculated in accordance with Chapter V of … Regulation (EC) No 794/2004 …, which merely [acknowledged] what has been the European Commission's practice since at least 1997'.

21. A2A brought an appeal against that judgment before the Corte suprema di cassazione, claiming inter alia that that finding by the Commissione tributaria regionale della Lombardia infringed 'Article 3 of Decision 2003/193 in conjunction with Article 13 of Regulation (EC) No 794/2004'.

22. A2A submits that the national legislation adopted for the purposes of the calculation of interest, namely Paragraph 24 of Decree-Law No 185/2008, is incompatible with EU law, inasmuch as that legislation refers to Regulation No 794/2004, Articles 9 and 11 of which lay down rules for the calculation of interest which are more stringent than the rules previously adopted, whereas the fifth subparagraph of Article 13 of that regulation provides that those rules apply to all recovery decisions notified after date on which the regulation entered into force (that is on 20 May 2004) and, consequently, not to Decision 2003/193.

23. The Corte suprema di cassazione points out, first, that no provision of EU law appears expressly to prohibit the Member States from adopting such a rule, but on the other hand finds that:

— Regulation No 794/2004 unequivocally establishes that the method laid down therein for applying interest is to be used for recovery decisions notified after the date of the regulation's entry into force;

— on the date of the adoption of Decision 2003/193 in June 2002, neither EU law nor the case-law of the Court specified that the interest to be applied in recovering the aid was to be calculated on a compound basis, with the Commission's practice actually referring in that regard to the provisions of national law; and

— under Italian law, the calculation of interest generated by interest (compound interest) with regard to any financial obligation, and therefore including State debts, is permitted only within the limits set by Article 1283 of the Italian Civil Code.

9 — It is apparent from the national file lodged at the Court Registry that the main proceedings relate to the following assessment notices: avviso di accertamento No R1P3101304/2009 IRPEG + ILOR 1996; avviso di accertamento No TMB030200374/2009 IRPEG 1998; avviso di accertamento No TMB030200379/2009 IRPEG 1999; avviso di accertamento No TMB030200381/2009 IRPEG 1998; avviso di accertamento No TMB030200382/2009 IRPEG 1999; and avviso di accertamento No R1P3100012/2009 IRPEG + ILOR 1997.

10 — According to the national file lodged at the Court Registry and the request for a preliminary ruling, the interest stated in those assessment notices was calculated in accordance with Chapter V of Regulation No 794/2004, to which Paragraph 24(4) of Decree-Law No 185/2008 refers.

24. In those circumstances, the Corte suprema di cassazione decided to stay the proceedings and to refer the following question to the Court for a preliminary ruling:

'Must Article 14 of [Regulation No 659/1999] and Articles 9, 11 and 13 of [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?'

## IV – **The procedure before the Court**

25. Written observations have been submitted by the Italian Government, A2A and the Commission. Since none of the parties concerned made a corresponding application, the Court decided to give a ruling without hearing of oral argument.

## V – **Analysis**

### A – *Reference to national law in relation to the calculation of interest for the period prior to Regulation No 794/2004*

26. The purpose of the question referred by the Corte suprema di cassazione is to ascertain whether EU law precludes national legislation, namely Decree-Law No 185/2008, which provides for the application of the compound interest method to the recovery of unlawful aid by referring to Regulation No 794/2004, Article 11 of which requires the application of that method, even though the decision to recover the aid at issue was notified to the Italian Republic prior to the date on which that regulation entered into force. [11]

27. It is established that, pursuant to the fifth subparagraph of Article 13 of Regulation No 794/2002, Articles 9 and 11 of that regulation do not apply ratione temporis to Decision 2003/193 because that decision was notified to the Italian Republic prior to the entry into force of the regulation. [12] Accordingly, Regulation No 794/2004 requires the application of the compound interest method to the recovery of unlawful aid only where the recovery decision was notified after the date on which that regulation entered into force.

28. However, by adopting Paragraph 24(4) of Decree-Law No 185/2008, the Italian legislature deliberately chose to apply the compound interest method to the aid to be recovered under Decision 2003/193, even though that decision pre-dated the entry into force of Article 11 of Regulation No 794/2004. Furthermore, it is clear from the documents before the Court that Paragraph 24(4) of Decree-Law No 185/2008 departs from Article 1283 of the Italian Civil Code, which provides for the calculation of interest on a compound basis in specific cases and in accordance with very strict requirements only.

11 — It should be noted that this question relates solely to the method for the calculation of interest applicable to the recovery of the unlawful aid in question and not to the actual principle of its recovery plus interest, as required under Article 14(2) of Regulation No 659/1999. Indeed, by judgment of 11 June 2009, the General Court dismissed actions brought by AEM SpA and ASM Brescia SpA seeking the annulment of Articles 2 and 3 of Decision 2003/193. See the judgments in *ASM Brescia* v *Commission* (T-189/03, EU:T:2009:193) and *AEM* v *Commission* (T-301/02, EU:T:2009:191), upheld on appeal, respectively, by the judgments in *A2A* v *Commission* (C-318/09 P, EU:C:2011:856) and *A2A* v *Commission* (C-320/09 P, EU:C:2011:858).

12 — See points 5 and 10 of this Opinion.

29. A2A takes the view that the fifth paragraph of Article 13 of Regulation No 794/2004 'establishes an unequivocal time-bar' and that, since Decision 2003/193 'is dated 5 June 2002 and was notified to the Italian Republic on 7 June 2002, that is prior to the entry into force of Regulation No 794/2004, on 20 May 2004, it is clear that, as far as the mere execution of that decision is concerned, the reference to the Regulation in question (dating from 2004) cannot justify the application of compound interest (as provided for in the Regulation)'.

1. EU law prior to Regulation No 794/2004 did not require the application of any method for the calculation of compound interest

30. It must be stated that, in the absence of further information and given the silence of the text of Regulation No 794/2004, it cannot be inferred from the mere non-applicability ratione temporis of Article 11 of Regulation No 794/2004 to Decision 2003/193 that EU law precludes national legislation which provides for the application of the compound interest method to the recovery of the unlawful aid at issue in the main proceedings. Although the fifth subparagraph of Article 13 of Regulation No 794/2004 clearly requires the Member States to apply the compound interest method to recoveries of unlawful aid with effect from a date which it specifies, the wording of that provision does not prohibit its application prior to that date.

31. I would also point out that, at the time of the adoption and of the notification of Decision 2003/193 in June 2002, there was no provision of EU law or any case-law of the Court of Justice or the General Court which required or excluded the choice of a specific method for the calculation of interest applicable to the recovery of unlawful aid. [13]

32. It should be noted in that regard that, although Article 14(2) of Regulation No 659/1999 provides that '[t]he aid to be recovered pursuant to a recovery decision shall include interest at an appropriate rate fixed by the Commission', that provision is silent on the issue of whether that interest is to be calculated on a simple basis or a compound basis.

33. In addition, with regard to Decision 2003/193, Article 3 thereof provides that '[r]ecovery 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' and that '[t]he 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', 'calculated on the basis of the reference rate used for calculating the grant equivalent of regional aid'. In spite of the clarifications provided regarding the reference period and rate [14] for the calculation of the interest, Decision 2003/193 provides no indication as to whether the interest [15] is to be calculated according to the simple interest method or the compound interest method.

2. EU law prior to Regulation No 794/2004 refers to the national law for the purposes of calculating the interest

34. Although in its judgment in *Commission* v *Département du Loiret* (C-295/07 P, EU:C:2008:707, paragraph 83) the Court rules that 'the method for calculating the present-day value of unlawful aid is a substantive and not a procedural matter', that judgment likewise makes clear that, prior to the adoption of Regulation No 794/2004, and given the silence of the recovery decision on the issue of

13 — See, to that effect, the judgment in *Commission* v *Département du Loiret* (C-295/07 P, EU:C:2008:707, paragraphs 46 and 82). In paragraph 46 of that judgment, the Court observes that, in its Communication 2003/C 110/08 of 8 May 2003 on the interest rates to be applied when aid granted unlawfully is being recovered (OJ 2003 C 110, p. 21), 'the Commission expressly acknowledged that the question had arisen as to whether such interest ought to be simple or compound and considered it necessary to clarify urgently its position on the matter. It accordingly informed the Member States and interested parties that, in any decision ordering the recovery of unlawful aid that it might adopt in the future, it would apply a compound interest rate'.

14 — See, by analogy, Article 9 of Regulation No 794/2004.

15 — See, by analogy, Article 11 of Regulation No 794/2004.

whether or not the present-day value of the aid to be recovered must be calculated on the basis of a compound interest rate, the recovery of the amount of aid paid unlawfully was effected in accordance with national law, including the provisions concerning interest due for late payment of amounts owing to the government.[16] The Court therefore took the view that the practice established by the Commission linked the matter of charging interest and the calculation of that interest to the procedural rules for recovery, and referred in that regard to national law.[17] In that judgment, the Court noted that French law provided for the application of a simple interest rate. It therefore found that the recovery decision at issue was to be interpreted as meaning that the interest relating to the period between the date of that decision and the date of recovery of the aid will be calculated at a simple rate.

35. I am therefore of the view that, by providing that the recovery of the aid in question was to be effected in accordance with the procedures laid down in the national law of the Member State concerned, Article 3 of Decision 2003/193 leaves the question of the method of calculating the interest open. It follows that the Italian Republic was free to choose between the application of interest on a simple basis or on a compound basis.[18] I would add that the Italian legislature made its choice by reference to a method which is indeed laid down in Regulation No 794/2004, but did so without any allusion to its intention in so doing to execute an obligation imposed on it by EU law.

B – *Does EU law lay down limits on the exercise of that freedom?*

36. In this connection, it is quite clear that Article 3 of Decision 2003/193 implements Article 14 of Regulation No 659/1999, which lays down the procedure for the recovery of unlawful aid by the Member States.

37. Thus, pursuant to Article 14(1) of Regulation No 659/1999, where negative decisions are taken in cases of unlawful aid, the Commission is to decide that the Member State concerned must take all necessary measures to recover the aid from the beneficiary. That paragraph adds that the Commission is not to require recovery of the aid if this would be contrary to a general principle of EU law.

38. Under the first sentence of Article 14(3) of that regulation, recovery is to be effected without delay and in accordance with the procedures under the national law of the Member State concerned, in so far as those procedures allow the immediate and effective execution of the Commission's decision. To this effect, and in accordance with the final sentence of Article 14(3) of the regulation, the Member States concerned are to take all necessary steps which are available in their respective legal systems, including provisional measures, without prejudice to EU law.

16 — The Commission stated, 'in its letter to the Member States SG(91) D/4577 of 4 March 1991 that the final decision by which it declares aid to be incompatible with the common market will entail recovery of the amount of aid already paid unlawfully, to be effected in accordance with national law, including the provisions concerning interest due for late payment of amounts owing to the government, interest which should normally run from the date of the award of the unlawful aid in question'. By its communication of 30 April 2004 concerning the obsolescence of certain State aid policy documents (OJ 2004 C 115, p. 1), the Commission informed the Member States and interested third parties that it no longer intended to apply that letter. It is clear from that communication that '[f]ollowing the adoption by the Commission of … Regulation (EC) No 794/2004 …, a number of these texts have become obsolete. These texts concern the notification obligation, notification procedures, including accelerated notifications, annual reporting, time-limits and recovery of unlawful aid'. Judgment in *Commission* v *Département du Loiret* (EU:C:2008:707, paragraphs 83 and 84).

17 — See, to that effect, the judgment in *Commission* v *Département du Loiret* (EU:C:2008:707, paragraphs 80 to 86).

18 — In my opinion, Article 3 of Decision 2003/193, which is worded almost identically to the provision at issue in the judgment in *Commission* v *Département du Loiret* (EU:C:2008:707), expressly links the matter of charging interest to the procedural rules for recovery, and refers in that regard to national law.

39. The conditions required under Article 14(3) of Regulation No 659/1999 simply reflect the requirements of the principle of effectiveness laid down by the case-law of the Court.[19] In accordance with the principle of effectiveness, as consistently applied specifically to State aid in case-law, a Member State which, pursuant to a decision of the Commission, is obliged to recover unlawful aid is — in accordance with the principle of procedural autonomy — free to choose the means of fulfilling that obligation, provided that the measures chosen do not adversely affect the scope and effectiveness of EU law[20] and observe the general principles of EU law and fundamental rights.[21]

40. It is therefore necessary to determine whether or not the application of the compound interest method laid down in national legislation such as that at issue in the main proceedings adversely affects the scope and effectiveness of EU law and is contrary to fundamental rights or to a general principle of EU law. After all, the requirements flowing from the protection of the general principles recognised in the European Union legal order are also binding on the Member States when they implement EU rules,[22] in the present case Article 14(1) of Regulation No 659/1999 and Article 3 of Decision 2003/193.

1. The measure at issue in the light of the effectiveness of EU law on State aid

41. The Court has consistently held that the withdrawal of unlawful aid by recovery is the logical consequence of the finding that it is unlawful. By repaying the amount of aid paid, the recipient forfeits the advantage which it had enjoyed over its competitors on the market, and the situation prior to payment of the aid is restored.[23]

42. Furthermore, as is stated in Communication 2003/C 110/08, the effects of the unlawful aid to be repaid 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'.[24] It follows that the application of compound interest merely calculates the present-day financial value of the unlawful aid from which the recipient benefited.

43. Accordingly, national legislation such as that at issue in the main proceedings, which requires the recovery of interest calculated on a compound basis on the aid granted unlawfully and which is therefore intended to eliminate the financial advantages afforded by that aid, including those incidental to the aid,[25] is appropriate for the purpose of re-establishing the normal conditions of competition which were distorted by the grant of the unlawful aid in question[26] and, therefore, is capable of guaranteeing the scope and effectiveness of EU law on State aid.

19 — See the judgment in *Scott and Kimberly Clark* (C-210/09, EU:C:2010:294, paragraph 20 and the case-law cited).

20 — Judgment in *Scott and Kimberly Clark* (EU:C:2010:294, paragraph 21).

21 — Judgment in *Commission* v *Germany* (C-527/12, EU:C:2014:2193, paragraph 39).

22 — Judgment in *Gerekens and Procola* (C-459/02, EU:C:2004:454, paragraph 21).

23 — Judgment in *Unicredito Italiano* (C-148/04, EU:C:2005:774, paragraph 113 and the case-law cited).

24 — See also recital 13 in the preamble to Regulation No 794/2004 which provides that '[a] State aid grant may be deemed to reduce a beneficiary undertaking's medium-term financing requirements. …'

25 — See, by analogy, the judgment in *Falck and Acciaierie di Bolzano* v *Commission* (C-74/00 P and C-75/00 P, EU:C:2002:524, paragraph 159), in which the Court held that 'the previously existing situation cannot of necessity be restored unless repayment of the aid bears interest running from the date of payment of the aid and the interest rates applied are representative of the rates of interest charged on the market. Otherwise, the recipient would at the very least retain an advantage amounting to an interest-free government advance or subsidised loan'.

26 — See the judgment in *Scott and Kimberly Clark* (EU:C:2010:294, paragraph 22 and the case-law cited).

2. The measure at issue in the light both of the inertia of the Italian Republic and the protection of the general principles of legitimate expectations and legal certainty

44. A2A observes that the delay in the recovery of the aid at issue in the main proceedings and the fact that action was taken only after the Court found — in its judgment in *Commission* v *Italy* (C-207/05, EU:C:2006:366) — that the Italian Republic had failed to fulfil its obligations must be attributed exclusively to the 'inertia' of that Member State. Accordingly, in A2A's opinion, the application of compound interest would constitute 'undue taxation'.

45. That argument cannot be accepted.

46. The application of compound interest from the date of receipt of the unlawful aid until the date of its recovery is simply a means of matching the recovery to the actual value over time of the aid from which A2A benefited. [27] There can therefore be no question of a tax or 'undue taxation'

47. A2A is also of the view that 'the protection of legitimate expectations precludes national legislation which retroactively deprives a person of the legally protected expectation that his repayment obligation would attract simple interest only'. It further observes that the acts of the institutions and the national measures implementing those acts must be certain and foreseeable so as to enable interested parties to assess their effects in good time and to understand the precise scope of the obligations imposed on them by those acts and measures. According to A2A, that requirement of legal certainty is to be applied with particular rigour in the case of legislation liable to entail financial costs for individuals.

48. Although, as a general rule, the principle of legal certainty, which is one of the general principles recognised in the European Union legal order and is binding on the Member States when they implement EU rules, [28] 'precludes a[n] … act from taking effect as from a date prior to its publication', [29] I do not take the view — contrary to A2A's observations — that the national legislation at issue in the main proceedings is applied retroactively.

49. It is in fact unclear from the documents produced before the Court, but subject to verification by the referring court, whether Decree-Law No 185/2008 applied the compound interest method retroactively to aid which had already been recovered or whether it entered into force prior to its date of publication. I would point out that, at the time the assessment notices at issue in the main proceedings were sent out, [30] Decree-Law No 185/2008 was already applicable because Article 36 of that decree-law fixes the date of its entry into force as the date of its publication in the *Gazzetta ufficiale della Repubblica italiana* (Official Gazette of the Italian Republic), that is 29 November 2008. [31]

50. In addition, although it is true that the compound interest method applied to the calculation of the interest due on the aid to be recovered under Decision 2003/193 was applicable neither under EU law nor under Italian law prior to the adoption of Decree-Law No 185/2008, and, therefore, not at the time of the adoption and notification of that decision, it does however follow from settled case-law that new rules apply immediately to the future effects of a situation which arose under the old rules. [32]

27 — See points 42 and 43 of this Opinion.

28 — See, to that effect, the judgment in *Gerekens and Procola* (EU:C:2004:454, paragraphs 21 to 24).

29 — See the judgment in *Netherlands* v *Council* (C-110/97, EU:C:2001:620, paragraph 151 and the case-law cited). In addition, in accordance with settled case-law, in order to ensure observance of the principles of legal certainty and the protection of legitimate expectations, substantive rules of law must be interpreted as applying to situations existing before their entry into force only in so far as it clearly follows from their terms, their objectives or their general scheme that such effect must be given to them [see also, to that effect, the judgment in *Pokrzeptowicz-Meyer* (C-162/00, EU:C:2002:57, paragraph 49)].

30 — Subject to verification by the referring court, those notices appear to have been issued in 2009. See footnote 9 of this Opinion.

31 — Since Decree-Law No 10/2007 entered into force on 16 February 2007, my analysis applies *mutatis mutandis* to Article 1 thereof. See footnote 7 of this Opinion.

32 — Judgment in *Pokrzeptowicz-Meyer* (EU:C:2002:57, paragraph 50 and the case-law cited).

51. In view of the fact that the aid at issue in the main proceedings had not been recovered or even formed the subject of the abovementioned assessment notices prior to the publication of Decree-Law No 185/2008, Paragraph 24(4) of that decree-law cannot be regarded as affecting a situation existing before its entry to force.

52. It follows that A2A's observations on both the retroactive application of the compound interest method and the resultant infringement of the principles of legitimate expectations and legal certainty cannot succeed.

53. I would also point out that, on the publication of Decree-Law No 185/2008, the application of the compound interest method for the calculation of the interest due on the unlawful aid to be recovered pursuant to Decision 2003/193 was certain and its application foreseeable from the perspective of individuals.

### C – *The measure at issue in the light of fundamental rights*

54. First, I note — as does the Commission — that, since the recovery of aid plus interest calculated on a compound basis is meant strictly to restore the prior legal situation, national legislation such as that at issue in the main proceedings does not constitute a sanction [33] and cannot be regarded as disproportionate to the objectives laid down in Articles 107 TFEU and 108 TFEU. [34] It is further clear that, since there is in fact no penalty, Article 49 of the Charter of Fundamental Rights of the European Union, which provides inter alia that '[n]or shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed', does not apply.

55. Secondly, I must consider the argument advanced by A2A regarding discrimination.

56. According to A2A, undertakings which received aid and are the addresses of recovery orders based on Paragraph 24 of Decree-Law No 185/2008 have been placed in a different and less favourable situation than that of the undertakings concerned by decisions to recover aid adopted at the same time as, or prior to, Decision 2003/193, [35] which were subject to the application of compound interest in connection with the recovery of the aid.

57. Although the principle of equal treatment is a general principle of EU law, enshrined in Articles 20 and 21 of the Charter of Fundamental Rights of the European Union, [36] according to settled case-law that principle requires that comparable situations must not be treated differently and that different situations must not be treated in the same way unless such treatment is objectively justified. The elements which characterise different situations, and more specifically their comparability, must in particular be determined and assessed in the light of the subject-matter and purpose of the European Union act which makes the distinction in question. The principles and objectives of the field to which the act relates must also be taken into account. That approach must also prevail *mutatis mutandis* in an examination of the compliance with the principle of equal treatment of national measures implementing EU law. [37]

33 — See, by analogy, the judgment in *Belgium* v *Commission* (C-75/97, EU:C:1999:311, paragraph 65).

34 — See the judgment in *Diputación Foral de Vizcaya and Others* v *Commission* (C-471/09 P to C-473/09 P, EU:C:2011:521, paragraph 100).

35 — According to A2A, the Italian Republic did not apply compound interest to the recoveries effected pursuant to Commission Decision 2000/668/EC of 12 July 2000 on State aid granted by Italy to shipbuilders in the form of tax relief under Law No 549/95 (OJ 2000 L 279, p. 46).

36 — Judgment in *Guardian Industries and Guardian Europe* v *Commission* (C-580/12 P, EU:C:2014:2363, paragraph 51).

37 — Judgment in *IBV & Cie* (C-195/12, EU:C:2013:598, paragraphs 50, 52 and 53).

58. Even though Article 24(4) of Decree-Law No 185/2008 is worded in abstract and general terms, it is however clear from certain information contained in the documents produced before the Court that that provision was adopted specifically to govern the recovery of the aid found to be unlawful by Decision 2003/193. [38] In addition, the request for a preliminary ruling and the observations submitted by A2A and the Italian Government indicate the differences between the method of calculating interest laid down in Article 24(4) of Decree-Law No 185/2008 (compound interest) and that laid down in Article 1283 of the Italian Civil Code [39] (simple interest). Furthermore, it is unclear from the national legal framework set out by the referring court whether the compound interest method was applied or made applicable only to the aid to be recovered under Decision 2003/193, and not to other unlawful aid. [40]

59. I would further point out that the Italian Government fails to explain in its observations why the national legislature decided to extend the method of calculating interest provided for in Regulation No 794/2004 only to the recovery measures based on Decision 2003/193. It states merely that the purpose of the national legislation is to restore the situation existing prior to the grant of the unlawful aid, and that 'whereas the general rule of domestic law (namely that laid down in Article 1283 of the Civil Code) enshrines the principle that interest is generally charged on a simple basis, the special rules governing the recovery of State aid pursuant to Decision 2003/193 apply the opposite principle, namely that interest is charged on a compound basis'.

60. It is true, as I have already previously explained, that national legislation such as that at issue in the main proceedings, which requires that the compound interest method is applied for the calculation of the interest due on the aid to be recovered, seeks merely to restore the situation existing prior to the grant of the unlawful aid and to eliminate all the financial advantages resulting from the aid, advantages which have anti-competitive effects. Indeed, by requiring the use of that method, the legislation prevents undertakings from retaining an advantage amounting to an interest-free loan. [41]

61. In order for Articles 107 TFEU and 108 TFEU to be applied effectively, a Member State must therefore be able to adapt the method of calculation of the interest on unlawful aid so as to eliminate any financial advantage resulting from the aid. In addition, legislation which amends previous legislation must not give rise to an infringement of the principle of equal treatment.

62. Consequently, the fact that the undertakings which received aid and were addressees of recovery orders based on Paragraph 24 of Decree-Law No 185/2008 were placed in a different and less favourable situation than that of the undertakings concerned by decisions requiring the recovery of aid addressed to the Italian Republic prior to Decision 2003/193 does not constitute infringement of the principle of equal treatment. [42]

63. The same cannot perhaps be said of the decisions to recover aid adopted at the same time as, or subsequent to, those based on Decision 2003/193 and not yet made subject to Regulation No 794/2004; however, but the request for a preliminary ruling does not contain sufficient information to assess whether any discrimination in fact exists in that regard.

38 — Paragraph 1 of Decree-Law No 10/2007 is entitled 'Execution of the judgment given by the Court of Justice of the European Communities on 1 June 2006 in Case C-207/05. Implementation of Commission Decision 2003/193/EC of 5 June 2002 …'. See also footnote 7 of this Opinion.

39 — See points 22 and 23 of this Opinion.

40 — See footnote 8 of this Opinion

41 — See points 41 to 43 of this Opinion.

42 — Contrary to A2A's observations, the fact that, in accordance with the principle of procedural autonomy, the Italian Republic applies the compound interest method whereas other Member States apply the simple interest method likewise does not constitute infringement of the principle of equal treatment. After all, the principle of procedural autonomy presupposes that there may be a difference in treatment between the beneficiaries of unlawful aid in the various Member States who are therefore not in comparable situations, but, of course, subject to the proviso that those differences are not prejudicial to the effectiveness of EU law.

64. Since the Court has no specific information either about other contemporary or subsequent aid recovery decisions or about any criteria forming the basis of any such differentiation made and, where appropriate, the justification for those criteria, it is therefore for the referring court to consider this issue on the basis of the principles set out in this Opinion.

65. If the referring court were to find that A2A did in fact suffer unjustified discrimination, it would fall to that court to adopt the corrective measures necessary to eliminate that discrimination in accordance with its national procedure. In other words, in order to give practical effect to the general principle of equality, it would thus fall to the referring court, without waiving the charging of interest, to rule out the application of the compound interest method for the calculation of the interest due on the aid to be recovered from A2A.

## VI – **Conclusion**

66. In the light of the foregoing considerations, I propose that the Court answer the question referred by the Corte suprema di cassazione for a preliminary ruling as follows:

Article 14 of Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article [108 TFEU], Articles 9, 11 and 13 of Commission Regulation (EC) No 794/2004 of 21 April 2004 implementing Regulation No 659/1999 and the general principles of EU law must be interpreted as not 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 by applying the compound interest method.