



Reports of Cases

OPINION OF ADVOCATE GENERAL
SAUGMANDSGAARD ØE
delivered on 12 December 2019¹

Case C-627/18

Nelson Antunes da Cunha, Lda

v

Instituto de Financiamento da Agricultura e Pescas IP (IFAP)

(Request for a preliminary ruling
from the Tribunal Administrativo e Fiscal de Coimbra (Coimbra Administrative and Tax Court,
Portugal))

(Reference for a preliminary ruling — Recovery of unlawful aid — Limitation period for recovery —
Limitation period of 10 years — Interest — Limitation period of a lesser duration provided for in
national legislation — Legal certainty — Regulation (EU) 2015/1589 — Article 17(1) — Article 16(2) —
Article 16(3) — Principle of effectiveness)

I. Introduction

1. This request for a preliminary ruling from the Tribunal Administrativo e Fiscal de Coimbra (Coimbra Administrative and Tax Court, Portugal) concerns the interpretation of Article 16(2) and (3) and Article 17(1) of Regulation (EU) 2015/1589.² Article 17(1) of that regulation makes the powers of the European Commission to recover unlawful State aid subject to a limitation period of 10 years.

2. The request was made in the course of proceedings between Nelson Antunes da Cunha Lda and the Instituto de Financiamento da Agricultura e Pescas IP (Institute for the Financing of Agriculture and Fisheries, IFAP) regarding the forced recovery, following a Commission decision, of unlawful State aid from Nelson Antunes da Cunha.

3. Under Article 16(3) of Regulation 2015/1589, the recovery of that unlawful aid must be effected in accordance with the procedures under Portuguese national law, provided that they allow the effective execution of the Commission's decision.

4. In that regard, under Portuguese law, the recovery of the aid capital is subject to a limitation period of 20 years. The application of that period, in the present case, does not preclude the recovery of that capital. By contrast, with regard to the recovery of the interest on the aid in question, according to the referring court, Portuguese law provides for a limitation period of 5 years from the date on which it becomes payable. The application of that period prevents the full recovery of the interest on the aid and, for at least part of that interest, it would appear that the limitation took effect even before the Commission had given the abovementioned decision.

¹ Original language: French.

² Council Regulation of 13 July 2015 laying down detailed rules for the application of Article 108 of the Treaty on the Functioning of the European Union (OJ 2015 L 248, p. 9).

5. In that context, by its fourth question, the referring court asks whether, in essence, Article 16(2) of Regulation 2015/1589, under which the aid to be recovered is to include interest, and the principle of effectiveness provided for in Article 16(3) of that regulation, preclude the application of a limitation period for the recovery of interest on unlawful aid which is of a lesser duration than the 10-year period laid down in Article 17(1) of that regulation, such as the five-year period under Portuguese law.

6. As requested by the Court, this Opinion will be limited to the analysis of that question alone, which I propose that the Court should answer in the affirmative.

II. Legal framework

A. Regulation 2015/1589

7. Article 16 of Regulation 2015/1589, 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.

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 Union law.’

8. Article 17 of Regulation 2015/1589, entitled ‘Limitation period for the recovery of aid’, provides in paragraph 1:

‘The powers of the Commission to recover aid shall be subject to a limitation period of 10 years.’

B. Portuguese law

9. Article 309 of the Código Civil (Portuguese Civil Code, ‘the Civil Code’), entitled ‘Ordinary period’, provides:

‘The ordinary limitation period shall be 20 years.’

10. Article 310 of the Civil Code provides:

‘The following shall be time-barred after a period of five years:

...

(d) contractual or statutory interest, even if not yet due, and dividends from companies;

....'

III. The dispute in the main proceedings

11. Since this Opinion is limited to analysing the fourth question referred for a preliminary ruling by the Tribunal Administrativo e Fiscal de Coimbra (Coimbra Administrative and Tax Court, Portugal), the account of the facts forming the background to the dispute shall be limited to the facts essential to and necessary for an understanding of that question.

12. On 8 April 1993 and 7 July 1993, the applicant in the main proceedings, Nelson Antunes da Cunha, concluded with the Caixa de Crédito Agrícola Mútuo — Coimbra, credit agreements relating to a credit line for the recovery of agricultural and breeding livestock activities.

13. Under those credit agreements, the IFAP's predecessor,³ in accordance with decreto-lei n° 146/94 (Decree-Law No 146/94) of 24 May 1994, paid to Nelson Antunes da Cunha, between 1994 and 1996, an overall amount of EUR 7 526.90 by way of interest rate subsidies (EUR 4 189.90 was paid on 12 July 1994, EUR 2 513.94 on 12 July 1995 and EUR 823.06 on 30 April 1996).

14. On 25 November 1999, the Commission adopted Decision 2000/200/EC concerning an aid scheme implemented by Portugal with a view to reducing the debt burden of intensive stock farms and assisting recovery in the pig-farming sector⁴ ('the Commission decision of 25 November 1999').

15. In that decision, the Commission took the view that the following were incompatible with the internal market: first, the credit line for reducing the debt burden of intensive stock farms, implemented by Chapter I of Portuguese Decree-Law No 146/94 of 24 May 1994 in cases where, together with the investment aid received, the grant equivalent exceeds 35% in farming areas other than less-favoured farming areas and, secondly, the credit line for assisting recovery in the pig-farming sector, implemented by Chapter II of Decree-Law No 146/94 of 24 May 1994.⁵

16. In accordance with the operative part of the Commission decision of 25 November 1999, Portugal had to take all the necessary measures to recover from the recipients the abovementioned aid which had been granted to them unlawfully, with the interest accrued for the period from the date on which the recipients received the aid in question to the date of its recovery. The Portuguese authorities were also required to inform the Commission, within 2 months of the notification of the decision, of the measures they had taken to comply with it.⁶

17. In March 2001, the IFAP's predecessor sent Nelson Antunes da Cunha a letter requesting from it the repayment of sums unduly received. Nelson Antunes da Cunha did not respond to that letter.

18. On 12 August 2009, the IFAP sent it a new letter, asking it to pay EUR 14 953.56 (EUR 7 526.90 in respect of the aid granted, plus default interest of EUR 7 426.66) within a period of 10 working days from receipt of that letter.

19. On 7 July 2013, a tax execution procedure in respect of that debt was initiated by the Catanhede Tax Office (Portugal) against the applicant in the main proceedings for the purposes of recovering the debt owed to the IFAP.

³ I note that, according to the request for a preliminary ruling, at the time when the aid at issue was granted, the competent Portuguese agency was the Instituto de Financiamento e Apoio ao Desenvolvimento da Agricultura e da Pesca (Financing and Supporting Institute for the Development of Agriculture and Fisheries). It is, if my understanding is correct, the predecessor to the IFAP.

⁴ OJ 2000 L 66, p. 20.

⁵ Article 1 of the Commission decision of 25 November 1999.

⁶ Articles 3 and 4 of the Commission decision of 25 November 1999.

20. Nelson Antunes da Cunha challenged that procedure before the Tribunal Administrativo e Fiscal de Coimbra (Coimbra Administrative and Tax Court).

21. Nelson Antunes da Cunha claims, first, that, under Article 40 of decreto-lei n° 155/92 (Decree-Law No 155/92) of 28 July 1992,⁷ the obligation to repay amounts received from unlawful aid is discharged after the expiry of a period of 5 years of their receipt, and therefore the obligation to repay the aid received in the present case is time-barred. Secondly, in respect of the default interest, it submits that, since more than 5 years has passed since the due date of the obligation with which those amounts are associated, that interest is also time-barred under Article 310(d) of the Civil Code.

22. In that regard, the referring court states that the national legislation does not provide for a limitation period that is specifically applicable to the enforcement of the order for the recovery of unlawful aid, which has led to rulings by the higher national courts that the debt owed to the IFAP corresponding to the recovery of financial aid granted by the Portuguese State and which, by a Commission decision, is considered to be aid which is incompatible with the internal market, is subject to the ordinary limitation period of 20 years provided for in Article 309 of the Civil Code.

23. The referring court adds that, as far as the limitation period in respect of interest is concerned, the higher national courts have held that ‘irrespective of the nature and the “*nomen juris*” that may be attributed to interest ..., it cannot be concluded, without further formalities, that such interest (whether it be classified as compensatory interest or default interest) is subject to the 20-year limitation period provided for in Article 309 of the [Civil Code]. Contractual or statutory interest, even if not yet due [Article 310(d) of the Civil Code] is time-barred after a period of 5 years. In accordance with the rule in Article 306 of the Civil Code, that period starts to run from the date on which the obligation becomes due’.⁸

24. The referring court considers however that it could be contrary to the principle of the effectiveness of EU law to take the view that interest from a decision ordering the recovery of aid is subject to that five-year period. Assuming that the interest payable for the period prior to the 5 years before the act interrupting the limitation period is time-barred, it is possible that, even though the Commission still has the power to order the recovery under Article 17(1) of Regulation 2015/1589, the debt relating to interest has already been extinguished.

25. With regard to the situation in the main proceedings, the referring court, in response to a request for clarification from the Court,⁹ has submitted that, since the opponent, Nelson Antunes da Cunha, had been summoned for the purposes of the enforcement procedure seeking the recovery of the aid in question only by a registered letter dated 26 July 2013, all interest accrued before 26 June 2008 was time-barred, pursuant to Article 310(d) of the Civil Code, cited above.

26. Moreover, according to the referring court, the limitation period provided for in Article 310(d) of the Civil Code cannot, in the light of national law, be considered to have been interrupted by a letter from the Commission to the Portuguese authorities, or from those authorities to the opponent, since a letter of that kind does not amount to a summons or the judicial notification of a document within the meaning of Article 323 of the Civil Code. Indeed, the IFAP has not produced any judicial document (other than the tax execution) in which it has expressed its intention to exercise the right to demand payment of the interest due from the opponent.

⁷ That provision, entitled ‘Limitation’, provides:

‘1. Obligatory repayment of the amounts received shall be limited to 5 years following their receipt.

2. The abovementioned period shall be interrupted or suspended by the occurrence of general causes of interruption or suspension of the limitation.’

⁸ Judgment of the Supremo Tribunal Administrativo (Supreme Administrative Court, Portugal) of 12 October 2011. Under Article 306(1) of the Civil Code, that period of 5 years must be calculated from the date on which the obligation becomes due and is interrupted by a summons or the judicial notification of any form of document which expresses, directly or indirectly, the intention to exercise the right.

⁹ Response dated 30 July 2019 to the Court’s request for clarification dated 27 June 2019.

27. Furthermore, the referring court states that service only by a registered letter is certainly not capable of interrupting in the long term a limitation period that has started to run, since it does not have the unique and specific features of a summons, which are set out in Articles 326 and 327(1) of the Civil Code. Thus, on 26 July 2013, a new five-year limitation period had started to run and that period could only be interrupted again in the event of a new reason for interruption, in accordance with Article 323 of the Civil Code.

28. In the light of the foregoing, the referring court considers that the application of Article 310(d) of the Civil Code in respect of interest payable as a result of a decision ordering the recovery of aid may call into question the principle of effectiveness and the principle of the incompatibility of State aid with the internal market.

29. Against that background, by decision of 31 July 2018, received at the Court on 5 October 2018, the Tribunal Administrativo e Fiscal de Coimbra (Coimbra Administrative and Tax Court) decided to stay the proceedings and refer the following question to the Court for a preliminary ruling:

‘Article 16(2) of ... Regulation ... 2015/1589 ..., together with the principles of EU law, namely the principles of effectiveness and of the incompatibility of State aid with the [internal] market, preclude the application of a limitation period of a lesser duration than that laid down in Article 17 of the regulation, such as that provided for in Article 310(1)(d) of the Civil Code, to the interest accruing on the aid to be recovered?’

30. The IFAP, the Portuguese Government and the Commission lodged written observations before the Court. The same parties attended the hearing held on 12 September 2019.

IV. Analysis

31. By the question which forms the subject matter of this Opinion, the referring court is asking whether a national rule on limitation is compatible with EU law in the context of the recovery of the unlawful aid at issue in the main proceedings.

32. More specifically, that court asks, in essence, whether Article 16(2) of Regulation 2015/1589, and the principle of effectiveness laid down in Article 16(3) of that regulation,¹⁰ preclude the application of a limitation period for interest accruing on the aid to be recovered, which, like the five-year period provided for in Article 310(d) of the Civil Code, is of a lesser duration than the 10-year period available to the Commission under Article 17(1) of Regulation 2015/1589 to order the recovery of the unlawful aid.

33. In the present case, it is not disputed that the obligation to recover the aid at issue includes interest. That requirement stems from both Article 16(2) of Regulation 2015/1589 and the Commission decision of 25 November 1999,¹¹ which, I would reiterate, has not been the subject of legal proceedings.

¹⁰ I would point out that, in the wording of its question, the referring court makes reference to ‘principles of EU law, namely the principles of effectiveness and of the incompatibility of State aid with the [internal] market’ (see point 29 of this Opinion). In that regard, I note that, in the field of the recovery of aid, the principle of effectiveness is expressed in Article 16(3) of Regulation 2015/1589, which is why the question must be understood in that sense. As regards the principle of the incompatibility of State aid with the internal market, I observe that, since Regulation 2015/1589 lays down detailed rules for the application of Article 108 TFEU, the response to the question raised may be given only in the light of that regulation.

¹¹ See point 16 of this Opinion.

34. In accordance with Article 16(3) of Regulation 2015/1589, and as is clear from the Commission decision of 25 November 1999, the recovery of unlawful aid in the main proceedings must, in principle, be effected in accordance with the procedures under Portuguese national law, including the procedures governing the rules on limitation.¹²

35. In that regard, I note that it is apparent from the file submitted to the Court that the parties concerned have diverging views on the rules on limitation that are applicable under Portuguese law in respect of the aid capital concerned and the interest on that aid.

36. That said, according to the referring court's submissions,¹³ the limitation period which is applicable to the recovery of the aid *capital* under Portuguese law must be regarded as the period of 20 years provided for in Article 309 of the Civil Code.¹⁴ There is nothing in the request for a preliminary ruling to indicate that the application of that period prevents the recovery of that capital in the dispute in the main proceedings.¹⁵

37. However, as regards the recovery of the interest on the aid, it would appear, on the one hand, that the referring court considers that, in principle, the period of 5 years provided for in Article 310(d) of the Civil Code applies.¹⁶ It would also appear, on the other, that the application of that period of 5 years prevents the full recovery of the interest on the aid in the present case.¹⁷

38. It follows from the referring court's response to the request from the Court for clarification that the five-year limitation period was interrupted on 26 July 2013 and that all interest accrued before 26 June 2008 is time-barred under Article 310(d) of the Civil Code.¹⁸ I take the national provision to mean that the debt relating to interest is extinguished on the expiry of a period of 5 years from the date on which it becomes payable.

39. It may be inferred from this that the Commission decision of 25 November 1999 was not, under Portuguese law, capable of interrupting the limitation period. I note in that regard that it would appear that part of the interest had already been time-barred even though the Portuguese authorities had interrupted the five-year limitation period immediately after the adoption of the Commission's decision.¹⁹

¹² See, to that effect, judgment of 5 March 2019, *Eesti Pagar* (C-349/17, EU:C:2019:172, paragraph 114).

¹³ I note that the Court, when a question is referred to it by a national court, relies on the interpretation of national law as described to it by that court (judgment of 14 June 2017, *Online Games and Others* (C-685/15, EU:C:2017:452, paragraph 45). Therefore, whatever criticism the parties to the main proceedings may have made of the interpretation of national law adopted by the referring court, the present request for a preliminary ruling must be examined in the light of that court's interpretation of that law (judgment of 21 June 2016, *New Valmar* (C-15/15, EU:C:2016:464, paragraph 25)).

¹⁴ See point 22 of this Opinion. I would point out that, whilst the Portuguese Government and the IFAP also take that view, Nelson Antunes da Cunha disputes that assessment by the referring court (see point 21 of this Opinion).

¹⁵ For the sake of completeness, I note, however, that it is apparent from the request for a preliminary ruling that the referring court has doubts as to whether that period is compatible with other aspects of EU law, but that point will not be addressed in this Opinion which is limited in its subject matter to the fourth question referred for a preliminary ruling.

¹⁶ See points 23 and 24 of this Opinion. I should point out that, in the request for a preliminary ruling, the referring court highlights the obligation imposed under EU law on the national court to interpret national law in a manner which is consistent with the meaning and scope of EU law. In the light of that comment, I note that the question could arise as to whether the national law could be interpreted as meaning that the interest on the aid is also subject to the 20-year limitation period provided for in Article 309 of the Civil Code, in which case the national law does not appear to prevent the recovery of the interest on the aid, which would also appear to be the position taken by the Portuguese Government (see footnote 17 of this Opinion). I note, however, that, in essence, that question concerns the interpretation of national law, which is a matter for the national courts. Therefore, I shall not address that matter in this Opinion.

¹⁷ I should point out that it is apparent from the file submitted to the Court that both the Portuguese Government and the IFAP dispute that assessment by the referring court. The Portuguese Government considers that the national law does not provide for a specific limitation period for the recovery of State aid that has been unduly received. It takes the view that the applicable limitation period is therefore the national ordinary limitation period which is 20 years. It states that that period also applies to default interest related to the amount of the wrongly obtained advantage since that interest and that amount are inextricably linked. The IFAP submits that it is only following the completion of the administrative procedure that was initiated in pursuance of recovering the aid that it is able to exercise, against the opponent, the right it derives from the debt at issue, and that is why it considers that the limitation period in respect of interest has not taken effect.

¹⁸ See points 25 and 26 of this Opinion. Given that the limitation period was interrupted on 26 July 2013, I wonder, however, whether the date of the limitation period in respect of interest is 26 July 2008, rather than 26 June 2008, as the referring court has stated.

¹⁹ I recall that the first amount was paid on 12 July 1994. See point 13 of this Opinion.

40. In the light of that information, in order to respond to the question raised, two periods must be distinguished: the period which preceded the Commission's decision (Section A) and that which followed the decision (Section B).

41. As far as the first period is concerned, the question that arises is whether Article 17(1) and Article 16(2) and (3) of Regulation 2015/1589 preclude the application of a limitation period of 5 years, such as the period at issue here, in so far as that period is capable of giving rise to a time bar on the interest accrued even before the expiry of the 10-year period available to the Commission under Article 17(1) of Regulation 2015/1589 to order the recovery of the unlawful aid.

42. As for the second period, it would appear that the time bar on the interest on the aid which took effect arises because the IFAP complied with the Commission's decision only after a considerable delay.

43. Even though the Portuguese authorities were required to comply with the Commission's decision immediately,²⁰ 14 years passed between the adoption of the Commission's decision and the interruption of the limitation period, which, if Article 310(d) of the Civil Code applies, would lead to a large part of the interest accrued after the Commission's decision was adopted being time-barred.

44. The question that arises in this situation is therefore whether the recipient of aid is able to rely on a national rule on limitation in the context of a final decision of the Commission on the recovery of unlawful aid where the application of that rule prevents the full recovery of the interest on the aid.

45. Although the Court has already given a ruling on similar questions, the present case allows it to clarify the extent to which a national rule on limitation of that kind is applicable in the field of the recovery of unlawful aid in a situation such as that at issue in the main proceedings.

46. In that context, it should be recalled that the rules on limitation play a fundamental role in the law of property. The limitation makes it impossible for the creditor to enforce the recovery of the debt. As the Court has already held, by imposing a time limit, the rules on limitation seek to ensure legal certainty for the debtor.²¹

47. As I shall explain, I take the view, like the Commission and the IFAP, that, for each of those two periods, a national rule on limitation setting a five-year period, such as that at issue in the main proceedings, must be set aside.²²

A. The period which preceded the Commission's decision

48. At the outset, I would point out that, under Article 17(1) of Regulation 2015/1589, the Commission is subject to a limitation period of 10 years to request the recovery of unlawful aid. Under Article 17(2) of that regulation, that limitation period is to begin on the day on which the unlawful aid is awarded to the beneficiary either as individual aid or as aid under an aid scheme. Any aid with regard to which the limitation period has expired, is deemed to be existing aid pursuant to Article 17(3) of that regulation.²³

²⁰ I note that Article 16(3) of Regulation 2015/1589 requires the national authorities to execute the recovery of the unlawful aid immediately after the Commission's decision, which also follows from the Commission decision of 25 November 1999. Accordingly, Article 4 of that decision requires the Portuguese authorities, within 2 months of notification of the decision, to inform the Commission of the measures they have taken to comply with it.

²¹ See judgment of 23 January 2019, *Fallimento Traghetti del Mediterraneo* (C-387/17, EU:C:2019:51, paragraph 71 and the case-law cited).

²² With regard to the position taken by the Portuguese Government, I recall that that government considers that the 20-year period provided for in Article 309 of the Civil Code is applicable to the aid capital and to the interest on that aid (see footnote 17).

²³ As is apparent from recital 26 of Regulation 2015/1589, that limitation period, after the expiry of which no recovery can be ordered, was established for reasons of legal certainty.

49. In the present case, it has been established that the Commission decision of 25 November 1999 was delivered before that period expired.²⁴

50. Next, I note that Article 16(3) of Regulation 2015/1589 reflects the requirements of the principle of effectiveness laid down previously by case-law.²⁵

51. In accordance with that case-law, although, in the absence of EU provisions relating to the procedure applicable to the recovery of illegal aid, such recovery must take place, in principle, in accordance with the relevant provisions of national law, those provisions must however be applied in such a way that the recovery required by EU law is not rendered practically impossible and the interests of the European Union are taken fully into consideration.²⁶

52. Thus, a national rule that would prevent a national judge or a national authority from taking action to respond to the consequences of an infringement of the third sentence of Article 108(3) TFEU must be regarded as being incompatible with the principle of effectiveness.²⁷

53. I take the view, as does the referring court, that it is clear from a combined reading of Article 17(1) and Article 16(2) and (3) of Regulation 2015/1589 that those provisions preclude the application of a limitation period of 5 years, such as the period laid down in Article 310(d) of the Civil Code in the dispute in the main proceedings.

54. A provision such as Article 310(d) of the Civil Code, read in conjunction with Article 306 of that code, is capable of undermining the Commission's competence, since the limitation on the interest on aid may take effect before the expiry of the 10-year period available to the Commission under Article 17(1) of Regulation 2015/1589 to adopt a decision to recover unlawful aid.

55. In the dispute in the main proceedings, it would appear that part of the interest would therefore have been time-barred if Article 310(d) of the Civil Code had been applied.²⁸ That national rule therefore makes the full recovery of the interest on the aid impossible.

56. My proposed interpretation is also confirmed in the judgment in *Eesti Pagar*, which was delivered recently by the Grand Chamber of the Court.²⁹

57. That case concerned, in particular, which limitation period applied to the recovery of unlawful aid and whether the applicable limitation period was that provided for by national law or that provided for by EU law, and, if appropriate, in that situation, the period specified in Article 15(1) of Regulation No 659/1999.³⁰

24 The aid was paid between 1994 and 1996. See point 13 of this Opinion. I should point out that, at the time when the Commission decision of 25 November 1999 was adopted, the provision in force was Article 15(1) of 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) ('Regulation No 659/1999'). That provision was repealed by Regulation 2015/1589 and corresponds to Article 17(1) of that regulation.

25 See, inter alia, judgment of 20 May 2010, *Scott and Kimberly Clark* (C-210/09, EU:C:2010:294, paragraph 20 and the case-law cited).

26 See, inter alia, judgments of 26 June 2003, *Commission v Spain* (C-404/00, EU:C:2003:373, paragraph 51 and the case-law cited), and of 20 May 2010, *Scott and Kimberly Clark* (C-210/09, EU:C:2010:294, paragraph 21 and the case-law cited).

27 See, inter alia, judgment of 5 March 2019, *Eesti Pagar* (C-349/17, EU:C:2019:172, paragraph 140 and the case-law cited).

28 See point 39 and footnote 19 of this Opinion.

29 Judgment of 5 March 2019 (C-349/17, EU:C:2019:172). I would point out that that judgment was delivered after the referring court in the present case had decided to stay the proceedings and to request a preliminary ruling from the Court.

30 See judgment of 5 March 2019, *Eesti Pagar* (C-349/17, EU:C:2019:172, paragraph 107). With regard to Article 15(1) of Regulation No 659/1999, see footnote 24 of this Opinion.

58. The Court held that the mere fact that national rules on limitation are, in principle, applicable to the recovery of unlawfully granted aid by national authorities on their own initiative does not detract from the possibility of that aid being recovered subsequently, in implementation of a decision to that effect by the Commission which, where it has in its possession information on the alleged unlawfulness of that aid, whatever the source of that information, after the national limitation periods have expired, remains free to assume, within the period of 10 years referred to in Article 15 of Regulation No 659/1999, an examination of that aid.³¹

59. In other words, the Commission can still, within the 10-year period provided for in Article 17(1) of Regulation 2015/1589, request the recovery of unlawful aid, despite the fact that a limitation period applied in the national proceedings may have expired.

60. It follows from the foregoing that Article 16(2) and (3) of Regulation 2015/1589, and Article 17(1) of that regulation, preclude the application of a national provision such as Article 310(d) of the Civil Code. It is for the referring court to refuse of its own motion to apply such a provision in a case such as that at issue in the main proceedings.³²

B. The period subsequent to the Commission's decision

61. With regard to the period following the Commission's decision, it does indeed follow from Article 16(3) of Regulation 2015/1589 that a national rule on limitation setting a five-year period, such as that at issue in the main proceedings, must be set aside since it precludes the full recovery of the aid in accordance with the Commission decision of 25 November 1999.

62. Nevertheless, the question arises as to whether the principle of effectiveness laid down in Article 16(3) of Regulation 2015/1589 still requires the full recovery of the aid, in accordance with the final decision of the Commission, where the competent authority has allowed the limitation period provided for in national law to elapse.³³

63. In other words, given that a period of 14 years has elapsed since the adoption of the Commission's decision, consideration must therefore be given to whether the requirement for legal certainty may, in such a situation, justify the application of a national rule of that kind.

64. In that regard, I note that the Court has recognised that the principle of effectiveness is not absolute since there may be exceptional circumstances in which it would be inappropriate to order repayment of unlawful aid.³⁴

65. More specifically, as regards, first, the Commission's powers, that principle is set out in the final sentence of Article 16(1) of Regulation 2015/1589, which provides that the Commission is not to require the recovery of the aid if this would be contrary to a general principle of EU law.

³¹ Judgment of 5 March 2019, *Eesti Pagar* (C-349/17, EU:C:2019:172, paragraph 114).

³² See, to that effect, inter alia, judgment of 18 July 2007, *Lucchini* (C-119/05, EU:C:2007:434, paragraph 61).

³³ In that regard I note that, at the hearing, the Commission stated that the question whether a national provision on limitation is able to prevent the execution of a Commission decision ordering the recovery of unlawful aid arises fairly frequently in practice since the Member States are often late in implementing Commission decisions in that field.

³⁴ See judgment of 12 February 2008, *CELF and Ministre de la Culture et de la Communication* (C-199/06, EU:C:2008:79, paragraph 42 and the case-law cited).

66. As regards, secondly, the Member States' national laws, the Court has acknowledged that, since the principle of the protection of legitimate expectations is part of the EU legal order, the fact that national legislation provides for the principles of the protection of legitimate expectations and assurance of legal certainty to be observed in a matter such as the recovery of unlawful aid cannot be considered contrary to that same legal order,³⁵ even in a situation in which the Commission has issued a negative final decision.³⁶

67. In the present case, I note, first of all, that the Court has held that, due to the mandatory nature of the supervision of State aid by the Commission under Article 108 TFEU, undertakings to which aid has been granted may not, in principle, entertain a legitimate expectation that the aid is lawful unless it has been granted in compliance with the procedure laid down in that article. A diligent businessman should normally be able to determine whether that procedure has been followed.³⁷ The same is true in the case of individual aid and of aid granted under an aid scheme.³⁸

68. It follows that, in the present case, the applicant cannot submit that it entertained a legitimate expectation that the aid was lawful.

69. Furthermore, as regards the principle of legal certainty, I note that the Court has already given a ruling on a question similar to that raised in the present case.

70. Accordingly, one of the questions raised in the judgment of 20 March 1997, *Alcan Deutschland*³⁹ was whether EU law required the competent authority to revoke a decision granting unlawful aid, in accordance with a final decision of the Commission declaring the aid incompatible and ordering recovery, even if the authority had allowed the time limit laid down for that purpose under national law in the interest of legal certainty to elapse. The national rule in question imposed a time limit for the revocation of administrative acts of 1 year from the moment when the authority became aware of the facts justifying such revocation.

71. First of all, the Court recalled the principle of effectiveness and the principle that the recipient of aid may not, in principle, entertain a legitimate expectation that the aid is lawful unless it has been granted in compliance with the procedure laid down in Article 108 TFEU. According to the Court, the question referred had to be answered in the light of those principles.⁴⁰

72. The Court then stated, in paragraphs 34 to 37, that:

'34. ... where State aid is found to be incompatible with the common market, the role of the national authorities is ... merely to give effect to the Commission's decision. The authorities do not, therefore, have any discretion as regards revocation of a decision granting aid. Thus, where the Commission, in a decision which has not been the subject of legal proceedings, orders the recovery of unduly paid sums, the national authorities are not entitled to reach any other finding.

35 See, inter alia, judgment of 20 September 1990, *Commission v Germany* (C-5/89, EU:C:1990:320, paragraphs 13 and 14).

36 See judgment of 12 February 2008, *CELF and Ministre de la Culture et de la Communication* (C-199/06, EU:C:2008:79, paragraph 43).

37 See, inter alia, judgments of 20 September 1990, *Commission v Germany* (C-5/89, EU:C:1990:320, paragraphs 13 and 14), and of 20 March 1997, *Alcan Deutschland* (C-24/95, EU:C:1997:163, paragraph 25).

38 See, in that regard, inter alia, judgment of 28 July 2011, *Diputación Foral de Vizcaya and Others v Commission* (C-471/09 P to C-473/09 P, not published, EU:C:2011:521, paragraphs 63 to 66).

39 Judgment of 20 March 1997 (C-24/95, EU:C:1997:163).

40 Judgment of 20 March 1997, *Alcan Deutschland* (C-24/95, EU:C:1997:163, paragraphs 24 to 26).

35. Where the national authorities nevertheless allow the time-bar provided for in national law in respect of revocation of the decision granting the aid to come into effect, that situation cannot be treated in the same way as the situation where a trader does not know whether the competent administrative authorities are going to reach a decision, and where the principle of legal certainty requires that such uncertainty be brought to an end after a certain period has elapsed.

36. Since the national authorities have no discretion in the matter, the recipient of unlawfully granted aid ceases to be in a state of uncertainty once the Commission has adopted a decision finding the aid incompatible with the common market and requiring recovery.

37. The principle of legal certainty cannot therefore preclude repayment of the aid on the ground that the national authorities were late in complying with the decision requiring such repayment. If it could, recovery of unduly paid sums would be rendered practically impossible and the [EU] provisions concerning State aid deprived of effectiveness'.⁴¹

73. The Court concluded from this that EU law requires the competent authority to revoke a decision granting unlawful aid, in accordance with a final decision of the Commission declaring the aid incompatible with the common market and ordering recovery, even if the authority has allowed the time limit laid down for that purpose under national law in the interest of legal certainty to elapse.⁴²

74. In my view, it can be inferred from the judgment cited above that, in general, rules on limitation laid down in national law cannot apply in the field of the recovery of aid where they prevent the recovery of aid in accordance with a final decision of the Commission, and where the only reason why that recovery is precluded is the fact that the national authorities complied with that decision only after a considerable delay, and therefore the aid is time-barred under national law.

75. Admittedly, the judgment in *Alcan Deutschland*⁴³ does not concern a rule on limitation strictly speaking, but a rule concerning the lapse of rights.⁴⁴ I note, however, that rules on the lapse of rights, like rules on limitation, are adopted in the interest of legal certainty, which is why the grounds of the judgment in *Alcan Deutschland*⁴⁵ can be transposed to rules on limitation, as the Court also appears to indicate in the judgment in *Commission v Italy*.⁴⁶

76. In the latter judgment, the Court applied by analogy the principles of the judgment in *Alcan Deutschland*⁴⁷ to rules on limitation. More specifically, the Court held that, in cases in which orders for recovery of the unlawful aid are challenged in the national courts, it is for the Member State concerned, in accordance with the requirement actually to recover aid that is incompatible with the common market, to 'contest any national decision depriving the Commission's decision of effect, in particular on grounds relating ... to the application of limitation rules (see, by analogy, judgment of 20 March 1997 in Case C-24/95 *Alcan Deutschland*, ... paragraphs 34 and 38)'.⁴⁸

41 Judgment of 20 March 1997, *Alcan Deutschland* (C-24/95, EU:C:1997:163).

42 Judgment of 20 March 1997, *Alcan Deutschland* (C-24/95, EU:C:1997:163, paragraph 38).

43 Judgment of 20 March 1997 (C-24/95, EU:C:1997:163).

44 I note that the national rule on the lapse of rights in *Alcan Deutschland* (judgment of 20 March 1997 (C-24/95, EU:C:1997:163)) set a time limit for the authorities to revoke administrative measures. The question at issue in the case was therefore whether the authorities were obliged, under EU law, to set aside a national rule on the lapse of rights of that kind in order to request the recovery of unlawful aid, in accordance with a final decision of the Commission. In respect of the situation at issue in the present case, the question that arises is whether the recipient of unlawful aid is able to rely on a national rule on limitation in order to challenge a request for the recovery of unlawful aid from the national authorities, even though part of the amount to be recovered is time-barred under national law.

45 Judgment of 20 March 1997 (C-24/95, EU:C:1997:163).

46 Judgment of 17 November 2011 (C-496/09, EU:C:2011:740, paragraph 78).

47 Judgment of 20 March 1997 (C-24/95, EU:C:1997:163).

48 Judgment of 17 November 2011, *Commission v Italy* (C-496/09, EU:C:2011:740, paragraph 78).

77. Secondly, I would point out that, whilst the judgment in *Alcan Deutschland*⁴⁹ concerned individual aid, the Court's reasoning in that judgment is intended to apply, in my eyes, to aid granted under an aid scheme.

78. I note that the principle that undertakings to which aid has been granted may not, in principle, entertain a legitimate expectation that the aid is lawful, unless it has been granted in compliance with the procedure laid down in Article 108 TFEU, applies to both individual aid and aid granted under an aid scheme.⁵⁰ There is therefore no need to draw a distinction between those two situations.

79. Lastly, I would point out that the period of 1 year in the rule imposing a time bar at issue in *Alcan Deutschland*⁵¹ had no impact, in my view, on the reasoning adopted by the Court in that judgment.

80. As the Commission stated, in essence, at the hearing, the duration of a rule on limitation has no bearing on the arguments set out above which justify denying the recipient of unlawful aid the ability to rely on a national rule on limitation.

81. To summarise the foregoing, where the Commission orders the recovery of unlawful aid which has not been the subject of legal proceedings, the role of the national authorities is merely to give effect to the Commission's decision. Those authorities do not, therefore, have any discretion as regards the recovery of the aid.⁵² Since the national authorities have no discretion in the matter, the recipient of unlawfully granted aid ceases to be in a state of uncertainty once the Commission has adopted a decision finding the aid incompatible and requiring recovery.⁵³ That is the case in respect of both individual aid and aid granted under an aid scheme.⁵⁴ The principle of legal certainty cannot therefore preclude repayment of the aid on the ground that the national authorities were late in complying with the decision requiring such repayment, notwithstanding the duration of the limitation period. If it could, recovery of unduly paid sums would be rendered practically impossible and the EU provisions concerning State aid deprived of effectiveness.⁵⁵

82. This strict approach is supported by the fact that the aim is to eliminate a distortion of competition that infringes the TFEU. Recovering the aid, including the related interest, is the logical consequence of it being unlawful. The objective of recovery is to restore the previously existing situation. By repaying the aid, the recipient forfeits the advantage which it had enjoyed over its competitors on the market, and the situation prior to the payment of the aid is considered to be restored.⁵⁶ The recovery of interest is therefore a necessary adjunct to the full recovery of the aid.⁵⁷

83. Moreover, as Advocate General Jacobs noted in *Alcan Deutschland*,⁵⁸ it is necessary to bear in mind that a rule on limitation poses inherent problems when applied in the sphere of State aid.

49 Judgment of 20 March 1997 (C-24/95, EU:C:1997:163).

50 See point 67 of this Opinion and footnote 38.

51 Judgment of 20 March 1997 (C-24/95, EU:C:1997:163, paragraph 33).

52 See, to that effect, judgment of 20 March 1997, *Alcan Deutschland* (C-24/95, EU:C:1997:163, paragraph 34).

53 See, to that effect, judgment of 20 March 1997, *Alcan Deutschland* (C-24/95, EU:C:1997:163, paragraph 36).

54 See, to that effect, point 67 and footnote 38 of this Opinion.

55 See, to that effect, judgment of 20 March 1997, *Alcan Deutschland* (C-24/95, EU:C:1997:163, paragraph 37).

56 See, inter alia, judgment of 29 April 2004, *Germany v Commission* (C-277/00, EU:C:2004:238, paragraphs 74 and 75 and the case-law cited). See also, to that effect, recital 25 of Regulation 2015/1589.

57 See, inter alia, judgments of 12 February 2008, *CELF and Ministre de la Culture et de la Communication* (C-199/06, EU:C:2008:79, paragraph 54), and of 3 September 2015, *AZA* (C-89/14, EU:C:2015:537, paragraph 42).

58 Opinion of Advocate General Jacobs in *Alcan Deutschland* (C-24/95, EU:C:1996:433).

84. Such a rule presupposes that the interests of the authority are opposed to those of the individual. Having discovered that a decision granting a financial benefit was unlawful, the authority's interest is normally in recovering the sums paid as expeditiously as possible. The individual's interest is in retaining the benefit. However, the interests of the authority and the individual may coincide when a State authority has knowingly infringed EU law by granting aid and, unless it has changed its policy, its interest therefore lies in ensuring that the recipient retains the benefit, in breach of EU law, since it has also infringed that law.⁵⁹

85. In respect of the situation in the main proceedings, it follows from the foregoing that there is nothing that can justify not recovering the interest on the aid, notwithstanding the fact that the aid is time-barred under national rules. As from 25 November 1999, the date on which the Commission delivered its decision ordering the recovery of the aid, Nelson Antunes da Cunha ceased to be in a state of uncertainty with regard to the fact that the aid would be recovered in its entirety.⁶⁰

86. Moreover, as stated by the Commission, I note that the IFAP sent Nelson Antunes da Cunha a letter in March 2001 requesting repayment of the aid.⁶¹ It therefore appears that, in particular, it is the refusal by the recipient to accede to that request which led to the delay in recovering the aid. Accordingly, the situation in the main proceedings cannot be treated in the same way as the situation where a trader does not know whether the competent administrative authorities are going to reach a decision, and where the principle of legal certainty requires that such uncertainty be brought to an end within a certain period.⁶²

87. It follows that the referring court must also set aside a national rule such as that at issue in the main proceedings with respect to the period subsequent to the Commission's decision, since that rule prevents the full recovery of the interest on the aid.

V. Conclusion

88. In view of the foregoing considerations, I propose that the Court should answer the fourth question referred by the Tribunal Administrativo e Fiscal de Coimbra (Coimbra Administrative and Tax Court, Portugal) as follows:

- (1) Article 17(1) and Article 16(2) and (3) of Council Regulation (EU) 2015/1589 of 13 July 2015 laying down detailed rules for the application of Article 108 of the Treaty on the Functioning of the European Union must be interpreted as meaning that they preclude the application of a five-year limitation period under national law, such as that at issue in the main proceedings, according to which the full recovery of the State aid, including interest, is time-barred even before the expiry of the 10-year period laid down in Article 17(1) of Regulation 2015/1589.
- (2) Article 16(2) and (3) of Regulation 2015/1589 must be interpreted as meaning that it precludes a national rule setting a five-year limitation period, such as that at issue in the main proceedings, applicable to the recovery of interest on State aid that has been declared unlawful and incompatible with the internal market in a final decision of the Commission, since that rule prevents the full recovery of the aid.

⁵⁹ Opinion of Advocate General Jacobs in *Alcan Deutschland* (C-24/95, EU:C:1996:433, point 26).

⁶⁰ See, to that effect, judgment of 20 March 1997, *Alcan Deutschland* (C-24/95, EU:C:1997:163, paragraph 37).

⁶¹ See point 17 of this Opinion.

⁶² See, to that effect, judgment of 20 March 1997, *Alcan Deutschland* (C-24/95, EU:C:1997:163, paragraph 35).