



Reports of Cases

OPINION OF ADVOCATE GENERAL
SHARPSTON
delivered on 23 April 2020¹

Case C-743/18

Elme Messer Metalurgs

v

Latvijas Investīciju un attīstības aģentūra

(Request for a preliminary ruling from the Rēzeknes tiesa (Rēzekne City Court, Latvia))

(Reference for a preliminary ruling — Structural funds — Regulation (EC) No 1083/2006 — Articles 98, 57 and 2(7) — European Regional Development Fund (ERDF) — Obligation to make financial corrections in connection with irregularities — Durability of operations — Meaning of an ‘irregularity’ — Act or omission by an economic operator — Insolvency of the beneficiary’s sole commercial partner)

1. All business ventures involve an element of risk. Even the surest enterprises may sometimes founder, adrift in the doldrums of an economic downturn or scuttled by the misfortunes of a vital partner or customer. In the present case, the Court is called on to examine a situation in which a project, co-financed by the European Regional Development Fund (‘the ERDF’), failed to meet certain objectives because the beneficiary’s sole partner became insolvent. In such a situation, should the beneficiary be required to repay all of the funding granted from the ERDF, even if its failure to meet those objectives was the result of circumstances beyond its control?

2. More specifically, the question referred by the Rēzeknes tiesa (Rēzekne City Court, Latvia) in the present case gives the Court the opportunity to clarify the scope of the concept of an ‘irregularity’ within the meaning of Article 2(7) of Regulation No 1083/2006.² The referring court wishes to know, in essence, whether a situation such as that at issue in main proceedings constitutes an ‘irregularity’, within the meaning of that regulation, in respect of which a Member State must carry out a financial correction and recover all or part of the funding concerned.

¹ Original language: English.

² Council Regulation (EC) No 1083/2006 of 11 July 2006 laying down general provisions on the European Regional Development Fund, the European Social Fund and the Cohesion Fund and repealing Regulation (EC) No 1260/1999 (OJ 2006 L 210, p. 25), as amended by Regulation (EU) No 539/2010 of the European Parliament and of the Council of 16 June 2010 (OJ 2010 L 158, p. 1). Regulation No 1083/2006 was repealed, with effect from 1 January 2014, by Regulation (EU) No 1303/2013 of the European Parliament and of the Council of 17 December 2013 laying down common provisions on the European Regional Development Fund, the European Social Fund, the Cohesion Fund, the European Agricultural Fund for Rural Development and the European Maritime and Fisheries Fund and laying down general provisions on the European Regional Development Fund, the European Social Fund, the Cohesion Fund and the European Maritime and Fisheries Fund and repealing Council Regulation (EC) No 1083/2006 (OJ 2013 L 347, p. 320). Article 152 of Regulation No 1303/2013, entitled ‘Transitional Provisions’, provides that ‘[t]his Regulation shall not affect either the continuation or modification, including the total or partial cancellation of assistance approved by the Commission on the basis of Regulation (EC) No 1083/2006 or any other legislation applying to that assistance on 31 December 2013. That Regulation or such other applicable legislation shall consequently continue to apply after 31 December 2013 to that assistance or the operations concerned until their closure’. It is therefore the provisions of Regulation No 1083/2006 that govern these proceedings.

Legal Framework

EU law

Regulation No 2988/95

3. Regulation No 2988/95³ lays down general rules for supervision and penalties for the purpose of safeguarding the European Union's financial interests. Article 1(2) of that regulation provides:

“‘Irregularity’ shall mean any infringement of a provision of Community law resulting from an act or omission by an economic operator, which has, or would have, the effect of prejudicing the general budget of the Communities or budgets managed by them, either by reducing or losing revenue accruing from own resources collected directly on behalf of the Communities, or by an unjustified item of expenditure.’

Regulation No 1080/2006

4. Regulation No 1080/2006,⁴ which establishes the tasks of the ERDF, the scope of its assistance with regard to the objectives defined in Article 3(2) of Regulation (EC) No 1083/2006 and the rules on eligibility for assistance, states, in Article 2 thereof:

‘Pursuant to Article 160 of the Treaty and Regulation (EC) No 1083/2006, the ERDF shall contribute to the financing of assistance which aims to reinforce economic and social cohesion by redressing the main regional imbalances through support for the development and structural adjustment of regional economies, including the conversion of declining industrial regions and regions lagging behind, and support for cross-border, transnational and interregional cooperation.

In so doing, the ERDF shall give effect to the priorities of the Community, and in particular the need to strengthen competitiveness and innovation, create and safeguard sustainable jobs, and ensure sustainable development.’

Regulation No 1083/2006

5. Regulation No 1083/2006 laid down the general rules governing the ERDF, as well as the European Social Fund and the Cohesion Fund (together, ‘the Funds’), for the 2007-2013 period. It sets out, inter alia, the principles and rules on financial management, monitoring and control on the basis of responsibilities shared between the Member States and the European Commission.

6. Recitals 22, 28, 60 and 61 of Regulation No 1083/2006 explain that:

‘(22) The activities of the Funds and the operations which they help to finance should be consistent with the other Community policies and comply with Community legislation.

...

³ Council Regulation (EC, EURATOM) No 2988/95 of 18 December 1995 on the protection of the European Communities financial interests (OJ 1995 L 312, p. 1).

⁴ Regulation (EC) No 1080/2006 of the European Parliament and of the Council of 5 July 2006 on the European Regional Development Fund and repealing Regulation (EC) No 1783/1999 (OJ 2006 L 210, p. 1).

(28) Under Article 274 of the Treaty, in the context of shared management, the conditions allowing the Commission to exercise its responsibilities for implementation of the general budget of the European Union should be specified and the responsibilities of cooperation by the Member States clarified. Applying these conditions should enable the Commission to satisfy itself that Member States are using the Funds in a legal and regular manner and in accordance with the principle of sound financial management within the meaning of the Financial Regulation.

...

(60) In accordance with the principle of subsidiarity and subject to exceptions provided for in Regulation (EC) No 1080/2006 ..., Regulation (EC) No 1081/2006 [⁵] and Council Regulation (EC) No 1084/2006 [⁶], there should be national rules on the eligibility of expenditure.

(61) To ensure the effectiveness, fairness and sustainable impact of the intervention of the Funds, there should be provisions guaranteeing that investments in businesses are long-lasting and preventing the Funds from being used to introduce undue advantage. It is necessary to ensure that investments which benefit from assistance under the Funds can be written off over a sufficiently long period.'

7. Article 2(7) of Regulation No 1083/2006, defines an 'irregularity' (in terms not dissimilar to those of Article 1(2) of Regulation No 2988/95) as 'any infringement of a provision of Community law resulting from an act or omission by an economic operator which has, or would have, the effect of prejudicing the general budget of the European Union by charging an unjustified item of expenditure to the general budget'.

8. According to Article 3(1), action taken by the European Union under what is now Article 174 TFEU must be designed to strengthen the economic and social cohesion of the enlarged European Union in order to promote the harmonious, balanced and sustainable development of the Union. That action must be aimed at reducing the economic, social and territorial disparities which have arisen particularly in countries and regions whose development is lagging behind and in connection with economic and social restructuring and the ageing of the population.⁷

9. Under Article 9(2), the Commission and the Member States are to ensure that assistance from the Funds is consistent with the activities, policies and priorities of the European Union. In accordance with Article 9(5), operations financed by the Funds are to comply with the provisions of the Treaty and of acts adopted under it.

10. Article 56 of Regulation No 1083/2006, entitled 'Eligibility of expenditure', provides:

'1. Expenditure, including for major projects, shall be eligible for a contribution from the Funds if it has actually been paid between the date of submission of the operational programmes to the Commission or from 1 January 2007, whichever is earlier, and 31 December 2015. Operations must not have been completed before the starting date for eligibility.

...

⁵ Regulation (EC) No 1081/2006 of the European Parliament and of the Council of 5 July 2006 on the European Social Fund and repealing Regulation (EC) No 1784/1999 (OJ 2006 L 210, p. 12).

⁶ Council Regulation (EC) No 1084/2006 of 11 July 2006 establishing a Cohesion Fund and repealing Regulation (EC) No 1164/94 (OJ 2006 L 210, p. 79)

⁷ See also recital 1.

3. Expenditure shall be eligible for a contribution from the Funds only where incurred for operations decided on by the managing authority of the operational programme concerned or under its responsibility, in accordance with criteria fixed by the monitoring committee.

...

4. The rules on the eligibility of expenditure shall be laid down at national level subject to the exceptions provided for in the specific Regulations for each Fund. They shall cover the entirety of the expenditure declared under the operational programme.

...'

11. Under Article 57 of Regulation No 1083/2006, entitled 'Durability of operations':

'1. The Member State or managing authority shall ensure that an operation comprising investment in infrastructure or productive investment retains the contribution from the Funds only if it does not, within five years from its completion, undergo a substantial modification which is caused by a change in the nature of ownership of an item of infrastructure or the cessation of a productive activity and which affects the nature or the implementation conditions of the operation or gives to a firm or a public body an undue advantage.

...'

12. In accordance with Article 60 of Regulation No 1083/2006:

'The managing authority shall be responsible for managing and implementing the operational programme in accordance with the principle of sound financial management and in particular for:

- (a) ensuring that operations are selected for funding in accordance with the criteria applicable to the operational programme and that they comply with applicable Community and national rules for the whole of their implementation period.
- (b) verifying that the co-financed products and services are delivered and that the expenditure declared by the beneficiaries for operations has actually been incurred and complies with Community and national rules; ...'

13. Article 70 of Regulation No 1083/2006, entitled 'Management and control', provides:

'1. Member States shall be responsible for the management and control of operational programmes, in particular through the following measures:

- (a) ensuring that management and control systems for operational programmes are set up in accordance with Articles 58 to 62 and function effectively;
- (b) preventing, detecting and correcting irregularities and recovering amounts unduly paid together with interest on late payments where appropriate. They shall notify these to the Commission and keep the Commission informed of the progress of administrative and legal proceedings.

2. When amounts unduly paid to a beneficiary cannot be recovered, the Member State shall be responsible for reimbursing the amounts lost to the general budget of the European Union, when it is established that the loss has been incurred as a result of fault or negligence on its part.

...'

14. Article 88(1) of Regulation No 1083/2006 provides, *inter alia*, that, for the purposes of that regulation, ‘an operation shall be deemed completed where the activities under it have been actually carried out and for which all expenditure by the beneficiaries and the corresponding public contribution have been paid’.

15. Pursuant to Article 98(1) of that regulation, the Member States bear in the first instance responsibility for investigating irregularities, acting upon evidence of any major change affecting the nature or the conditions for the implementation or control of operations or operational programmes and making the financial corrections required.⁸ Under Article 98(2), the Member State is to make the financial corrections required in connection with the individual or systemic irregularities detected in operations or operational programmes. Those corrections consist of cancelling all or part of the public contribution to the operational programme, taking into account the nature and gravity of the irregularities and the financial loss to the Funds.

Regulation No 1828/2006

16. Regulation No 1828/2006⁹ lays down rules to implement Regulation No 1083/2006 and Regulation No 1080/2006 as regards, *inter alia*, management and control systems and irregularities.

17. Under Article 13 of Regulation No 1828/2006, entitled ‘Managing authority and controllers’:

‘1. For the purposes of the selection and approval of operations pursuant to Article 60(a) of Regulation (EC) No 1083/2006, the managing authority shall ensure that beneficiaries are informed of the specific conditions concerning the products or services to be delivered under the operation, the financing plan, the time limit for execution and the financial and other information to be kept and communicated.

It shall satisfy itself that the beneficiary has the capacity to fulfil these conditions before the approval decision is taken.’

18. Article 27 of Regulation No 1828/2006, in Section 4 thereof, entitled ‘Irregularities’, defines an ‘economic operator’ as ‘any natural or legal person or other entity taking part in the implementation of assistance from the Funds, with the exception of a Member State exercising its prerogatives as a public authority’.

19. Article 28 of Regulation No 1828/2006 provides that Member States are to report to the Commission any irregularities which have been the subject of a primary administrative or judicial finding, specifying, *inter alia*, the provision which has been infringed, the practices employed in committing the irregularity and, where appropriate, whether the practice gives rise to a suspicion of fraud.

National law

20. Point 16.1 of Cabinet Regulation No 200, concerning the first stage of selection of proposals for projects relating to the activity ‘High added value investments’ in Annex 2.1.2.4 to the operational programme ‘Entrepreneurship and Innovations’, provides that ‘[l]ong-term investments shall be eligible only if they are used in the place of performance of the project mentioned in the application and in the context of the economic activity of the beneficiary’.

⁸ See also recital 65.

⁹ Commission Regulation (EC) No 1828/2006 of 8 December 2006 setting out rules for the implementation of Council Regulation (EC) No 1083/2006 laying down general provisions on the European Regional Development Fund, the European Social Fund and the Cohesion Fund and of Regulation (EC) No 1080/2006 of the European Parliament and of the Council on the European Regional Development Fund (OJ 2006 L 371, p. 1).

21. Point 17.1 of that regulation provides that '[i]n the context of the activity, the following expenditure is considered eligible: expenditure relating to the purchase of new equipment (and plant) which are directly linked to the process of production or the provision of services in the sector in which the project is to be implemented ...'

22. Point 2.1 of Cabinet Regulation No 740 on the 'Procedures for reporting irregularities detected in the implementation of the European Union Structural Funds and Cohesion Fund, taking decisions on utilisation of the financing granted and recovering irregular expenditure' provides that 'an irregularity must be interpreted as any act which infringes any provision of Latvian or EU law'.

23. Article 1774 of the Latvian Civil Code provides that 'an accidental loss is not required to be compensated by anyone. Therefore, if an unforeseen obstacle prevents a person from performing an obligation that he has undertaken, that person shall be considered to have performed the obligation, unless he has accepted in a contract the risk of accidental loss.'

Facts, procedure and the question referred

24. On 7 April 2010, the applicant in the main proceedings, SIA 'Elme Messer Metalurgs' ('EMM'), concluded a contract with the 'Latvijas Investīciju un attīstības aģentūra' (Investment and Development Agency of Latvia; 'the Agency') under which EMM was granted co-financing from the ERDF for a project aimed at creating a new facility for the production of certain industrial gases ('the contract'). It was envisaged that that facility would form part of the operation of the metallurgy plant owned by AS 'Liepājas Metalurgs' ('LM'), which was also a party to the contract.¹⁰

25. Implementation of the project began that very day and was supposed to be completed by 6 December 2012. The necessary equipment was purchased and installed, experts were recruited and trained, and the production facility began operating. To achieve this, EMM invested EUR 12 283 579.00 of its own funds, as well as the financial assistance from the ERDF granted to it by way of interim payments, which amounted to EUR 2 212 511.14.

26. On 3 January 2013, EMM submitted a final performance report on the project to the Agency, which it supplemented on 7 February 2013, requesting that the final payment of EUR 737 488.86 by way of ERDF assistance be transferred to it in accordance with the contract.

27. In early 2013, LM began to have cash-flow problems. Since EMM's performance of the commitments set out in its business plan was directly dependant on LM's commercial activity, the Agency expressed concerns that EMM might be unable to fulfil its obligations under the contract and meet those commitments – namely maintaining production at no less than approximately 50.5 million m³ per year, as well as ensuring an average increase in turnover of at least 20% during the first two years following the completion of the project. The Agency therefore suspended payment of the financial assistance.

28. On 12 November 2013, it was announced that insolvency proceedings had been commenced against LM.

29. By a letter dated 28 July 2014 the Agency demanded that EMM supply documents containing information about the implementation of the project, indicating that it might terminate the contract.

30. The metallurgy plant belonging to LM was acquired at some point by KVV 'Liepājas Metalurgs'. In consequence, EMM was able to resume its economic activity. It informed the Agency of this and proposed business restructuring options.

¹⁰ LM's obligations under the contract were limited to the leasing of a property.

31. On 31 March 2016, the Agency wrote to EMM. Having pointed out certain problems with the Liepājas Metalurgs metallurgy plant, it notified EMM that it was terminating the contract unilaterally. The Agency justified that termination on the ground that, during the implementation of the project, EMM had committed serious breaches, namely by departing substantially from the commitments set out in EMM's business plan.

32. EMM brought an action against the Agency before the referring court, requesting that the notice terminating the contract be declared invalid. It claims that, by unilaterally terminating that contract, the Agency breached the principle of good faith, since EMM did not breach its contractual obligations and it is common ground that it used the financial assistance granted to it for tasks associated with implementing the project.

33. The Agency submits that LM's financial problems and the interruption of its economic activity should not be regarded as an unforeseen obstacle within the meaning of Article 1774 of the Latvian Civil Code. Rather, the situation at issue in the main proceedings should be regarded as an 'irregularity' within the meaning of Article 2(7) of Regulation No 1083/2006 and Point 2.1 of Cabinet Regulation No 740. In consequence, the Agency was entitled to recover the funding already granted in accordance with the procedures laid down in Cabinet Regulation No 740.

34. The Agency therefore filed a counterclaim against EMM, whereby it seeks to recover the entirety of the financial assistance already paid to the latter – that is to say, EUR 2 212 511.14 – as well as the default interest accrued over the period from 18 April 2016 to 14 February 2017, amounting to EUR 670 390.53.

35. EMM contends that Regulation No 1083/2006, which states that an irregularity is 'any infringement of a provision of [EU] law resulting from an act or omission by an economic operator', cannot be applied in the present case. The situation in which EMM was unable to use the production facility as part of its economic activity did not occur as a result of an act or omission attributable to EMM, but because the 'Liepājas Metalurgs' plant had ceased to operate.

36. The referring court considers that the outcome of the main proceedings depends to a large extent on whether or not an 'irregularity' has occurred, within the meaning of Article 2(7) of Regulation No 1083/2006. In its view, only if such an irregularity is established will the Agency be entitled to refuse to continue the funding and recover the funding already granted.

37. In those circumstances, the Rēzeknes tiesa (Rēzekne City Court, Latvia) decided to stay the proceedings and to refer the following question to the Court of Justice for a preliminary ruling:

'Must Article 2(7) of Council Regulation No 1083/2006 be interpreted as meaning that a situation in which the beneficiary of funding is unable to achieve the expected level of turnover during the relevant period because, during that period, the business of its sole partner has been suspended or that partner has become insolvent to be considered an act or omission by an economic operator (the beneficiary of funding) which has, or would have, the effect of prejudicing the general budget of the European Union?'

38. Written observations were submitted by EMM, the Agency, the Estonian and Latvian Governments and the European Commission. At the hearing held on 11 December 2019, those parties, as well as the Czech Government, made oral submissions and answered questions put to them by the Court.

Admissibility

39. Both the Commission and the Estonian Government submit that certain elements of the factual and legal context of the main proceedings cannot be clearly discerned from the order for reference. That raises the question whether the request for a preliminary ruling is admissible.

40. It is settled case-law that, in the context of the cooperation instituted by Article 267 TFEU, the national court is bound to observe scrupulously the requirements concerning the content of a request for a preliminary ruling, expressly set out in Article 94 of the Rules of Procedure of the Court of Justice, so as to enable the Court to provide an interpretation of EU law which will be of use to the national court and to ensure that it is possible for the Governments of the Member States and other interested parties to submit observations in accordance with Article 23 of the Statute of the Court of Justice of the European Union.¹¹ In that context, given that it is the request for a preliminary ruling that serves as the basis for the proceedings before the Court, it is essential that the national court should set out in that request, *inter alia*, the factual and legal background to the dispute in the main proceedings.¹²

41. However, in view of the spirit of judicial cooperation which governs relations between national courts and the Court of Justice in the context of preliminary-ruling proceedings, the fact that the referring court did not make certain initial findings does not necessarily mean that the request for a preliminary ruling is inadmissible if, in spite of those deficiencies, the Court, in the light of the information contained in the case file, considers that it is in a position to provide a useful answer to the referring court.¹³

42. It is true that the information provided in the order for reference is less than exhaustive in certain respects, particularly as regards the precise content and nature of EMM's obligations under the contract. Nevertheless, I consider that the order for reference contains sufficient factual and legal material to enable the Court to provide an answer that will be of use to the referring court in resolving the dispute before it. In particular, it is clear from the material before the Court that the outcome of the dispute in the main proceedings does indeed turn upon whether or not an 'irregularity' has occurred. An interpretation of that concept, within the meaning of Article 2(7) of Regulation No 1083/2006, is therefore essential to enable the referring court to resolve the dispute before it.

Assessment

43. By its question, the referring court essentially wishes to know whether a situation such as that in the main proceedings – in which a beneficiary of financial assistance from the ERDF is unable to achieve certain objectives of the operation in question because its sole commercial partner or customer has ceased its economic activity or become insolvent – constitutes an irregularity within the meaning of Article 2(7) of the Regulation No 1083/2006.

44. An irregularity, as defined in that provision, contains three elements. There must be (i) an infringement of a provision of EU law, (ii) resulting from an act or an omission by an economic operator, (iii) which has, or would have, the effect of prejudicing the general budget of the European Union by charging an unjustified item of expenditure to that budget.

¹¹ Judgment of 27 October 2016, *Audace and Others*, C-114/15, EU:C:2016:813, paragraphs 35 and 36 and the case-law cited.

¹² See, to that effect, order of 8 September 2016, *Google Ireland and Google Italy*, C-322/15, EU:C:2016:672, paragraph 18 and the case-law cited.

¹³ Order of 8 September 2016, *Google Ireland and Google Italy*, C-322/15, EU:C:2016:672, paragraph 24 and the case-law cited.

45. In order to establish the existence of an irregularity within the meaning of Article 2(7) of Regulation No 1083/2006, it is therefore necessary to determine whether each of those three (cumulative) conditions are met.

Infringement of a provision of EU law

46. The Court has held that ‘any infringement of a provision of [EU] law’ must be interpreted as covering not only breaches of EU law but also breaches of provisions of national law applicable to operations financed under the Funds.¹⁴

47. That interpretation is supported by both the legislative context and the objectives of Regulation No 1083/2006. In particular, Article 60(a) of Regulation No 1083/2006 requires managing authorities to ensure that operations selected for funding ‘comply with applicable [EU] and *national* rules for the whole of their implementation period’ (emphasis added). If breaches of provisions of national law which contribute to ensuring that EU law relating to the management of projects financed by EU funds is properly applied could not constitute an ‘irregularity’ within the meaning of Article 2(7) of Regulation No 1083/2006, that would risk jeopardising a principal objective pursued by the EU legislature in this area, namely ensuring that EU funds are used properly and effectively in order to safeguard the financial interests of the European Union.¹⁵

48. It is for the national court to ascertain whether an infringement of EU law or of the provisions of national law relating to the application of the ERDF funding occurred in the present case. In particular, it is for that court to determine whether, as the Agency submits in its written observations, EMM breached the contract and various provisions of national law¹⁶ by failing to carry out an economic activity with the equipment acquired in the context of the operation in question and by failing to achieve the objectives of that operation.

49. In that respect, it should be borne in mind that the system of subsidies developed in the EU rules is based, inter alia, on compliance by the recipient with a series of conditions for entitlement to financial assistance. If the recipient does not fulfil all of the conditions to which the grant of assistance was made subject, it cannot rely on the principles of protection of legitimate expectations and acquired rights in order to secure payment of the balance of the assistance initially granted.¹⁷

50. That said, the national court must evaluate whether the elements of the contract that EMM is alleged to have breached were indeed (i) formal terms of the contract, rather than aspirational statements, and (ii) (if so) essential terms thereof, viewed from the perspective of ensuring that EU funds are used properly and effectively in order to safeguard the financial interests of the European Union. Only where both conditions are met could an irregularity have occurred.¹⁸

¹⁴ Judgment of 26 May 2016, *Județul Neamț*, C-260/14 and C-261/14, EU:C:2016:360, paragraph 43, and the Opinion of Advocate General Bot in those cases (EU:C:2016:7), points 73 and 74.

¹⁵ See judgment of 26 May 2016, *Județul Neamț*, C-260/14 and C-261/14, EU:C:2016:360, paragraphs 38 to 43. The definition of an ‘irregularity’ in Article 2(36) of Regulation No 1303/2013 now refers expressly to ‘any breach of Union law, or of national law relating to its application’ (emphasis added).

¹⁶ In that respect, the Agency cites, inter alia, Article 15(2)(1) of the Eiropas Savienības struktūrfondu un Kohēzijas fondu vadības likums (Latvian Law on the management of the Structural Funds and of the Cohesion Fund of the European Union), according to which the beneficiary of a subsidy is required to ensure that the project financed by an EU fund is carried out in accordance with the terms of a civil law contract. Thus, according to the Agency, EMM automatically breached that national law provision by failing to respect the terms of the contract.

¹⁷ Judgment of 13 March 2008, *Vereniging Nationaal Overlegorgaan Sociale Werkvoorziening and Others*, C-383/06 to C-385/06, EU:C:2008:165, paragraph 56.

¹⁸ Thus, for example, breach of a term that all reception areas of a building should be painted white by painting them magnolia instead might not satisfy condition (i) and certainly would not satisfy condition (ii).

51. The national court must also verify whether the beneficiary was sufficiently informed by the Agency of its obligations in relation to the operation in question. Under Article 13(1) of Regulation No 1828/2006, the managing authority is to ensure that beneficiaries are informed of, *inter alia*, the specific conditions concerning the products or services to be delivered under the operation and the time limit for execution. Furthermore, where a beneficiary of financial assistance from the Funds is not in a position to ascertain unequivocally what its rights and obligations are and take steps accordingly, the principle of legal certainty precludes reliance on those obligations against that beneficiary, provided that it is possible to establish the beneficiary's good faith.¹⁹

52. The Agency also claims that EMM breached the durability requirement laid down in Article 57(1) of Regulation No 1083/2006 and thereby breached EU law as well as national law. On the basis of the material before the Court, it does not seem to me that that provision can be invoked here.

53. As recital 61 of Regulation 1083/2006 makes clear, the durability requirement laid down in Article 57(1) of that regulation is intended to ensure that investments from the Funds have a long-lasting impact on the regions in question and are not used to introduce undue advantage.

54. Article 57(1) of Regulation No 1083/2006 therefore provides that the Member State or managing authority is to ensure that operations comprising investment in infrastructure or productive investment retain the contribution from the Funds only if those operations do not undergo a substantial modification, meeting the conditions set out in that provision, within five years from their completion. Article 57(1) is therefore triggered only once an operation is legally 'completed'.

55. Article 88(1) of Regulation No 1083/2006 provides that, for the purposes of that regulation, an operation is to be deemed completed 'where the activities under it have been actually carried out and for which all expenditure by the beneficiaries and the corresponding public contribution have been paid'.

56. Thus, an operation will *not* be deemed 'completed' for the purposes of Regulation No 1083/2006 if further activity is required to complete the operation or further payments remain to be made to the beneficiary.²⁰

57. As the Commission pointed out in its written observations, it is not clear from the order for reference whether EMM had actually carried out the activities under the operation in question. That is a matter for the national court to establish and I make no judgment one way or the other. What is clear from the documents before the Court is that the public contribution was not paid in full. As the Agency indicated in its written observations, it did *not* transfer to EMM the final payment provided for under the contract, amounting to EUR 737 488.86.

58. Since the public contribution was not paid in full, it follows that the operation was not completed within the meaning of Article 88(1) of Regulation No 1083/2006. Article 57(1) of that regulation is therefore not triggered, because the durability requirement it lays down applies to the period 'within five years from [the operation's] completion'.²¹

¹⁹ See, to that effect, judgment of 21 June 2007, *ROM-projecten*, C-158/06, EU:C:2007:370, paragraphs 24 to 26 and 29 to 31.

²⁰ See also the Commission's Guidance note of 21 April 2010 on partial closure (under Article 88 of Regulation (EC) No 1083/2006) (COCOF 08/0043/03), p. 3.

²¹ The link between the durability requirement and the payment of the public contribution is made even more explicit in Regulation No 1303/2013, Article 71(1) of which provides that the requirement concerning the durability of operations is to apply to the period 'within five years of the *final payment* to the beneficiary' (emphasis added).

59. I would add that, as well as running counter to the applicable texts, it also seems to me unreasonable to impose such a requirement on a beneficiary which has not received the full public contribution corresponding to the eligible expenditure it has incurred in respect of the operation in question. Without access to the full measure of that financial assistance the beneficiary might well not have the means to ensure the durability of that operation.

Act or omission by an economic operator

60. The second cumulative condition set out in the definition of an ‘irregularity’ in Article 2(7) of Regulation No 1083/2006 is that the infringement must result from ‘an act or omission by an economic operator’.²²

61. Does a situation in which a beneficiary of assistance from the Funds infringes a provision of EU law or a relevant provision of national law because its sole partner or customer ceases activity or becomes insolvent constitute an ‘act or omission by [that] economic operator’?

62. Contrary to the position espoused by the EMM in its written observations, the notion of an ‘act or omission’ within the meaning of Article 2(7) of Regulation No 1083/2006 is not limited to deliberate fraudulent acts. The legislation in this area makes a clear distinction between the broad category of *irregularities*, which merely entail an administrative measure withdrawing the wrongly obtained advantage, and the narrower subcategory of *intentional irregularities* or those caused by *negligence*, which may attract administrative penalties or – in the case of fraudulent irregularities – give rise to criminal proceedings.²³ In particular, as the Agency correctly pointed out at the hearing, the reporting requirement in Article 28 of Regulation No 1828/2006 requires the Member State concerned to specify to the Commission whether a given irregularity involves a suspicion of fraud.²⁴ That would be unnecessary if fraud were an essential element of an irregularity. Accordingly, an irregularity may be established even if the act or omission in question is devoid of any fraudulent intent.²⁵

63. However, by including the words ‘resulting from an act or omission by an economic operator’ in the definition of an irregularity, the legislature imposed a condition that the infringement in question must be attributable to an act or omission *by the operator itself*. In other words, there must be an adequate link of causality between the infringement and an act or omission imputable to the

²² The notion of an ‘economic operator’, within the meaning of that provision, is not defined in Regulation No 1083/2006. However, Article 27 of Regulation No 1828/2006, which lays down rules for the implementation of Regulation No 1083/2006, defines an ‘economic operator’ as ‘any natural or legal person or other entity taking part in the implementation of assistance from the Funds, with the exception of a Member State exercising its prerogatives as a public authority’.

²³ See Articles 4 and 5 of Regulation No 2988/95, concerning irregularities in general and intentional irregularities or those caused by negligence, respectively. As the Court noted in *Județul Neamț*, since ‘Regulation Nos 2988/95 and 1083/2006 form part of the same mechanism designed to ensure the proper management of EU funds and the safeguarding of the European Union’s financial interests, the term “irregularity” within the meaning of Article 1(2) of Regulation No 2988/95 and Article 2(7) of Regulation No 1083/2006 must be interpreted in a uniform manner’ (judgment of 26 May 2016, *Județul Neamț*, C-260/14 and C-261/14, EU:C:2016:360, paragraph 34).

²⁴ ‘Suspected fraud’ is defined in Article 27 of Regulation No 1828/2006 as ‘an irregularity giving rise to the initiation of administrative or judicial proceedings at national level in order to establish the presence of intentional behaviour, in particular fraud, as referred to in Article 1(1)(a) of the Convention drawn up on the basis of Article K.3 of the Treaty on European Union, on the protection of the European Communities’ financial interests’.

²⁵ See Justyna Łacny, Lech Paprzycki and Eleonora Zielińska, ‘The System of Vertical Cooperation in Administrative Investigations Cases’, *Toward a Prosecutor for the European Union, Volume 1: A Comparative Analysis*, Hart Publishing, 2013, 805 – 807.

operator.²⁶ Thus, in *Bayerische Hypotheken- und Vereinsbank* the Court held that a situation in which an export refund had been wrongly paid to an exporter owing to an error on the part of the national authorities did not constitute an ‘irregularity’ within the meaning of Regulation No 2988/95, since the erroneous overpayment did not result from an act or omission by that exporter.²⁷

64. Accordingly, it does not appear to me that an infringement can be said to result from an act or omission imputable to the operator where its ultimate cause lies in external circumstances that are beyond that operator’s control, such as the insolvency of its sole commercial partner. It will only be otherwise where, despite the existence of those external circumstances, the infringement can nevertheless properly be attributed to the operator’s conduct – in that, for example, it failed to exercise all due care to avoid the consequences of those circumstances. In such a situation, the infringement in fact results from the operator’s conduct (his act or omission) rather than from the external circumstances as such.

65. That interpretation is in line with the overarching aim of the Funds, and of the ERDF in particular. Article 3 of Regulation No 1083/2006 indicates that to be reducing disparities which have arisen particularly in countries and regions whose development is lagging behind by, inter alia, promoting growth and employment in those countries and regions. One of the ways in which that aim is accomplished is by supporting entrepreneurship and innovation in those areas. Indeed, the operational programme under which the assistance was granted to the operation at issue was entitled ‘Entrepreneurship and Innovations’.

66. It would run counter to that objective of promoting growth and employment, and in particular supporting entrepreneurship and innovation, if the concept of an ‘act or omission’ in Article 2(7) of Regulation No 1083/2006 were interpreted as covering a situation in which a beneficiary of financial assistance from the Funds is, as a result of external circumstances beyond its control and despite exercising all due care, unable to meet all of the objectives of the operation. Entrepreneurs might reasonably be reluctant to seek assistance from the Funds if they could be required to repay all of the assistance received in the event that external circumstances beyond their control rendered them unable to meet their stated objectives, despite exercising all due care. Such an interpretation of ‘act or omission’ could therefore have a chilling effect on growth and employment in the countries and regions in question.

67. The objective of promoting regional growth and employment must, however, be balanced with the objective of ensuring that EU funds are used properly and effectively in order to safeguard the financial interests of the European Union. That latter objective would be undermined if an operator could justify, on the basis of external circumstances, infringements which were in reality the result of its negligence or inaction.

68. Accordingly, an infringement which occurs as a result of external circumstances beyond the control of the operator in question may nevertheless properly be attributed to an act or omission on the part of that operator in negligently allowing that situation to arise, or in failing to take appropriate and reasonable measures to remedy the situation. In particular, that will be the case where the operator failed to exercise all due care, in that it failed to foresee that situation and take measures to attenuate its consequences or, after the situation had arisen, failed to take appropriate and reasonable measures to remedy the situation and meet its obligations in relation to the operation in question.

²⁶ The various language versions of Regulation No 1083/2006 use ‘resulting from’, ‘résultant de’, ‘als Folge’, ‘derivante da’, and ‘correspondiente a’ in the English, French, German, Italian and Spanish versions respectively, all of which confirm that a causal link is required between the infringement and the act or omission in question.

²⁷ Judgment of 15 January 2009, *Bayerische Hypotheken- und Vereinsbank*, C-281/07, EU:C:2009:6, paragraphs 20 and 21. In my Opinion in that case, I explored whether the exporter might nevertheless have committed an irregularity through omission by failing to verify the amount paid to it and raise the error with the national authorities (Opinion in *Bayerische Hypotheken- und Vereinsbank*, C-281/07, EU:C:2008:522, points 35 and 36). The consequence of *not* holding that an irregularity had been committed was that the four- year limitation period applicable to irregularities did *not* intervene so as to protect the exporter against belated recovery of the export refund wrongly paid.

69. A useful analogy can perhaps be drawn with the situation in which, under Article 5(3) of Regulation (EC) No 261/2004,²⁸ airlines are exempted from their obligation to pay compensation where the cancellation of a flight is due to extraordinary circumstances which could not have been avoided even if all reasonable measures had been taken. In its judgment in *Wallentin-Hermann*, the Court held, in essence, that, in order to confer exemption, it must be established that the extraordinary circumstances in question could not have been avoided by ‘measures appropriate to the situation, that is to say by measures which, at the time those extraordinary circumstances arise, meet, inter alia, conditions which are technically and economically viable for the air carrier concerned’.²⁹ Similarly, when faced with external circumstances beyond its control which threaten its ability to meet its obligations in relation to the operation in question, a beneficiary of assistance from the Funds must, in my view, take all reasonable measures appropriate to the situation at the time those circumstances arise in order to meet those obligations and avoid an infringement. Failure to do so would constitute an omission on its part and an infringement within the meaning of Article 2(7) of Regulation No 1083/2006 would have been established.

70. The Agency argues in its written observations that EMM failed to meet the objectives of the project in question here, not because of LM’s insolvency, but as a result of a deliberate act and a subsequent omission on EMM’s part. It submits, first, that EMM freely chose to base its business model on manufacturing products in a single form and adapted to a single customer (LM), without evaluating the commercial risks linked to the possibility that that customer would get into financial difficulties. The Agency further alleges that EMM misled it by stating that, in the future, by acquiring an additional installation, it would be able to produce liquefied gas products and sell its production to another customer, in the event that demand from LM diminished. Second, the Agency submits that EMM omitted to restructure its business, draw up an action plan and begin selling products to other customers, despite the Agency’s repeated requests that it do so.

71. It is for the national court to examine those arguments in detail and ascertain whether the infringements alleged in the main proceedings can ultimately be attributed to an act or omission on the part of EMM. In particular, that national court must determine whether EMM failed to exercise all due care in choosing to rely on LM as its sole customer or in failing to foresee LM’s insolvency or whether, after LM’s financial problems became clear, EMM failed to take all reasonable measures appropriate to the situation in order to meet its obligations and avoid an infringement.

72. That said, it does not appear to me as a matter of principle that EMM necessarily demonstrated a lack of diligence by basing its business model on the supply of gas products to LM, as its sole customer, such that the alleged infringements could be attributed to that choice. Relying on a single customer is undoubtedly associated with certain commercial risks. It does not necessarily demonstrate a lack of diligence however, particularly in industries in which the number of potential customers is limited or where the method of production and supply dictates a strong link with a single customer. In that respect, EMM explained at the hearing that gas products such as those which it supplied to LM can be neither stocked nor transported. For that reason, production facilities are normally installed in proximity to large customers. Furthermore, as noted in the order for reference, in 2008 the Latvian State guaranteed a loan of approximately EUR 160 000 000 to LM, following a thorough assessment by the Latvian Ministry for Finance and State Treasury. Against that background, it does not appear evident to me – though it is a matter for the national court to verify – that EMM failed to exercise all due care in relying on LM as its sole customer or that it could reasonably have foreseen, at the time the contract was concluded, that LM’s financial state would deteriorate to the point of insolvency.

²⁸ Regulation (EC) No 261/2004 of the European Parliament and of the Council of 11 February 2004 establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights, and repealing Regulation (EEC) No 295/91 (OJ 2004 L 46, p. 1)

²⁹ Judgment of 22 December 2008, *Wallentin-Hermann*, C-549/07, EU:C:2008:771, paragraphs 26, 27 and 40.

73. I also recall that Article 13(1) of Regulation No 1828/2006 requires the managing authority to satisfy itself, before approving a proposed operation, that the beneficiary has the capacity to fulfil the specific conditions concerning, *inter alia*, the products or services to be delivered under the operation and the time limit for execution. It appears to me that the heavy reliance of EMM's business model on the supply of gas products in a single form to a single customer must have been evident from the proposal which it submitted to the Agency. In particular, it is apparent from the order for reference that the envisaged production facility was to form part of the operation of the Liepājas Metalurgs metallurgy plant and would supply the gases necessary for the operation of the latter. In those circumstances, I do not see how the Agency could have been in any doubt, when it approved the operation, that the success of EMM's operation was inherently linked to the continued operation of the Liepājas Metalurgs plant. By approving the proposed operation, the Agency must therefore have been satisfied that EMM was capable, using that business model, of fulfilling the objectives of the operation.

74. The Agency cannot subsequently claim that EMM failed to assess the commercial risks of that business model, without implying that the Agency failed to assess those risks in approving the operation.

75. In that respect, it is irrelevant that, as the Agency submits, EMM amended its initial proposal to clarify that it would no longer be able to produce liquefied gas with the equipment to be acquired. Since the Agency approved the amended proposal, it must have been satisfied that, even taking into account those changes, EMM would still be able to fulfil the objectives of the operation.

76. I turn to the Agency's argument that the alleged infringements can be attributed to an omission on the part of EMM, in that, faced with LM's financial difficulties, it omitted to take the measures required in order to ensure that it could continue to meet the objectives of the operation.

77. In a situation where an operator's sole commercial partner or customer becomes insolvent, or its insolvency is reasonably foreseeable, a failure by that operator to take all appropriate and reasonable measures in order to remedy the situation and avoid an infringement would indeed constitute an 'omission' for the purpose of Article 2(7) of Regulation No 1083/2006. Whether, in the present case, there were appropriate and reasonable measures that EMM could have taken to remedy the situation is ultimately for the national court to determine.

78. On the basis of the material before this Court, it is not evident to me that the measures which the Agency claims EMM should have taken, namely restructuring its business so as to produce liquefied gas which could be sold to other customers, were appropriate and reasonable measures that would have allowed EMM to meet the objectives of the operation. EMM's production facility was adjacent to, and formed part of, the operation of the Liepājas Metalurgs plant. EMM has stated, without being contradicted by the Agency, that its production facility is connected to the latter by a fixed pipe network. If EMM could reasonably have expected that plant to resume operations, it is not evident that embarking on a radical and expensive restructuring of its business would have been either reasonable or appropriate.

79. In the light of the foregoing, I conclude that a situation in which the beneficiary of financial assistance from the ERDF is unable to achieve the expected level of turnover during the relevant period because, during that period, the business of its sole partner has become suspended or that partner has become insolvent does not constitute an act or omission by an economic operator, within the meaning of Article 2(7) of Regulation No 1083/2006, where

- that situation was not reasonably foreseeable by the beneficiary at the time the contract granting funding was entered into;
- the beneficiary did not act negligently in allowing the situation to arise; and

- the beneficiary could not have remedied the situation and met its obligations in relation to that assistance even by taking all reasonable and appropriate measures.

Prejudice, or potential prejudice, to the general budget of the European Union

80. The third element of an irregularity, within the meaning of Article 2(7) of Regulation No 1083/2006, is that the infringement in question must be such that it ‘has, or would have, the effect of prejudicing the general budget of the European Union by charging an unjustified item of expenditure to the general budget’.

81. In that respect, it is not necessary to demonstrate the existence of a specific financial impact; the infringement must merely be capable, as such, of having an impact on the budget.³⁰

82. As I have already explained, I am doubtful that the infringements alleged in the main proceedings can be attributed to an act or an omission on the part of EMM. Should the referring court nevertheless conclude that the infringements in question have been established, and that they can be attributed to an act or omission on the part of EMM, it is for that court to determine whether those infringements are capable of having an impact on the budget of the European Union.

83. In its written observations, EMM argues that, in order to meet the requirement that there be a prejudice, or potential prejudice to the general budget of the European Union, the expense imposed on the EU budget due to the grant of the funding in question must have been unjustified from the beginning (that is to say from the time the funding was granted). Thus, because the funding granted to EMM in 2010 was duly granted, and indeed duly used until 2013, when LM ceased its economic activity, no unjustified expense could have been imposed on the EU budget.

84. I do not agree.

85. In my view, an unjustified expense may be imposed on the EU budget even if funding is duly granted, and duly used initially. In particular, there will be a prejudice to the budget of the Union if it has to bear expenditure linked to a project which is not fully implemented or which, if it is completed, does not respect the durability requirement laid down in Article 57(1) of Regulation No 1083/2006.³¹

86. It is for the national court to determine, in view of all the foregoing, whether the three elements of an irregularity are established in the case at issue in the main proceedings. Since those elements are cumulative, only if all three are established may a financial correction be carried out on the basis of Article 98(2) of Regulation No 1083/2006.

Factors to be taken into account in calculating the amount of a financial correction

87. The referring court does not expressly refer in its question to the issue of how any applicable financial correction is to be calculated in the event that an irregularity is established. In the present case, the Agency seeks to apply a 100% correction, recovering all of the funding granted to EMM for the operation in question. The issue therefore merits examination.

³⁰ Judgment of 6 December 2017, *Compania Națională de Administrare a Infrastructurii Rutiere*, C-408/16, EU:C:2017:940, paragraph 60.

³¹ Thus there would be prejudice to the EU budget if funding were granted for the construction of a school which was never completed, though the foundations were laid and a frame erected.

88. Under Article 98(2) of Regulation No 1083/2006, the Member States are to make the financial corrections required in connection with the irregularities detected in operations.³² When calculating such a financial correction, they are required to take into account three criteria, namely (i) the nature of the irregularities, (ii) their gravity and (iii) the financial loss to the Funds. Where a specific, and not a systematic, irregularity is at issue, that requirement necessarily involves a case-by-case examination, ‘taking into account all of the specific circumstances which are relevant in the light of [those] criteria’.³³

89. In addition, financial corrections must comply with the principle of proportionality. That is made explicit by Article 2(1) of Regulation No 2988/95, which requires administrative checks, measures and penalties to be introduced ‘in so far as they are necessary to ensure the proper application of [EU] law’ and to be ‘effective, proportionate and dissuasive so that they provide adequate protection for the [European Union’s] financial interests’. Financial corrections should therefore not go beyond what is actually necessary given the nature and gravity of the infringements.^{34 35}

90. Lastly, while the correction applied need not correspond precisely to the financial impact on the budget, that impact should be taken into account, particularly if there is merely a weak risk of an impact.³⁶

91. If an irregularity is established and a financial correction is required, in calculating that correction all of the specific circumstances of the case which are relevant in the light of the criteria of the nature and gravity of the irregularities and the financial loss to the Funds should therefore be taken into account, as well as the principle of proportionality. The relevant factors in such an assessment would here include the extent of the beneficiary’s responsibility for the irregularity and any responsibility on the part of the managing authority, the financial impact on the EU budget (whether actual or potential), and the extent to which the irregularity invalidated the operation (e.g. whether the operation was correctly implemented and initially successful and whether some or all of its objectives were achieved).

92. It will be for the national court to assess, if necessary, whether the financial correction at issue in the main proceedings, namely a 100% correction, is appropriate in the light of those considerations.

32 Article 98 of Regulation No 1083/2006 constitutes of itself a sufficient legal basis for Member States to carry out the required financial corrections in the event of irregularities, without there being any need for separate authority to do so under national law (see, by analogy, judgment of 13 March 2008, *Vereniging Nationaal Overlegorgaan Sociale Werkvoorziening and Others*, C-383/06 to C-385/06, EU:C:2008:165, paragraphs 35 to 40).

33 Judgment of 14 July 2016, *Wrocław - Miasto na prawach powiatu*, C-406/14, EU:C:2016:562, paragraphs 48 and 51.

34 See my Opinion in *Wrocław - Miasto na prawach powiatu*, C-406/14, EU:C:2015:761, point 60. That interpretation of Article 98 of Regulation No 1083/2006 accords with the precisions introduced by the EU legislature in Regulation No 1303/2013, which expressly requires Member States to apply financial corrections that are ‘proportionate’.

35 The Commission guidelines on the principles, criteria and indicative scales to be applied in respect of financial corrections made by the Commission under Articles 99 and 100 of Council Regulation (EC) No 1083/2006 of 11 July 2006, adopted by Commission Decision C(2011) 7321 final of 19 October 2011, also emphasise the need to take into account the principle of proportionality. They recommend that Member States also apply the criteria and rates set out in those guidelines when correcting irregularities detected by their own services during checks and audits carried out in accordance with Regulation No 1083/2006, ‘unless they wish to apply more detailed rules, respecting these guidelines and the principle of proportionality’. Those guidelines recommend a flat-rate correction of 100% as being appropriate in the case of an irregularity which is so serious as to constitute a complete failure to comply with the rules, so rendering all the relevant payments irregular (see section 2.3 of those guidelines). As to the legal value of such guidelines, see judgment of 3 September 2014, *Baltlanta*, C-410/13, EU:C:2014:2134, paragraph 64 and case law cited.

36 Judgment of 14 July 2016, *Wrocław - Miasto na prawach powiatu*, C-406/14, EU:C:2016:562, paragraph 50.

Conclusion

93. I therefore propose that the Court should reply to the question referred by the Rēzeknes tiesa (Rēzekne City Court, Latvia) as follows:

A situation in which the beneficiary of financial assistance from the European Regional Development Fund is unable to achieve the expected level of turnover during the relevant period because, during that period, the business of its sole partner has become suspended or that partner has become insolvent does not constitute an act or omission by an economic operator which has, or would have the effect of prejudicing the general budget of the European Union, within the meaning of Article 2(7) of Council Regulation (EC) No 1083/2006 of 11 July 2006 laying down general provisions on the European Regional Development Fund, the European Social Fund and the Cohesion Fund and repealing Regulation (EC) No 1260/1999, as amended by Regulation (EU) No 539/2010 of 16 June 2010, where

- that situation was not reasonably foreseeable by the beneficiary at the time the contract granting funding was entered into;
- the beneficiary did not act negligently in allowing the situation to arise; and
- the beneficiary could not have remedied that situation and met its obligations in relation to that assistance even by taking all appropriate and reasonable measures.