Reports of Cases

OPINION OF ADVOCATE GENERAL
RANTOS
delivered on 6 February 2025 [1]

Case C-514/23

Tiberis Holding Srl
v
Gestore dei servizi energetici (GSE) SpA,
Ministero dello Sviluppo Economico,
Ministero dell'ambiente e della sicurezza energetica
other party:
Conza Energia Srl

(Request for a preliminary ruling from the Consiglio di Stato (Council of State, Italy))

(Reference for a preliminary ruling – Environment – Promotion of the use of energy from renewable sources – Directive 2009/28/EC – Article 3 – Directive (EU) 2018/2001 – Article 4 – National incentives for the production of energy from renewable sources – Sale of energy on the free market – Support scheme – Different aid arrangements depending on the size of the production installation – Access to the incentive mechanism through a registration system – Reimbursement of sums exceeding the amount of the incentive in the event of an increase in the energy market price (the 'negative incentive' mechanism) – Commission decision not to raise objections – Compatibility with those directives – Admissibility)

I. Introduction

1. This request for a preliminary ruling concerns the interpretation of Article 3 of Directive 2009/28/EC and Article 4 of Directive (EU) 2018/2001 [2] on the promotion of the use of energy from renewable sources. They provide, respectively, that Member States may apply, inter alia, support schemes, subject to compliance with certain principles, in order to meet their targets for the production of electricity from renewable sources.

2. The request arises out of a dispute relating to a specific aspect of the application of a State support scheme adopted by Italy to promote electricity from renewable sources between, on the one hand, Tiberis Holding Srl ('Tiberis') and, on the other hand, Gestore dei servizi energetici

[1] Original language: French.

[2] Directive of the European Parliament and of the Council of 23 April 2009 on the promotion of the use of energy from renewable sources and amending and subsequently repealing Directives 2001/77/EC and 2003/30/EC (OJ 2009 L 140, p. 16). That directive was repealed and replaced by Directive (EU) 2018/2001 of the European Parliament and of the Council of 11 December 2018 on the promotion of the use of energy from renewable sources (OJ 2018 L 328, p. 82). However, in view of the time of the facts at issue, Directive 2009/28 is applicable *ratione temporis* to the main proceedings.

(GSE) SpA (energy services operator, Italy; 'GSE'), the Ministero dello Sviluppo Economico (Ministry of Economic Development, Italy) and the Ministero dell'ambiente e della sicurezza energetica (Ministry of the Environment and Energy Security, Italy).

3. Specifically, the Consiglio di Stato (Council of State, Italy) questions the compatibility with the provisions referred to above of an aspect of the application of an incentive scheme for the production of electricity from renewable sources which lays down, for producers who sell energy on the free market, an incentive tariff guaranteeing a minimum price, which is also a maximum price under a mechanism for the recovery of amounts exceeding the value of the incentive tariff where the market price is higher than the latter (the so-called negative incentive mechanism) ('the negative incentive mechanism' or 'the adjustment mechanism'). In addition, the negative incentive mechanism applies only to producers selling energy on the free market that access the incentive by registering in a register, but not to those that access the incentive by participating in an auction procedure.

4. The present case affords the Court the opportunity to rule on the relationship between a European Commission decision authorising a support scheme for the production of renewable energy, the obligations associated with the incentives that Member States must implement in line with Directive 2009/28 and Directive 2018/2001, which replaced Directive 2009/28 but contains similar provisions, and the extent of the national courts' powers when hearing disputes on the compliance with those directives of certain aspects of the application of State support schemes previously authorised by the Commission.

II. Legal context

A. European Union law

1. Directive 2009/28

5. Point (k) of the second paragraph of Article 2 of Directive 2009/28, entitled 'Definitions', defined the concept of 'support scheme' as 'any instrument, scheme or mechanism applied by a Member State or a group of Member States, that promotes the use of energy from renewable sources by reducing the cost of that energy, increasing the price at which it can be sold, or increasing, by means of a renewable energy obligation or otherwise, the volume of such energy purchased …'.

6. Article 3 of that directive,[3] entitled 'Mandatory national overall targets and measures for the use of energy from renewable sources', provided:

'1. Each Member State shall ensure that the share of energy from renewable sources … in gross final consumption of energy in 2020 is at least its national overall target for the share of energy from renewable sources in that year …

[3] Article 3 was amended by Directive (EU) 2015/1513 of the European Parliament and of the Council of 9 September 2015 amending Directive 98/70/EC relating to the quality of petrol and diesel fuels and amending Directive 2009/28 (OJ 2015 L 239, p. 1), the transposition period of which expired on 10 September 2017. Since the amendments to Article 3 are not relevant to the main proceedings, they are not reproduced here.

2. Member States shall introduce measures effectively designed to ensure that the share of energy from renewable sources equals or exceeds that shown in the indicative trajectory set out in part B of Annex I.

3. In order to reach the targets set in paragraphs 1 and 2 of this Article Member States may, inter alia, apply the following measures:

(a) support schemes;

…'

7. The directive, as amended by Directive 2015/1513, was repealed and replaced by Directive 2018/2001, with effect from 1 July 2021, in accordance with Article 37 thereof.

2. Directive 2018/2001

8. Recitals 16, 18 and 19 of Directive 2018/2001 state as follows:

'(16) … If and when Member States decide to implement support schemes, such support should be provided in a form that is as non-distortive as possible for the functioning of electricity markets. To that end, an increasing number of Member States allocate support in a form by means of which support is granted in addition to market revenues and introduce market-based systems to determine the necessary level of support. Together with steps by which to make the market fit for increasing shares of renewable energy, such support is a key element of increasing the market integration of renewable electricity, while taking into account the different capabilities of small and large producers to respond to market signals.

…

(18) Pursuant to Article 108 TFEU, the Commission has exclusive competence to assess the compatibility of State aid measures with the internal market which the Member States may put in place for deployment of energy from renewable sources. That assessment is carried out on the basis of Article 107(3) TFEU and in accordance with the relevant provisions and guidelines which the Commission may adopt to that effect. This Directive is without prejudice to the Commission's exclusive competence granted by the TFEU.

(19) … While Member States develop their support schemes, they may limit tendering procedures to specific technologies where this is needed to avoid sub-optimal results with regard to network constraints and grid stability, system integration costs, the need to achieve diversification of the energy mix, and the long-term potential of technologies.'

9. Article 2 of that directive, entitled 'Definitions', reproduces, in point 5 of the second paragraph, the definition of the concept of 'support scheme' in point (k) of the second paragraph of Article 2 of Directive 2009/28.

10. Article 4 of Directive 2018/2001, entitled 'Support schemes for energy from renewable sources', states:

'1. In order to reach or exceed the Union target set in Article 3(1), and each Member State's contribution to that target set at a national level for the deployment of renewable energy, Member States may apply support schemes.

2. Support schemes for electricity from renewable sources shall provide incentives for the integration of electricity from renewable sources in the electricity market in a market-based and market-responsive way, while avoiding unnecessary distortions of electricity markets as well as taking into account possible system integration costs and grid stability.

3. Support schemes for electricity from renewable sources shall be designed so as to maximise the integration of electricity from renewable sources in the electricity market and to ensure that renewable energy producers are responding to market price signals and maximise their market revenues.

…

4. Member States shall ensure that support for electricity from renewable sources is granted in an open, transparent, competitive, non-discriminatory and cost-effective manner.

Member States may exempt small-scale installations and demonstration projects from tendering procedures.

…

5. Member States may limit tendering procedures to specific technologies where opening support schemes to all producers of electricity from renewable sources would lead to a suboptimal result, in view of:

(a) the long-term potential of a particular technology;

(b) the need to achieve diversification;

(c) grid integration costs;

(d) network constraints and grid stability;

…

9. This Article shall apply without prejudice to Articles 107 and 108 TFEU.'

11. Article 6 of that directive, headed 'Stability of financial support', provides:

'1. Without prejudice to adaptations necessary to comply with Articles 107 and 108 TFEU, Member States shall ensure that the level of, and the conditions attached to, the support granted to renewable energy projects are not revised in a way that negatively affects the rights conferred thereunder and undermines the economic viability of projects that already benefit from support.

2. Member States may adjust the level of support in accordance with objective criteria, provided that such criteria are established in the original design of the support scheme.

…'

3. Regulation (EU) 2015/1589

12. Article 1 of Regulation (EU) 2015/1589,[4] entitled 'Definitions', provides, under points (b) and (c):

'For the purposes of this Regulation, the following definitions shall apply:

…

(b) "existing aid" means:

…

(ii) authorised aid, that is to say, aid schemes and individual aid which have been authorised by the Commission or by the Council [of the European Union];

…

(c) "new aid" means all aid, that is to say, aid schemes and individual aid, which is not existing aid, including alterations to existing aid;

…'

13. Article 3 of that regulation, entitled 'Standstill clause', provides:

'Aid notifiable pursuant to Article 2(1) shall not be put into effect before the Commission has taken, or is deemed to have taken, a decision authorising such aid.'

4. The 2014-2020 Guidelines

14. The Communication from the Commission entitled 'Guidelines on State aid for environmental protection and energy 2014-2020' ('the 2014-2020 Guidelines')[5] includes a Chapter 3 entitled 'Compatibility assessment under Article 107(3)(c) [TFEU]', which provides:

'3.2.5. Proportionality of the aid

3.2.5.1. General conditions

(69) Environmental and energy aid is considered to be proportionate if the aid amount per beneficiary is limited to the minimum needed to achieve the environmental protection or energy objective aimed for.

4 Council Regulation of 13 July 2015 laying down detailed rules for the application of Article 108 [TFEU] (OJ 2015 L 248, p. 9).

5 OJ 2014 C 200, p. 1.

…’

15. Section 3.3. of those guidelines, entitled ‘Aid to energy from renewable sources’, states:

‘3.3.1. General conditions for investment and operating aid to energy from renewable sources

…

(109) Market instruments, such as auctioning or competitive bidding [procedures] open to all generators producing electricity from renewable energy sources competing on equal footing at EEA level, should normally ensure that subsidies are reduced to a minimum in view of their complete phasing out.

…

(111) Specific exceptions are included for installations of a certain size, for which it cannot be presumed that a bidding process is appropriate …

…

3.3.2. Operating aid granted to energy from renewable sources

3.3.2.1. Aid for electricity from renewable energy sources

(124) In order to incentivise the market integration of electricity from renewable sources, it is important that beneficiaries sell their electricity directly in the market and are subject to market obligations …

…

(125) The conditions established in paragraph (124) do not apply to installations with an installed electricity capacity of less than 500 kW …

…

(128) In the absence of a competitive bidding process, the conditions of paragraphs (124) and (125) and the conditions for operating aid to energy from renewable energy sources other than electricity as set out in paragraph (131) are applicable.

…

3.3.2.2. Aid for energy from renewable sources other than electricity

(131) For energy from renewable sources other than electricity, operating aid will be considered compatible with the internal market if the following cumulative conditions are met:

(a) the aid per unit of energy does not exceed the difference between the total levelised costs of producing energy (‘LCOE’) from the particular technology in question and the market price of the form of energy concerned;

(b) the LCOE may include a normal return on capital. Investment aid is deducted from the total investment amount in calculating the LCOE;

(c) the production costs are updated regularly, at least every year; and

(d) aid is only granted until the plant has been fully depreciated according to normal accounting rules in order to avoid that operating aid based on LCOE exceeds the depreciation of the investment.

…'

16. Those guidelines were replaced by the 'Guidelines on State aid for climate, environmental protection and energy 2022' ('the 2022 Guidelines'),[6] Chapter 7 of which, entitled 'Applicability', is worded as follows:

'(466) The Commission will apply these guidelines to assess the compatibility of all notifiable aid for climate, environmental protection and energy awarded or intended to be awarded from 27 January 2022. Unlawful aid will be assessed in accordance with the rules applicable at the date on which the aid was awarded.

(467) These guidelines replace the [2014-2020 Guidelines].

(468) The Commission proposes the following appropriate measures to Member States under Article 108(1) [TFEU]:

(a) Member States amend, where necessary, existing environmental protection and energy aid schemes in order to bring them into line with these guidelines no later than 31 December 2023;

…'

5. Decision C(2016) 2726 final

17. By Decision C(2016) 2726 final of 28 April 2016 on State aid SA.43756 (2015/N) – Italy, Support to electricity from renewable sources in Italy[7] ('the decision granting authorisation'), the Commission did not raise objections to the support scheme notified to it by Italy, in the form of a draft ministerial decree, to promote the production of electricity from renewable sources, on the ground that it is compatible with the internal market pursuant to Article 107(3)(c) TFEU.

[6] OJ 2022 C 80, p. 1.

[7] OJ 2016 C 258, p. 8. That decision is available (in, inter alia, English) on the Commission's website at the following address: https://ec.europa.eu/competition/state_aid/cases/261615/261615_1761694_150_2.pdf

18. In Part 2.2. of the decision, which describes the support scheme at issue, recital 7, under the heading 'New medium size generators and repowering', states:

'New installations smaller than 5 MW can access priority lists specific for each technology. … The projects included in the lists receive support in the form of a variable premium on top of the electricity reference market price. The variable premium is set at the level sufficient to compensate for the difference between the total levelised costs of electricity (LCOE) from the relevant technology in question and the reference electricity market price. …'

19. Recital 22, in Part 2.4. of the decision, entitled 'Financing, budget and duration', states that support will be granted to individual projects for a period equal to the average project lifetime shown in Table 1 of the decision and that that period does not exceed the projects' depreciation period as defined in the Italian legislation. Recital 21 adds that 'the scheme is notified until 31 December 2016'.

20. In Part 3 of the decision granting authorisation, on the assessment of the notified support scheme, the Commission states, in recitals 31 and 32, that, since it aims at providing operating aid to the generation of electricity from renewable sources, the scheme falls within the scope of the 2014-2020 Guidelines. It is therefore on the basis of the relevant provisions of those guidelines, namely those contained in Sections 3.2., 3.3.1. and 3.3.2., that it assesses the compatibility of the scheme with Article 107(3)(c) TFEU. Section 3.3.3., also in Part 3, entitled 'Proportionality', also contains the following recitals:

'(47) As specified in paragraph 128 of the [2014-2020 Guidelines], in the absence of competitive bidding, the Commission assesses proportionality of the aid under the provisions of paragraph 131 of [the Guidelines].

(48) For projects on the priority lists benefiting from a feed-in tariff, Italy demonstrated that aid per unit of energy does not exceed the LCOE for the technology in question …

…

(50) For projects on the priority lists, if the electricity market price exceeds the estimated LCOE, the difference will be recovered by reducing the premium in later payments. This will avoid windfall profits in case electricity prices higher than the LCOE generate extra revenues for the project … For projects participating in tenders, it is assumed that participants will account for the risks and opportunities of fluctuating energy market prices when placing their bids. …

(51) In light of the above, the Commission concludes that the remuneration satisfies the conditions of paragraph 131 [of the 2014-2020 Guidelines] and is, therefore, proportionate.'

B. Italian law

21. The Decreto del Ministero dello Sviluppo Economico – Incentivazione dell'energia elettrica prodotta da fonti rinnovabili diverse dal fotovoltaico (Decree of the Ministry of Economic Development on the promotion of electricity produced from renewable sources other than

photovoltaic energy), of 23 June 2016[8] ('the decree of 23 June 2016'), was adopted with reference, inter alia, to the decision granting authorisation.

22. Article 4(1) to (3) of that decree sets out the different procedures for accessing incentive mechanisms: by registering in the appropriate register, depending on the energy source and type of installation; by participating in descending price auctions; or by direct means. For each type of procedure, the article specifies the categories of eligible installations, which are essentially determined according to the production capacity of the plant concerned.

23. Article 7 of the decree determines the feed-in tariffs and incentives. Paragraph 4 thereof provides that, for installations with a capacity less than or equal to 500 kW, GSE will, where applicable, purchase the net amount of electricity fed into the grid by paying an overall incentive tariff determined on the basis of Annex 1 to that decree.[9] Paragraph 6 states that, if the operator of the installation chooses to keep the electricity generated and sell it on the free market, GSE will pay a 'feed-in tariff'. Switching from one incentive payment method to the other is not permitted more than twice during the period during which the incentive applies. Paragraph 5 of Article 7 provides that, for installations with a nominal power of more than 500 kW participating in descending price auctions, GSE will pay, in return for the net amount of electricity fed into the grid, the incentive determined in accordance with that decree, the electricity produced by those installations remaining available to the producer.

III. The dispute in the main proceedings, the question referred for a preliminary ruling and the procedure before the Court

24. Tiberis is a company operating a hydroelectric power plant on the River Tiber, in the municipality of Fiano Romano (Italy), with a capacity of 2.747 MW.

25. On 8 September 2017, GSE – a public limited company owned by the Italian authorities and responsible, inter alia, for the promotion and development of renewable energy sources and energy efficiency – granted the request submitted by Tiberis on 22 December 2016 to access the incentive mechanism for electricity production provided for by the decree of 23 June 2016. On 5 October 2017, Tiberis entered into a contract with GSE that set out the conditions for payment of the incentives accruing to the company under that mechanism. By virtue of the planned incentives, the company received a total of EUR 4 044 340.75 in contributions over five years, from 2017 to 2021.

26. By three invoices, the first two dated 4 April 2022 and the last dated 2 May 2022, GSE requested Tiberis to reimburse part of the contributions granted, for a total amount of EUR 1 224 210.86.

27. Tiberis brought an action before the Tribunale Amministrativo Regionale per il Lazio (Regional Administrative Court, Lazio, Italy), seeking the annulment of those claims and of the contractual and regulatory provisions on which they were based. In support of its action, Tiberis relied, inter alia, on an infringement of Article 3 of Directive 2009/28 and Article 4 of Directive 2018/2001.

[8] GURI No 150 of 29 June 2016, p. 8.

[9] Point 1 of that annex describes the detailed rules for calculating the incentive for installations with a capacity less than or equal to 500 kW opting for the feed-in tariff. Point 2 of that annex sets out the detailed rules for calculating the incentive for other installations, namely those that have not requested the application of the feed-in tariff. The basic tariffs shown in Table 1 differ according to the source, type of installation and power generated. Those tariffs are lower for large installations than for medium-sized installations.

28. The court held that the action was unfounded. It found, in essence, that the measure at issue guaranteed the beneficiary of the incentive a constant overall remuneration for the energy produced, generating a return on the investments made in the construction of the plant and protecting the entrepreneur from the uncertainty of the market price over time, the guaranteed fixed tariff ensuring that it recovered the amount invested in the construction of the installation. The court also found that, under that system, any increase in the market price did not result in an increase in the revenues of the beneficiary of the incentive, but in a 'negative incentive', that is to say, a rebate in favour of GSE, which constituted unforeseeable and uncertain consideration for the guarantee of a constant tariff which, in any event, made the original investment profitable when the market price was lower than the tariff guaranteed by GSE. It concluded that Tiberis' complaints concerning the impossibility of earning extra profits due to market variations were unfounded and that, by submitting its request for the incentives concerned and by entering into the corresponding contract on 5 October 2017, Tiberis had accepted the business risk that followed.

29. In addition, the court considered the type of incentive mechanism at issue to be in line with that envisaged by the Commission in the 2014-2020 Guidelines. It thus ruled that it could not be considered discriminatory on the sole ground that operators who obtained the incentives following auction procedures could, unlike those who obtained the incentives through the registration procedure, collect the full market price, their situation being different in so far as operators participating in descending price auctions benefited from a lower overall tariff than operators who had registered and, in return, could therefore benefit from possible increases in the market. Accordingly, the incentive mechanism at issue, taken as a whole, was not contrary to EU law.

30. Tiberis lodged an appeal against that judgment before the referring court, the Consiglio di Stato (Council of State). In support of its appeal, seeking a variation of that judgment, the company essentially reiterated its plea alleging infringement of Article 3 of Directive 2009/28 and Article 4 of Directive 2018/2001.

31. According to the referring court, point 2 of Annex 1 to the decree of 23 June 2016 seems, prima facie, contrary to Article 3 of Directive 2009/28 and Article 4 of Directive 2018/2001. Indeed, those provisions set out five cumulative parameters for the lawfulness of incentives: that the incentives are market-based; that they allow beneficiaries to be market-responsive; that they avoid unnecessary distortions of markets; that they ensure that producers are responding to market price signals; and that they ensure that producers maximise their market revenues. Such incentives should, in addition, be granted in an open, transparent, competitive, non-discriminatory and cost-effective manner.

32. However, the national legislation at issue in the main proceedings could have the effect of compelling producers to abandon the incentive, which, according to that court, would be contrary to the purpose of the incentive mechanism. In that regard, it states that Article 4 of the decree of 23 June 2016 provides that access to incentive mechanisms is to be carried out according to three different procedures, while clarifying that membership of one scheme or the other is not voluntary, but depends exclusively on the power plant's production capacity. Therefore, Tiberis would not have been able to decide freely whether to apply for registration in the register or to participate in the auction, since they are two distinct categories pre-defined on the basis of the type and maximum capacity of the installation in question. However, producers benefiting from the incentive by means of their registration in the register are required to

reimburse GSE for the difference between the market price and the incentive, if the market price is higher than the incentive, unlike producers with large installations, which access the incentive by means of the auction and may collect the full market price.

33. Furthermore, according to the referring court, the measure aimed at making an 'adjustment' in favour of GSE when the market price is higher than the incentive appears to contradict Directives 2009/28 and 2018/2001, in so far as those directives require Member States to allow operators to react to market dynamics in order to prevent distortions resulting from the elimination of elasticity of demand by producers, whereas, given the negative incentive, producers accessing the incentive by means of their registration in the register would not have an interest in reacting to market dynamics.

34. In those circumstances, the Consiglio di Stato (Council of State) decided to stay the proceedings and to refer the following question to the Court of Justice for a preliminary ruling:

'Do the principles set out in Article 3 of Directive [2009/28] and Article 4 of Directive [2018/2001] preclude or not preclude national legislation which, in the context of a national incentive scheme, provides, in situations where producers sell energy on the free market, for an incentive tariff that guarantees a minimum price, which is at the same time also a maximum price, by virtue of an adjustment/reimbursement mechanism for sums exceeding the value of the incentive where the market price is higher than the latter (the so-called negative incentive), and, moreover, applies the adjustment mechanism only where the producer selling energy on the free market accesses the incentive by registering in the relevant register[, not] where it accesses it by participating in an auction procedure?'

35. Written observations were lodged by Tiberis, GSE, the Italian Government and the Commission, all of which took part in the hearing held on 7 November 2024.

IV. Assessment

A. Admissibility of the request for a preliminary ruling

36. Before analysing the question referred for a preliminary ruling, it is necessary to rule on the pleas of inadmissibility raised by GSE and the Italian Government.

37. GSE submits that the request for a preliminary ruling is inadmissible on the ground that the requirements of Article 94 of the Rules of Procedure of the Court of Justice are not met, since the order for reference does not set out the necessary facts and points of law to enable the Court of Justice to give a useful answer to the question referred. [10]

38. Moreover, the Italian Government's position is that the question referred for a preliminary ruling is inadmissible on the ground that the contested measure constitutes existing aid authorised in advance by the Commission by its decision granting authorisation. The referring

[10] With regard to the factual context, GSE argues that the order for reference does not explain how Tiberis failed to increase its revenue, given that the national legislation at issue allowed it to make a return on its investment and to sell energy on the free market. The referring court also failed to state that Tiberis had the option of terminating the contract with GSE at any time, subject to 60 days' notice, without having to repay the incentive received until that date. Additionally, it failed to mention that national regulations provide for higher incentives for installations registered in the register, which protect them from market fluctuations. Furthermore, the description of the legal framework applicable to the request is incomplete, since the order for reference does not provide the Court with any details of applicable national law and thus fails to establish the actual existence of any infringement of EU law.

court was thus unable to make a decision on the intensity of the aid at issue, apart from reclassifying it as 'new aid', contrary to Article 108(3) TFEU, which prohibits the granting of new aid that has not been notified to and authorised by the Commission in advance. It follows that the question referred has no real link with the case in the main proceedings and is purely hypothetical, given that, irrespective of the answer provided in response to that question, Tiberis' request could not, in any event, be granted, since Article 108 TFEU precludes it.

39. As a preliminary point, with regard to the admissibility of requests for a preliminary ruling, it must be borne in mind that, according to the Court's settled case-law, where the questions submitted concern the interpretation of EU law, they enjoy a presumption of relevance and the Court is, in principle, bound to give a ruling.[11] The Court may refuse to rule on a question referred by a national court for a preliminary ruling only where it is quite obvious that the interpretation of EU law that is sought bears no relation to the actual facts of the main action or its purpose, where the problem is hypothetical, or where the Court does not have before it the factual or legal material necessary to give a useful answer to the questions submitted to it.[12] On the last point, the need to provide an interpretation of EU law that will be of use to the national court requires, as emphasised by Article 94 of the Rules of Procedure of the Court, that the national court define the factual and legal context of the questions it is asking or, at the very least, that it explain the factual circumstances on which those questions are based.[13] 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.[14]

40. In the present case, the arguments put forward by GSE as to the inadmissibility of the request for a preliminary ruling can be dismissed without much difficulty on the basis of the settled case-law of the Court, as summarised in the previous point of this Opinion. Indeed, even if proved, the alleged omissions in the factual and legal context do not prevent the Court from answering the question referred.[15]

41. By contrast, the issue raised by the Italian Government as to the relevance of the decision granting authorisation for the purposes of the main proceedings merits further consideration, given that it may constitute an obstacle to the admissibility of the request for a preliminary ruling (or at least influence the interpretation sought).

42. In that respect, it should be noted that although the referring court makes no reference to the decision granting authorisation, that circumstance in itself is not sufficient to render that decision irrelevant and to allow the objections raised by the Italian Government as to the admissibility of the present case to be dismissed *ex officio*. Indeed, the presumption of relevance enjoyed by the referring court's description of the factual and legal context cannot be interpreted as meaning

[11] See, to that effect, judgment of 22 October 2024, *Kolin Inşaat Turizm Sanayi ve Ticaret* (C-652/22, EU:C:2024:910, paragraph 36 and the case-law cited).

[12] See, to that effect, judgment of 16 May 2024, *INSS (Leave for a mother in a single-parent family)* (C-673/22, EU:C:2024:407, paragraph 25 and the case-law cited).

[13] See, to that effect, judgment of 8 June 2023, *Prestige and Limousine* (C-50/21, EU:C:2023:448, paragraph 38 and the case-law cited).

[14] See, to that effect, judgment of 16 November 2023, *Tüke Busz* (C-391/22, EU:C:2023:892, paragraph 29 and the case-law cited).

[15] It must be noted, in that respect, that although the referring court fails to refer to the Commission's decision granting authorisation, GSE expressly relies on it in its written observations, not in support of its plea of inadmissibility, but to argue that, in the event that the request for a preliminary ruling is deemed admissible, the national legislation establishing the support scheme at issue would not be contrary to EU law, since the Commission has already approved it.

that the Court is required to disregard such a decision, particularly when it proves relevant in the context of the resolution of a case – for example, to provide a useful answer to the question referred by the national court. This is especially true since it is common ground, as in the present case, that the Italian support scheme at issue in the main proceedings is covered by the decision granting authorisation and that Tiberis was one of the recipient undertakings of that support scheme.

43. In the light of the foregoing, and although it cannot be ruled out that the present request for a preliminary ruling may be deemed inadmissible,[16] I propose that the Court, in order to provide a useful answer to the referring court, reword the question referred for a preliminary ruling to the effect that, by that question, the referring court is seeking to ascertain whether Articles 107 and 108 TFEU must be interpreted as precluding a national court from assessing the compatibility of the negative incentive mechanism with Article 3 of Directive 2009/28 and Article 4 of Directive 2018/2001, where that mechanism forms part of a State support scheme authorised in advance by the Commission.

B. Jurisdiction of the referring court to assess the compatibility of the negative incentive mechanism in the light of Directives 2009/28 and 2018/2001

44. In the first place, it should be borne in mind that the application of the EU rules on State aid is based on an obligation of sincere cooperation between, on the one hand, the national courts and, on the other, the Commission and the Courts of the European Union, in the context of which each acts on the basis of the role assigned to it by the Treaty. In the context of that cooperation, as follows from Article 4(3) TEU, national courts must take all the necessary measures, whether general or specific, to ensure the fulfilment of the obligations under EU law and refrain from taking those which may jeopardise the attainment of the objectives of the Treaty, by refraining from taking decisions which conflict with a decision granting authorisation.[17]

45. It is also clear from the Court's settled case-law that the national courts and the Commission fulfil complementary but separate roles in the system established by the Treaty for supervision of State aid.[18] Thus, the assessment of the compatibility of aid measures with the common market falls within the exclusive competence of the Commission, subject to review by the EU Courts,[19] while it is for the national courts to ensure that the rights of individuals are safeguarded where the obligation to give prior notification of State aid to the Commission laid down in the last sentence of Article 108(3) TFEU is infringed.[20]

16 In that regard, it should be borne in mind that, considering that in the case giving rise to the judgment of 22 October 2024, *Kolin Inşaat Turizm Sanayi ve Ticaret* (C-652/22, EU:C:2024:910), the interpretation sought by the referring court of the provisions of a directive are in no way relevant to resolving the dispute in the main proceedings (on the ground that economic operators from a third country which has not concluded an international agreement on public procurement with the European Union cannot claim equal treatment in this area), the Court concluded that the request for a preliminary ruling was inadmissible. See, inter alia, paragraphs 67 to 69 of that judgment.

17 See, to that effect, judgment of 15 September 2016, *PGE* (C-574/14, EU:C:2016:686, paragraph 33 and the case-law cited).

18 See judgment of 2 May 2019, *A-Fonds* (C-598/17, EU:C:2019:352, paragraph 45 and the case-law cited; 'the judgment in *A-Fonds*').

19 However, assessments which might implicitly follow from a decision of that institution relating to State aid cannot, in principle, be binding on the national courts in a dispute, such as that in the main proceedings, which is unrelated to the compatibility of that aid with the internal market (see, in that regard, judgment of 17 October 2024, *NFŠ*, C-28/23, EU:C:2024:893, paragraph 59 and the case-law cited).

20 See, in that regard, judgment of 8 December 2011, *Residex Capital IV* (C-275/10, EU:C:2011:814, paragraph 27 and the case-law cited). Such failure to have regard to the obligation that flows from Article 108(3) TFEU, if relied on by individuals and confirmed by the national courts, must lead those courts to draw from it all the consequences in accordance with their national law, without their decisions, however, implying an assessment of the compatibility of the aid with the internal market, which is a matter within the exclusive competence of the Commission, subject to review by the Court (see, to that effect, judgment of 23 April 2002, *Nygård*, C-234/99, EU:C:2002:244, paragraph 59 and the case-law cited).

46. In that respect, it should be noted that the Court has already held that allowing a national court, in the context of the implementation of a State support scheme which the Commission has found to be compatible with the internal market, to rule in turn on the compatibility of such a scheme with the internal market would amount, in essence, to giving that court the power to substitute its own assessment for that of the Commission, and, consequently, to encroach on the Commission's exclusive powers relating to the assessment of the compatibility of State aid with the internal market. [21]

47. In the second place, it is also clear from the case-law of the Court that a national court has competence to assess whether the arrangements of an aid scheme comply with Treaty provisions which have direct effect, other than those relating to State aid, only if those arrangements can be assessed separately and which, though forming part of the system of aid in question, are not necessary for the attainment of its object or for its functioning. [22] By contrast, the arrangements of an aid may be so indissolubly linked to the object of the aid that it is impossible to assess them separately, so that their effect on the compatibility or incompatibility of the aid viewed as a whole must therefore necessarily be determined in the light of the procedure prescribed in Article 108 TFEU. [23]

48. By finding, in the recent case giving rise to the judgment in *A-Fonds*, [24] that one of the conditions provided for by the support scheme at issue in that case (namely the condition of residence) was indissolubly linked to the support scheme in so far as it was necessary for the attainment of its object or for its functioning, the Court held that EU law precludes a national court from being able to assess whether such a condition complies with the free movement of capital and that that national court cannot, a fortiori, draw the consequences of a possible infringement of the free movement of capital. The Court thus concluded that it was not necessary to provide an answer to the question referred to it. [25]

49. In the present case, I note that the referring court is faced with an issue that is similar to that addressed by the Court in the judgment in *A-Fonds*, even if that judgment was delivered in a different context. Indeed, unlike the case giving rise to that judgment, the referring court asks the Court whether the mechanism in question is compatible, not with the internal market in the light of the provisions of the FEU Treaty on State aid or other provisions of primary law, but with certain provisions of secondary law, namely Directives 2009/28 and 2018/2001, making no mention of the decision granting authorisation previously adopted by the Commission.

[21] See, to that effect, judgment of 15 September 2016, *PGE* (C-574/14, EU:C:2016:686, paragraph 33 and the case-law cited).

[22] See, to that effect, judgments of 22 March 1977, *Iannelli & Volpi* (74/76, EU:C:1977:51, paragraph 14), and of 23 April 2002, *Nygård* (C-234/99, EU:C:2002:244, paragraph 57).

[23] See, to that effect, the judgment in *A-Fonds* (paragraphs 47 and 48 and the case-law cited). See, also, order of 24 July 2003, *Sicilcassa and Others* (C-297/01, EU:C:2003:416, paragraph 47 and the case-law cited), which held as inadmissible a question by which a national court asked the Court whether State aid or a support scheme was compatible with the internal market.

[24] In that case, the referring court questioned the compatibility of the provisions of primary EU law on the free movement of capital with those relating to State aid in the light of a State aid decision adopted by the Commission. Specifically, the issue was whether a national court could grant a claim for a refund of the dividend tax of companies established in the Netherlands, even though that tax was covered by a Commission decision.

[25] According to the Court, the answer to the question referred by the referring court was that Articles 107 and 108 TFEU must be interpreted as meaning that a national court cannot assess whether a residence condition complies with Article 63(1) TFEU, where the scheme for the refund of dividend tax concerned constitutes an aid scheme. See, inter alia, to that effect, the judgment in A-Fonds (paragraph 45 and the case-law cited, as well as paragraphs 49 to 54).

50. Nevertheless, irrespective of those differences, I am of the opinion that it is appropriate to transpose the reasoning followed by the Court in the case referred to above. As a result, it must be concluded that the referring court does not have jurisdiction to rule on whether the negative incentive mechanism is compatible with Directives 2009/28 and 2018/2001, for the reasons set out below.

51. First, it should be borne in mind that the negative incentive mechanism challenged by Tiberis is an integral part of the State support scheme adopted by the Italian Government, the compatibility of which with the internal market was examined by the Commission in its decision granting authorisation.

52. It is clear from that decision that, in accordance with the 2014-2020 Guidelines, in the light of which it was assessed whether the support scheme at issue was compatible with Article 107(3)(c) TFEU, the Commission examined specifically whether the notified measure actually had a particular incentive effect on the objective of common interest to promote energy production from renewable sources, particularly as regards the owners of production installations who access the incentive by registering in the appropriate registers. [26] That decision also confirmed the proportionality of the measures envisaged by the Italian authorities, including the negative incentive mechanism, in so far as that mechanism was limited to what is necessary to attain the pursued objective of environmental protection. [27]

53. Second, it is apparent from the case-law of the Court, referred to in points 47 and 48 of this Opinion, that, where the issue concerns conditions or elements that are necessary for the attainment of the object or for the functioning of the support scheme, the allocation of competences between the Commission and the national courts in State aid matters precludes the national courts from assessing the compatibility of those conditions in the light of rules other than those contained in Article 107 TFEU.

54. In the present case, the question whether the referring court may assess the negative incentive mechanism in the light of Directives 2009/28 and 2018/2001 depends, as a result, on whether that aspect of the support scheme at issue in the main proceedings can be assessed separately, in so far as it is not necessary for the attainment of the object or for the functioning of the support scheme in question. It should be pointed out in that regard that an aspect of aid is necessary for the attainment of the object or for the functioning of aid where it is a constituent or essential element of the aid, so that its inapplicability leads to a change in the scope or the principal characteristics of the aid. [28]

55. To my mind, there is no doubt that the negative incentive mechanism would meet the criteria arising from the case-law cited in point 48 of this Opinion, since, even if it cannot be considered to be a constituent condition of the support scheme at issue in the present case, it nevertheless remains an essential and inseparable element of it. Indeed, as explained in point 52 of this Opinion, that mechanism not only concerns one of the arrangements for granting the aid, but is

[26] See Section 3.3.2. of the decision granting authorisation, recitals 39 and 42 specifically, in which the Commission clarified that, without the aid and under normal market conditions, the projects benefitting from the support scheme would not be financially viable and would have a negative net present value, such that the aid 'therefore allows the beneficiaries to change their behaviour and invest in renewable energy' and provides 'the necessary incentive effect to address the objective of common interest'.

[27] It is clear from recital 50 of the decision granting authorisation that the adjustment mechanism was considered appropriate in the event that the electricity market price exceeded the guidelines' calculations, in order to avoid 'windfall profits' and 'extra revenues for the project', namely revenue on top of that accounted for in estimating the project's profitability.

[28] See Opinion of Advocate General Saugmandsgaard Øe in *A-Fonds* (C-598/17, EU:C:2018:1037, point 81).

also indissolubly linked to the intensity and proportionality of that aid, which are themselves key elements of the analysis of the compatibility of the aid, which falls within the exclusive competence of the Commission under the procedure provided for in Articles 107 and 108 TFEU.

56. Since it does not seem possible to isolate that aspect, which appears necessary for the attainment of the object and for the functioning of a support scheme authorised by the Commission, it is difficult to see how a national court could draw the consequences from any finding of incompatibility of the mechanism in question with the relevant provisions of Directives 2009/28 and 2018/2001, without altering, if only to a limited extent, that support scheme and without this affecting the decision granting authorisation, and therefore its validity, or even without encroaching on the Commission's powers, thereby affecting the allocation of competences between that institution and the national courts, a solution which cannot be supported in the light of the settled case-law of the Court cited in points 44 to 46 of this Opinion.

57. In the third and last place, it should be noted that, by its action before the referring court, Tiberis in fact seeks to alter the support scheme previously approved by the Commission, or least certain aspects of it.

58. It must be recalled in that regard that, in the context of the system for the supervision of State aid, established in Articles 107 and 108 TFEU, the procedure differs according to whether the aid is existing or new.[29] Whereas existing aid may, in accordance with Article 108(1) TFEU, be implemented lawfully so long as the Commission has made no finding of incompatibility, Article 108(3) TFEU prohibits the granting of new aid or the alteration of existing aid that has not been notified to and authorised by the Commission in advance.[30] In that context, Article 1(b)(ii) of Regulation 2015/1589 provides that 'existing aid' consists of authorised aid, namely aid schemes and individual aid which have been authorised by the Commission or by the Council. Article 1(c) of that regulation provides that 'new aid' means any aid scheme or individual aid that does not constitute existing aid, including alterations to existing aid.

59. It should also be pointed out that, although alterations to existing aid are not automatically reclassified as new aid, this is the case where those alterations are not purely formal or administrative, but liable to affect the assessment of the compatibility of the aid measure with the internal market.[31] However, as established in point 52 of this Opinion, the negative incentive mechanism constitutes an essential element of the support scheme at issue, on the basis of which the Commission analysed whether that support scheme was compatible with the internal market. Accordingly, any alteration of that support scheme, such as the one proposed by Tiberis, would have the effect of reclassifying it as new and unlawful aid.

60. Admittedly, in the recent cases giving rise to the judgment in *DOBELES HES* (C-702/20 and C-17/21, EU:C:2023:1), the Court held that a national court may grant a request for payment of a sum corresponding to new aid which has not been notified to the Commission, provided that that aid is duly notified in advance by the national authorities concerned to that institution and that the Commission gives, or is deemed to have given, its consent in that regard.[32] Nevertheless,

[29] See, in that regard, Article 1(b)(ii) and (c) of Regulation 2015/1589.

[30] See judgment of 28 October 2021, *Eco Fox and Others* (C-915/19 to C-917/19, EU:C:2021:887, paragraph 36 and the case-law cited).

[31] See, to that effect, judgment of 28 October 2021, *Eco Fox and Others* (C-915/19 to C-917/19, EU:C:2021:887, paragraph 41 and the case-law cited).

[32] Judgment of 12 January 2023, *DOBELES HES* (C-702/20 and C-17/21, EU:C:2023:1, paragraph 123).

such a scenario appears hypothetical in the present case, given that, on the one hand, the Italian Government does not seem to be considering alteration of the support scheme at issue and, on the other hand, the question of the referring court does not consider such a possibility. [33]

61. In the light of the foregoing, the answer to the question referred for a preliminary ruling, as reworded, is that Articles 107 and 108 TFEU must be interpreted as precluding a national court from assessing whether the negative incentive mechanism of an existing support scheme previously authorised by the Commission is compatible with Article 3 of Directive 2009/28 and Article 4 of Directive 2018/2001, where that mechanism is indissolubly linked with the support scheme, in so far as it is necessary for the attainment of the object or for the functioning of that support scheme.

C. The question whether the negative incentive mechanism at issue in the main proceedings is compatible with Article 3 of Directive 2009/28 and Article 4 of Directive 2018/2001

62. In the event that the Court does not share my analysis and finds that the referring court has jurisdiction to examine whether the negative incentive mechanism at issue in the main proceedings is compatible with Article 3 of Directive 2009/28 and Article 4 of Directive 2018/2001, I will analyse in the following points, in the alternative, whether those provisions preclude that mechanism.

63. By its question, the referring court is essentially asking for an interpretation of Directives 2009/28 and 2018/2001, so that it may examine whether aspects of the application of the Italian incentive scheme for the production of electricity from renewable sources, from which Tiberis has benefited, are compatible with those directives. Specifically, the referring court seeks to ascertain whether Article 3 of Directive 2009/28, in force when the support scheme was introduced and when the contract between Tiberis and GSE was concluded, and Article 4 of Directive 2018/2001, which replaced Directive 2009/28 with effect from 1 July 2021, must be interpreted as precluding the negative incentive mechanism included under that support scheme.

64. In my view, the question actually encompasses two separate issues, which can be described as follows. The first is whether aspects of the application of the Italian support scheme, the negative incentive mechanism in particular, are contrary to the abovementioned provisions of those two directives on the ground that they do not appear to be 'market-based'. The adjustment mechanism could therefore lead some beneficiaries to forgo the incentive, which would, according to the referring court, be contrary to the objectives pursued by those directives. The second is whether there is any discrimination due to the fact that the procedures for accessing State aid are not identical for all renewable energy producers, since only those registered in the register are subject to the adjustment mechanism. [34]

[33] It should be borne in mind, in that regard, that in the context of the eleventh question referred in the cases giving rise to the judgment in *DOBELES HES* (C-702/20 and C-17/21, EU:C:2023:1, paragraphs 117 to 123 and the case-law cited), the referring court asked specifically whether Article 108(3) TFEU and Article 2(1) and Article 3 of Regulation 2015/1589 had to be interpreted as meaning that a national court may grant an application for payment of a sum corresponding to new aid which has not been notified to the Commission, provided that that aid is first duly notified by the national authorities concerned to the Commission and that the Commission gives, or is deemed to have given, its consent in that regard.

[34] See points 32 and 33 of this Opinion.

1. Preliminary observations

65. First, it is useful to recall that the support scheme established by the decree of 23 June 2016 involved three different aid arrangements, based on separate incentive mechanisms, which were determined according to the production capacity of the plant concerned. Specifically, those three aid arrangements were as follows:

– the first aid arrangement was based on participation in a descending price auction, which was available to *large* installations with a production capacity of more than 5 MW. The aid was paid to beneficiaries only when the zonal hourly price fell below the auction price, in order to cover the difference between the two prices. In addition, the incentive tariff for large installations was lower than for small or medium-sized installations;

– the second aid arrangement, from which Tiberis benefited, applied to *medium-sized* installations with a production capacity of between 1 and 5 MW and required the installation to be registered in the register. This mechanism was based on a tariff proportionate to the costs of the project submitted by that undertaking when the initial contract with GSE was signed, thus guaranteeing the beneficiary a constant overall remuneration for the energy produced, which made it possible to remunerate the investments made for the construction of the plant. The mechanism provided, in particular, for support to be granted when the zonal hourly price fell below the tariff price set by decree, in order to offset the difference between the two prices. However, if the market price was higher than the fixed tariff, the undertaking concerned had to reimburse GSE for the difference through the negative incentive mechanism;

– the third aid arrangement was available only to *small* installations with a production capacity of less than 1 MW and involved the provision of direct support.

66. It should also be noted that operators such as Tiberis could choose from the outset not to enter into a contract with GSE, and so could refuse the aid arrangements corresponding to their production capacity. Moreover, if it did enter into a contract with GSE, Tiberis had the option of terminating the contract at any time and of leaving the incentive scheme from which it had previously benefited. It would then be free to sell the electricity produced on the market, in which case it would be exposed to market fluctuations.

67. Second, as regards the scope *ratione materiae* of the two directives referred to in the order for reference, it is not disputed that the aid granted to Tiberis under the decree of 23 June 2016 falls within the concept of 'support scheme', defined identically in point (k) of Article 2 of Directive 2009/28 and in Article 2(5) of Directive 2018/2001. It should be emphasised, in that regard, that although the two directives allow Member States to introduce State support schemes for the production of energy from renewable sources, that option is contingent on the schemes being compatible with State aid rules. Indeed, that requirement is apparent from both Article 3 of Directive 2009/28 and Article 4 of Directive 2018/2001, which provide that those provisions apply without prejudice to the Commission's exclusive competence under Article 108 TFEU. [35]

68. Third, as regards the scope *ratione temporis* of the two directives, it should be noted that when the decree of 23 June 2016 was adopted and when Tiberis entered into the contract with GSE under the support scheme provided for in that decree, only the provisions of Directive

[35] See Article 3(3) of Directive 2009/28 and Article 4(9) of Directive 2018/2001, as well as recital 18 of the latter directive.

2009/28 were applicable, those of Directive 2018/2001 having entered into force only from 1 July 2021. As a result, the support scheme at issue may be examined in the light of the latter directive only from that date, subject to the observations set out in points 77 to 79 of this Opinion.

2. The compatibility of the negative incentive mechanism with Directive 2009/28

69. As a preliminary point, it should be borne in mind that Article 3(1) of Directive 2009/28 provides, in essence, that each Member State is to ensure that the share of energy from renewable sources in gross final consumption of energy in 2020 is at least its national overall target as specified by that directive. Article 3(2) states that Member States are to introduce measures effectively designed to ensure that the share of energy from renewable sources equals or exceeds that shown in the indicative trajectory specified in that directive. In addition, Article 3(3) specifies that, in order to reach the targets set in paragraphs 1 and 2, Member States 'may', inter alia, apply support schemes.

70. It is clear from the wording of Article 3 of Directive 2009/28 that there is no obligation for Member States to adopt State support schemes to promote renewable energy, the adoption of such schemes being optional, nor, a fortiori, is there any guidance for Member States on how they are to design their support schemes. Accordingly, Member States have some discretion as to the measures to be taken to reach the mandatory national targets for energy from renewable sources, [36] provided that they comply with the EU rules on State aid. [37]

71. It should be noted that, in any event, on the basis of the elements presented in the order for reference, there is nothing to indicate that the adjustment mechanism actually jeopardised investments in the renewable energy sector, so as to raise doubts as to whether it complies with the objectives pursued by Directive 2009/28. [38]

72. It follows that Directive 2009/28, including Article 3 thereof, does not preclude an adjustment mechanism such as that at issue in the main proceedings.

3. The compatibility of the negative incentive mechanism with Directive 2018/2001

73. I observe at the outset that, although the referring court questions whether the negative incentive mechanism is compatible with Article 4 of Directive 2018/2001, it must still be established whether that provision applies to a State support scheme such as that at issue in the main proceedings, which was already in place when that directive entered into force, or whether it is rather a case of assessing the compatibility of that mechanism in the light of Article 6(1) of that directive, which, although the referring court does not expressly refer to it, aims to guarantee the legitimate expectations of aid beneficiaries under pre-existing schemes.

[36] It should be noted in that connection that, according to the information provided by the Commission in its written observations, which were not contested by Tiberis, the Italian Republic exceeded the mandatory target of energy from renewable sources that it had to meet under that directive. From a purely factual point of view, therefore, the argument cannot be made that the Italian support scheme for electricity from renewable sources prevented Italy from reaching its target.

[37] See, to that effect, judgment of 27 June 2024, *Gestore dei Servizi Energetici* (C-148/23, EU:C:2024:555, paragraph 38 and the case-law cited).

[38] See analysis in points 83 to 87 of this Opinion, which applies *mutatis mutandis* as far as Directive 2009/28 is concerned.

74. It is apparent from the case-law of the Court that, in principle, a new rule of law applies from the entry into force of the act introducing it. While it does not apply to legal situations that have arisen and become definitive under the old law, it applies to the future effects of a situation which arose under the old rule, as well as to new legal situations. It is otherwise – subject to the principle of the non-retroactivity of legal acts – only if the new rule is accompanied by special provisions which specifically lay down its conditions of temporal application. [39]

75. More specifically, it is apparent from the Court's case-law that unlike rules of procedure, which are generally taken to apply from the date on which they enter into force, the substantive rules of EU law must be interpreted, in order to ensure observance of the principles of legal certainty and the protection of legitimate expectations, as applying to situations existing before their entry into force only in so far as it clearly follows from their terms, their objectives or their general scheme that such effect must be given to them. [40]

76. As regards, more specifically, directives, it is, as a general rule, only legal situations existing after the expiry of the time limit for transposition of a directive which may be brought within the scope *ratione temporis* of that directive. That applies a fortiori to legal situations which arose under the old rule and which continue to produce effects after the entry into force of the national measures taken to transpose a directive after the expiry of the time limit for its transposition. [41]

77. However, while indeed, in the present case, Article 4 of Directive 2018/2001 provides for the *possibility* for Member States to adopt support schemes to achieve the objectives relating to the production of electricity from renewable sources, the directive does not specify whether that provision is intended to apply only to new support schemes adopted after the date of transposition of that directive, or whether its scope also covers existing support schemes established prior to that date. [42] In addition, as a provision that lays down criteria for granting support for the production of renewable energy, Article 4 constitutes a substantive rule. Theoretically, therefore, that provision can apply to existing support schemes only as regards their effects after the expiry of the time limit for its transposition, in the light of the case-law cited in points 75 and 76 of this Opinion.

78. It should also be noted that Article 6(1) of Directive 2018/2001 provides that, without prejudice to adaptations necessary to comply with Articles 107 and 108 TFEU, Member States must ensure that the level of, and the conditions attached to, the support granted to renewable energy projects are not revised in a way that negatively affects the rights conferred thereunder and undermines the economic viability of projects that already benefit from support. Article 6(2) adds that Member States may adjust the level of support in accordance with objective criteria, provided that such criteria are established in the original design of the support scheme.

79. It follows that, although there is no obligation for Member States to revise their existing support schemes to bring them into line with Article 4 of Directive 2018/2001, the directive being silent in that respect, they are free to make such alterations, provided, however, that they comply not only with the rules on State aid, but with Article 6 of that directive, which prohibits

[39] See, to that effect, judgment of 22 June 2022, *Volvo and DAF Trucks* (C-267/20, EU:C:2022:494, paragraph 32 and the case-law cited).

[40] See, to that effect, judgment of 22 June 2022, *Volvo and DAF Trucks* (C-267/20, EU:C:2022:494, paragraph 31 and the case-law cited).

[41] See, to that effect, judgment of 22 June 2022, *Volvo and DAF Trucks* (C-267/20, EU:C:2022:494, paragraphs 33 and 34 and the case-law cited).

[42] It must be noted, in that regard, that recitals 16 to 19 of Directive 2018/2001 give no indication as to the temporal scope of Article 4 of that directive.

the revision of the support scheme for projects that already benefit from support in a way that negatively affects the rights conferred thereunder and undermines the economic viability of those projects. [43]

80. Having made those preliminary points, the following analysis will seek to examine, in the alternative, whether the negative incentive mechanism is compatible with Article 4 of Directive 2018/2001, assuming that that provision applies, as the referring court seems to suggest.

81. Like Article 3 of Directive 2009/28, Article 4 of Directive 2018/2001 provides for the possibility for Member States to adopt support schemes to reach the targets for electricity production from renewable sources. However, unlike Article 3 of Directive 2009/28, Article 4 of Directive 2018/2001 establishes a more binding framework and rules for Member States in developing State support schemes for renewable energy production. [44]

82. As mentioned in points 29 to 31 of this Opinion, it is clear from the grounds for its decision that the referring court is asking, first, whether the adjustment mechanism provides incentives which, in accordance with Article 4 of Directive 2018/2001, are '*market-based and market-responsive*'.

83. First – notwithstanding the fact that the referring court has explained in detail the functioning of the adjustment mechanism at issue in the main proceedings – the Court still does not have all the necessary elements to carry out a full assessment of that mechanism, which, in any event, falls under the exclusive jurisdiction of the national court.

84. In addition, although Article 4 of Directive 2018/2001 does establish a link between the support schemes introduced by Member States and actual market conditions, in the sense that the amount of support granted must, in principle, be determined on the basis of the *prevailing market conditions*, the fact remains that the directive recognises expressly that the capability of different producers to respond to market signals varies according to their size. [45] Thus, Member States may not only opt for different types and aspects of aid, but also limit competitive tendering or tendering procedures to specific technologies where this is needed to avoid sub-optimal results with regard to constraints and system integration costs, the need to achieve diversification of the energy mix, and the long-term potential of technologies. [46] On that point, it is important to note that, in developing their support schemes, irrespective of the circumstances and market dynamics, Member States are also required to take into account other objectives set out in Directive 2018/2001, including in Article 4 thereof, in order, inter alia, to avoid distortions in electricity markets, to ensure the optimal integration of energy from renewable sources into the electricity market and to ensure grid stability.

[43] That interpretation is also supported by recital 466 of the 2022 Guidelines, which provides that the Commission will apply those guidelines to assess the compatibility of new aid notified to it after the entry into force of those guidelines. Recital 468 of those guidelines provides only that Member States have the right (but not the obligation) to amend, where they deem it necessary, existing support schemes in order to bring them into line with the 2022 Guidelines.

[44] In particular, article 4(3) of that directive states that support schemes for electricity from renewable sources must be designed so as to maximise the integration of electricity from renewable sources in the electricity market and to ensure that renewable energy producers are responding to market price signals and maximise their market revenues. Moreover, Article 4(4) thereof adds that Member States must ensure that support for electricity from renewable sources is granted in an open, transparent, competitive, non-discriminatory and cost-effective manner. Furthermore, those provisions lay down certain clarifications and possibilities for exemption, as do paragraphs 5 and 6 of that article.

[45] See recital 16 of Directive 2018/2001.

[46] See, inter alia, Article 4(4) and (5) of Directive 2018/2001, as well as recital 19 of that directive.

85. Second, it is apparent from the grounds of its decision that the referring court seems uncertain whether there is any discrimination due to the fact that installations with a capacity of more than 5 MW and which sell the electricity produced on the free market can benefit from support without an adjustment mechanism, whereas that option is not available to producers, like Tiberis, who are registered and whose installation capacity is between 1 MW and 5 MW.

86. In that respect, it should be borne in mind that the general principle of non-discrimination precludes different treatment of comparable situations and like treatment of different situations. [47]

87. However, as described in point 54 of this Opinion, the Italian support scheme introduced by the decree of 23 June 2016 provided for three different aid arrangements, depending on the (maximum) capacity of the installation concerned, which were based on distinct characteristics and incentive mechanisms. [48] It follows that differences in the treatment of various renewable energy producers stemmed precisely from the fact that those producers were not in comparable situations. More specifically, as for the fact that the incentive differentiates between production installations that participated in the auction procedure and those that did not, it should be noted that the State support scheme from which Tiberis benefited was based on a guaranteed fixed tariff aimed at protecting medium-sized undertakings from the uncertainty of the market price of energy, thus allowing them to recover the amount invested in the construction of the installation by ensuring the economic viability of their investments. [49] Conversely, the system of participation in the auction procedure to which operators of large (production) installations were subject did not guarantee any support for those operators, their remuneration being, in principle, based on revenue from sales on the free market. [50]

88. Furthermore, as recalled in point 78 of this Opinion, when assessing the compatibility of the adjustment mechanism with Directive 2018/2001, Article 6(1) of that directive must also be taken into account, which prohibits the revision of support schemes for renewable energy projects in a way that might negatively affect the rights conferred thereunder and undermine the economic viability of such projects. In any event, in the present case, the fact that the adjustment mechanism at issue in the main proceedings was provided for from the outset by national legislation means that it cannot be regarded as infringing Article 6(1) specifically.

89. In the light of the foregoing analysis, there is nothing to suggest that the mechanism at issue in the present case does not comply with the provisions of Directive 2018/2001 referred to above.

V. Conclusion

90. In the light of the foregoing considerations, I propose that the Court answer the question referred for a preliminary ruling by the Consiglio di Stato (Council of State, Italy) as follows:

Articles 107 and 108 TFEU

[47] See judgment of 14 April 2005, *AEM and AEM Torino* (C-128/03 and C-129/03, EU:C:2005:224, paragraph 58 and the case-law cited).

[48] The differentiation of incentive mechanisms according to the capacity of the installation is also provided for expressly in the decision granting authorisation and in Section 3.3.2.1. of the 2014-2020 Guidelines.

[49] As explained in point 65 of this Opinion, the incentive scheme based on the 'registration system', from which Tiberis benefited, is designed to safeguard investments by guaranteeing an incentive tariff in proportion to the costs of the project submitted by the aid applicant.

[50] As specified in point 65 of this Opinion, large producers only received support if the zonal hourly price fell below the auction price, in order to cover the difference between the two prices. In addition, the incentive tariff was lower than for operators who had registered in the register.

must be interpreted as precluding a national court from assessing whether the negative incentive mechanism of an existing support scheme is compatible with Article 3 of Directive 2009/28/EC of the European Parliament and of the Council of 23 April 2009 on the promotion of the use of energy from renewable sources and amending and subsequently repealing Directives 2001/77/EC and 2003/30/EC and Article 4 of Directive (EU) 2018/2001 of the European Parliament and of the Council of 11 December 2018 on the promotion of the use of energy from renewable sources, where that mechanism is indissolubly linked to the support scheme previously authorised by the European Commission in so far as it is necessary for the attainment of the object or for the functioning of that support scheme.