Reports of Cases

OPINION OF ADVOCATE GENERAL
WAHL
delivered on 17 March 2016 [1]

Case C-493/14

Dilly's Wellnesshotel GmbH

(Request for a preliminary ruling from the Bundesfinanzgericht (Federal Finance Court, Austria))

(Reference for a preliminary ruling — State aid — Regulation (EC) No 800/2008 — Categories of aid which may be regarded as compatible with the common market — Aid for environmental protection — Aid measures in the form of reductions in environmental taxes — Mandatory nature of the conditions for exemption))

1. It is well established that the obligation of prior notification of each measure intended to grant or alter new aid, which is incumbent on the Member States under the Treaties, is one of the fundamental features of the system of control in the field of State aid. [2] It necessarily follows that any qualification of that obligation, which arises from the wish to facilitate cooperation between national authorities and the Commission in clearly defined situations, by adopting administrative simplification measures in connection with the grant of block exemption, must be interpreted strictly.

2. This requirement lies at the heart of the present request for a preliminary ruling, which is the first from the Bundesfinanzgericht (Federal Finance Court, Austria) [3] and raises several questions on the interpretation of Regulation (EC) No 800/2008. [4]

3. In particular, the present case gives the Court the opportunity to clarify the formal and substantive conditions that must be satisfied if a Member State is to qualify for an exemption from the obligation to notify aid measures under that regulation. More generally, it provides the opportunity to point out that all the specific obligations on the Member States in that context, whether formal or substantive, are mandatory in nature and that infringement of them results in loss of entitlement to the exemption sought.

1 — Original language: French.

2 — See, inter alia, judgment in *France Télécom* v *Commission* (C-81/10 P, EU:C:2011:811, paragraph 58).

3 — It must be noted that that court is the successor to the Unabhängiger Finanzsenat (Independent Finance Tribunal, 'the UFS') and that the Court has, on a number of occasions, already held that it has jurisdiction to answer questions referred by the UFS.

4 — Commission Regulation of 6 August 2008 declaring certain categories of aid compatible with the common market in application of Articles 87 and 88 of the Treaty (General block exemption Regulation) (OJ 2008 L 214, p. 3).

I – Legal framework

A – *EU law*

4. Article 109 TFEU (formerly Article 94 of the EC Treaty) authorises the Council of the European Union, inter alia, to take implementing measures in order to determine the categories of aid exempted from the information procedure referred to in Article 108(3) TFEU (formerly Article 93(3) of the EC Treaty).

5. Council Regulation (EC) No 994/98 of 7 May 1998 on the application of Articles 92 and 93 of the Treaty establishing the European Community to certain categories of horizontal State aid[5] was adopted pursuant to Article 94 of the EC Treaty. Article 3(1) of that regulation, entitled 'Transparency and monitoring', states that, 'when adopting regulations pursuant to Article 1, the Commission shall impose detailed rules upon Member States to ensure transparency and monitoring of the aid exempted from notification in accordance with those regulations'.

6. Regulation No 800/2008,[6] which is applicable in the present case, was adopted under Regulation No 994/98.

7. Under Article 1(1)(d) of Chapter I of Regulation No 800/2008, entitled 'Scope', that regulation applies, inter alia, to 'aid for environmental protection'.

8. Article 3(1) of that chapter, entitled 'Conditions for exemption', provided:

'Aid schemes fulfilling all the conditions of Chapter I of this Regulation, as well as the relevant provisions of Chapter II of this Regulation, shall be compatible with the common market within the meaning of Article 87(3) of the Treaty and shall be exempt from the notification requirement of Article 88(3) of the Treaty provided that any individual aid awarded under such scheme fulfils all the conditions of this Regulation, and the scheme contains an express reference to this Regulation, by citing its title and publication reference in the *Official Journal of the European Union*.'

9. Under Article 9 of that chapter, entitled 'Transparency':

'1. Within 20 working days following the entry into force of an aid scheme or the awarding of an ad hoc aid, which has been exempted pursuant to this Regulation, the Member State concerned shall forward to the Commission a summary of the information regarding such aid measure. That summary shall be provided in electronic form, via the established Commission IT application and in the form laid down in Annex III.

The Commission shall acknowledge receipt of the summary without delay.

The summaries shall be published by the Commission in the *Official Journal of the European Union* and on the Commission's website.

5 — OJ 1998 L 142, p. 1. Regulation No 994/98 was amended by Council Regulation (EU) No 733/2013 of 22 July 2013 (OJ 2013 L 204, p. 11) and subsequently repealed by Council Regulation (EU) 2015/1588 of 13 July 2015 on the application of Articles [107 TFEU] and [108 TFEU] to certain categories of horizontal State aid (OJ 2015 L 248, p. 1).

6 — Regulation No 800/2008 was amended by Commission Regulation (EU) No 1224/2013 of 29 November 2013 (OJ 2013 L 320, p. 22). The period of application of Regulation No 800/2008 was therefore extended until 30 June 2014. That regulation was subsequently repealed by Commission Regulation (EU) No 651/2014 of 17 June 2014 declaring certain categories of aid compatible with the internal market in application of [Articles 107 TFEU] and [108 TFEU] (OJ 2014 L 187, p. 1).

2. Upon the entry into force of an aid scheme or the awarding of an ad hoc aid, which has been exempted pursuant to this Regulation, the Member State concerned shall publish on the Internet the full text of such aid measure. In the case of an aid scheme, this text shall set out the conditions laid down in national law which ensure that the relevant provisions of this Regulation are complied with. The Member State concerned shall ensure that the full text of the aid measure is accessible on the Internet as long as the aid measure concerned is in force. The summary information provided by the Member State concerned pursuant to paragraph 1 shall specify an Internet address leading directly to the full text of the aid measure.

…'

10. Article 10 of the same chapter, entitled 'Monitoring', was worded as follows:

'1. The Commission shall regularly monitor aid measures of which it has been informed pursuant to Article 9.

…

3. On written request, the Member State concerned shall provide the Commission within a period of 20 working days or such longer period as may be fixed in the request, with all the information which the Commission considers necessary to monitor the application of this Regulation.

Where the Member State concerned does not provide the information requested within the period prescribed by the Commission or within a commonly agreed period, or where the Member State provides incomplete information, the Commission shall send a reminder setting a new deadline for the submission of the information. If, despite such reminder, the Member State concerned does not provide the information requested, the Commission may, after having provided the Member State concerned with the possibility to make its views known, adopt a decision stating that all or part of the future aid measures to which this Regulation applies are to be notified to the Commission in accordance with Article 88(3) of the Treaty.'

11. Article 17 of Chapter II of Regulation No 800/2008, entitled 'Definitions', was in Section 4 thereof, entitled 'Aid for environmental protection', and provided as follows:

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

1. "environmental protection" means any action designed to remedy or prevent damage to physical surroundings or natural resources by the beneficiary's own activities, to reduce risk of such damage or to lead to a more efficient use of natural resources, including energy-saving measures and the use of renewable sources of energy;

…

10. "environmental tax" means a tax whose specific tax base has a clear negative effect on the environment or which seeks to tax certain activities, goods or services so that the environmental costs may be included in their price and/or so that producers and consumers are oriented towards activities which better respect the environment;

…'

12. Under Article 25 of Section 4, entitled 'Aid in the form of reductions in environmental taxes':

'1. Environmental aid schemes in the form of reductions in environmental taxes fulfilling the conditions of [Council Directive 2003/96/EC of 27 October 2003 restructuring the Community framework for the taxation of energy products and electricity (OJ 2003 L 283, p. 51] shall be compatible with the common market within the meaning of Article 87(3) of the Treaty and shall be exempt from the notification requirement of Article 88(3) of the Treaty, provided the conditions laid down in paragraphs 2 and 3 of this Article are fulfilled.

2. The beneficiaries of the tax reduction shall pay at least the Community minimum tax level set by [Directive 2003/96].

3. Tax reductions shall be granted for maximum periods of ten years. After such 10-year period, Member States shall re-evaluate the appropriateness of the aid measures concerned.'

B – *Austrian law*

13. Under the Law accompanying the budget (Budgetbegleitgesetz) of 30 December 2010,[7] service providers were to be excluded once again from the energy tax rebate.

14. Paragraph 2(1) of the Law on the rebate of energy taxes (Energieabgabenvergütungsgesetz, 'the EAVG'), as amended by Paragraph 72 of the BBG 2011, reads as follows:

'Only undertakings whose activity is shown to consist primarily in the manufacture of goods shall be entitled to a rebate, and only in so far as those undertakings do not provide the energy resources set out in Paragraph 1(3) or heating (steam or hot water) produced from the energy resources set out in Paragraph 1(3).'

15. The temporal scope of Paragraph 2 is laid down in Paragraph 4(7) of the Law on the rebate of energy taxes (Energieabgabenvergütungsgesetz, 'the EAVG'), which provides:

'Paragraphs 2 and 3 [of the EAVG] shall apply to rebate applications which relate to a period after 31 December 2010, subject to the approval of the European Commission.'

16. With regard to Paragraph 4(7) of the EAVG, the travaux préparatoires for the draft law state as follows:

'The application of the amended provisions is subject to the approval of the European Commission. That amendment shall enter into force in respect of energy use after 31 December 2010. Applications from service providers for periods after 31 December 2010 shall therefore no longer be accepted. If the amendment to the EAVG is approved by the Commission as authorised State aid, the statutory restriction to production undertakings shall apply from 1 January 2011, with the result that, after that date, service providers will no longer be entitled to the energy tax rebate for energy used. If the amendment is not approved by the Commission, the current legal situation shall remain unchanged and both production undertakings and service providers shall be entitled to an energy tax rebate.'

7 — BGBl. I, 111/2010, 'the BBG 2011'.

II – The case before the referring court, the questions referred and the procedure before the Court

17. On 29 December 2011, Dilly's Wellnesshotel GmbH ('Dilly's Wellnesshotel') submitted an application for an energy tax rebate for 2011.

18. By decision of 21 February 2012, that application was rejected as unfounded, with reference being made to the new legislation contained in the BBG 2011, in accordance with which, from 1 January 2011, the energy tax rebate was to be granted only to production undertakings. An appeal to the Unabhängiger Finanzsenat (Independent Finance Tribunal, which was succeeded by the Bundesfinanzgericht (Federal Finance Court), was dismissed.

19. By decision of 19 March 2013, the Verwaltungsgerichtshof (Administrative Court) held that, following a judgment delivered by that court on 22 August 2012, the energy tax rebate should still have been granted to service providers for January 2011. The Verwaltungsgerichtshof (Administrative Court) took the view that, for that month, the Commission had not yet given its approval for the new legislation as regards the notice issued under Regulation No 800/2008, which related only to the period commencing 1 February 2011.

20. Dilly's Wellnesshotel lodged a further administrative appeal before the Unabhängiger Finanzsenat (Independent Finance Tribunal), by which that company requested, in essence, inter alia, that its application for the energy tax rebate for the period from January to December 2011 be granted in full.

21. Dilly's Wellnesshotel started from the premiss that, if the application of Paragraph 2(1) of the EAVG in conjunction with Paragraph 4(7) of the EAVG infringes EU law, the new legislation introduced by the BBG 2011 is not applicable and service providers could continue to apply for the energy tax rebate for the whole of 2011 and beyond.

22. It is clear from the order for reference that Paragraph 2(1) of the original version of the EAVG provided for an energy tax rebate for undertakings engaged essentially in the 'manufacture of goods'. The provision of services was excluded from the tax rebate. The referring court states that, according to the travaux préparatoires, the purpose of the EAVG was to prevent Austrian production industries which consume a large amount of energy from being placed at a competitive disadvantage in relation to undertakings from other countries in which, as a general rule, there was no taxation on energy.

23. The national legislation on energy tax rebates has subsequently been amended on several occasions.

24. In the present case, the referring court has doubts as to whether the new legislation on energy tax rebates introduced by the BBG 2011 is compatible with Regulation No 800/2008. That court raises the question of whether the Republic of Austria is able to use the special procedure provided for in Article 25 of Regulation No 800/2008 for the national legislation at issue, although it appears that several requirements in Chapter I of that regulation have not been fulfilled.

25. In those circumstances, the Bundesfinanzgericht (Federal Finance Court) decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

'(1) Is EU law infringed if an aid scheme makes use of the special procedure under [Article 25 of] Regulation [No 800/2008] ... in order to be exempt from the obligation to notify under Article 108(3) TFEU, but does not comply with various obligations of Chapter I of [that regulation] and, moreover, does not make any reference to [that regulation]?

(2) Is EU law infringed if an aid scheme is based on the special procedure [under Article 25 of Regulation No 800/2008] which is applicable to environmental aid ... but the requirements laid down in Chapter II — namely the promotion of environmental protection measures and energy-saving measures under Article 17(1) [of that regulation] — are not satisfied?

(3) Does EU law preclude national rules which contain no temporal restriction and also no reference to the period stated in the exemption notice, with the result that the limitation of the energy tax refund to 10 years, required in Article 25(3) [of Regulation No 800/2008], is to be inferred only from the exemption notice?'

26. Written observations were submitted by Dilly's Wellnesshotel, the Austrian and Estonian Governments and the Commission.

27. A hearing was held on 21 January 2016, which was attended by Dilly's Wellnesshotel, the Austrian Government and the Commission.

III – Analysis

A – *Preliminary remarks regarding the situation in the main proceedings and the obligation to notify plans to grant new aid*

1. Situation in the main proceedings

28. The present reference for a preliminary ruling raises several questions of interpretation concerning the formal requirements (first question) and substantive conditions (second and third questions) that a national aid measure must fulfil in order to be eligible for an exemption from the obligation to notify under Regulation No 800/2008.

29. As is clear from the information provided by the referring court, the dispute in the main proceedings arises from the refusal by the Austrian tax authorities to grant an application for an energy tax rebate for 2011 submitted by the appellant in the main proceedings, Dilly's Wellnesshotel, a service provider. The reason for that refusal was the fact that, since the amendment introduced by the BBG 2011, the EAVG excludes service providers from entitlement to the energy tax rebate.

30. In the appeal before the referring court, the appellant in the main proceedings relies on the earlier version of that national legislation, a version which also covered service providers. It argues that that new legislation, since it does not comply with the binding provisions laid down in Regulation No 800/2008, has not been exempted from the obligation to notify laid down in Article 108(3) TFEU and therefore could not be implemented.

31. The referring court has made the present request for a preliminary ruling under its obligation to draw all the appropriate conclusions from any infringement of EU law on State aid relied on by individuals in accordance with their procedural rights.[8] Under the third sentence of Article 108(3) TFEU, 'the Member State concerned shall not put its proposed measures into effect until this procedure has resulted in a final decision'. Article 3 of Regulation (EC) No 659/1999,[9] entitled 'Standstill clause', states in that regard that 'aid notifiable ... shall not be put into effect before the Commission has taken, or is deemed to have taken, a decision authorising such aid'.

8 — See, inter alia, judgments in *Fédération nationale du commerce extérieur des produits alimentaires and Syndicat national des négociants et transformateurs de saumon* (C-354/90, EU:C:1991:440, paragraphs 16 and 17) and *SFEI and Others* (C-39/94, EU:C:1996:285).

9 — Council Regulation of 22 March 1999 laying down detailed rules for the application of Article 93 of the EC Treaty (OJ 1999 L 83, p. 1), as amended by Council Regulation (EC) No 1791/2006 of 20 November 2006 (OJ 2006 L 363, p. 1, 'Regulation No 659/1999').

32. In the present case, the referring court stated that the original version of the EAVG was notified to the Commission as State aid in 2002 and that the Commission found it to be compatible with the internal market. By contrast, the version of the EAVG that is relevant to the dispute in the main proceedings was not notified to the Commission, within the prescribed periods, as State aid, since the Austrian Ministry of Finance considered that that amendment was exempt from notification, under Article 25 of Regulation No 800/2008.

33. It is also clear from the file that, on 7 February 2011, a communication was sent to the Commission concerning the new version of the EAVG and announcing a new duration for the scheme from 1 February 2011 to 31 December 2013. A summary of the measure, referring to that duration, was published in the *Official Journal of the European Union* of 30 September 2011. The Internet link in that publication which was supposed to give access to the full text of the measure was incorrect.

34. Moreover, it appears to be common ground that the national legislation at issue in the dispute in the main proceedings was not notified to the Commission, in accordance with Article 2 of Regulation No 659/1999, and that the only exemption from the notification requirement which could be applied is that provided for in Article 25 of Regulation No 800/2008.

2. Importance of the obligation to notify plans for new aid and the need for a strict interpretation of the obligations incumbent on the Member States under a block exemption regulation

35. There is undeniably an element of novelty to the questions referred by the national court, since no interpretation has yet been given of Regulation No 800/2008 concerning the aspects specifically referred to in the present case.[10]

36. Before addressing in turn the questions referred, I consider it appropriate to recall a number of rules and guiding principles which will inform my entire examination.

37. In the first place, under the first sentence of Article 108(3) TFEU, as clarified by Article 2(1) of Regulation No 659/1999, the general rule is that any plans for new aid must be notified. It must be stated that the obligation of prior notification is the keystone of the entire monitoring system introduced by the Treaty, since it enables the Commission effectively and systematically to carry out a precautionary assessment of all plans to grant new aid or to alter existing aid. As Advocate General Jacobs stated, 'the obligation to notify proposed aids is of such manifest importance for the functioning of the common market that, in the absence of any Council regulations on the matter, it is plain that the obligation must be rigorously observed both as to content and as to form, and that it is essential, in particular, that the notification should make it clear beyond doubt that its purpose is to enable the Commission to submit its comments under Article 93(3) and if necessary to initiate the procedure provided for in Article 93(2) before the proposed aid is implemented'.[11]

38. The Court held at a very early stage that the obligation to inform the Commission of plans to grant or alter aid does not apply solely to the initial plan, but also covers subsequent alterations to that plan; such information may be supplied to the Commission in the course of the consultations which take place following the initial notification.[12]

10 — Although that regulation has been referred to in a number of cases brought before the Court (judgment in *Wam Industriale* v *Commission*, C-560/12 P, EU:C:2013:726, and Opinion of Advocate General Sharpston in *Commission* v *Spain*, C-184/11, EU:C:2014:33), the guidance provided by the latter is of little use in the present case.

11 — See his Opinion in *France* v *Commission* (C-301/87, EU:C:1989:357, point 19).

12 — See judgment in *Heineken Brouwerijen* (91/83 and 127/83, EU:C:1984:307, paragraph 18).

39. Under the first sentence of Article 4(1) of Commission Regulation (EC) No 794/2004 of 21 April 2004 implementing Council Regulation (EC) No 659/1999,[13] the concept of 'new aid' covers, inter alia 'any change, other than modifications of a purely formal or administrative nature which cannot affect the evaluation of the compatibility of the aid measure with the common market'. Moreover, in accordance with Article 4(2)(c) of Regulation No 794/2004, the tightening of the criteria for the application of an authorised aid scheme, such as that at issue in the main proceedings which seeks to restrict the circle of recipient undertakings covered by the scheme notified previously, is one of the alterations whose notification is, in principle, obligatory.

40. The obligation to notify any alteration to an aid scheme notified previously applies irrespective of whether the new scheme provides, as such, selective advantages that are incompatible with the common market. Whether aid may be classified as new aid or as the alteration of existing aid must be determined by reference only to the provisions that provide for the grant of the aid.[14]

41. The strict requirements which are imposed on the Member States in that regard also apply, in my view, when determining the conditions under which those Member States may, pursuant to an exemption regulation, be exempted from their obligation to notify.

42. Also, I take the view that, when adopting a block exemption regulation under Article 108(4) TFEU, it should be possible to exempt from the obligation to notify only the measures which satisfy in every respect the conditions laid down in that regulation. If all of the conditions for exemption are not satisfied, the obligation to notify remains.

43. In the second place, and following on from what I have just stated, since the basic principle is that State aid is incompatible with the common market, any proposed derogations in this field must be interpreted restrictively. Such a principle means that the Member State concerned has the burden of proving that both the formal and substantive conditions on which the compatibility of aid depends are fulfilled. It is for that Member State, in particular, to provide all the relevant information to determine that the conditions for the derogation sought are fulfilled.[15]

44. In the third place, if an exemption from the obligation to notify is, as in the present case, conceivable under a general exemption regulation adopted under Regulation No 994/98, the requirements of transparency and efficiency underlying the adoption of that regulation (see, inter alia, Article 3 and recitals 4, 6, 7 and 10 thereof) and the requirements of legal certainty with regard to third parties require the Member States to comply with the detailed rules set out in the exemption regulation.

45. Since the obligation to notify is central to the system of monitoring plans for State aid, *all* of the detailed rules laid down in an exemption regulation, possibly to avoid that obligation, must be duly observed. Unlike the situation which may arise with regard to information provided by the Member States to determine whether planned aid is compatible with the common market, there is no need to establish a hierarchy between the specific conditions provided for by an exemption regulation to avoid the obligation to notify plans for new aid laid down in Article 108(3) TFEU.

13 — OJ 2004 L 140, p. 1.

14 — See, inter alia, judgment in *Namur-Les assurances du crédit* (C-44/93, EU:C:1994:311, paragraph 28).

15 — See, inter alia, judgment in *Italy* v *Commission* (C 372/97, EU:C:2004:234, paragraph 81 and the case-law cited).

46. In such a context, there is no need to draw a distinction between the various conditions for exemption — the conditions which are 'substantive' in nature and those which are not — laid down in Regulation No 800/2008 and, therefore, between the legal consequences of failing to fulfil a particular condition as opposed to another. The only distinction that may apply as regards that regulation is that between the 'general conditions for exemption', laid down in Chapter I of that regulation (Articles 1 to 12), entitled 'Common provisions', and the special conditions laid down in Chapter II thereof (Articles 13 to 42), entitled 'specific provisions for the different categories of aid'.

47. Although it cannot be denied that, in other areas of EU law, it has been possible to draw a distinction between procedural defects which are substantive in nature and those which are not, that distinction cannot, in my view, apply where all of the conditions imposed on the Member States are eminently mandatory in nature, as is the case in procedures to notify plans for new aid and, where necessary, exemption from that procedure.

48. Therefore, in the judgment in *Heintz van Landewijck*,[16] the Court, called upon to give a ruling on the scope of the obligation to notify which was binding on the Member States under Article 27(5) of the Sixth Council Directive 77/388/EEC of 17 May 1977 on the harmonisation of the laws of the Member States relating to turnover taxes — Common system of value added tax: uniform basis of assessment[17] ('the Sixth Directive'), ruled that failure to observe the period for notification of measures intended to simplify the procedure for charging taxes does not constitute a procedural defect capable of rendering inapplicable a derogating measure which was notified late.

49. However, even if an analogy with the issue of fulfilling the conditions for exemption were allowed — which to me seems highly doubtful in the light of the, previously noted, eminently mandatory nature of the conditions for exemption laid down by the regulation at issue — I note that the Court, whilst recalling the rule that a derogation from the Sixth Directive adopted without compliance with the duty of notification imposed on the Member States by Article 27(2) thereof cannot be relied upon as against a taxable person, has taken care to point out that the reason for that conclusion was the fact that, 'in the present case, it [was] not a question of a new derogating measure which must be authorised by the Council, but a special measure in existence on 1 January 1977 and which the Member State [had] wished to maintain, in accordance with Article 27(5) of the Sixth Directive, in spite of the implementation of that directive'.[18]

50. Clearly, such a situation contrasts with that in which, as in the present case, new aid is involved, even though it results from an amendment to a national legislative measure that was notified previously.

51. In any event, in the field of State aid, it should be considered that, where provisions are clearly worded, such as those relating to the obligation to notify and concomitantly to the possibilities for exemption from such an obligation, the conditions laid down by such provisions are not mere procedural requirements.[19]

52. This must be true in particular as regards mandatory conditions laid down in a general block exemption regulation such as those referred to in Chapter I of Regulation No 800/2008. It is not possible, in my view, to be freed from the formal obligation to notify a proposed aid measure where one or more of those conditions have not been satisfied. Measures that do not fulfil all the required conditions remain subject to the notification requirement of Article 88(3) of the EC Treaty, as stated in recital 7 of that regulation.

16 — C-494/04, EU:C:2006:407, paragraph 51.

17 — OJ 1977 L 145, p. 1.

18 — Judgment in *Heintz van Landewijck* (C-494/04, EU:C:2006:407, paragraph 49).

19 — See, by analogy, order in *Banco Privado Português and Massa Insolvente do Banco Privado Português* v *Commission* (C-93/15 P, EU:C:2015:703, paragraph 67 and the case-law cited).

B – *The first question: formal requirements under Regulation No 800/2008*

53. By its first question, concerning formal requirements, the referring court wishes to ascertain the effect, first, of the absence of any reference to Regulation No 800/2008 in the aid measure at issue, secondly, of the late forwarding to the Commission of a summary of information regarding that measure and, thirdly, of an error in the Internet link that was supposed to give access to the full text of that measure.

1. Express reference requirement in Regulation No 800/2008

54. It seems to me that the indispensable nature of such a reference, which constitutes one of the strict conditions to which the exemption from the obligation laid down in Article 25(1) of Regulation No 800/2008 is subject, may be clearly deduced from the relevant provisions of Regulation No 800/2008.

55. In that regard, Article 3(1) of that regulation, entitled 'Conditions for exemption', provides that aid schemes fulfilling 'all the conditions' of Chapter I and the relevant provisions of Chapter II of that regulation are to be compatible with the common market and exempt from the notification requirement provided that any individual aid awarded under such scheme fulfils 'all the conditions' of the regulation and the scheme contains 'an express reference to [Regulation No 800/2008], by citing its title and publication reference in the *Official Journal of the European Union*'.

56. Moreover, Regulation No 800/2008 was adopted on the basis of Regulation No 994/98, which provided in Article 3(1) thereof, entitled 'Transparency and monitoring', that 'when adopting regulations pursuant to Article 1, the Commission shall impose detailed rules upon Member States to ensure transparency and monitoring of the aid exempted from notification in accordance with those regulations'.

57. That provision must be read in the light of recital 5 of Regulation No 800/2008, in accordance with which 'this Regulation should exempt any aid that fulfils *all the relevant conditions* of this Regulation, and any aid scheme .... In order to ensure transparency, as well as more efficient monitoring of aid, any individual aid measure granted under this Regulation should contain *an express reference* to the applicable provision of Chapter II and to the national law on which the individual aid is based' (emphasis added).

58. That requirement must also be understood in the light of the transparency requirement set out above, which is laid down inter alia in Article 3(1) of Regulation No 994/98. As the Commission submits, a reference to that regulation in a given aid measure enables the recipients, and their competitors, to understand the reasons why that measure may be implemented even though it was not notified to the Commission or authorised by it. In other words, that reference enables not only the Commission to review, but also third parties to be informed of, the proposed aid measures, so that they may exercise their procedural rights.

59. I do not think that such an interpretation, which is fully in line with the wording of Regulation No 800/2008, is excessively formalistic.

60. First of all, the inclusion in an aid measure of an express reference to Regulation No 800/2008 does not pose any particular difficulty for the Member States. That ease contrasts with the possible difficulty, both for the Commission and third parties, in identifying a scheme of that kind in the absence of such a reference.

61. Moreover, it seems to me that forwarding a summary of the information regarding the aid measure and its publication in the *Official Journal of the European Union*, as laid down in Article 9(1) of Regulation No 800/2008, can only partly remedy the absence of an express reference to that regulation. It seems to me that those provisions pursue objectives which are different in nature and that satisfying the conditions set out in one of those provisions cannot remedy non-compliance with the other.

62. If, as I suggest, the Court finds that an express reference to Regulation No 800/2008 in the aid measure is essential, it will not be necessary to examine the other aspects of the first question referred for a preliminary ruling or the second and third questions referred to the Court.

63. Should this not prove to be the case, I shall examine the other aspects below.

2. Requirement to forward a summary of the information regarding the aid measure under Article 9(1) of Regulation No 800/2008

64. Forwarding to the Commission a summary of the aid measure, in accordance with Article 9(1) of Regulation No 800/2008 and within 20 working days following the entry into force of the aid scheme is, in my view, very important in order to enable the Commission to carry out, at short notice, effective monitoring of compliance by the Member State concerned with the conditions for exemption.

65. This is undeniably a condition for the effectiveness of the exemption from the obligation to notify laid down in Article 108(3) TFEU.

66. Since this is a condition set out in Chapter I of Regulation No 800/2008, infringement of it means that the exemption sought is ineffective. Where that irregularity is remedied late, which seems to have been the situation in the case in the main proceedings, the exemption sought may, in my view, apply only for the future, namely for the period after the irregularity is remedied — that is the period from February to December 2011 [20] — and not for the preceding period.

3. Requirement to state the Internet address giving direct access to the full text of the aid measure

67. Under the first sentence of Article 9(2) of Regulation No 800/2008, the Member State is required to publish on the Internet the full text of the aid measure in question. Under the third sentence of Article 9(2) of Regulation No 800/2008, the Member State concerned must, in addition, ensure that the full text of that measure is accessible as long as the measure is in force. In the present case, the referring court has stated that the Republic of Austria did not comply with those obligations in every respect.

68. As regards the fourth sentence of Article 9(2) of Regulation No 800/2008, which requires that the summary information provided by the Member State contain an Internet address 'leading directly to the full text of the aid measure', the referring court has stated that the Internet address sent to the Commission and contained in the summary published in the *Official Journal of the European Union* cannot be opened.

20 — Although, as has been stated by the referring court, the summary information was communicated on 7 February 2011, it is reasonable to consider that the whole of February 2011 is covered by the exemption, since, under Article 9(1) of Regulation No 800/2008, the Member State concerned has a period of 20 working days following the entry into force of the aid scheme to forward to the Commission a summary of the information regarding the aid measure. I note that a rebate of the energy tax for only one month is conceivable under Austrian law, as is clear from the decision of the Verwaltungsgerichtshof (Administrative Court) of 19 March 2013 (see point 19 of this Opinion).

69. As I noted above, Article 3(1) of Regulation No 800/2008 requires the Member States to comply with all the conditions laid down in Chapter I thereof. This is *a fortiori* the case as provisions satisfying the legislature's desire to ensure transparency and legal certainty in the process for examining aid measures are at issue.

70. In my view, the requirement to comply with the obligations under Article 9 of Regulation No 800/2008 is as strict as that regarding the express reference to that regulation. To decide otherwise would, in my view, amount to establishing a hierarchy between the various conditions, in particular of a formal nature, imposed on the Member States under the exemption regulation.

71. However, it seems to me that the transparency requirements are met since, despite the fact that the Internet link provided in the summary referred to in Article 9 of Regulation No 800/2008 does not work, which may be the result of a technical fault, it has clearly been established that, having regard to the information provided in the summary forwarded to the Commission in accordance with that provision, the full text of the national legislation at issue was readily accessible both to the Commission services and to any interested third parties.

72. Nevertheless, it should be pointed out, following on from what I have stated above, that a failure to comply with one of the conditions laid down in Regulation No 800/2008 can in no way be remedied by possible compliance with another of those conditions.

C – *The second question: formal requirement, set out in Article 25(1) of Regulation No 800/2008, concerning the existence of an 'environmental' aid scheme*

73. The second question referred for a preliminary ruling asks the Court to specify the substantive conditions that must be satisfied in order to qualify for the notification exemption provided for in Article 25 of that regulation. The referring court is asking whether the granting of an exemption under Article 25 of Regulation No 800/2008 presupposes, in addition to compliance with the conditions set out in that provision, that it is demonstrated that the national scheme to reduce environmental taxes actually contributes to the protection of the environment.

74. There are two opposing points of view in the present case.

75. According to the Austrian and Estonian Governments and the Commission, it is sufficient that an aid measure fulfils the conditions expressly laid down in that article, namely the conditions set out in Directive 2003/96, the condition that the beneficiaries of the tax reduction pay at least the Community minimum tax level set by that directive and the condition that such reductions are granted for maximum periods of ten years, in order for an exemption to be granted for it.

76. By contrast, Dilly's Wellnesshotel submits that aid in the form of reductions in environmental taxes must also constitute aid for 'environmental protection' within the meaning of Article 17(1) of Regulation No 800/2008, which sets out a definition to that effect.

77. If, in particular, certain conclusions are drawn from the case-law established prior to the adoption of Regulation No 800/2008,[21] the referring court's doubts as to whether the tax reduction measures at issue are actually intended to improve environmental protection are easily understandable. It is, at first sight, difficult to understand the reasons why those measures lead to a reduction in environmental damage, by preventing such damage or by a rational use of natural resources.

21 — See judgment in *Adria-Wien Pipeline and Wietersdorfer & Peggauer Zementwerke* (C 143/99, EU:C:2001:598), according to which it became apparent that the advantageous terms granted to undertakings manufacturing goods were more intended to preserve the competitiveness of that sector than motivated by ecological considerations.

78. However, a literal, systemic and teleological interpretation of Article 25 of Regulation No 800/2008 causes me to state a clear preference for the viewpoint expressed by the majority of the intervening parties.

79. From a literal standpoint, it appears that Article 25 of Regulation No 800/2008 lays down only three conditions for an aid measure to be exempt, namely compliance with the requirements of Directive 2003/96, the requirement for a minimum tax level and the grant of tax reductions for a maximum period of ten years.

80. That provision merely refers to 'environmental' aid schemes and does not make any reference to the definition of aid contained in Article 17(1) of that regulation. Article 25 of that regulation is expressly linked to fulfilment of the conditions set out in Directive 2003/96. Recital 31 of Regulation No 800/2008 states, in that regard, that 'reductions in environmental taxes fulfilling the conditions of Council Directive 2003/96/EC ... and covered by this Regulation should be presumed to have an incentive effect in view of [the] fact that these reduced rates contribute at least indirectly to an improvement of environmental protection by allowing the adoption or the continuation of the overall tax scheme concerned, thereby incentivising the undertakings subject to the environmental tax to reduce their level of pollution'.

81. From a teleological and systemic standpoint, it seems that Article 25 of Regulation No 800/2008, which has the title 'Aid in the form of reductions in environmental taxes', covers the environmental taxes that are harmonised by Directive 2003/96 [22] and can therefore be distinguished from Articles 17 to 20 of that regulation, which lay down additional conditions related to environmental protection.

82. As can be seen from its preamble (see, inter alia, recitals 6, 7 and 12 thereof), that directive takes into consideration environmental protection objectives. Since that directive, which itself takes account of environmental protection objectives, constitutes the basis on which the energy taxes are harmonised, such taxes fall within the concept of 'environmental taxes'.

83. In other words, aid schemes that are found to comply with Article 25 — that is to say which meet 1) the requirements of Directive 2003/96, 2) the minimum tax level and 3) the ten-year limit — take indirect account of environmental protection objectives and must be classified as environmental taxes.

84. With regard, more specifically, to the reduction of environmental taxes, as in the present case, recital 31 of Regulation No 800/2008 states that it has 'an incentive effect in view of fact that these reduced rates contribute at least indirectly to an improvement of environmental protection by allowing the adoption or the continuation of the overall tax scheme concerned, thereby incentivising the undertakings subject to the environmental tax to reduce their level of pollution'.

85. Moreover, that is why the reference in Article 25 of Regulation No 800/2008 to compliance with the minimum Community levels laid down in Directive 2003/96 is justified.

86. It is therefore clear from the scheme of Regulation No 800/2008 that a mechanism to reduce energy tax which complies with the minimum levels of taxation set by Directive 2003/96 is capable of falling within the scope of the measures referred to in Article 25 of Regulation No 800/2008.

22 — See, in that regard, judgment in *Austria* v *Commission* (T-251/11, EU:T:2014:1060, paragraph 202).

D – *The third question: requirement that the measure at issue cannot be granted for a period of more than ten years (Article 25(3) of Regulation No 800/2008) and consequences of an absence of any reference to that period in that measure*

87. In the context of any answer to the third question, it must be examined whether Article 25(3) of Regulation No 800/2008 requires the aid measure itself to contain an express reference to its duration.

88. I think that this question should be answered in the negative.

89. In accordance with that provision, tax reductions 'shall be granted for maximum periods of ten years'. Recital 47 of that regulation states that, after that maximum period of 10 years, Member States should re-evaluate the appropriateness of the tax reductions concerned, without prejudice to the possibility for Member States of re-adopting those measures or similar measures on the basis of Regulation No 800/2008, after having realised such re-evaluation.

90. In the present case, the referring court stated that the contested amendment, namely Paragraph 4(7) of the EAVG, does not limit in time the entitlement to a rebate of environmental taxes and also contains no reference to the period mentioned in the exemption notice.

91. It is true that the time limit for the grant of aid which applies to the measures and is expressly laid down in Regulation No 800/2008, read in the light of recital 47 thereof and the Community guidelines on State aid for environmental protection[23] for the period 2008 to 2014, is very important and is mandatory in nature.

92. It is well-established that, as a derogation from the principle of prohibition of State aid, a declaration of compatibility, such as that resulting implicitly from a block exemption, must necessarily be limited in time.[24] Moreover, that requirement makes the temporal application of the aid measures transparent, both for potential beneficiaries of the aid scheme and for their competitors, in accordance with one of the Commission's objectives in drafting the detailed rules applicable to the Member States under the block exemption regulations.

93. However, that requirement does not stipulate that the Member State concerned must state that time limit in the actual wording of the national scheme for reductions in or exemptions from environmental taxes, such as that at issue in the main proceedings, since the mere reference to Regulation No 800/2008 — which, as I stated above, is mandatory — establishes a temporal limit for the grant of the aid at issue. In that regard, it must be noted that Article 4(1) of Regulation No 994/98 provides that aid exempted from notification under a block exemption regulation, such as Regulation No 800/2008, is to be exempted 'for the period of validity of that regulation and for the adjustment period provided for in paragraphs 2 and 3'.

94. Moreover, that conclusion seems to me to be fully in line with the approach taken by the Court in the judgment in *Nuova Agricast and Cofra* v *Commission*.[25] Called upon to give a ruling on compliance with the principles of legitimate expectations and legal certainty in the light of an aid scheme authorised previously by a Commission decision, the Court held that, on account of a publication by the Commission in the *Official Journal of the European Union* which stated the date on which the aid scheme in question ceased to apply, 'a prudent and alert economic operator' could have inferred the expiry date for the authorisation of the aid scheme 'even though the national provisions governing the detailed rules of that scheme and [some related] measures did not indicate a specific expiry date [to that effect]'.

23 — OJ 2008 C 82, p. 1.

24 — See, by analogy, judgment in *Nuova Agricast and Cofra* v *Commission* (C 67/09 P, EU:C:2010:607, paragraph 80).

25 — C 67/09 P, EU:C:2010:607, paragraphs 71 to 77 and the case-law cited.

95. I therefore take the view that the absence of any indication of the maximum period of ten years laid down in Article 25(3) of Regulation No 800/2008 in the actual wording of the national scheme at issue cannot, in itself, exclude that scheme from the benefit of the block exemption laid down in that regulation.

96. Not only does the wording of Article 25(3) of Regulation No 800/2008 contain no such requirement, it seems to me to be wholly impractical in respect of measures of a fiscal nature which are amended periodically and which, to my knowledge, are not implemented for so long a period. This is evidenced by the scheme in the main proceedings, which was subject to several amendments and which, according to the information contained in the summary forwarded to the Commission on 7 February 2011, was proposed for a period from 1 February 2011 to 31 December 2011.

IV – Conclusion

97. In the light of the foregoing considerations, I propose that the Court should answer the questions referred by the Bundesfinanzgericht (Federal Finance Court) as follows:

An aid scheme which, in breach of Article 3(1) of Commission Regulation (EC) No 800/2008 of 6 August 2008 declaring certain categories of aid compatible with the common market in application of Articles 87 and 88 of the Treaty (General block exemption Regulation), contains no reference to that regulation by citing its title and publication reference in the *Official Journal of the European Union* does not fulfil the eligibility conditions for an exemption from the obligation to notify laid down in Article 108(3) TFEU (formerly Article 88(3) of the EC Treaty).

An aid scheme in the form of a reduction in an energy tax for the purposes of Council Directive 2003/96/EC of 27 October 2003 restructuring the Community framework for the taxation of energy products and electricity, under which the beneficiary pays at least the Community minimum tax levels set by that directive and the period of validity of which is limited to ten years, falls within the scope of Article 25 of Regulation No 800/2008.

An aid scheme which does not comply with the time limit of ten years for granting aid laid down by Article 25(3) of Regulation (EC) No 800/2008 does not fulfil the eligibility conditions for the exemption provided for by that regulation. Such a requirement does not necessarily mean that that time limit must appear in the actual wording of the scheme in question.