Reports of Cases

OPINION OF ADVOCATE GENERAL
RANTOS
delivered on 2 June 2022 [1]

Case C-470/20

AS Veejaam,
OÜ Espo
v
AS Elering

(Request for a preliminary ruling from the Riigikohus (Supreme Court, Estonia))

(Reference for a preliminary ruling – Article 108(3) TFEU – Regulation (EU) 2015/1589 – Article 1(c) – Aid granted by Member States – Renewable energy subsidy – Companies producing renewable hydroelectricity having received a renewable energy subsidy in respect of electricity produced by their hydro-generators – Incentive effect of a subsidy applied for after work has started on a project)

I. Introduction

1. This request for a preliminary ruling concerns the interpretation of Article 108(3) TFEU, Article 1(c) of Regulation (EU) 2015/1589 [2] and paragraph 50 of the Guidelines on State aid for environmental protection and energy 2014-2020 ('the 2014 Guidelines'). [3]

2. The request has been made in the context of disputes between two renewable energy producers, AS Veejaam and OÜ Espo (together 'the applicants'), and AS Elering, the Estonian authority responsible for granting renewable energy subsidies, concerning those companies' applications for the renewable energy subsidy provided for by Estonian legislation.

1 Original language: French.

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

3 OJ 2014 C 200, p. 1.

II. Legal framework

A. European Union law

3. Article 1 of Regulation 2015/1589, entitled 'Definitions', reads:

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

…

(b) "existing aid" means:

(i) without prejudice to … the Appendix of Annex IV to the Act of Accession of … Estonia, … all aid which existed prior to the entry into force of the TFEU in the [Member State concerned], that is to say, aid schemes and individual aid which were put into effect before, and are still applicable after, the entry into force of the TFEU in the respective Member States;

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

(iii) aid which is deemed to have been authorised pursuant to Article 4(6) of Regulation (EC) No 659/1999 [4] or to Article 4(6) of this Regulation, or prior to [Regulation No 659/1999] but in accordance with this procedure;

…

(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;

…'

4. Paragraphs 49 and 50 of the 2014 Guidelines read:

'(49) Environmental and energy aid can only be found compatible with the internal market if it has an incentive effect. An incentive effect occurs when the aid induces the beneficiary to change its behaviour to increase the level of environmental protection or to improve the functioning of a secure, affordable and sustainable energy market, a change in behaviour which it would not undertake without the aid. The aid must not subsidise the costs of an activity that an undertaking would anyhow incur and must not compensate for the normal business risk of an economic activity.

(50) The Commission considers that aid does not present an incentive effect for the beneficiary in all cases where work on the project had already started prior to the aid application by the beneficiary to the national authorities. In such cases, where the beneficiary starts implementing a project before applying for aid, any aid granted in respect of that project will not be considered compatible with the internal market.'

4 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).

5. By its decision of 28 October 2014 concerning a support scheme for electricity produced from renewable sources and efficient cogeneration (State aid SA.36023) [5] ('the 2014 Decision'), the European Commission established that the Estonian aid scheme, although it breached the obligation set out in Article 108(3) TFEU, was compatible with Article 107(3)(c) TFEU.

6. By its decision of 6 December 2017 concerning amendments to the Estonian support scheme for electricity produced from renewable sources and cogeneration (State Aid SA.47354) [6] ('the 2017 Decision'), the Commission, although it found that Estonia had implemented the amendments to the aid scheme which was the subject of the 2014 Decision in breach of Article 108(3) TFEU, decided that the aid scheme that resulted from those amendments was compatible with the internal market within the meaning of Article 107(3) TFEU (together 'the 2014 and 2017 Decisions').

B. Estonian law

7. Paragraphs 59, 59[1] and 108 of the elektrituruseadus (Law on the electricity market) (*Riigi Teataja* of 30 June 2015; 'the ELTS') provide:

'Paragraph 59. Subsidy

(1) A producer is entitled to claim from the transmission system operator a subsidy:

(1) for the production of electricity from a renewable energy source, using a generating unit with net output of no more than 100 MW;

…

Paragraph 59[1]. Conditions under which the subsidy may be granted

(1) Grant of the subsidy referred to in Paragraph 59 of the present law shall be subject to the following conditions:

(1) the electricity must be generated by a generating unit meeting the requirements of the present law and of the network code;

…

(2) A producer shall not be entitled to the subsidy:

…

(4) if the producer does not have the necessary environmental approvals to generate electricity or fails to comply with the conditions attaching to such approvals;

(3) An application referred to in Paragraph 59(2) of the present law shall include data on the generating units, the details required by legislation for the grant of a subsidy and the information required by the transmission system operator …

[5] OJ 2015 C 44, p. 2.

[6] OJ 2018 C 121, p. 7.

…

Paragraph 108. Period of eligibility for the subsidy

(1) The subsidy referred to in Paragraph 59(1), points (1) to (4), of the present law can be paid for a period of 12 years from the start of production …

…

(3) The date of the start of production referred to above is the day on which a generating unit that fulfils the requirements first delivers electricity to the system or a direct line.

…'

III. The disputes in the main proceedings, the questions referred and the procedure before the Court

8. The applicants are two companies which have received State aid for the production of energy from renewable resources in Estonia.[7] Following the replacement of the generating units for which they had originally received those subsidies,[8] those companies submitted further applications for State aid,[9] which were rejected by Elering on the ground that they did not meet the conditions of the renewable energy subsidy scheme ('the aid scheme at issue'). Under that scheme, the subsidy in question could be paid only in respect of electricity produced by a completely new generating unit and in order to promote the entry onto the market of new operators, and not to support electricity producers on a permanent basis.

9. The applicants therefore brought actions against Elering's decisions before the Tallina Halduskohus (Administrative Court, Tallinn, Estonia). By decisions of 10 October and 27 October 2017, that court dismissed those actions. The companies appealed against those decisions before the Tallina Ringkonnakohus (Court of Appeal, Tallinn, Estonia). Following the dismissal of those appeals, by decisions of 27 June and 15 November 2018, the applicants lodged an appeal on a point of law before the Riigikohus (Supreme Court, Estonia), the referring court.

10. That court raises, first, the issue of possible tension between the 2014 and 2017 Decisions and the 2014 Guidelines regarding assessment of the incentive effect of the renewable energy subsidy provided for by the aid scheme at issue. In those decisions, the Commission effectively accepted the possibility that a subsidy application could also be submitted after the generating units at issue had been installed, although, according to paragraph 50 of the 2014 Guidelines, aid does not present an incentive effect in all cases where the beneficiary has submitted its aid application to the national authorities after work on the project has already started.

7 Veejaam produced electricity at a hydroelectric power plant between 2001 and 2015, using two generating units with outputs of between 100 kW and 200 kW. Between 2001 and 2012, Veejaam received the renewable energy subsidy under the Estonian aid scheme at issue in the main proceedings. Espo produced energy, at a hydroelectric power plant, using a 15 kW turbine. With effect from 2009, a new 45 kW turbine was put into operation. Espo received the renewable energy subsidy for the period from 2004 to 2015.

8 In 2015, Veejaam replaced the existing generating units with a new turbine generator installed on the power plant's existing dam. The generating unit resulting from that operation was, therefore, partly new in relation to the one existing at the time energy production started.

9 In 2016, Veejaam provided Elering with data on the new unit in order to obtain the renewable energy subsidy. Espo also submitted an application to Elering in 2016 relating to the turbine installed in 2009.

11. Secondly, the referring court states that, in the opinion which the Commission was requested to provide during the main proceedings under Article 29(1) of Regulation 2015/1589, the Commission had taken the view that a company in Veejaam's situation, which had undertaken work to install new generating units in order to meet the new requirements of the water use permit, was not entitled to receive renewable energy subsidies. Since work to meet the requirements of the Estonian legislation would have had to be carried out anyway, the requirement relating to the incentive effect of the subsidy was not met, as that work did not fulfil any viable purpose. The referring court questions, however, whether it is necessary also to look into the reasons which prompted Veejaam to install a new generating unit. The referring court therefore asks whether analysis of the compatibility of State aid in the present case should not also take into consideration the fact that without the prospect of the renewable energy subsidy Veejaam would have been forced to stop electricity production and that, in that circumstance, the subsidy at issue did indeed have an incentive effect.

12. Thirdly, the referring court asks about the procedural consequences of the Republic of Estonia's infringement of Article 108(3) TFEU in the course of implementing the aid scheme at issue. It is clear from the 2014 Decision that the Republic of Estonia had provided for two renewable energy subsidy schemes. Under the first scheme, only existing producers who had started production by no later than 1 March 2013 were eligible to receive the subsidy, which was granted automatically where the conditions laid down by the law in force at that time were met ('the old scheme'). The second scheme provided that, with effect from 1 January 2015, producers who had started production after 1 March 2013 could obtain State aid only under a competitive bidding procedure ('the new scheme'). However, the Republic of Estonia did not adopt the legislative measures needed in order for the new scheme to be implemented and continued to apply the old scheme until 2017, thereby enabling producers who had started production after 1 March 2013 to receive the subsidy also. The Commission therefore found, in its 2017 Decision, that the Republic of Estonia had breached the prohibition on implementing State aid, laid down in Article 108(3) TFEU.

13. The question therefore arises whether, since the old scheme continued to be applied beyond the date originally set, the aid at issue should be described as 'new aid' (which has been implemented without the Commission's approval) or 'existing aid', in light of the distinction between those two types of aid provided for by Regulation 2015/1589. If the Court were to hold that it is 'new aid' and that extension of the old scheme at issue could be regarded as lawful only after the adoption of the 2017 Decision, it would be necessary to examine whether the applicants might be eligible to receive the subsidy with effect from 2016, the year in which they applied for that subsidy.

14. It is in those circumstances that the Riigikohus (Supreme Court) decided to stay the proceedings and refer the following questions to the Court of Justice for a preliminary ruling:

'(1) Are EU rules on State aid, including the incentive effect required under paragraph 50 of the 2014 Guidelines to be interpreted as meaning that an aid scheme which allows a renewable energy producer to apply for State aid after work has started on a project is compatible with those rules where domestic legislation grants every producer which fulfils the requirements laid down by law the right to apply for the subsidy without granting the competent authorities any discretion in that regard?

(2) Is the incentive effect of aid always precluded where the investment on which the aid application is based was made due to a change to the terms of environmental approval, even where, as in this case, the applicant would probably have ceased its activity due to the stricter terms of approval had it not received the State aid?

(3) In light, inter alia, of the findings of the Court in its judgment in Case C-590/14 P (paragraphs 49 and 50), where, in a case, such as this one, in which the Commission has adopted a decision on State aid finding that an existing aid scheme and planned changes are compatible with the internal market and the State has announced, inter alia, that it will only apply the existing aid scheme up to a particular cut-off date, the existing aid scheme based on the applicable provisions of law is applied beyond the cut-off date announced by the State, does it qualify as new aid within the meaning of Article 1(c) of Regulation [2015/1589]?

(4) Where the Commission decides *ex post facto* not to raise any objections to an aid scheme applied in breach of Article 108(3) [TFEU], are persons with a claim to operating aid entitled to apply for payment of the aid for the period prior to the Commission's Decision, provided that domestic procedural rules so permit?

(5) Does an applicant which applied for operating aid under an aid scheme and which started to implement a project which fulfilled the criteria for compatibility with the internal market at a time when the aid scheme was lawfully applied, but applied for the State aid at a time when the aid scheme had been extended without notifying the Commission, have a claim to State aid notwithstanding the rule enacted in Article 108(3) [TFEU]?'

15. Written observations were submitted by Elering, the Estonian Government and the Commission. Those parties and Espo also presented oral argument at the hearing on 16 March 2022.

IV. Analysis

A. Preliminary observations

16. I note first of all that the factual and legal background to this case is complex, involving inter alia more than one State aid scheme, breaches of the standstill obligation set out in Article 108(3) TFEU and two decisions in which the Commission raised no objections to those schemes.

17. I would also note that, on some points, the questions raised by the referring court concern the interpretation of national law. Moreover, that court asks the Court about certain aspects that are essentially factual and somewhat technical. The Court does not, however, possess certain data that are required in order to uphold or invalidate the referring court's preliminary findings. On those points, it will therefore be for the latter court to take the final decision in light of the guidance that the Court will give to it.

18. I should like to point out in that connection that when the Court is requested to give a preliminary ruling, its task is to provide the national court with guidance on the scope of the rules of EU law so as to enable that court to apply the rules correctly to the facts in the case before it and it is not for the Court of Justice to apply those rules itself, a fortiori since it does not

necessarily have available to it all the information that is essential for that purpose. [10]

19. Having given that clarification, it seems appropriate to set out briefly the main characteristics of the Republic of Estonia's State aid scheme and the main aspects of the 2014 and 2017 Decisions.

20. The Estonian Government, with effect from 2003, implemented different versions of an aid scheme in order to increase the share thereof in Estonia's production of electricity. [11] The aid granted was designed mainly to offset the difference between production costs and the market price in order to encourage undertakings to build renewable energy generating units.

21. In that context, the aid scheme provided that a producer could, under certain conditions, obtain from the system operator a subsidy for the production of electricity from a renewable energy source. First, the subsidy was limited to new producers coming onto the market and using generating units of a certain type with a predefined output. Secondly, the amount of aid was not established in relation to the cost of the operator's investment for the installation of the generating units but depended on the amount of renewable energy produced. Thirdly, payment of the aid was linked not to the energy producer but to the generating unit, so that, in principle, the same producer could obtain State aid for several different installations. Fourthly, the scheme limited the period during which that aid could be paid to 12 years from the start of production, the latter corresponding to the date on which that unit first delivered electricity to the system.

22. It would appear that, to a great extent, the referring court's doubts regarding the interpretation of the term 'start of production' are at the root of the present reference for a preliminary ruling. That court therefore asks, in particular, whether it is necessary to take as the 'date of the start of production', within the meaning of Paragraph 108(3) of the ELTS, the day on which production at the power plant first started, or whether the mere replacement of a 'generating unit' at the same power plant gives reason to consider that production has started anew. That court also regards that question as being closely linked to the interpretation to be given of the term 'generating units', to which the Estonian law refers. [12]

23. If, as the referring court observes, the answer to the questions referred for a preliminary ruling depends on the definition of those two terms, it should be noted that that issue, and the issue whether the *start of production* may occur also where a generating unit has been only partially changed, is exclusively a matter of national law. [13]

24. It is important to point out, however, that in the exercise of its discretion the national court is required to comply with the 2014 and 2017 Decisions. I note, in that regard, that although *start of production* is not defined as such in those decisions, that term was adopted in order to establish the point when the period within which a company may receive State aid under the aid scheme at issue begins. Those decisions therefore included various conditions for the grant of the aid, including, inter alia, the condition that the total duration of the aid must not exceed a period of 12 years from the 'start of production'. [14]

[10] Judgment of 21 June 2007, *Omni Metal Service* (C-259/05, EU:C:2007:363, paragraph 15).

[11] That scheme was not described as 'existing' aid at the time of the accession of Estonia and was not notified to the Commission until 2014.

[12] The referring court also considers that it should decide whether the term 'generating unit' includes not only the turbine generator (that is to say, the items which have been replaced in the present case), but also includes the dam and the penstock.

[13] Similarly, the questions regarding the classification of the generating units which have been raised by the referring court are questions of fact that can only be interpreted by the national court.

[14] See recitals 62, 73, 109 and 111 of the 2014 Decision and recital 66 of the 2017 Decision.

25. I would also point out that, according to the Court's settled case-law, the scope of the authorisation granted by Commission State aid decisions is determined by reference to the aid scheme notified by the Member State concerned.[15] It should also be noted that the relevant provision of the draft law, namely Paragraph 108 of the ELTS, notified by the Estonian authorities to the Commission in the context of the aid scheme authorised by the 2014 Decision, leaves no doubt in that regard.[16]

26. In the light of the above, it would appear at first sight and subject to the checks which it is for the national court to undertake, that the aid scheme at issue does not allow the applicants' applications to be granted (and that Elering was right to refuse their applications). I therefore take the view that the 2014 and 2017 Decisions must be interpreted as meaning that replacement of a generating unit does not create 'fresh entitlement' to State aid and, in any event, does not cause a new 12-year payment period to run.

27. It should be noted that, by its first and second questions, the referring court would seem to be asking the Court about the compatibility of the old scheme with the EU State aid rules and, hence, about the actual lawfulness of the 2014 and 2017 Decisions.

28. It should be stated that none of the parties in the main proceedings has challenged the lawfulness of the abovementioned Commission decisions or, more generally, the lawfulness of the aid scheme at issue. Similarly, neither the parties in the main proceedings nor any third party contested the Commission decisions within the period of two months laid down in Article 263 TFEU. In those circumstances, as the Estonian Government rightly submits, the Commission decisions should bind the national courts in order to guarantee the principle of legal certainty.[17]

29. Now that clarification has been given regarding the aid scheme at issue and the Commission decisions, it is necessary to analyse the questions raised by the referring court, which, in the case of the first and second questions, concern the interpretation of the 'incentive effect' criterion, which constitutes a precondition for the grant of State energy and environmental aid. The third, fourth and fifth questions concern procedural aspects associated with the coexistence of the different State aid schemes put in place by the Republic of Estonia, and the procedural consequences of any failure to notify those schemes to the Commission.

B. The first question referred

30. By its first question, the referring court asks the Court, in essence, whether the old scheme is compatible with paragraph 50 of the 2014 Guidelines, which provides that aid does not present an incentive effect if the beneficiary's aid application is made to the national authorities after work on the project has already started. The referring court therefore asks the Court, more generally, to rule on the scope of the Commission Guidelines in the event of a conflict with a State aid decision adopted by the Commission.

[15] Judgment of 16 December 2010, *Kahla Thüringen Porzellan* v *Commission* (C-537/08 P, EU:C:2010:769, paragraph 44 and the case-law cited).

[16] Paragraph 108 of the draft law (ELTS) notified to the Commission stated that 'no aid shall be paid in respect of electricity produced by a new generating unit installed on the same site as a replacement for an old generating unit where, in accordance with the present law, aid has already been paid over 12 years in respect of electricity produced by the generating unit being replaced. Aid shall be paid in respect of electricity produced by a generating unit built to replace an old generating unit, until the end of a period of 12 years since the start of production using the original generating unit'.

[17] Judgment of 9 March 1994, *TWD Textilwerke Deggendorf* (C-188/92, EU:C:1994:90, paragraph 25).

31. I note, first of all, that, as the Court held inter alia in *Kotnik*, [18] Commission measures such as guidelines are not capable of imposing independent obligations on the Member States, but do no more than establish conditions, designed to ensure that State aid is compatible with the internal market, which the Commission must take into account in the exercise of the wide discretion that it enjoys under Article 107(3) TFEU.

32. In adopting such guidelines and announcing by publishing them that they will apply to the cases to which they relate, the Commission imposes a limit on the exercise of its discretion and cannot, as a general rule, depart from those guidelines, at the risk of being found to be in breach of general principles of law, such as equal treatment or the protection of legitimate expectations. [19] This means in practice that if a Member State notifies the Commission of proposed State aid which complies with the guidelines, the Commission must, as a general rule, authorise that proposed aid. However, the Member States retain the option to notify the Commission of proposed State aid which does not meet the criteria laid down by that communication and the Commission may authorise such proposed aid in exceptional circumstances. [20]

33. It follows from the foregoing that the Commission remains free to declare compatible with the internal market an aid scheme in respect of which the requirement of an incentive effect is met other than by submission of the aid application before the start of the work. In the present case, the Commission, taking into consideration a number of other criteria and the specific economic effects of the aid scheme at issue, found that the latter did have an 'incentive effect' regardless of the fact that an aid application may be made by a beneficiary after the work has started.

34. In that regard, the Commission found that, under normal market conditions (and in the absence of State aid), the undertakings concerned would not be induced to build renewable energy generating units since the latter would not be competitive. Therefore, the aid granted was intended mainly to offset the difference between the production costs and the market price, in order to induce undertakings to build such units. Moreover, the Commission pointed out that an essential characteristic of the aid scheme at issue is that the provider of the aid has no discretion as regards granting the aid where the applicant for that aid meets the requirements laid down by law. Therefore, the Commission concluded that that scheme meets the requirements of incentive effect, stating that, in the absence of that aid, new renewable energy projects would not be deployed at the required scale and pace. [21]

35. In the light of the foregoing, I propose that the answer to the first question referred for a preliminary ruling should be that the requirement of an incentive effect, laid down in paragraph 50 of the 2014 Guidelines does not preclude renewable energy producers from applying for State aid after work has started on a project, provided that all the other conditions laid down in the Commission decision approving the compatibility of the aid scheme concerned are met.

[18] Judgment of 19 July 2016, *Kotnik and Others* (C-526/14, EU:C:2016:570, paragraph 44).

[19] Judgment of 19 July 2016, *Kotnik and Others* (C-526/14, EU:C:2016:570, paragraph 40).

[20] Judgment of 19 July 2016, *Kotnik and Others* (C-526/14, EU:C:2016:570, paragraphs 43 to 45).

[21] See recital 64 of the 2014 Decision and recitals 62 and 63 of the 2017 Decision.

C. Second question referred

36. By its second question, the referring court asks whether the incentive effect of State aid is always precluded where the investment on which the aid application is based was made due to a change to the terms of environmental approval, even where the applicant would probably have ceased its activity due to the stricter terms of approval had it not received the State aid.

37. In other words, that question concerns the existence of an incentive effect in a case where the replacement of a generating unit is the consequence of a change in the legal provisions governing such investment.

38. I note from the outset that that question concerns only one of the applicants, Veejaam, which in 2015 was forced to change its generating unit for a new unit due to amendments to the Estonian law which no longer allowed the old generating unit to provide electricity efficiently.

39. As regards, next, the incentive effect, the 2014 and 2017 Decisions refer to paragraph 49 of the 2014 Guidelines, which provides that environmental and energy aid can be found compatible with the internal market only if it has an incentive effect.

40. In order to determine whether aid has an incentive effect, a comparison is made between, on the one hand, the hypothetical scenario where aid is granted to the undertaking and, on the other hand, the 'counterfactual' scenario where no aid is paid. When building on the latter scenario, it is necessary to take account of all the objective facts, such as environmental requirements, which have an effect on the profitability of a particular production unit. The authority responsible for granting the aid is then required to determine the plausibility of the 'counterfactual' scenario and confirm that the aid has the required incentive effect.

41. I note, in that regard, that there is nothing in the 2014 Guidelines to show that the fact of carrying out investment to comply with a change to the terms for obtaining environmental approval always precludes the aid having an incentive effect. The same applies regarding the 2014 Decision, which did not make specific provision for the case envisaged by the second question referred, namely a situation in which the investment is linked to stricter terms imposed by national law.

42. Subject to the following observations, I therefore take the view that the incentive effect of State aid is not precluded if the investment giving rise to State aid was made due to a change to the terms of environmental approval (in particular, where the original aid has become insufficient due to a change to the environmental requirements).

43. I would point out in that regard that the referring court considers that the outcome of the cases in the main proceedings will depend on whether it is necessary to take into account, as the 'date of the start of production', within the meaning of Paragraph 108(3) of the ELTS, the day on which production at the power plant first started or if mere replacement of a 'generating unit' at the same power plant means that production has started anew.[22] The answer to that question will make it possible to establish whether Veejaam can claim payment of new State aid, although it had already received such aid for the period of 12 years laid down by the Estonian scheme in respect of a unit originally installed at the same hydroelectric power plant which is being replaced.

[22] See point 22 of this Opinion.

44. As mentioned in points 23 to 25 of this Opinion, if that question concerns national law and falls within the discretion of the national court, the latter is required to comply with the conditions attaching to the 2014 and 2017 Decisions. I note in that regard that the payment of State aid under the 2014 and 2017 Decisions is subject to a number of conditions, including the condition that aid may not be granted for a period of more than 12 years.

45. Lastly, it is also important to note that it follows from the objectives of the Estonian scheme, as approved by the Commission, that that scheme is intended to support the entry of new operators onto the renewable energy market. There is no evidence in the 2014 and 2017 Decisions to show that the objective of that scheme is to support permanently (or at least for more than the 12-year period that was laid down under that scheme) producers who have already received State aid, in order for them to carry out investment in renewable energy. Thus, in addition to the risk of overcompensation, the result, if each replacement of a unit was accepted as counting towards the start of a new 12-year aid period, would be that the undertakings concerned would receive subsidies automatically, and (almost) continuously, without incurring any commercial risk.

46. The fact that, in the present case, the replacement of the equipment was due to a change to the legal terms governing such investment does not alter the above finding. If Veejaam's approach was accepted it would mean that the granting of State aid might entirely depend on the legislative or regulatory initiative of the Member States, with no regard for the Commission's decision-making framework, an outcome that would not comply with the rules of EU State aid law.

47. It is clear from the foregoing that, in principle, it is for the referring court to examine, in the light of the facts of the present case, the plausibility of the 'counterfactual' scenario set out by Veejaam in its aid application, and in particular the possibility that that company would have ceased its activity due to the new stricter terms had it not received the aid. Nonetheless, in the context of that examination, that court is bound by the 2014 and 2017 Decisions and, in particular, the condition concerning the limit on the maximum duration of the aid, which is set at 12 years.

48. In those circumstances, I propose that the answer to the second question referred for a preliminary ruling should be that the incentive effect of State aid is not precluded where the investment on which the aid application is based was made due to a change to the terms of environmental approval, in particular where the applicant would have ceased its activity due to the stricter terms of approval had it not received the State aid, provided that the aid granted meets the conditions imposed by the Commission decision approving the compatibility of the aid scheme concerned.

D. Third question referred

49. The third question referred seeks to establish whether the Republic of Estonia implemented new aid without the Commission's approval.

50. It is clear from the 2014 Decision, and from the information at the disposal of the Court, that the Republic of Estonia had planned to keep the old scheme in place until 31 December 2014, the date on which the new scheme – which featured a system of competitive bidding between operators and was open also to producers who had started production after 1 March 2013 –

should have entered into force.[23] However, the entry into force of the new scheme was delayed and, consequently, the old scheme was still being applied in Estonia at the time when Veejaam and Espo submitted their aid applications to Elering in 2016. In the 2017 Decision, the Commission, whilst finding that implementation of the old scheme beyond 31 December 2014 constituted a breach of the standstill obligation set out in Article 108(3) TFEU,[24] declared for a second time that the aid was compatible with the internal market and authorised the extension of the existing aid scheme until 31 December 2016.

51. In that context, the referring court asks whether the extended implementation of the old scheme – which had become 'existing aid' as the result of approval under the 2014 Decision – beyond the date announced to the Commission, constitutes 'new aid' within the meaning of Article 1(c) of Regulation 2015/1589.

52. It should be noted, in the first place, that there is both a substantive and a procedural difference in EU law between 'existing aid' and 'new aid'. First, 'existing aid' means a State measure which falls within one of the five types of existing aid set out in Article 1(b) of Regulation 2015/1589.[25] Secondly, Article 1(c) of that regulation defines new aid as meaning 'all … aid schemes and individual aid, which is not existing aid, including alterations to existing aid'. The classification of a measure as 'existing aid' or 'new aid' determines, moreover, the procedure which the Commission uses to determine whether it is compatible with the internal market.

53. According to Article 108(1) TFEU, existing aid may be properly implemented so long as the Commission has made no finding of incompatibility. Article 108(3) TFEU, however, requires that plans to grant new aid[26] must be notified to the Commission and may not be implemented until the procedure has led to a final decision.[27] Accordingly, unlike new aid, which is regarded as 'unlawful' where a Member State grants it in breach of the standstill obligation set out in that paragraph, existing aid must be regarded as lawful so long as the Commission, as part of the constant review provided for in Article 108(1) TFEU, has not found that it is incompatible with the internal market.[28]

54. It should be observed, in the second place, that it is clear from the 2014 Decision that the Commission approved the old aid scheme as being compatible with the internal market, on the basis of a number of commitments made by the Republic of Estonia, including in particular a commitment to not to apply that scheme beyond 31 December 2014.[29] I note, in that regard, that the referring court itself states, in the order for reference, that the Republic of Estonia extended the existing aid scheme without the Commission's approval and therefore in breach of Article 108(3) TFEU. The Commission, in its 2017 Decision, also stated that, by continuing the

[23] See recitals 27, 28 and 106 of the 2014 Decision.

[24] See recitals 29, 31 and 96 of the 2017 Decision.

[25] In the present case, the relevant type of existing aid is that defined in Article 1(b)(ii) of that regulation.

[26] Including plans to alter existing aid, since alterations to existing aid constitute new aid within the meaning of Article 1(c) of Regulation 2015/1589.

[27] Judgment of 26 October 2016, *DEI and Commission* v *Alouminion tis Ellados* (C-590/14 P, EU:C:2016:797, paragraph 45).

[28] Judgment of 18 November 2010, *NDSHT* v *Commission* (C-322/09 P, EU:C:2010:701, paragraph 52).

[29] That position is challenged by Elering, which interprets the 2014 Decision differently. Elering contends that the old scheme had not set an expiry date and that it is not clear from the 2014 Decision that the Commission made approval of the old scheme subject to the requirement that that scheme should expire on 31 December 2014 or that it should have been replaced by the new scheme. Therefore, it was lawful for the Republic of Estonia not to implement the amendments approved by that decision and to continue to implement the old aid scheme approved by that decision.

existing aid scheme after 1 January 2015 and thereby allowing new producers to join the scheme, the Estonian authorities had put the aid measure in question into effect before a final Commission decision. [30]

55. According to the Court's settled case-law, authorisation given by the Commission to put into effect aid compatible with the internal market is valid only to the extent that the Member State fulfils the commitments to which it has agreed, which form an integral part of the measure that has been authorised. Where there are no such commitments under national law, it is for the Member State to amend its legislation appropriately in order to be able to fulfil the commitments it proposes and thus remain within the limits of the authorisation granted by the Commission. [31]

56. In that regard, it should be noted that in *DEI and Commission* v *Alouminion tis Ellados* (C-590/14 P, EU:C:2016:797), which is moreover expressly mentioned by the referring court in its third question, the Court held that the period of validity of existing aid is a factor likely to influence the evaluation, by the Commission, of the compatibility of that aid with the internal market. [32] In those circumstances, extension of the duration of existing aid must be considered to be an alteration of existing aid and therefore, in accordance with Article 1(c) of Regulation 2015/1589, constitutes new aid. [33]

57. Accordingly, the answer to the third question should be that, where the Commission has, by a decision on State aid, found to be compatible with the internal market both an existing aid scheme and planned changes to it, but the Member State has not fulfilled its commitment to apply that scheme only up to a certain date, application of that scheme beyond that date is to be regarded as 'new aid' within the meaning of Article 1(c) of Regulation 2015/1589.

E. Fourth and fifth questions referred

58. By its fourth and fifth questions, the referring court asks about the effects of a potential breach of Article 108(3) TFEU as regards applications for State aid made by the applicants during the period when that aid might be regarded as being unlawful. Those questions are raised, in essence, in the event that the Court considers that the old scheme constituted new, and therefore unlawful, aid during the period from 2015 until 2017. In light of the answer which I propose to give to the third question referred, I consider that an answer should be given to the fourth and fifth questions referred.

59. The fourth question seeks to determine whether Veejaam and Espo were entitled to receive aid from the time they submitted their application in 2016, or only from the date of the adoption of the 2017 Decision. The fifth question is linked to the specific situation of Espo. That company applied for entitlement to receive aid at a time (namely, in 2016) when such aid might be regarded as unlawful, although the completion of the investment, in 2009, might be covered by the approval under the 2014 Decision.

60. In the light of the connection between them, I propose to deal with those questions together.

[30] See Subsection 3.2 of the 2017 Decision.

[31] Judgment of 15 October 2015, *Iglesias Gutiérrez and Rion Bea* (C-352/14 and C-353/14, EU:C:2015:691, paragraphs 28 and 29).

[32] Judgment of 26 October 2016, *DEI and Commission* v *Alouminion tis Ellados* (C-590/14 P, EU:C:2016:797, paragraph 49 and the case-law cited).

[33] Judgment of 26 October 2016, *DEI and Commission* v *Alouminion tis Ellados* (C-590/14 P, EU:C:2016:797, paragraph 50 and the case-law cited).

61. As a preliminary point, I note that the Commission considers that the fourth and fifth questions are hypothetical and therefore inadmissible, on the ground that the applicants are not entitled to aid either under the old or the new aid schemes because they had already received aid for a period of 12 years.

62. It is true that the applicants do not appear to be entitled to payment of the new aid – in particular for the reason put forward by the Commission.[34] However, the answer to the question whether the applicants can receive aid depends ultimately on the interpretation of certain facts and on the interpretation of the Estonian aid scheme, which are exclusively matters of national law. I consider, therefore, that it is necessary to answer those questions, whilst noting nonetheless that the answers assume that the conditions attaching to the 2014 and 2017 Decisions are met.

63. I would point out that it follows from the classification of the old scheme as 'new aid' due to the breach of the obligation to notify set out in Article 108(3) TFEU that that aid was 'unlawful' between 2015 and 2017. The aid only became 'existing aid' (and therefore 'lawful') on 6 December 2017, the date on which its extension was declared compatible with the internal market by the Commission decision.[35]

64. According to settled case-law, an approval decision by the Commission does not have the effect of regularising a posteriori aid measures that have not been notified and are in breach of Article 108(3) TFEU.[36] The Court has therefore ruled that the illegality of an aid measure (or of part of that measure) owing to infringement of the obligation to notify is not affected by the fact that the measure has been held to be compatible with the common market by a final decision of the Commission.[37] Any other interpretation would have the effect of according a favourable outcome to the non-observance of the third sentence of Article 108(3) TFEU and would deprive it of its effectiveness.[38] Indeed, if, for any particular proposed aid, whether compatible with the internal market or not, failure to comply with Article 108(3) TFEU carried no greater risk or penalty than compliance, the incentive for Member States to notify and await a decision on compatibility would be greatly diminished – as would, consequently, the scope of the Commission's control.[39]

65. It follows from the foregoing considerations that procedural irregularity persists irrespective of whether the aid is compatible with the internal market. Accordingly, first, EU law requires the national courts to order the measures appropriate effectively to remedy the consequences of the unlawfulness and in particular to protect the rights of individuals faced with breaches resulting from the unlawfulness of the aid. Secondly, the national court is bound, under EU law, to order the beneficiary of the aid to pay interest in respect of the period of unlawfulness of that aid.[40] That obligation on the national court stems from the fact that implementation of aid in breach of Article 108(3) TFEU procures for the beneficiary of that aid an undue advantage, consisting in the non-payment of the interest which it would have paid on the aid amount in question had it had to

[34] See points 24 to 26 of this Opinion.

[35] See, to that effect, judgment of 21 October 2003, *Van Calster and Others* (C-261/01 and C-262/01, EU:C:2003:571, paragraph 56).

[36] Judgment of 19 March 2015, *OTP Bank* (C-672/13, EU:C:2015:185, paragraph 76).

[37] Judgment of 21 October 2003, *Van Calster and Others* (C-261/01 and C-262/01, EU:C:2003:571, paragraph 62).

[38] Judgment of 24 November 2020, *Viasat Broadcasting UK* (C-445/19, EU:C:2020:952, paragraph 21 and the case-law cited).

[39] Judgment of 24 November 2020, *Viasat Broadcasting UK* (C-445/19, EU:C:2020:952, paragraph 23 and the case-law cited).

[40] Judgment of 5 March 2019, *Eesti Pagar* (C-349/17, EU:C:2019:172, paragraph 134 and the case-law cited).

borrow that amount on the market pending the adoption of the Commission's final decision, and also in the improvement of its competitive position as against the other operators in the market during the period of unlawfulness of the aid concerned. [41]

66. It should be noted that in the present case no aid was paid to the applicants during 'the period of unlawfulness' (between 2015 and 2017) in connection with their applications submitted in 2016. [42] Consequently, those companies are not required to pay interest on sums that were never received (in respect of those applications). The question therefore arises whether in such a case the Estonian authorities can pay that aid retrospectively, taking as the starting point not the date of the 2017 Decision but the date of the application for payment of the aid in 2016, since that is permitted under national law.

67. For the following reasons, I am of the view that the answer to that question should be in the affirmative.

68. It should be noted that the purpose of Article 108(3) TFEU is to ensure that aid that is incompatible with the internal market will never be implemented, and that compatible aid alone will be implemented. That purpose is achieved first, provisionally, by means of the prohibition laid down in that provision, and, later, definitively, by means of the Commission's final decision, which, if negative, precludes for the future the implementation of the notified aid plan. [43]

69. However, where the Commission adopts a positive decision and finds that the aid scheme implemented is indeed a compatible aid scheme, the unlawful aid is not likely to have an adverse effect on the persons concerned and bring about distortion of competition, which moreover renders the objective of Article 108(3) TFEU, to prevent the implementation of incompatible aid, superfluous. The effectiveness of that provision would, therefore, not be called into question by a decision to grant such aid retrospectively.

70. Furthermore, I take the view that, in the present case, to allow the Republic of Estonia to grant an application for the payment of aid declared compatible by the Commission, including for the period prior to that decision, would make it possible to ensure there was no distortion of competition on the market. That would be, in particular, in light of the fact that in the present case certain operators appear to have continued to receive aid during the period of unlawfulness under the old scheme. Accordingly, the latter group of operators are bound in principle, in light of the case-law cited in point 65 of this Opinion, not to repay the aid but merely to pay interest on the aid received during that period. Not to allow operators who have not received aid to receive it retrospectively (under the same scheme and for the same period of time), although they were entitled to claim it on the basis of a Commission decision that had ruled that the aid was compatible, would be likely to give rise to inequality that would lead to distortion of competition.

71. As regards, lastly, the situation of Espo, which installed a generating unit in 2009 but only applied for the aid at issue in respect of electricity produced by that unit in 2016, the referring court seeks to ascertain whether the fact that that application was submitted on a date that was not covered by the 2014 Decision would lead to rejection of that company's application, even though it might be eligible to benefit under the old scheme, approved by the 2014 Decision. The

[41] Judgment of 5 March 2019, *Eesti Pagar* (C-349/17, EU:C:2019:172, paragraph 132 and the case-law cited).

[42] The specific case of Espo, which continued to receive aid under the old scheme during the 2015-2016 period, is dealt with in point 75 of this Opinion.

[43] Judgment of 12 February 2008, *CELF and ministre de la Culture et de la Communication* (C-199/06, EU:C:2008:79, paragraphs 47 and 48).

question therefore arises, according to that court, whether the prohibition on the implementation of aid, laid down in Article 108(3) TFEU, is likely to preclude such an application if it was permitted by national law.

72. Although, for the reasons given above, I consider that Article 108(3) TFEU does not preclude the Republic of Estonia granting such an application since it would be permitted under national law, the fact remains that the referring court is bound to comply with the 2014 and 2017 Decisions.

73. First, it should be noted that the wording of the question as raised by the referring court appears to be based on the premiss that Espo was entitled to aid for the installation of the generating unit in 2009, which does not appear to be the case on the basis of the 2014 and 2017 Decisions, in light of the fact that that company had already received the subsidy provided for under the Estonian scheme for the maximum period of 12 years.

74. Secondly, it should be pointed out that Espo appears, in fact, to have received a subsidy in respect of that new installation from 2009 (the date of its installation) until 2015 (the date on which the maximum period of 12 years for granting aid ended). [44]

75. Thirdly, it is for the national court to examine the extent to which Espo must pay interest in respect of the period from 2014 to 2015, since the aid it received was unlawful. Unlike Veejaam, which did not receive aid in respect of its 2016 application, it is clear from the request for a preliminary ruling that Espo received aid during the period from 1 April 2004 until 31 December 2015. According to the case-law referred to in point 65 of this Opinion, although that company was not required to repay the capital sum received, the question arises whether interest should be paid in respect of the period when the aid was unlawful.

76. In the light of the foregoing, I propose that the answer to the fourth and fifth questions should be that, where the Commission decides not to raise any objections to a State aid scheme applied in breach of Article 108(3) TFEU, persons with a claim to operating aid are entitled to apply for payment of the aid in respect of the period prior to the Commission's decision, where national procedural rules so permit, provided that all the other conditions laid down in that decisions are met.

V. Conclusion

77. In the light of the above considerations, I propose that the Court should answer the questions referred for a preliminary ruling by the Riigikohus (Supreme Court, Estonia) as follows:

(1) The requirement of an incentive effect, laid down in paragraph 50 of the Guidelines on State aid for environmental protection and energy 2014-2020 does not preclude renewable energy producers from applying for State aid after work has started on a project, provided that all the other conditions laid down in the Commission decision approving the compatibility of the aid scheme concerned are met.

[44] See point 8 of this Opinion.

(2) The incentive effect of State aid is not precluded where the investment on which the aid application is based was made due to a change to the terms of environmental approval, in particular where the applicant would have ceased its activity due to the stricter terms of approval had it not received the State aid, provided that the aid granted meets the conditions imposed by the Commission decision approving the compatibility of the aid scheme concerned.

(3) Where the Commission has, by a decision on State aid, found to be compatible with the internal market both an existing aid scheme and planned changes to it, but the Member State has not fulfilled its commitment to apply that scheme only up to a certain date, application of that aid scheme beyond that date is to be regarded as 'new aid' within the meaning of Article 1(c) of Council Regulation (EU) 2015/1589 of 13 July 2015 laying down detailed rules for the application of Article 108 of the Treaty on the Functioning of the European Union.

(4) Where the Commission decides not to raise any objections to a State aid scheme applied in breach of Article 108(3) TFEU, persons with a claim to operating aid are entitled to apply for payment of the aid in respect of the period prior to the Commission's decision, where national procedural rules so permit, provided that all the other conditions laid down in that decision are met.