Case C-470/20

Summary of the request for a preliminary ruling pursuant to Article 98(1) of the Rules of Procedure of the Court of Justice

Date lodged:

29 September 2020

Referring court or tribunal:

Riigikohus (Estonia)

Date of the decision to refer:

28 September 2020

Applicants:

Veejaam AS

Espo OÜ

Defendant:

Elering AS

Subject matter of the main proceedings

Appeal on a point of law by Veejaam AS and Espo OÜ against the judgments of the Tallinna Ringkonnakohus (Court of Appeal, Tallinn, Estonia) upholding the judgments of the Tallinna Halduskohus (Administrative Court, Tallinn, Estonia) dismissing the applications for annulment of the decisions of Elering AS not to pay the applicants any renewable energy subsidies.

Subject matter and legal basis of the reference

The questions referred for a preliminary ruling pursuant to Article 267(3) TFEU concern the interpretation of provisions of EU law on State aid, including the Communication from the Commission ‘Guidelines on State aid for environmental protection and energy 2014-2020’, paragraph 50, Article 1(c) of Regulation (EU) 2015/1589 and Article 108(3) TFEU.

Questions referred for a preliminary ruling

1. Are EU rules on State aid, including the incentive effect required under paragraph 50 of the Communication from the Commission 'Guidelines on State aid for environmental protection and energy 2014-2020' 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 (EU) 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 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?

Provisions of EU law and case-law of the Court of Justice cited

Article 108(3) TFEU

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 (OJ 2015 L 248, p. 9), Article 1(c)

Communication from the Commission 'Guidelines on State aid for environmental protection and energy 2014-2020' (OJ 2014 C 200, p. 1), paragraphs 49 and 50

Judgment of the Court of 26 October 2016, *DEI and Commission*, C-590/14 P, EU:C:2016:797, paragraphs 49 and 50

Provisions of national law cited

Elektrituruseadus (Law on the Electricity Market, 'the ELTS')

Brief summary of the facts and proceedings

Administrative case no 3-16-1864

1 Veejaam AS ('Veejaam') started to produce electricity at the Joaveski hydroelectric power plant in 2001. Electricity was generated from 2001 to 2015 using two generating units with output of 100 kW and 200 kW. Veejaam applied to Elering AS ('Elering') for the renewable energy subsidy provided for in Paragraph 59 of the ELTS for the production of electricity started in 2001. Elering registered the generating unit in the Joaveski hydroelectric power plant as a beneficiary and paid Veejaam the renewable energy subsidy up to 31 December 2012. In 2015, Veejaam replaced the existing generating units with a new turbine generator with a nominal output of 200 kW. The measuring point was all that remained of the previous units. On 21 January 2016, Veejaam provided Elering with the data on the new generating unit in order to apply for the renewable energy subsidy. On 22 January 2016, Elering advised Veejaam that the generating unit had been registered as a beneficiary, but noted that same day that it had failed to take account in the course of registration of the fact that the applicant had already received a subsidy in previous years and requested clarification.

2 In its replies of 3 February, 6 July and 24 August 2016, Elering advised that the renewable energy subsidy is paid for electricity produced by a new integrated generating unit on a generating unit basis; that the subsidy could not therefore be paid, as the turbine generator which had replaced the original generating unit could not be considered a new integrated generating unit; that a new dam had not been constructed; that the objective of the subsidy referred to in Paragraph 59 of the ELTS in the version that applied when the application was made was to eliminate market barriers to new electricity producers in the aim of diversifying electricity production; that the objective was not to subsidise electricity producers indefinitely; and that it would therefore be incompatible with the objective of the subsidy if a producer which had replaced part of a generating unit had a claim to a new 12-year subsidy.

3 On 16 September 2016, Veejaam lodged an action in the Administrative Court, Tallinn, seeking judgment ordering Elering to pay the renewable energy subsidy in an amount of EUR 57 519.98. In its statement of claim, Veejaam contends that

the Environmental Agency granted it a new special water use permit on 28 December 2011, requiring the normal backwater height to be guaranteed at all times and prohibiting the regulation of the water level needed in order to use the previous turbines; that it was therefore no longer possible to generate electricity using those generating units; that, had the terms of the permit not changed, Veejaam would have also continued production using the existing units and used the new generating unit to expand production; that, when the turbine and generator were replaced, new hydraulics and a new automatic control system had to be installed; that, to all intents and purposes therefore, Veejaam had had to re-enter the market and the previous subsidy paid had not achieved its objective of compensating for the initial investment needed to start production; that, it had installed a new integrated generating unit, not replaced individual parts of a generating unit at the Joaveski hydroelectric power plant; that the term 'generating unit' is defined in Paragraph 3, points 9 and 25, of the ELTS; that a distinction has to be drawn between a generating unit and a power plant (Paragraph 3, point 8, of the ELTS); and that auxiliary equipment and structures, which are separate parts of the power plant, not components of the generating unit, include the dam as one of those structures, meaning that a dam does not need to be erected in order to obtain the renewable energy subsidy.

4 Elering contested the claim. It contends that the objective of the renewable energy subsidy is to support new market operators and increase the proportion of renewable energy in the generation mix; that paying an additional subsidy would achieve none of the objectives; that this is unlawful State aid; that only the subsidy for the installation of a new generating unit as the result of the activity of a new producer or investor or which a producer and/or investor already participating in the market uses to increase the proportion of electricity generated from renewable sources, that is which expands production, is compatible with the objectives of the subsidy; that the aid must have an incentive effect, that is it must be necessary and limited in time; that the European Commission recognised by Decision of 28 October 2014 in case SA.36023 (C(2014) 8106 final, 'the 2014 Decision') that the renewable energy subsidy paid under Paragraph 59 of the old version of the ELTS constitutes 'State aid' within the meaning of Article 107(1) TFEU; that it is therefore of material importance that the subsidy be paid in keeping with State aid rules and the guidelines laid down in the aforesaid Decision; that the meaning of the incentive effect is explained in paragraph 49 of the Guidelines on State aid for environmental protection and energy 2014-2020, which states that 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; and that the sole purpose of the subsidy in this case would be to compensate for the normal business risk, so as to enable renewable energy production already started to continue more profitably.

5 The Administrative Court dismissed the action by judgment of 10 October 2017. It gave as its reason that, as interpreted by Veejaam, the ELTS infringes EU law prohibiting State aid that distorts competition; that the subsidy must therefore support the start of production or, at the very least, the expansion of production

(incentive effect and/or increase in the proportion of renewable energy in the generation mix); and that, in installing the new turbine generator, Veejaam had, however, neither expanded nor started production.

6 Veejaam lodged an appeal with the Court of Appeal, Tallinn, which upheld the appeal in part by judgment of 27 June 2018. The Court of Appeal found that, based on their wording, Paragraph 108(1) and (3) of the old version of the ELTS are to be interpreted as meaning that the subsidy must be paid for 12 years from the start of production using a specific generating unit; that, although Veejaam had already produced electricity previously at the same site, in part using the same units and structures, the quantity of electricity produced had declined overall; that it is possible to produce larger quantities of electricity using the new units, as variable speed turbine technology allows the turbines to operate continuously, not just during higher flow rates; and that the proportion of electricity produced from renewable energy sources had therefore been increased, which is an objective in keeping with the 2008 Community Guidelines on State aid for environmental protection (OJ 2008 C 82, p. 1).

7 At the same time, the Court of Appeal agreed with Elering's argument that the subsidy must have an incentive effect. It found that, by its own admission, Veejaam had started preparations to put a variable speed turbine generator into operation as early as 2008 and had installed the new units in 2015; that it submitted the application for payment of the subsidy to the defendant on 21 January 2016, that is after the start of work on the project and even after it had been completed; that these circumstances do not support the contention that Veejaam would not have made the investment without the subsidy; that it is to be assumed, in light of the size of the investment, that it would have been made even without payment of the subsidy; and that the subsidy did not therefore have the required incentive effect.

8 The court further found that replacing part of the internal unit of a hydroelectric power plant had significantly less of a positive effect than replacing the entire internal unit of a hydroelectric power plant or erecting a new hydroelectric power plant; that payment of the same subsidy for replacing part of the internal unit of a power plant and for erecting a new power plant would constitute unjustified unequal treatment of electricity producers generating electricity from renewable energy sources; that payment of the subsidy in this case would simply have resulted in no reduction or a slight increase in the previous production capacity and, therefore, given the less than usual positive effect of the investment, Paragraph 108(1) and (3) of the old version of the ELTS, read in combination with its other provisions aimed to guarantee competition, are to be interpreted strictly and understood to mean that, in this case, the generating unit includes the dam and penstock of the hydroelectric power plant; and that the lack of incentive effect of the subsidy justifies that interpretation.

9 Veejaam lodged an appeal on a point of law against that judgment in the Riigikohus (Supreme Court, Estonia).

Administrative case no 3-17-753

10 Espo OÜ ('Espo') owns a hydroelectric power plant in the village of Pikru in the county of Viljandi (Estonia) which used a 15 kW Francis turbine between 2004 and 2009. On 30 March 2009, a new 45 kW Kaplan turbine was put into operation. On 13 April 2016, Espo submitted an application to Elering under Paragraph 59(1), point 1, of the old version of the ELTS for payment of a renewable energy subsidy for the generating unit installed in 2009. Elering rejected the application by letter of 8 July 2016, giving as its reason that the turbine generator cannot generate electricity independently as it formed part of an existing integrated generating unit, rather than being a separate integrated generating unit within the meaning of Paragraph 3, point 25, and Paragraph 59(1), point 1, of the ELTS. It stated that Espo had received a renewable energy subsidy from 1 April 2004 to 31 December 2015 for the electricity generated using the existing generating unit, and that the 12-year period does not start anew following the replacement of certain parts. In response to a letter from Espo, Elering explained by letter of 27 July 2016 that, when a new generating unit is erected, the other units to create an integrated generating system must also be erected (in this case the dam, new power lines, etc.).

11 Espo lodged an action in the Administrative Court, Tallinn, which the court dismissed by judgment of 27 October 2017 on the basis of Paragraph 59 of the old version of the ELTS, which states that the subsidy is State aid to support the start of new production. The court found on that basis that that provision targets generating units capable of producing electricity independently; that the fact that the dam is classed as a structure under building regulations does not preclude its forming part of the functional assembly of the generating unit, as the criterion is the generating capacity; that Espo's start-up investments were covered by the previous subsidy paid to it; and that it should be able at the end of the period of support to operate independently on competitive terms.

12 Espo lodged an appeal against that judgment with the Court of Appeal, Tallinn, which the court dismissed by judgment of 15 November 2018, including for the reasons set out below: As the granting of State aid (payment of the renewable energy subsidy) distorts free competition and undermines the business activity of operators of generating units producing electricity from other sources, the basis for payment of the subsidy must not be interpreted broadly and, where conflict arises, payment of the subsidy should not be preferred. The legislature provided for the renewable energy subsidy to be paid only inasmuch as it is necessary to start renewable energy production, not for the entire estimated lifetime of a generating unit. It should not be concluded that the renewable energy subsidy can be paid only if energy from renewable sources was not produced previously on the same site using a different generating unit. The objective of paying the subsidy is to promote environmental protection through investments to increase the production of electricity from renewable energy sources. The more powerful turbine put into operation by Espo had increased the proportion of electricity produced from renewable energy sources in the overall generation mix. Moreover,

the subsidy must have an incentive effect, that is the beneficiary must change its behaviour so that the level of environmental protection is higher than it would have been had the aid not been granted. Aid does not have an incentive effect if the project was started before the aid application was submitted.

13 In this case, Espo replaced the operational turbines in 2009, at the end of their 5-year life, but did not apply to the defendant for payment of the renewable energy subsidy for the new units until 13 April 2016, after the original period of support had ended (on 31 December 2015) and a full 7 years after the units had been put into operation. That being so, it cannot be argued that Espo would not have made the investment in question without the subsidy, which therefore had no incentive effect. The fact that the earlier investment stopped being used before the end of the estimated period of amortisation of the units does not preclude payment of a new subsidy; however, if only part of the internal unit of a power plant is replaced, the investment has less of a positive impact than it would have had if the entire internal unit of the power plant had been replaced or a new hydroelectric power plant had been erected. Payment of the subsidy is predicated on the quantity of electricity produced, not the size of the investment. In order to guarantee competition, the cited provisions of the ELTS must therefore be interpreted strictly, taking account of the less than usual positive effect of the investment.

14 Espo lodged an appeal on a point of law against that judgment in the Supreme Court, which joined administrative cases no 3-16-1864 and no 3-17-753.

Principal arguments of the parties to the main proceedings

15 Veejaam contends that the Court of Appeal erred in its finding that the subsidy paid to it did not have an incentive effect; that the European Commission has taken the view that Estonia's legislation to promote renewable energy has an incentive effect; that, however, the legislation enacted in the ELTS does not allow the subsidy to be applied for before electricity production is started with a new generating unit; that it cannot therefore be concluded that the subsidy has no incentive effect if it is applied for after the generating unit has been completed; that Veejaam would not have made the new investment had it not been able to count on the subsidy provided for under the ELTS; that Veejaam submitted the subsidy application as soon as the unit had been completed; that it would have been financially unsustainable for it to continue production with the old units and it would have had to cease production in Joaveski and that the Court of Appeal erred in finding that the erection of a new power plant has a greater positive effect, as the subsidy scheme approved by the Commission applies on a generating unit basis.

16 Espo contends first and foremost that it always assumed that it would be entitled to a subsidy once the new generating unit had been installed; that the fact that it applied for the subsidy about 3.5 months after the end of the original period of

support did not constitute unreasonable delay that pointed to a lack of incentive effect; that Espo was unable to apply for the subsidy before making the investment, as Paragraph 59(1), point 1, of the old version of the ELTS only allowed the subsidy to be applied for after the investment had been made; that the legitimate expectation of receiving a subsidy was the main reason for Espo's investment; and that the subsidy could have an incentive effect even if the project was started before the aid application was submitted.

17 The defendant requests that the appeal on a point of law be dismissed. It contends that Paragraph 108 of the ELTS is in keeping with the objectives of the subsidy; that, according to EU law, those objectives are to eliminate entry barriers to the renewable energy market and remedy market failure with regard to the use of renewable energy sources for energy production, increase the proportion of renewable energy sources in the generation mix and ensure the market integration of electricity from renewable energy sources; that the legislature's objective is to support the market entry of new producers and investors and competitiveness at the start of production; that, according to the applicants' interpretation, undertakings could artificially extend the period of support by simply replacing individual units; that, as State aid, the subsidy is by definition limited in time and intended to support activity during the start-up phase of production; that the subsidy is not designed to compensate for the normal business risk of an undertaking; and that the start of production within the meaning of Paragraph 108(1) of the old version of the ELTS must necessarily be understood to mean the putting into operation of a new generating unit as a result of the activity of a new producer or investor or the expansion of renewable energy production by an existing producer, for example by giving the power plant new and additional generating capacity.

18 By letter of 20 June 2019, the Supreme Court referred the following questions to the European Commission for its observations:

1. Is it consistent with EU State aid rules and Commission Decision C(2014) 8106 final of 28 October 2014 for the 'start of production' of a hydroelectric power plant to include the putting into operation of new electricity generating units on an existing dam?

2. In deciding on an application for a renewable energy subsidy made in 2016 on the basis of a subsidy scheme introduced before 2014, can the aid be assumed to have an incentive effect even if the generating unit was installed and put into operation before the subsidy application was made?

19 The Commission replied to the Supreme Court by letter of 3 February 2020. It stated that neither a positive nor a negative answer by the Estonian authorities to the question of whether the time at which new generating units are put into operation on an existing dam counts as the start of production would conflict with EU State aid rules; that this must be determined based on domestic rules; that, however, aid may not be granted for more than 12 years from the start of

production; that, in order to fulfil the requirement of an incentive effect, the beneficiary may only start work to install and put into operation the generating unit for which the aid is granted after the aid application has been made; that anyone who has started work on a project is clearly prepared to implement the project even if no aid is granted; that as, in this case, the applicants had even finished work to install the generating units before applying for the aid, the aid could not have had an incentive effect; that the fact that, by its own admission, Veejaam had to replace the generating units to fulfil the requirements of the new special water use permit points to the absence of any incentive effect; and that, if the construction works were provided for under domestic law in any event (without compensation), the aid does not achieve the necessary objectives.

Brief summary of the grounds for the reference

20 First, the Supreme Court notes in connection with the applicants' claim to a renewable energy subsidy that, under Paragraph 59(1), point 1, of the old version of the ELTS, producers were entitled to claim a renewable energy subsidy from the transmission system operator for generating units with net output of no more than 100 MW. According to Paragraph 108(1) of the old version of the ELTS, the subsidy provided for under Paragraph 59(1), points 1 to 4, can be paid for 12 years from the start of production. Paragraph 108(3) of the ELTS states that the start of production within the meaning of that paragraph means the day on which a generating unit that fulfils the requirements first delivers electricity to the system or a direct line. The Court of Appeal did not concur in either case with the defendant's contention that the term 'start of production' in Paragraph 108(1) of the old version of the ELTS and the term 'time of start of production' in Paragraph 108(3) of the ELTS are two different things. The Court of Appeal considers that any such finding would be inconsistent with the wording of the provisions, which predicate the start of production on the putting into operation of a particular generating unit, to the exclusion of any other activity by the same producer or at the same site. The Court of Appeal is of the opinion that it clearly follows from Paragraph 108(4) to (8) of the ELTS, which entered into force on 9 July 2018, that payment of the renewable energy subsidy is linked to the particular generating unit, not the producer. The Chamber concurs with that opinion of the Court of Appeal. Once a new generating unit has been installed, production starts anew within the meaning of Paragraph 108(1) of the old version of the ELTS, it does not follow on from previous production.

21 A subparagraph (4) has since been added to Paragraph 108 of the ELTS, which states that a subsidy is not paid where a producer received a subsidy for 12 years under Paragraph 59 of the ELTS for electricity produced with one generating unit which it then replaces with another generating unit. Subparagraph (6) allows for a derogation from that rule: where a generating unit is over 25 years old at the time of replacement, a subsidy is paid under the new subsidy scheme for the electricity produced by the generating unit installed in its place from the start of production using the new generating unit. Paragraph 108(8) of the ELTS stipulates with

regard to payment of the subsidy under the old subsidy scheme that a subsidy is paid for 12 years for electricity produced by the producer's respective generating unit which fulfils the requirements of that provision or for a phase of the generating unit provided for in a follow-on contract in accordance with Paragraph 59 from the start of production with each generating unit or in each phase of the generating unit. Thus, the key significance of the term 'generating unit' with regard to payment of the subsidy also follows from those provisions.

22 Although it can be assumed that it costs less to install a new generating unit in an existing power plant than to erect a new power plant, the size of the subsidy depends by law on the quantity of renewable energy produced, not the installation cost of a generating unit. The subsidy is not investment aid and it is not paid in each individual case on a cost basis. However, the subsidy achieves its objective by supporting an increase in renewable energy production, including by the applicants in this case.

23 As there has been disagreement in the proceedings to date as to the meaning of the term 'generating unit' and as to whether the term 'generating unit' in the context of a hydroelectric power plant includes the dam and the penstock as well as the turbine generator, the Supreme Court considers that the definition of the term 'generating unit' is the key question that must be answered in order to rule on the dispute on the basis of the old version of the ELTS. The Supreme Court is of the opinion that it is not possible to conclude, based on either a grammatical or a systematic interpretation, that the dam and penstock of a hydroelectric power plant form part of the generating unit. The Supreme Court finds, based on various provisions of domestic law, that, as by definition 'power plant' includes systems as well as structures, whereas 'generating unit' is defined as only including systems, lines and accessories, it is appropriate to class the dam as a structure that forms part of the overall power plant, not part of the generating unit. The Chamber is therefore of the opinion that the old version of the ELTS entitles the applicants to a renewable energy subsidy for the new generating units.

24 However, the above considerations do not necessarily mean that the applications should have been admitted. As the renewable energy subsidy constitutes State aid, it is essential that EU State aid rules also be taken into account. If provisions of an EU act with direct effects preclude the subsidy, any domestic provisions that are inconsistent with EU law are to be disapplied.

25 Second, the Supreme Court notes with regard to the incentive effect that the European Commission has analysed the various versions of Estonia's renewable energy subsidy scheme and found them to be compatible with the internal market on two occasions, namely in 2014 and 2017. That being so, it should be assumed that a subsidy applicant which meets the requirements of the ELTS is also in compliance with EU State aid rules. However, the question has arisen in this case as to whether the subsidy scheme that applied in Estonia in 2016 fulfilled the requirement of incentive effect addressed in the Commission Guidelines on State aid for environmental protection and energy 2014-2020 (paragraphs 49 to 52).

Paragraph 50 of the Guidelines states 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 and, 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.

26 The old version of the ELTS was based on the premiss that a subsidy is applied for after the generating unit has been installed. The facility to apply for a subsidy under the subsidy scheme that applied in 2016 after work on the project had started also follows from the amendments to the ELTS that entered into force in 2018. For example, Paragraph 59(2)[2] of the ELTS extending the application of the previous subsidy scheme, still allows producers to apply for a subsidy under the old subsidy scheme, provided they started work on the investment project for the generating unit concerned by no later than 31 December 2016. Moreover, the Commission approved the facility to apply for a subsidy after a project had started in its 2017 Decision on State aid, including in light of the 2014 Guidelines. The Commission based that approval on paragraph 126 of the 2014 Guidelines which, although it provides for aid to be granted exclusively in a competitive bidding process from 2017 onwards, states in footnote 66: 'Installations that started works before 1 January 2017 and had received a confirmation of the aid by the Member State before such date can be granted aid on the basis of the scheme in force at the time of confirmation.' The Commission found that, if an applicant which meets the requirements receives the subsidy and the State has no discretion in that regard, it can be assumed that confirmation by the Member State within the meaning of that footnote is automatic as soon as a project meets the requirements for the subsidy (2017 Decision on State aid, paragraph 38). However, that Decision does not expressly address the question of how the requirement of incentive effect is fulfilled in such a case. The Commission merely states that, on the basis of the State's calculations, the aid scheme fulfils the general requirement of incentive effect laid down in paragraph 49 of the 2014 Guidelines, whereby aid should induce the beneficiary to change its behaviour, which it would not do without the aid (paragraphs 62 and 63 of the Decision). It did not address paragraph 50 of the Guidelines.

27 However, the Commission took a different stand in its reply to the Supreme Court's questions, stating that, in order to fulfil the requirement of incentive effect, the beneficiary may only start work to install and put into operation the generating unit for which the aid is granted after the aid application has been made and that anyone who has already started work on a project is clearly prepared to implement the project even if no aid is granted.

28 The scheme in the old version of the ELTS corresponds to the requirement described in the Commission Decision, that every applicant which meets the requirements is granted the subsidy, hence it can be assumed that confirmation by the Member State is automatic as soon as a project meets the requirements for the subsidy. Renewable energy producers which met the statutory requirements were

already entitled to a subsidy by law. The defendant had no margin of discretion or latitude on the question of whether a particular producer should be granted a subsidy. As confirmation of the granting of the subsidy already follows from the law, the Chamber is of the opinion that the subsidy would have had an incentive effect even where, based on the provisions of the law, applicants install the generating unit first and then apply for disbursement of the subsidy granted as operating aid. In view of the different points of view expressed by the Commission on this question, the Chamber considers that the following question needs to be referred to the Court of Justice of the European Union for a preliminary ruling: are EU State aid rules, especially the requirement of incentive effect laid down in paragraph 50 of the Commission's 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 aid without granting the competent authorities any discretion in that regard?

29 As regards Veejaam, the further question has arisen as to whether the subsidy had an incentive effect in light of the fact that the amended terms of the special water use permit, under which it was not possible to continue to produce energy efficiently with the old generating unit, induced it to replace the old generating unit with a new one. By its own admission, Veejaam would have had to cease operations had it been unable to count on the renewable energy subsidy. The subsidy therefore had an incentive effect, as it induced Veejaam to continue production with a more powerful turbine generator than before. The Commission took the view in its answer to the Supreme Court's questions that, if the construction works were provided for under domestic law in any event without compensation, the aid does not fulfil any viable purpose. However, the Chamber is of the opinion that, where a law grants a claim to a subsidy to all applicants which meet the requirements laid down by law, what induced a renewable energy producer to install a new generating unit should be irrelevant. As both the State and the Commission have confirmed that the renewable energy subsidy provided for under the 2016 subsidy scheme has an incentive effect, as the implementation of such projects would not be financially viable without the subsidy (2017 Decision on State aid, paragraph 63), Veejaam's contention that it would not have installed the new generating unit had it not assumed that it would receive the subsidy provided for by law on installing the new generating unit is also plausible. In the opinion of the Chamber, therefore, this is not a situation, as described in the third sentence of paragraph 49 of the 2014 Guidelines, in which the costs of an activity are subsidised which the undertaking would anyhow incur. In light of the view taken by the Commission, the Chamber therefore considers it necessary to seek a preliminary ruling from the Court of Justice of the European Union on the following question: is the incentive effect of State 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 aid?

30 Third, as regards the question of whether the subsidy granted in 2016 was in keeping with Article 108(3) TFEU and whether that is relevant in terms of enabling judgment to be given on the dispute, the Supreme Court notes that the Commission's 2014 Decision on State aid highlights the fact that, according to Estonia's description of its subsidy scheme, new producers would not be admitted to the old subsidy scheme in 2014 and, from the beginning of 2015 onwards, new producers would be granted aid only following a competitive bidding process (paragraphs 27, 28 and 106 of the Decision). Apparently the State intended to apply the old subsidy scheme only to existing producers who had started production by no later than 1 March 2013 (paragraph 17 of the Decision). The Commission did not therefore assess whether the old subsidy scheme was consistent with the 2014 Guidelines; it confined itself in that regard to the earlier guidelines and merely examined the new support scheme planned in light of the 2014 Guidelines (see also 2017 Decision on State aid, paragraph 49). However, Estonia did not make the described amendments to the law following the Commission's 2014 Decision; instead it continued to apply the old subsidy scheme until 2017, without the proviso that production must have started by no later than 1 March 2013. The Commission found in the 2017 Decision on State aid that, by continuing to apply the old subsidy scheme and allowing new producers to join the scheme even after 1 January 2015, Estonia was in breach of Article 108(3) TFEU prohibiting State aid not approved by the Commission from being put into effect (paragraphs 29, 31 and 96 of the Decision).

31 Based on the Regulation laying down detailed rules for the application of Article 108 TFEU, the Court has drawn a distinction between existing and new aid within the context of Article 108(3) TFEU. According to Article 1(b)(ii) of Regulation No 2015/1589, existing aid means authorised aid, that is to say, aid schemes and individual aid which have been authorised by the Commission or by the Council, and, according to Article 1(c) of that Regulation, new aid means all aid, that is to say, aid schemes and individual aid, which is not existing aid, including alterations to existing aid. In its judgment in *DEI and Commission* (C-590/14 P), the Court held, in application of the identical provisions of Council Regulation (EC) No 659/1999, that the evaluation, by the Commission, of the compatibility of aid with the internal market is based on the assessment of the economic data and of the circumstances on the market at issue at the date on which the Commission makes its decision and takes into account, in particular, the period over which the grant of that aid is provided for. Consequently, 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. In those circumstances, extension of the duration of existing aid must be considered to be an alteration of existing aid (paragraphs 49 and 50 of the judgment and the case-law cited).

32 Although, when the 2014 Decision on State aid was adopted, the national scheme did not in fact include any provisions limiting the duration of the subsidy scheme, it follows from the description, repeated in the Commission's 2014 Decision, of the aid scheme which was found to be compatible with the internal market that the

State did not intend to continue to apply the old subsidy scheme from 2015 onwards. In those circumstances, the Commission took the view in 2017, rightly in the Chamber's opinion, that the State had extended the subsidy scheme, in breach of Article 108(3) TFEU. Given the differing opinions, it is therefore also necessary to seek a preliminary ruling by the Court of Justice of the European Union on the following question: in light, inter alia, of the findings of the Court in its judgment in Case C-590/14 P (paragraphs 49 and 50), where, as in this case, 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, an aid scheme 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 (EU) 2015/1589?

33 The above considerations may be relevant in terms of enabling judgment to be given on the dispute as, if the question is answered in the affirmative, the defendant was neither obliged nor even entitled to grant the subsidies at the time when the applicants applied for them (see, in particular, judgments of 26 April 2018, *ANGED*, C-233/16, EU:C:2018:280, paragraph 71, and of 11 November 2015, *Klausner Holz Niedersachsen*, C-505/14, EU:C:2015:742, paragraph 23). However, as the Commission decided in the 2017 Decision not to raise any objections to the aid on the grounds that it was compatible with the internal market (paragraph 97 of the Decision), that obstacle has now been eliminated. Therefore, if the question is answered in the affirmative, the Chamber must decide whether the rules of procedure allow it to admit an action seeking performance if the defendant was not obliged to take the measures requested when the action was brought.

34 The question also arises, if it is possible in principle to admit the action seeking performance when judgment is given, as to whether it is possible, in light of Article 108(3) TFEU, to admit the applicant's application for payment of the renewable energy subsidy for the period from the date of the application or whether the aid only became lawful from the date of the Commission's 2017 Decision on State aid. As the Court has explained, a Commission decision approving aid granted in breach of Article 108(3) TFEU does not make the aid lawful with retroactive effect (judgments of 19 March 2015, *OTP Bank*, C-672/13, EU:C:2015:185, paragraph 76; of 21 November 1991, *Fédération nationale du commerce extérieur des produits alimentaires*, C-354/90, EU:C:1991:440, paragraphs 16 and 17; and of 12 February 2018, *CELF and ministre de la Culture et de la Communication*, C-199/06, EU:C:2008:79, paragraph 40). On the other hand, the Commission decided in its 2017 Decision not to raise objections to the aid. In light of those circumstances, a preliminary ruling is also needed on the following question: 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 even for the period prior to the Commission's Decision, provided that domestic rules of procedure so permit?

35 It is common ground that Espo installed the generating unit used to produce the electricity for which it has applied for the contested subsidy in this case in 2009. The Commission found even in its 2014 Decision that the subsidy scheme that applied at that time was compatible with the internal market. However, Espo did not apply for the subsidy until 2016. If it follows from the Court's preliminary ruling that the State should not have applied the old subsidy scheme in the years 2015 to 2017, that does not necessarily mean that Espo's application must be rejected, as in any case its generating unit fulfilled the requirements of the subsidy scheme approved by the Commission's 2014 Decision on State aid. By that Decision, the Commission found, inter alia, that it was compatible with the internal market to pay a subsidy under the old subsidy scheme to producers which had started projects before 1 March 2013 (paragraph 17 of the Decision). However, bearing in mind that that cut-off date was not included in the ELTS and Espo did not apply for the subsidy until 2016, it is unclear whether the provision of Article 108(3) TFEU prohibiting State aid from being put into effect applies to it. The Chamber therefore requires a preliminary ruling by the Court of Justice of the European Union on the following question: 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 State aid at time when the aid scheme was extended without notifying the Commission, have a claim to aid notwithstanding the rule enacted in Article 108(3) TFEU?