

**Case C-11/22****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:**

5 January 2022

**Referring court:**

Tallinna Halduskohus (Administrative Court, Tallinn) (Estonia)

**Date of the decision to refer:**

5 January 2022

**Applicant:**

Est Wind Power OÜ

**Defendant:**

AS Elering

**Subject matter of the main proceedings**

Action brought by Est Wind Power OÜ seeking the annulment of the decision of Elering AS of 13 April 2021 by which the latter assessed that the investment project of Est Wind Power OÜ does not meet the conditions for the grant of support for renewable energy under the aid scheme approved by a State aid decision, and seeking an order requiring Elering AS to reconsider the application of Est Wind Power OÜ.

**Subject matter and legal basis of the request**

The request for a preliminary ruling under Article 267 TFEU seeks an interpretation of the State aid rules under EU law, in particular paragraph 19(44) and footnote 66 to paragraph 126 of the Commission Communication ‘Guidelines on State aid for environmental protection and energy 2014-2020’, and State aid decision SA.47354 (2017/NN) of the Commission of 6 December 2017.

## Questions referred for a preliminary ruling

1. Must the EU rules on State aid, in particular the first alternative of the definition of ‘start of works’ in paragraph 19(44) of the Commission Communication ‘Guidelines on State aid for environmental protection and energy 2014-2020’, namely ‘start of construction works on the investment’, be interpreted as meaning the start of construction works connected with any investment project or only the start of construction works connected with the installation of the investment project which will produce renewable energy?

2. Must the EU rules on State aid, in particular the first alternative of the definition of ‘start of works’ in paragraph 19(44) of the Commission Communication ‘Guidelines on State aid for environmental protection and energy 2014-2020’, namely ‘start of construction works on the investment’, be interpreted as meaning that, in a situation in which the competent authority of the Member State has established the start of the construction works in connection with an investment, that authority must, in accordance with the principle of the protection of legitimate expectations, additionally assess the stage of development of the investment project and the likelihood of completion of that project?

3. If the previous question is answered in the affirmative: can other objective circumstances, such as pending litigation which prevents the continuation of the investment project, be taken into account in the assessment of the stage of development of the investment project?

4. Is it relevant in the present case that the Court of Justice of the European Union held, in Case C-349/17, *Eesti Pagar*, paragraphs 61 and 68, that the question as to whether or not an incentive effect exists cannot be regarded as being a criterion that is clear and easily applicable by the national authorities, since its verification would necessitate, on a case-by-case basis, complex economic assessments, with the consequence that such a criterion would not comply with the requirement that the criteria for the application of an exemption must be clear and easily applicable by the national authorities?

5. If the previous question is answered in the affirmative: must the EU rules on State aid, in particular footnote 66 to paragraph 126 of the Commission Communication ‘Guidelines on State aid for environmental protection and energy 2014-2020’, in conjunction with paragraph 19(44) of that communication, be interpreted as meaning that the national authority is not required to make an economic assessment of the investment project, on a case-by-case basis, when examining the criterion of start of works?

6. If the previous question is answered in the affirmative: must the EU rules on State aid, in particular the last alternative of the definition of ‘start of works’ in paragraph 19(44) of the Commission Communication ‘Guidelines on State aid for environmental protection and energy 2014-2020’, namely ‘other commitment that makes the investment irreversible’, be interpreted as meaning that any other

commitment, with the exception of the buying of land and preparatory works (such as obtaining permits), makes the investment irreversible, irrespective of the cost of the commitment entered into?

7. Must the EU rules on State aid, in particular the concept of ‘start of works’ in paragraph 19(44) of the Commission Communication ‘Guidelines on State aid for environmental protection and energy 2014-2020’, be interpreted as meaning that the existence of a right to use the land held by the energy producer and the existence of State authorisation for implementing the investment project are essential conditions for the start of works?

8. If the previous question is answered in the affirmative: must the concept ‘State authorisation for implementing the investment project’ be interpreted in the light of national law, and can it be only the authorisation on the basis of which the construction work relating to the investment project is carried out?

### **Provisions of EU law cited**

Communication from the Commission ‘Guidelines on State aid for environmental protection and energy 2014-2020’ (OJ 2014 C 200, p. 1; ‘the Guidelines’), paragraph 19(44) and footnote 66 to paragraph 126.

Decision C(2017) 8456 final of the European Commission of 6 December 2017, ‘Subject: State Aid SA.47354 (2017/NN) – Estonia – Amendments to Estonian RES and CHP support scheme’ (‘State aid decision SA.47354’).

Judgment of the Court of Justice of 5 March 2019, *Eesti Pagar*, C-349/17 (EU:C:2019:172), paragraphs 61 and 68).

### **Provisions of national law cited**

Law on the electricity market (ELTS)

### **Succinct presentation of the facts and procedure in the main proceedings**

- 1 The Päite-Vaivina wind farm will comprise 28 wind turbines with a total capacity of 64.4 MW, to be erected on 28 plots of land. On 27 April 2004, Est Wind Power OÜ (‘Est Wind Power’) entered into a connection contract with Elering AS (‘Elering’) and paid connection fees of EUR 522 813.93. In 2008, Est Wind Power erected the wind measurement masts of the Päite-Vaivina wind farm and incurred costs of EUR 212 002.15 in order to do so. On 11 May 2010, Est Wind Power acquired development rights for the land of the Päite-Vaivina wind farm. On 19 January 2016, the Toila Municipal Council established the planning conditions for the Päite-Vaivina wind farm. On 4 February 2016, Est Wind Power applied for a construction permit for the wind farm. On 20 April 2016, the Ministry of Defence refused to approve the construction plans for the wind farm,

and, by order of 26 April 2016, the Toila Municipal Council refused to grant construction permits.

- 2 On 29 September 2020, in accordance with Paragraph 59(2<sup>3</sup>) of the Law on the Electricity Market (ELTS), Est Wind Power applied to Elering for an assessment of the compliance of the investment project for the wind farm to be constructed in Päite-Vaivina, Toila Parish ('Päite-Vaivina wind farm') with the conditions set out in Paragraph 59(2<sup>2</sup>) of the ELTS.
- 3 In Assessment No 22-7/2020/29-5 of 13 April 2021, Elering found that, as an investment project, the Päite-Vaivina wind farm of Est Wind Power does not meet the requirements set out in Paragraph 59(2<sup>2</sup>) of the ELTS, since, as at 31 December 2016, Est Wind Power had not commenced the construction works for the wind farm investment project within the meaning of point 2 of Paragraph 59(2<sup>2</sup>) of the ELTS and had not entered into any commitments that would render the investment project irreversible within the meaning of point 4 of Paragraph 59(2<sup>2</sup>) of the ELTS. According to that assessment, the only irreversible commitments entered into by the applicant are the connection fee and the order for the wind measurement mast. They do not represent a significant part of the total costs of the investment project and could not have brought the project to a stage where completion was highly probable as at 31 December 2016. Furthermore, the applicant does not have the required building rights to carry out the Päite-Vaivina wind farm investment project. The total cost of the Päite-Vaivina wind farm investment project is EUR 67 224 000.
- 4 On 13 May 2021, Est Wind Power brought an action before the Administrative Court, Tallinn, seeking the annulment of Elering's assessment of 13 April 2021 and an order requiring Elering to reconsider Est Wind Power's application.

#### **The essential arguments of the parties in the main proceedings**

- 5 The applicant submits that Elering's assessment of 13 April 2021 is unlawful. It states that it entered into an irreversible commitment in relation to the Päite-Vaivina wind farm and had made investments in excess of EUR 2.1 million as at 31 December 2016.
- 6 The applicant takes the view that point 4 of Paragraph 59(2<sup>2</sup>) of the ELTS excludes the costs of acquiring immovable property from irreversible investments, since such property can be used for various purposes. However, the development rights granted to the applicant are intended solely for the construction of the wind farm and have no other possible use.
- 7 According to the applicant, State aid decision SA.47354 expressly states that the concept of irreversible investment does not include the 'buying of land and preparatory works' (recital 36). In that regard, recital 42 of that decision requires that, in order to be considered as an existing producer, the producer must have 'the legal title to the land on which the project would be developed'. Thus, in its State

aid decision SA.47354, the Commission drew an unequivocal distinction between the buying of land and the acquisition of rights to use land, whereby the former cannot be regarded as an irreversible investment. Accordingly, the defendant should have taken the costs of acquiring the development rights into account as part of the investment made by the applicant.

- 8 According to the applicant, there is no justification for the defendant's approach, by which all the costs of consultancy, planning, consultations and studies were not taken into account as irreversible costs. The defendant is required to assess, in respect of each individual study and consultation, whether it is a preliminary feasibility study and, on that basis, to decide whether the costs are to be included in the irreversible costs.
- 9 The applicant submits that the defendant erred in its determination of the total cost of the project. If the preparatory works were not taken into account as irreversible costs, the amounts incurred for those works should have also been excluded from the total budget of the project. By contrast, it should be assumed that, in the present case, the self-financing for the project amounted to EUR 13 444 800, of which EUR 2 177 388.95 has been paid. This corresponds to 16.2% of the amount of the self-financing for the project. The remaining EUR 53 779 300 of the project budget was to be contributed by the financing authority at a later stage of the project. The size of the investment and the consequences of abandoning the investment are decisive factors in the assessment of the irreversibility of the commitments made. The key question is whether the project is at a stage of development at which completion is very likely. If the relative proportion of the commitments entered into were to be regarded as the decisive factor, then, in the case of an investment for a project with a relatively small total budget, even a small investment could be regarded as irreversible. In business practice, the absolute cost of abandoning a project (for example, the writing-off of an investment of EUR 3 million) is significant. It is irrelevant in this respect whether those costs arise from the abandonment of a project worth EUR 20 million or EUR 100 million.
- 10 The legislation does not set a threshold above which the scope of the commitments entered into by way of the investment project is sufficient. Nevertheless, the defendant has created such values itself. If any (subjective) circumstances other than the absolute amount of the expenditure incurred are to be taken into account, it would be appropriate to take the economic situation and investment capacity of the individual into account. The expenditure of more than EUR 2.1 million incurred by the applicant prior to 31 December 2016 is an objectively significant amount which the applicant would lose if it were to abandon the investment. The expenditure incurred represented 95.7% of the applicant's equity and 90.8% of its fixed assets as at 31 December 2016.
- 11 The applicant submits that it has commenced construction work on the Päite-Vaivina wind farm. It is common ground that the wind farm's connection point to the Allika substation was completed by 31 December 2016. In addition, the

applicant has erected wind measurement masts. The defendant misapplied the applicable law by attaching additional conditions to the scope of the construction works (see State aid decision SA.47354, recital 36; Paragraph 59(2<sup>2</sup>) of the ELTS); Recital 42 of State aid decision SA.47354 does not require building rights, but State authorisation for constructing the project. For the purposes of renewable energy aid and the corresponding State aid approval, a land use plan and the planning conditions based on it may also constitute a document attesting to the granting of such State authorisation.

- 12 The defendant contests the application and requests that it be dismissed. According to the defendant, the contested decision is lawful.
- 13 It submits that, according to Paragraph 59(2<sup>2</sup>) of the ELTS, only producers in existence on 31 December 2016 and having a generating installation with a capacity exceeding 1 MW are eligible. In the light of Paragraph 59(2<sup>1</sup>) of the ELTS, footnote 66 and paragraph 19(44) of the Guidelines, and recital 42 of State aid decision SA.47354, the compliance of an investment project with the conditions set out in points 2 to 4 of Paragraph 59(2<sup>2</sup>) of the ELTS requires that (1) the developer has obtained the necessary authorisation to carry out the project (in particular a construction permit) and has a legal right to use the land intended for the project; (2) the developer has started producing electricity, started construction works related to the investment project, entered into a firm commitment to order equipment for the construction of a generating installation or entered into any other commitment that makes the investment project irreversible; and (3) for each of those subcategories of start of construction works, it must be assessed whether, as at 31 December 2016, the project was at a stage of development at which the project is highly likely to be completed.
- 14 The defendant submits that the applicant does not fulfil the definition of an existing producer because (1) it had not started construction work on the project as at 31 December 2016 and had not entered into any other commitment that would have made the project irreversible, and (2) it did not have building rights for wind turbines as at 31 December 2016. In total, the applicant had entered into firm commitments amounting to EUR 734 816.08 as at 31 December 2016. The total cost of the Päite-Vaivina wind farm investment project is EUR 67 224 000. Therefore, only 1.09% of the total expenditure of the investment project had been incurred as at 31 December 2016. Thus, the amount of expenditure incurred, in comparison with the total cost of the project, was not sufficient to give rise to legitimate expectations.
- 15 According to the defendant, it used the exact percentage of the total costs incurred as an additional indicator in its assessment, and it was stated that that percentage is not the only decisive indicator. In addition, the defendant took into account the general scale of the commitments in relation to the overall scale of the project and the fact that the investments were not made in the wind turbine as the core component of the investment project.

- 16 In recitals 62 to 64 of State aid decision SA.47354, the Commission already assessed the existence of an incentive effect created by the specific aid scheme and found that the aid has a significant incentive effect. The defendant takes the view that that State aid decision establishes the criterion whereby the project must, in essence, be at such a stage of development that it is highly likely to be completed. The meaning ascribed to the incentive effect in the defendant's assessment of the existing producer pursuant to State aid decision SA.47354 differs from that in the assessment of the incentive effect under the General Block Exemption Regulation,<sup>1</sup> since State aid decision SA.47354 expressly requires an assessment of the stage of development. Therefore, the explanations provided by the Court of Justice in its judgment of 5 March 2019 in *Eesti Pagar* (C-349/17, EU:C:2019:172) in relation to the national authority's examination of the incentive effect are not transferable to the assessment under State aid rules in the present case. In recital 42 of State aid decision SA.47354, the Commission expressly stated that the granting authorities should consider as existing producers those producers whose project was at such a stage of development on 1 January 2017 that it would be very likely to be completed, thereby implying, in essence, the irreversibility of the project and a substantive assessment. This does not mean that the defendant would begin to verify the actual – that is to say, material – existence of an incentive effect in its own assessment under the Guidelines, since the Commission has exclusive competence to assess the compatibility of State aid. The defendant assesses the start of construction works on the substance, to such an extent that enables it to determine whether the project was at such a stage of development on 1 January 2017 that it would be very likely to be completed. In its opinion of 17 January 2020 in administrative case No 3-19-218, the European Commission confirmed that the start of construction works must be assessed on the substance. The Commission also confirmed, in its correspondence following State aid decision SA.47354, that the defendant ought to assess the projects on the substance and take into account the amount of the investment made in relation to the size of the overall project. This is confirmed by the definition of 'preparatory works'. An investment project's stage of development must be assessed in respect of all subcategories of the start of construction works. In accordance with State aid decision SA.47354, it is essential that the project should be at a stage of development on 31 December 2016 at which it is very likely to be completed, and this applies to all alternatives of the start of construction works. In accordance with that decision, the concept of 'start of construction works' is linked to the principle of legitimate expectations.
- 17 The defendant submits that, in the case of an existing producer, it is necessary for the producer to have obtained State authorisation to implement the project and to have the right to use the land (see State aid decision, recital 42; opinion of the Commission in administrative case No 3-19-218, point 13). The criterion of the right to use the land and the State authorisation, that is to say, the building rights,

<sup>1</sup> Commission Regulation (EU) No 651/2014 of 17 June 2014 declaring certain categories of aid compatible with the internal market in application of Articles 107 and 108 of the Treaty (Text with EEA relevance) (OJ 2014 L 187, p. 1).

must be determined by reference to national law. The building rights could not be granted by virtue of the land use plan and planning conditions, and it was also necessary to go through the construction permit procedure, including obtaining the necessary approvals for the construction project. Therefore, the Pääite-Vaivina wind farm investment project did not reach a stage at which it was very likely to be completed, including with regard to the building rights.

### **Succinct presentation of the reasoning in the request for a preliminary ruling**

- 18 The parties are in dispute as to whether the defendant lawfully found, on the basis of Paragraph 59(2<sup>3</sup>) of the ELTS, that the applicant does not meet the conditions of Paragraph 59(2<sup>2</sup>) of the ELTS, that is to say, it does not fulfil the definition of an existing producer, who would be entitled to aid for renewable energy under an existing aid scheme.<sup>2</sup> The question that arises in this respect is what conditions are laid down in Paragraph 59(2<sup>2</sup>) of the ELTS and whether additional criteria arise from State aid decision SA.47354 and the Guidelines, aside from those in that provision.
- 19 It is common ground that, in accordance with Paragraph 59(2<sup>2</sup>) of the ELTS, an existing producer is deemed to be a producer which, by 31 December 2016 at the latest, has commenced the construction works on the generating installations to which the investment project relates, and has, inter alia, (1) commenced electricity production, or (2) commenced construction works relating to that investment project, or (3) entered into a firm commitment to order equipment for the construction of the generating installation, or (4) entered into any other commitment that renders the investment project irreversible; the buying of the land on which the generating installation will be located, the obtaining of permits, and preparatory works are not regarded as commitments that render the investment project irreversible.
- 20 In the present case, it is common ground that the applicant had not yet started producing electricity on 31 January 2016 and had not entered into a firm commitment to order equipment for the construction of the generating installation. However, the question that arises is whether, as at 31 January 2016, the applicant had started construction works on the Pääite-Vaivina wind farm (point 2 of Paragraph 59(2<sup>2</sup>) of the ELTS) or entered into any other commitment rendering that investment project irreversible (point 4 of Paragraph 59(2<sup>2</sup>) of the ELTS). With regard to the latter condition, the parties to the proceedings also take different views regarding the content to be given to the irreversibility of the investment project, namely whether it includes an economic analysis of the share of the expenditure incurred under the investment project in the total cost of the

<sup>2</sup> This is the exception provided for in paragraph 126 of the Guidelines (footnote 66), whereby existing producers are entitled to apply for aid for a project without going through a competitive bidding process (see State aid decision SA.47354, recital 35), that is to say, where a producer meets the requirements of Paragraph 59(2<sup>2</sup>) of the ELTS, it is automatically entitled to apply for aid under that law (see State aid decision SA.47354, recital 38).

project and the case where any part of the expenditure incurred is to be regarded as preparatory works or expenditure excluded from the irreversible expenditure (for example, the buying of land or acquisition of building rights) and whether, in that case, when the economic analysis is carried out, such expenditure should also be excluded from the comparison of the percentage share in the total cost of the project represented by the expenditure incurred. There is also disagreement as to whether the applicant had State authorisation for the implementation of the project on 31 January 2016 and whether the term ‘State authorisation’ in paragraph 19(44) of the Guidelines is to be understood as meaning a construction permit, or whether it can also be a planning document (land use plan or detailed building plan) or planning conditions that precede the grant of a construction permit under national law.

- 21 The applicant takes the view that it started the construction works when it built the wind measurement masts and the wind farm’s connection point to the Allika substation before 31 December 2016. In that respect, the defendant included in the irreversible expenditure the cost of the wind measurement mast in the amount of EUR 212 002.15 and the connection fees of EUR 522 813.93. However, the defendant took the view that, if the Pääite-Vaivina wind farm investment project was not at such a stage of development on 31 January 2016, it was very likely to be completed, the requirements of point 2 of Paragraph 59(2<sup>2</sup>) of the ELTS could not be met either; otherwise, submits the defendant, the system provided for in Paragraph 59(2<sup>2</sup>) of the ELTS would lose its meaning and the applicant could evade the requirements of the principle of the protection of legitimate expectations, on which that provision is based. Thus, the defendant does not dispute that the applicant has completed the construction of the wind measurement mast and the Pääite-Vaivina wind farm’s connection point at the Allika substation, but considers that the start of construction works is precluded by the stage of development of the investment project. Consequently, the parties are in dispute as to whether the irreversibility of the investment project must be assessed in the case of all the alternatives of ‘start of construction works’ (Paragraph 59(2<sup>2</sup>) of the ELTS) or only the last alternative, ‘other commitment that makes the investment project irreversible’ (point 4 of Paragraph 59(2<sup>2</sup>) of the ELTS).
- 22 Recital 42 of State aid decision SA.47354 defines the term ‘existing producer’ as follows: ‘... the granting authorities should consider as “existing producer” those producers whose project on 1 January 2017 was in such state of development that it would very likely be completed so that they should receive support under the existing support scheme (legitimate expectations). This requires as a minimum that the project developers had obtained the necessary state authorisation for constructing the project, and that they had the legal title to the land on which the project would be developed’. The Commission’s decision is binding in its entirety on the addressee.<sup>3</sup> In that respect, the conditions set out in the statement of

<sup>3</sup> Treaty on the Functioning of the European Union (OJ 2012 C 326, pp. 47-390), fourth paragraph of Article 288

reasons in the Commission’s decision form an integral part of the aid scheme, irrespective of whether or not those conditions are laid down in national law.<sup>4</sup>

- 23 In its opinion of 17 January 2020 in administrative case 3-19-218, the Commission stated, with respect to ‘start of works’ as defined in paragraph 19(44) of the Guidelines, that that definition covers ‘either the start of construction works on the investment or the first firm commitment to order equipment or other commitment that makes the investment irreversible, whichever is the first in time’ (point 11); in point 13, the Commission adds, in relation to footnote 66 of the Guidelines, that the ‘start of works’ must have taken place before 1 January 2017, which means that one of the three alternative events referred to in the first sentence of paragraph 19(44) of the Guidelines must have taken place. The Commission also confirms, in point 14 of its opinion of 17 January 2020, that the term ‘existing producer’ covers only those producers whose project on 1 January 2017 was in such a state of development that it would very likely be completed so that they should receive support under the existing support scheme (legitimate expectations).
- 24 In the light of the foregoing, it is unclear how the first alternative of the term ‘start of works’ in paragraph 19(44) of the Guidelines, namely ‘start of construction works on the investment’, is to be understood. Is it to be interpreted as meaning that such construction works encompass the start of any construction works (for example, the construction of the connection point and the wind measurement mast, which are necessary for the construction of the wind farm) related to the investment project or only the construction works related to the implementation of the investment project via which renewable energy is to be produced (for example, the wind turbine)? If the competent authority of the Member State has established that the construction works for the investment project have started, does it follow from paragraph 19(44) of the Guidelines that the national authority must further assess whether that renders the investment irreversible, that is to say, must further assess the stage of development of the investment project? In the event that the competent authority of the Member State must also take the stage of development of the investment project into account: can objective circumstances, such as pending litigation (for example, in relation to the refusal of a construction permit), which prevent the continuation of the investment project also be taken into account in the assessment of the likelihood of completion of the investment project?
- 25 If it is found that the applicant did not start the construction works before 31 December 2016, it is necessary to verify whether it entered into any other commitment before 31 December 2016 that renders the investment irreversible (point 4 of Paragraph 59(2<sup>2</sup>) of the ELTS). In such a case, the question arises as to how to understand which of the other commitments entered into by the applicant are irreversible and whether this includes an economic analysis of the project in

<sup>4</sup> Judgment of the Court of Justice of 13 June 2013, *Ryanair v Commission*, C-287/12 P, not published, EU:C:2013:395, paragraph 67.

order to clarify whether the investment project has reached such a stage of development that it is highly likely to be completed.

- 26 The defendant submits that, in State aid law, it is important to distinguish the question as to whether an incentive effect actually exists on the substance from that as to whether and in what way the existence of an incentive effect is to be formally verified by the grantor of aid in an individual case (the incentive effect is deemed to exist on the basis of formal criteria). The defendant concludes that recital 42 of State aid decision SA.47354 requires it to assess the start of works on the substance, that is to say, to such an extent that enables it to determine whether the project was at such a stage of development on 31 December 2016 that it would be very likely to be completed. According to the defendant, it is common ground that the Commission has exclusive competence to assess the compatibility of State aid with the internal market. The Commission also assesses the incentive effect on the substance. This is also the case in the present dispute, in which the incentive effect of the existing scheme was assessed in Section 3.3.4.4 of State aid decision SA.47354. At the same time, the defendant, proceeding on the basis of recital 42 of State aid decision SA.47354, substantively assessed the other commitments entered into.
- 27 The referring court agrees with the defendant in so far as it submits that, in order to assess whether another commitment entered into by the applicant renders the investment irreversible, it is necessary to examine each item of expenditure separately and to identify the precise nature of the commitments entered into.<sup>5</sup> However, in so far as the defendant has established that the expenditure on the wind measurement mast and the connection fees in connection with the investment project are justified, but that the condition in point 4 of Paragraph 59(2<sup>2</sup>) of the ELTS is not met, the question arises as to whether and how the competent authority of the Member State must assess the incentive effect of the State aid.
- 28 The Court has clarified that, in the field of State aid, it is essential that the criteria for the application of an exemption must be clear and easily enforceable by the national authorities<sup>6</sup> and that whether or not such an effect exists cannot be regarded as being a clear criterion, since, inter alia, its verification would necessitate, on a case-by-case basis, complex economic assessments.<sup>7</sup> Although in Case C-349/17, cited above, State aid was granted on the basis of the General Block Exemption Regulation, unlike in the present case, which concerns the grant of aid on the basis of an aid scheme approved by a State aid decision, both cases concern the application of an exception as well as the incentive effect of the aid

<sup>5</sup> See judgment of the Court of 5 March 2019, *Eesti Pagar*, C-349/17, EU:C:2019:172, paragraph 75.

<sup>6</sup> See judgment of the Court of 5 March 2019, *Eesti Pagar*, C-349/17, EU:C:2019:172, paragraph 61.

<sup>7</sup> *Ibid.*, paragraph 68.

and the assessment of that effect by the national authority. Therefore, the question arises as to whether the considerations set out in the judgment of 5 March 2019 in Case C-349/17, *Eesti Pagar*, in particular those in paragraphs 61 and 68, are also relevant in the present case. If that question is answered in the affirmative, must footnote 66 to paragraph 126 of the Guidelines, in conjunction with paragraph 19(44) thereof, be interpreted as meaning that the national authority is not required to make an economic assessment of the investment project, on a case-by-case basis, when examining the criterion for the start of works? If so, must the last alternative of the term ‘start of works’ in paragraph 19(44) of the Guidelines, namely ‘other commitment that makes the investment irreversible’, be interpreted as meaning that any other commitment, with the exception of the buying of land and preparatory works (such as obtaining a construction permit), makes the investment irreversible, irrespective of the cost of the commitment entered into and the likelihood of the project being completed?

- 29 In addition, the question arises as to whether the essential conditions within the meaning of paragraph 19(44) of the Guidelines are (1) the existence of a right to use the land and (2) the existence of State authorisation for implementing the investment project. Lastly, if the previous question is answered in the affirmative, must the concept of ‘State authorisation for implementing the investment project’ be interpreted in the light of national law, and can it be only the authorisation on the basis of which the construction work relating to the investment project is carried out, and not the planning documents (such as the land use plan) or the planning conditions which preceded the construction permit?
- 30 The referring court takes the view that the request for a preliminary ruling does not concern the validity<sup>8</sup> of State aid decision No SA.47354, but the interpretation of the State aid rules under EU law, with the result that the request for a preliminary ruling is admissible.

<sup>8</sup> See judgment of the Court of Justice of 25 July 2018, *Georgsmarienhütte*, C-135/16, EU:C:2018:582.