



EUROPEAN COMMISSION

Legal Service

Brussels, [REDACTED]
[REDACTED]Supreme Court of Estonia
[REDACTED]
Estonia
[REDACTED]

**REPLY FROM THE COMMISSION TO THE REQUEST FOR OPINION
FROM THE SUPREME COURT OF ESTONIA IN CASES 3-16-1864 AND 3-17-753**

1. INTRODUCTION

1. On 3 July 2019, the Commission received a request for an opinion from the Administrative Chamber of the Supreme Court of Estonia on the basis of Article 29(1) of Regulation 2015/1589 (the “Procedural Regulation”).¹
2. It should be recalled that opinions of the Commission – in line with Article 29(1) of the Procedural Regulation and the Enforcement Notice² – are not binding upon the national court. Only the Union Courts can give a binding interpretation of EU State aid rules. Therefore, the Commission’s opinion is without prejudice to the possibility or obligation for the national court to ask the Court of Justice of the European Union for a preliminary ruling regarding the interpretation or the validity of Union law in accordance with Article 267 of the Treaty on the Functioning of the European Union (“TFEU”).³
3. In accordance with the Enforcement Notice, when giving its opinion the Commission will limit itself to providing the national court with the factual information or the economic or legal clarification sought, without considering the merits of the case pending before the national court.⁴

¹ 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, Official Journal of the European Union (“OJ”) L 248, 24.9.2015, p. 9.

² See points 89 to 96 of the Commission notice on the enforcement of State aid law by national courts, OJ C 85, 9.4.2009, p. 1 (the “Enforcement Notice”).

³ See Enforcement Notice, point 81.

⁴ See Enforcement Notice, point 93.

2. RELEVANT FACTS AND PROCEDURE

4. In the national court proceedings at issue two companies, AS Veejaam (“Veejaam”) and OÜ Espo (“Espo”), dispute the assessment of the granting authority Elering AS (“Elering”), which concluded that those two companies could not receive State aid under the aid scheme approved by Commission Decision of 28 October 2014 (the “2014 Decision”)⁵ and by Commission Decision of 6 December 2017 (the “2017 Decision”).⁶
5. In case No 3-16-1864, the applicant is Veejaam, which has generated electricity at a hydro-electric power station since 2001. From 2001 to 2015, Veejaam received support for renewable energy. In 2015 Veejaam replaced the existing generating installations with new equipment with a nominal capacity of 200 kW. Of the old equipment, only the measuring point remained. In 2016 the company submitted to Elering information regarding the new generating installation in order to apply for support for renewable energy. Elering replied that the support for renewable energy is paid for the electricity generated by a new, comprehensive generating installation, and the replacement of the initial turbine generator with a new one does not mean that it can be considered to be a new generating installation as no new dam was constructed. Veejaam brought a case before the administrative court with the aim of requiring Elering to pay the support. Veejaam claims that the replacement of the generating installation was necessitated by the conditions of the new permit for the special use of water, as a result of which it was no longer possible to generate electricity using the existing turbine.
6. In case No 3-17-753, the applicant is Espo, which owns a hydro-electric power station, where a turbine with a capacity of 15 kW was used from 2004-2009 and in 2009 a new turbine with a capacity of 45 kW began operation. In addition, new control panels, hydraulics, controls, measuring equipment, a flow through and other equipment were installed. Espo was paid support for renewable energy in the period from 2004 to 2015. In 2016 it submitted a new application for the payment of support for renewable energy for a generating installation built in 2009. Elering also refused to pay support to Espo, using similar justifications as in the case of Veejaam. Espo also brought a case before the administrative court with the aim of requiring Elering to pay the support.
7. As concerns the incentive effect of the aid, Veejaam and Espo claim that national legislation permits support to be applied for after the generating installation has begun generating power. They state that they would not have made the investments, if they knew that support would not be granted.

⁵ Commission Decision of 28.10.2014 regarding State Aid SA.36023 on support scheme for electricity produced from renewable sources and efficient co-generation, OJ C 44, 6.2.2015, p. 2.

⁶ Commission Decision of 6.12.2017 regarding State Aid SA.47354 on amendments to Estonian RES and CHP support scheme, OJ C 121, 6.4.2018, p. 7.

3. QUESTIONS RAISED BY THE ESTONIAN SUPREME COURT

8. In this context, the Administrative Chamber of the Supreme Court seeks the Commission's opinion on two questions:
 - 1) whether Union State aid rules, and in particular the 2014 Decision, must be interpreted in the sense that, in case of a hydro-electric power station, the launching of new electrical installations on an existing dam constitutes the commencement of power generation,
 - 2) whether, according to the 2014 and 2017 Decisions, the authorised aid has incentive effect even where the generating installation had been installed and put into operation before the company submitted an application for that aid in 2016.

4. THE COMMISSION'S OPINION

9. On the first question, the Commission takes the view that neither a positive nor a negative finding by the Estonian authorities on whether the launching of new electrical installations on an existing dam constitutes the commencement of power generation would run counter to EU State aid rules. As far as those EU rules are concerned, the Estonian authorities are free to decide either way.
10. The issue of the commencement of power generation was not dealt with or defined in the 2014 and 2017 Decisions. Therefore, it is to be determined in the light of the applicable national rules, including the national legal instruments that enacted the aid approved by the 2014 and 2017 Decisions. That determination may also vary by technology.
11. Nevertheless, compliance with the 2014 and 2017 Decisions requires that the duration of the aid does not go beyond the duration of the aid as authorised by those two Commission decisions, i.e. 12 years from the commencement of the power generation.⁷
12. On the second question, the Commission takes the view that, in order for the requirement of "incentive effect" to be fulfilled, the beneficiary must start the works of installing and putting into operation the aided generating installation only after it has submitted the application for aid.
13. According to points 49 and 50 of the Commission's guidelines on State aid for environmental protection and energy (the "EEAG"):⁸

"(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

⁷ See in particular recitals 62, 109 and 111 of the 2014 Decision, as well as recital 66 of the 2017 Decision.

⁸ Commission Guidelines on State aid for environmental protection and energy 2014-2020, OJ C 200, 28.6.2014, p. 1.

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.”

14. The Commission followed the above principles of its EEAG in recitals 101 and 102 of the 2014 Decision, which state:

“(101) According to point 49 of the EEAG, the Member State must demonstrate that the aid has an effect of incentivising the beneficiaries to change their behaviour in line with the objective of common interest pursued. In particular, the Commission considers that aid has no incentive effect for the beneficiary if work on the project has already started prior to the aid application by the beneficiary to the national authorities (point 50 of the EEAG). Moreover, the Member State must introduce a standardised application form fulfilling the requirements listed in point 51 of the EEAG and must ensure that the granting authority processes aid applications in a manner that is in line with point 52 of the EEAG.


(102) Estonia will apply a competitive bidding process for all aid granted to new renewable energy and cogeneration installations. The design of such bidding process will ensure that the beneficiary will apply for the aid before works are started and the financial information will follow from the bidding process. The aid has therefore an incentive effect, since it determines the beneficiaries to change their behaviour and invest in renewable energy projects and high-efficient cogeneration projects.”

15. Those principles are also reflected in the 2017 Decision, whereby the Commission approved certain amendments to the aid scheme in question. According to recital 62 of the 2017 Decision, “[i]n line with paragraph 49 EEAG, the incentive effect occurs if the aid induces the beneficiaries to change their behaviour towards reaching the objective of common interest which they would not do without the aid”.
16. The *rationale* behind the abovementioned extracts of the EEAG and of the 2014 and 2017 Decisions is the following: If a person has already started working on a given project before it submits any application for aid, that person is obviously willing to execute that project even absent the aid. Since no aid is necessary for the execution of that project, such aid cannot be declared compatible since it does not really serve any useful purpose in that regard. The “start of works” is defined in point 19(44) of the EEAG as 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 of those three events is the first in time triggers the “start of works”.
17. In the two cases at hand, it appears that Veejaam and Espo had not only started works in their respective generating installations, but they had even completed those works by the time that they applied for aid for those projects. Therefore, under those factual circumstances, aid to Veejaam and Espo would not seem to have any incentive effect for the works that they performed in their installations. It follows that such aid would not be covered by the Commission’s authorisation of compatible

aid in the 2014 and 2017 Decisions, and thus Elering was right to reject those two applications on that basis.

18. Although not inquired specifically by the Estonian Supreme Court, the Commission provides one last comment for the sake of completeness. The Commission understands that Veejaam stated that the replacement of the generating installation was necessitated by the conditions of the new permit for the special use of water, as a result of which it was no longer possible to generate electricity using the existing turbine. That fact alone would also lead to the absence of incentive effect, irrespective of the question of when exactly Veejaam submitted the aid application. If the works in Veejaam's generating installation were anyway required by national law (without compensation), the aid would again not serve any useful purpose and it would therefore lack incentive effect also for that reason.⁹
19. In view of the above, the Commission takes the view that:
 - 1) Neither a positive nor a negative finding by the Estonian authorities on whether the launching of new electrical installations on an existing dam constitutes the commencement of power generation would run counter to Union State aid rules, including the 2014 Decision.
 - 2) The 2014 and 2017 Decisions must be interpreted in the sense that, in order for the requirement of "incentive effect" to be fulfilled, the beneficiary must start the works of installing and putting into operation the aided generating installation only after it has submitted the application for aid.

With best regards,


Director General

Cc: 

⁹ See, by analogy, points 53 to 55 of the EEAG, which do not recognise any incentive effect in cases where aid is granted merely for adaptation to (obligatory) Union standards, except if the aid supports measures going beyond those standards or measures implementing those standards before they become obligatory.