EUROPEAN COMMISSION

Brussels, 12 December 2018
sj.c(2018)6966238

Court procedural documents

TO THE PRESIDENT AND MEMBERS OF THE REGIONAL ADMINISTRATIVE COURT

COMMISSION OBSERVATIONS

pursuant to Article 29(1) of Council Regulation (EU) 2015/1589 of 13 July 2015 laying down detailed rules for the application of Article 108 of the Treaty on the Functioning of the European Union (hereinafter "the Procedural Regulation")[1],

IN CASES

A43007311 (A43-0024-18/5)	A43008811 (A43-0023-18/5)
A43008711 (A43-0022-18/5)	A43007511 (A43-0027-18/5)
A43008611 (A43-0021-18/5)	A43007111 (A43-0002-18/5)
A43008411 (A43-0029-18/5)	A43008311 (A43-0014-18/5)
A43007611 (A43-0008-18/5)	A43008111 (A43-0026-18/5)
A43009311 (A43-0032-18/5)	A43007011 (A43-0001-18/5)
A43012011 (A43-0042-18/5)	A43011711 (A43-0035-18/5)
A43013311 (A43-0045-18/5)	A43012111 (A43-0043-18/5)
A43007711 (A43-0009-18/5)	A43008511 (A43-0011-18/5)
A43009011 (A43-0031-18/5)	A43012511 (A43-0044-18/5)
A43014011 (A43-0070-18/5)	A43011611 (A43-0039-18/5)
A43012112 (A43-0047-18/5)	A43013411 (A43-0046-18/5)
A43009511 (A43-0033-18/5)	A43008911 (A43-0030-18/5)
A43008011 (A43-0025-18/5)	A43007211 (A43-0010-18/5)

[1] OJ L 248 of 24.9.2015, p. 9.

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1. THE REQUEST FROM THE REGIONAL ADMINISTRATIVE COURT

1.1. Facts of the case

1. On 20 June 2018, the Regional Administrative Court (hereinafter, "the LV Court"), pursuant to Article 29(1) of the Procedural Regulation, requested the European Commission (hereinafter, "the Commission") to provide its opinion on various aspects related to the application of Articles 107 and 108 TFEU in different cases (hereinafter "the RAC Decision"). On 10 July, the Commission was made aware that the opinion requested on 20 June 2018 would be relevant also for other cases, in addition to those already mentioned in the Order of 20 June 2018.

2. Pursuant to the RAC Decision, in 2006, the applicants, small scale hydropower plants represented by an association, lodged an action with the Public Utilities Regulatory Commission (hereinafter, "the PURC") requesting it to increase the tariffs related to the determination of the price for mandatory purchase of electricity. After the refusal of the PURC, the applicants lodged an action with the LV Court, which ruled in favour of the applicants. As a consequence, the PURC adopted a decision whereby it increased the sales tariffs applicable by the applicants. However, this decision was only applicable for the period after 31 March 2010. Therefore, the applicants asked for compensation of damages resulting from the difference between the actual price and the higher price that the PURC should have fixed for the period 2006-2010, as no decision to increase the price was taken between 1 March 2006 and 1 April 2010.

3. These requests for damages were suspended until the adoption of Decision dated 24 April 2017 on the State Aid Case No SA.43140 (2015/NN) 'Latvian State Aid to Renewable Energy and CHP' (hereinafter referred to as "EC Decision SA.43140")[2].

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[2] OJ C 176, 2.6.2017.

1.2. The EC Decision SA.43140

4. The State aid scheme in place in Latvia that is subject to Decision SA.43140 is twofold: (i) the support for producers of energy from renewable sources, based on Cabinet Regulation No 262 of 16 March 2010 "Regulations Regarding the Production of electricity Using Renewable Energy Sources and the Procedures for the Determination of the Price" (hereinafter, "Regulation 262/2010"), and (ii) the support for operators of combined heat and power plants, pursuant to Cabinet Regulation No 221 of 10 March 2009 "Regulations Regarding Electricity Production and Price Determination upon Production of Electricity in Cogeneration" (hereinafter, Regulation 221/2009").

5. This scheme allowed for the electricity produced by generators using renewable energy sources or highly efficient cogeneration plants[3] to be purchased by a power distribution enterprise at a mandatory price, higher than the market price. The aid is provided as a fixed payment for the electricity sold to the grid under a mandatory procurement mechanism. The aid is also provided as fixed payments for electric power capacity installed (available only to large CHP plants and, as of 2009, to some biomass and biogas plants – even if those two types of plants did not receive any payment under the scheme). The Latvian authorities committed to cap the internal rate of return for the beneficiaries at 9 %[4]. The Decision covers the scheme during the period from 1 July 2007 to 31 December 2012[5].

6. Provided that the mandatory price did not exceed the difference between the costs of producing energy from renewable sources (and cogeneration) and the market price of the energy concerned, the EC Decision SA.43140 concluded that these two notified measures are compatible with the internal market.

1.3. The 1998 scheme

7. Furthermore, the LV Court explains that the two measures subject to the EC Decision SA.43140 coexisted with the so-called "historic aid regulations" that

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[3] The EC Decision SA.43140 covers the support granted to electricity generated from onshore wind turbines, biomass and biogas plants, small hydropower plants (with installed capacity lower than 5 MW), natural-gas-fired high-efficiency CHP plants as well as high-efficiency CHP plants using renewable energy as fuel.

[4] Section 2.2 of Decision SA.43140.

[5] Section 2.1. of Decision SA.43140.

were enacted by the Energy Law, in effect as of 6 October 1998 (hereinafter "the 1998 scheme"), and are, in the Court's view, similar to the two measures authorised by the Commission. The 1998 scheme provided that a licensed electric power distribution enterprise purchases the surplus of the electricity produced by small-scale hydropower plants (not exceeding 2 MW), if these plants were already operating before 1 January 2003 and during eight years from the commencement of their activities. The price corresponded to a double average electricity sales tariff.

8. According to the LV Court, after the eight years, the price corresponded to an average electricity sales tariff.

9. The 1998 scheme remained in force until 1 January 2015, when the price mentioned in the previous paragraph could no longer be increased. Instead, transitional rules were put in place that enabled existing renewable energy installations that decided not to be part of the scheme authorised by the EC Decision SA.41340 to sell electricity at a fixed price of 0.1112 *euro* per kilowatt/hour. The LV Court also indicates that the support pursuant to the 1998 scheme was not taken into account when granting aid under the new scheme.

1.4. Dispute before the LV Court

10. The applicants in the main proceedings were granted support under the 1998 scheme until 2003, and have since moved to the scheme covered by the EC Decision SA.41340 (which covers the period 1 July 2007 to 31 December 2012). In 2006, the applicants demanded an increase of the mandatory procurement tariff (set by the corresponding Cabinet regulations), as was the case for the historic aid regulations pursuant to the 1998 scheme, due to the fact that retail price was significantly increased in the liberalized market conditions over the period from 2006 to 2010.

11. The applicants consider that the claim for damages is the result of the illegal behaviour of the PURC, which refused to increase the tariffs in due time. As for classification of State aid of this claim, the applicants argue that, if anything, the payments relating to the increased price will be granted under the 1998 scheme and would therefore correspond to obligations that Latvia had to fulfil prior to its accession to the EU. The Ministry of Finance, on the contrary, considers that the

increase in the tariff for 2006-2010 would be implemented by a Court decision, and, therefore, the corresponding payments would entail new aid.

1.5. Questions by the LV Court

12. In view of these facts, the LV Court first disputes the relevance of State aid rules in the framework of damages action and questions the nature of new aid of the price increase, should it adjudicate in favour of the applicants.

13. It also casts doubts on the nature of State aid of the measures in place before 1 July 2007. The period from 1 July 2007 to 31 December 2012 is the period covered by Decision SA.43140. The date of 1 July 2007 has been given by the Latvian authorities to the Commission as being the date when liberalisation in the electricity market occurred. However, the LV Court indicates that liberalisation occurred before. According to the LV Court, with the transposition of Directive 2003/54/EC of the European Parliament and of the Council of 26 June 2003 concerning common rules for the internal market in electricity and repealing Directive 96/92/EC (hereinafter, "Directive 2003/54/EC")[6] by the Electricity Market Law (adopted on 5 May 2005 and in force as of 8 June 2005) the electricity market was certainly liberalised. The LV Court considers that even before that date, the market did not suffer any restriction.

14. As regards the compatibility assessment, the LV Court points to the fact that, according to point 56 of the Community guidelines on State aid for environmental protection (hereinafter, "EAG 2001")[7], aid may be limited to cover the difference between the cost of producing energy from renewable sources and the market price of that energy. However, according to the LV Court, the aid received under the 1998 scheme was not related to the costs incurred for the production of the energy, nor was the increase in the tariff. The LV Court indicates that it plans to "conduct data compilation regarding the operational indicators of each specific undertaking to be able to assess the compatibility of the measure with the 2001 EAG and the 2008 EAG".

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6 OJ L 176, 15.7.2003, p. 37–56.

7 OJ C 37, 3.2.2001, p. 3–15.

15. The LV Court, finally, points at the fact that, in the EC Decision SA.43140, the Latvian authorities committed to cap the Internal Rate of Return for the beneficiaries at 9% in order to avoid overcompensation. The LV Court notes that the assessment of the overcompensation performed by the competent national authorities does not allow them to take into account the aid received pursuant to the previous scheme, nor the applicants' claim for damages, which would increase their profit level.

16. In this framework, the LV Court asks the Commission five questions:

17. First, the LV Court demands **"whether it is relevant in terms of State aid criteria assessment that the claim is currently regarded by the Court as a claim for damages" (Question 1).**

18. Second, the LV Court seeks the Commission opinion on **"whether the increase in the State aid, which was granted over the period from 1 March 2006 to 31 March 2010 should be regarded as new State aid which is subject to approval by the European Commission"** and **"whether the State aid regulations initially adopted pursuant to Section 40 of the Energy Law and which remained in effect after the enactment of the Electricity Market Law (the 'historic aid regulations') are in line with Decision SA.43140 (2015/NN) of the European Commission of 24 April 2017 (Questions 2a and 2b).**

19. Third, the LV Court asks **"whether there are any ground to single out the time period from 8 June 2005 to 1 July 2007 as the period when trade between the Member States was not influenced by the increase in State aid" (Question 3).**

20. Fourth, the LV Court requests the opinion of the Commission **"as to whether it is necessary to assess the historic aid regulations in terms of their compatibility with the 2001 and 2008 Community guidelines on State aid for environmental protection"** and whether **"the administrative cases under considerations [should] be assessed for the existence of overcompensation" (Questions 4a and 4b).**

21. Fifth, as a final question, the LV Court asks **"what period should be covered by such an assessment for overcompensation"** and whether **"the said assessment**

[should] also include the part of the State aid granted under the historic aid regulations" (Questions 5a and 5b).

2. THE COMMISSION'S OPINION ON THE LV COURT QUESTIONS

2.1. Question 1

22. By the first question, the LV Court asks "whether it is relevant in terms of State aid criteria assessment that the claim is currently regarded by the Court as a claim for damages".

23. First of all, it has to be recalled that, according to the settled case-law, the fact that the payment would result from a judgment of national court, does not as such rule out the nature of State aid of the measure at stake[8].

24. In the *Asteris* judgment, the Court of Justice ruled that

> "23. (…) State aid, that is to say measures of the public authorities favouring certain undertakings or certain products, is fundamentally different in its legal nature from damages which the competent national authorities may be ordered to pay to individuals in compensation for the damage they have caused to those individuals."[9]

25. Nevertheless, while individuals may request national court to order the payment of damages which they considered to be entitled to, it has to be borne in mind that such actions cannot have the effect of circumventing the effective application of State aid rules[10]. In particular, individuals who would be entitled to aid which has not been notified to and approved by the Commission, but who have not received such aid, cannot claim as compensation for damages the equivalent of the sum of

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8 ECJ, *Buonotourist Srl v European Commission*, judgment of 11 July 2018, case T-185/15, ECLI:EU:T:2018:430, point 94.

9 ECJ, *Asteris AE e.a./Greece*, judgment of 27 Septembre 1988, joined cases 106 to 120/87, ECLI:EU:C:1988:457, point 23.

10 See ECJ, *Commission of the European Communities v Council of the European Union*, judgment of 29 June 2004, case C-110/02, ECLI:EU:C:2004:395, point 43, and more recently, ECJ, *Ministero dell'Industria, del Commercio e dell'Artigianato v Lucchini SpA*, judgment of 18 July 2007, case C-119/05, ECLI:EU:C:2007:434, point 59 and ECJ, *Klausner Holz Niedersachsen GmbH v Land Nordrhein-Westfalen*, judgment of 11 November 2015, case C-505/14, ECLI:EU:C:2015:742, points 42-44.

the non received aid, since this would constitute an indirect grant of unlawful aid[11].

26. In the case at stake, it appears that the applicants precisely claim as damages compensation the very amount of support that would have resulted from the historic aid regulations, interpreted as if the LV Court were to rule that the LV AUT were obliged to increase the respective tariffs.

27. The Commission considers that, in the present circumstances, the claim of the applicants cannot be regarded as claim for damages, in light of the State aid discipline.

2.2. Questions 2a and 2b

28. Question 2 is composed of two sub-questions. The LV Court asks, by the first sub-question, "whether the increase in the State aid, which was granted over the period from 1 March 2006 to 31 March 2010 should be regarded as new State aid which is subject to approval by the European Commission" and, by the second sub-question, "whether the State aid regulations initially adopted pursuant to Section 40 of the Energy Law and which remained in effect after the enactment of the Electricity Market Law (the 'historic aid regulations') are in line with Decision SA.43140 (2015/NN) of the European Commission of 24 April 2017.

29. In order to give guidance to the LV Court, the Commission would start by recalling the relevant provisions of the Procedural Regulation. In particular, Article 1(c) provides that

> "'new aid' means all aid, that is to say, aid schemes and individual aid, which is not existing aid, including alterations to existing aid".

30. Therefore, in order to assess whether the increase in the State aid granted from 2006 to 2010 constitutes new aid, it should be first excluded that it constitutes existing aid. Article 1(b) of the Procedural Regulation defines "existing aid" as follows:

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[11] See, in this sense, opinion of the Advocate General Ruiz-Jarabo Colomer delivered on 28 April 2005, in joined cases C-346/03 and C-529/03, *Scalas and Lilliu*, point 198.

"(i) without prejudice to Articles 144 and 172 of the Act of Accession of Austria, Finland and Sweden, to point 3 and the Appendix of Annex IV to the Act of Accession of the Czech Republic, Estonia, Cyprus, Latvia, Lithuania, Hungary, Malta, Poland, Slovenia and Slovakia, to points 2 and 3(b) and the Appendix of Annex V to the Act of Accession of Bulgaria and Romania, and to points 2 and 3(b) and the Appendix of Annex IV to the Act of Accession of Croatia, all aid which existed prior to the entry into force of the TFEU in the respective Member States, that is to say, aid schemes and individual aid which were put into effect before, and are still applicable after, the entry into force of the TFEU in the respective Member States;

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

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

(iv) aid which is deemed to be existing aid pursuant to Article 17 of this Regulation;

(v) aid which is deemed to be an existing aid because it can be established that at the time it was put into effect it did not constitute an aid, and subsequently became an aid due to the evolution of the internal market and without having been altered by the Member State. Where certain measures become aid following the liberalisation of an activity by Union law, such measures shall not be considered as existing aid after the date fixed for liberalisation"

31. According to the RAC Decision, it appears that the claim the applicants have brought to the attention of the LV Court cannot fall within the scope of letters (i) or (iii), abovementioned. As regards letter (iv), the increase in tariffs to be decided by the LV Court would be granted by the very decision of the LV Court. Therefore, the payments thereof cannot be time-barred.

32. This being said, the Commission considers that letters (ii) and (v) may be relevant to the case at stake. The Commission would like to recall that the EC Decision SA.43140 assessed the scheme as was in place during the period 1 July 2007 – 31 December 2012. The response to the question asked by the LV Court, which relates to the period between 1 March 2006 and 31 March 2010, requires therefore the assessment for the period before 1 July 2007 and after that date.

33. First, letter (ii) may be relevant for the aid granted for the period **after** 1 July 2007, which is the start date of the scheme covered by the EC Decision SA.43140, for beneficiaries that chose to receive aid under Regulations 221/2009 and 262/2010. In this respect, should the LV Court consider that the LV authorities were obliged, by virtue of national law, to increase the mandatory

procurement tariffs for this period, it would need to be assessed whether the level of compensation granted on the basis of such an increased tariff would still comply with all the compatibility conditions set out in the EC Decision SA.43140. The Commission draws a particular attention to the proportionality condition, which requires that aid is limited to the difference between the production costs of electricity from renewable energy sources and the electricity market price (see recitals 71 to 77 and 82 to 83 of the EC Decision SA43140). Any aid granted under the notified national scheme that would not fulfil the conditions set out in the EC Decision SA.43140 would constitute new aid.

34. Second, letter (v) is suitable to address the situation **before** 1 July 2007. It appears from the RAC Decision that the electricity market in Latvia has been open to competition already after 8 June 2005. In that respect, according to the case-law,[12] the fact that specific restrictions on the freedom to provide certain services within Member States were abolished after the relevant period, does not necessarily exclude the possibility that the subsidies at hand were liable even before to affect trade between Member States or that they distorted or threatened to distort competition.

35. The fact that in the EC Decision SA.43140 the Commission acknowledged that the market was liberalised as of 1 July 2007, for the purpose of the same Decision, does not mean that competition in the electricity market were inexistent before that date. As the Court has recognised, it is for the national judge to assess whether the market was open to competition. The LV Court seems to have given an affirmative answer to this question.

36. If that were the case, any support granted during the period before 1 July 2007 would constitute State aid within the meaning of Article 107(1) TFEU, and, since it would not fall within the scope of the EC Decision SA.43140, it would therefore qualify as new aid.

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[12] ECJ, *Fallimento Traghetti del Mediterraneo SpA v Presidenza del Consiglio dei Ministri*, judgment of 10 June 2010, case C-140/09, ECLI:EU:C:2010:335, point 49.

2.3. Question 3

37. Question 3 is drafted as follows: "are there any ground to single out the time period from 8 June 2005 to 1 July 2007 as the period when trade between the Member States was not influenced by the increase in State aid"?

38. Question 3 originates from the fact that, according to the LV Court, the electricity market in LV was already open before 1 July 2007.

39. In that respect, the Commission recalls its reasoning in paragraphs 32 to 34 above.

2.4. Questions 4a, 4b, 5a and 5b

40. By Questions 4a and 4b, the LV Court asks: "whether it is necessary to assess the historic aid regulations in terms of their compatibility with the 2001 and 2008 Community guidelines on State aid for environmental protection" and whether "the administrative cases under considerations [should] be assessed for the existence of overcompensation". Last, in Questions 5a and 5b, the LV Court seeks clarification on "what period should be covered by such an assessment for overcompensation" and whether "the said assessment [should] also include the part of the State aid granted under the historic aid regulations".

41. As Questions 4 and 5 relate both to the assessment of compatibility, the Commission would like to remind the LV Court that the assessment of the compatibility of a State aid measure falls within the exclusive competence of the Commission, subject to review by the Union's Courts, and cannot be performed by a national jurisdiction. According to the settled case law, the role of the national courts is to ensure the safeguarding, until the final decision of the Commission, of the rights of individuals faced with a possible breach by State authorities of the prohibition laid down by Article 108(3) TFEU:

> "24. National courts must offer to individuals the certain prospect that all the appropriate conclusions will be drawn from an infringement of the third sentence of Article 108(3) TFEU, in accordance with their national law, as regards the validity of measures giving effect to the aid, the recovery of financial support granted in disregard of that provision and possible interim measures.
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> 25. The objective of the national courts' tasks is therefore to pronounce measures appropriate to remedy the unlawfulness of the implementation of the aid, in order

that the aid does not remain at the free disposal of the recipient during the period remaining until the Commission makes its decision."[13]

42. In light of the above, the national court may verify whether the measure at stake fall within the scope of the EC Decision SA.43140 and whether the conditions provided for in that Decision are fulfilled. However, the national court is not competent to decide whether a measure not falling under that Decision could be compatible with the internal market.

[redacted]

[13] ECJ, *Klausner Holz Niedersachsen GmbH v Land Nordrhein-Westfalen,* judgment of 11 November 2015, case C-505/14, ECLI:EU:C:2015:742, points 24-25.