Reports of Cases

JUDGMENT OF THE COURT (Fifth Chamber)

28 October 2021 *

(Reference for a preliminary ruling – State aid – Biodiesel market – Aid scheme establishing biodiesel quotas exempt from excise duty – Alteration of the authorised aid scheme – Amendment of the criteria for allocating quotas – Obligation of prior notification to the European Commission – Regulation (EC) No 659/1999 – Article 1(c) – Concept of 'new aid' – Regulation (EC) No 794/2004 – Article 4(1) – Concept of 'alteration to existing aid')

In Joined Cases C-915/19 to C-917/19,

REQUESTS for a preliminary ruling under Article 267 TFEU from the Consiglio di Stato (Council of State, Italy), made by decisions of 28 November 2019, received at the Court on 12 December 2019, in the proceedings

Eco Fox Srl (C-915/19),

Alpha Trading SpA unipersonale (C-916/19),

Novaol Srl (C-917/19)

v

Fallimento Mythen SpA (C-915/19),

Ministero dell'Economia e delle Finanze,

Ministero dell'Ambiente e della Tutela del Territorio e del Mare,

Ministero delle Politiche agricole, alimentari e forestali,

Ministero dello Sviluppo economico (C-915/19 to C-917/19),

Agenzia delle Dogane e dei Monopoli (C-915/19),

interveners:

Oil.B Srl unipersonale,

Novaol Srl (C-915/19),

* Language of the case: Italian.

Fallimento Mythen SpA,

Ital Bi-Oil Srl,

Cereal Docks SpA,

Agenzia delle Dogane e dei Monopoli (C-916/19 and C-917/19),

THE COURT (Fifth Chamber),

composed of E. Regan (Rapporteur), President of the Chamber, C. Lycourgos, President of the Fourth Chamber, and M. Ilešič, Judge,

Advocate General: E. Tanchev,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

– Alpha Trading SpA unipersonale and Novaol Srl, by F. Francica and C. Rossi, avvocati,

– Fallimento Mythen Spa, by O. Grandinetti and A. Di Todaro, avvocati,

– the Italian Government, by G. Palmieri, acting as Agent, and A. Collabolletta, avvocato dello Stato,

– the European Commission, by P. Stancanelli and F. Tomat, acting as Agents,

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,

gives the following

Judgment

1 These requests for a preliminary ruling concern the interpretation of Articles 107 and 108 TFEU, Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 108 [TFEU] (OJ 1999 L 83, p. 1), as amended by Council Regulation (EU) No 734/2013 of 22 July 2013 (OJ 2013 L 204, p. 15) ('Regulation No 659/1999'), and Commission Regulation (EC) No 794/2004 of 21 April 2004 implementing Regulation No 659/1999 (OJ 2004 L 140, p. 1).

2 The requests have been made in proceedings between, on the one hand, Eco Fox Srl (C-915/19), Alpha Trading SpA unipersonale (C-916/19) and Novaol Srl (C-917/19) and, on the other hand, Fallimento Mythen SpA (C-915/19), the Ministero dell'Economia e delle Finanze (Ministry of Economic Affairs and Finance, Italy), the Ministero dell'Ambiente e della Tutela del Territorio e del Mare (Ministry of the Environment, the Protection of Natural Resources and the Sea, Italy), the Ministero delle Politiche agricole, alimentari e forestali (Ministry of Agricultural, Food and Forestry Policy, Italy), the Ministero dello Sviluppo economico (Ministry of Economic

Development, Italy) (C-915/19 to C-917/19) and the Agenzia delle Dogane e dei Monopoli (Customs and Monopolies Agency, Italy) (C-915/19) concerning the alteration of an aid scheme authorised by the European Commission which provides for the preferential tax treatment of biodiesel.

Legal framework

European Union law

Regulation No 659/1999

3 Article 1 of Regulation No 659/1999, entitled 'Definitions', provided:

'For the purpose of this Regulation:

…

(b) "existing aid" shall mean:

…

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

…

(c) "new aid" shall mean all aid, that is to say, aid schemes and individual aid, which is not existing aid, including alterations to existing aid;

…'

4 Article 2 of that regulation, entitled 'Notification of new aid', provided in paragraph 1 thereof:

'Save as otherwise provided in regulations made pursuant to Article [109 TFEU] or to other relevant provisions thereof, any plans to grant new aid shall be notified to the Commission in sufficient time by the Member State concerned. …'

5 That regulation, applicable at the time of the facts in the main proceedings, was repealed and replaced by 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).

Regulation No 794/2004

6 Article 4 of Regulation No 794/2004, entitled 'Simplified notification procedure for certain alterations to existing aid', is worded as follows:

'1. For the purposes of Article 1(c) of Regulation [No 659/1999], an alteration to existing aid shall mean any change, other than modifications of a purely formal or administrative nature which cannot affect the evaluation of the compatibility of the aid measure with the common market.

However an increase in the original budget of an existing aid scheme by up to 20% shall not be considered an alteration to existing aid.

2. The following alterations to existing aid shall be notified on the simplified notification form set out in Annex II:

…

(c) tightening of the criteria for the application of an authorised aid scheme, a reduction of aid intensity or a reduction of eligible expenses;

…'

Italian law

Ministerial Decree No 256/2003

7 Article 4(2) of decreto ministeriale n. 256 'Regolamento concernente le modalità di applicazione dell'accisa agevolata sul prodotto denominato biodiesel, ai sensi dell'articolo 21 del decreto legislativo 26 ottobre 1995, n. 504' (Ministerial Decree No 256, entitled 'Regulation laying down detailed rules for the application of the preferential rate of excise duty on the product known as biodiesel, within the meaning of Article 21 of Legislative Decree No 504 of 26 October 1995') of 25 July 2003 (GURI No 212 of 12 September 2003, p. 4) ('Ministerial Decree No 256/2003') provided:

'Where the quantities [of biodiesel exempt from excise duty] requested exceed the limit referred to in paragraph 1, the allocation shall be made as follows:

(a) in the first year in which the limit is exceeded, for each applicant, the quantities of biodiesel referred to in Article 3(1)(g), expressed in tonnes, and the production capacity referred to in Article 3(1)(d), also expressed in tonnes, shall be converted into a percentage of the total values and multiplied, respectively, by 0.6 and 0.4. The sum of the values obtained shall be multiplied by a coefficient equal to the degree of use, in the preceding year and in the current year up to 31 May, of the quotas allocated for those two years. For new installations and for the first year of activity, those coefficients shall be, respectively, zero and 0.1. The value obtained represents each applicant's weight in the allocation of the quota. Where that calculation results in an allocation greater than that requested, the amount of the excess shall be allocated among the other applicants, according to the same criterion;

(b) in subsequent years, each applicant undertaking shall be allocated a quantity equal to the monthly average of the quantities released for consumption in the preceding year and in the current year up to 31 May multiplied by 12. Any residual quotas shall be allocated using the criteria referred to in point (a). Where applications to participate are submitted by undertakings which did not receive an allocation in the preceding year, the quantities requested, corrected where appropriate using the criteria referred to in point (a), shall be allocated using, as a priority, the aforementioned residual quotas and, if necessary, by reducing existing allocations proportionately.'

Ministerial Decree No 156/2008

8 Article 3(4) of decreto ministeriale n. 156 'Regolamento concernente le modalità di applicazione dell'accisa agevolata sul prodotto denominato "biodiesel", ai sensi dell'articolo 22-bis, del decreto legislativo 26 ottobre 1995, n. 504' (Ministerial Decree No 156, entitled 'Regulation laying down detailed rules for the application of the preferential rate of excise duty on the product known as "biodiesel", within the meaning of Article 22*bis* of Legislative Decree No 504 of 26 October 1995') of 3 September 2008 (GURI No 239 of 11 October 2008, p. 4) ('Ministerial Decree No 156/2008') provided:

'The quota to be allocated shall be allocated among the entities referred to in paragraph 1 in the context of the general quotas requested, taking into account the respective agreed capacity defined as the sum of the average of the quantities referred to in Article 2(1)(g) and the annual production capacity referred to in Article 2(1)(d) of the entity, both as compared to the respective total values and multiplied, respectively, by 0.55 and 0.45. Only entities applying for general quotas shall be taken into consideration for the purposes of calculating the agreed capacity. The allocation referred to in this paragraph shall be made for 2008 no later than 60 days following the publication of the notice referred to in Article 11(3) and, for 2009 and 2010, no later than 28 February of each year.'

Ministerial Decree No 37/2015

9 Article 1 of decreto ministeriale n. 37 'Regolamento recante modalità di applicazione dell'accisa agevolata sul prodotto denominato biodiesel nell'ambito del programma pluriennale 2007-2010, da adottare ai sensi dell'articolo 22-bis del decreto legislativo 26 ottobre 1995, n. 504' (Ministerial Decree No 37, entitled 'Regulation laying down detailed rules for the application of the preferential rate of excise duty on the product known as biodiesel, within the framework of the 2007-2010 multiannual programme, to be adopted under Article 22*bis* of Legislative Decree No 504 of 26 October 1995') of 17 February 2015 (GURI No 76 of 1 April 2015, p. 1) ('Ministerial Decree No 37/2015') is worded as follows:

'1. Article 4(2) of [Ministerial Decree No 256/2003] shall be reworded as follows:

"2. Where the quantities [of biodiesel exempt from excise duty] requested exceed the limit referred to in paragraph 1, the allocation shall be made as follows:

(a) in the first year in which the limit is exceeded, for each applicant, the quantities of biodiesel referred to in Article 3(1)(g), expressed in tonnes, and the production capacity referred to in Article 3(1)(d), also expressed in tonnes, shall be converted into a percentage of the total values and multiplied, respectively, by 0.5 and 0.5. The sum of the values obtained shall be multiplied by a coefficient equal to the degree of use, in the preceding year and in the current year up to 31 May, of the quotas allocated for those two years. For new installations and for the first year of activity, those coefficients shall be, respectively, zero and 0.125. The value obtained represents each applicant's weight in the allocation of the quota. Where that calculation results in an allocation greater than that requested, the amount of the excess shall be allocated among the other applicants, according to the same criterion;

(b) in subsequent years, each applicant undertaking shall be allocated a quantity equal to the monthly average of the quantities released for consumption in the preceding year and in the current year up to 31 May multiplied by 12. Residual quotas shall be allocated in proportion to the production capacities of the undertakings which have submitted applications. Where

applications to participate are submitted by undertakings which did not receive an allocation in the preceding year, the quantities to be allocated to such undertakings shall be determined by applying the criteria referred to in point (a) and shall be allocated by reducing existing allocations proportionately.”’

10 According to Article 2(1) of Ministerial Decree No 37/2015:

‘Article 3(4) of [Ministerial Decree No 156/2008] shall be reworded as follows:

“4. The quota to be allocated shall be distributed among the entities referred to in paragraph 1 in the context of the general quotas requested, taking into account the respective agreed capacity defined as the sum of the average of the quantities referred to in Article 2(1)(g) and the annual production capacity referred to in Article 2(1)(d) of the entity, both as compared to the respective total values and multiplied, respectively, by 0.5 and 0.5. Only entities applying for general quotas shall be taken into consideration for the purposes of calculating the agreed capacity.”’

11 Article 3 of Ministerial Decree No 37/2015 provides:

‘Notwithstanding the historical data on the basis of which each undertaking was permitted to take part in the programmes and received the preferential biodiesel quotas, for financial years 2006, 2007, 2008 and 2009 the product allocations shall be reformulated for those undertakings taking into account the criteria set out, respectively, in Articles 1 and 2.’

The disputes in the main proceedings and the questions referred for a preliminary ruling

12 The cases in the main proceedings arise from actions brought before the Consiglio di Stato (Council of State, Italy) by Eco Fox, Alpha Trading and Novaol. The facts and the grounds of the order for reference in Cases C-916/19 and C-917/19 are essentially the same as those in Case C-915/19, and the question raised in each of those cases is also identical.

13 The facts and the grounds of the order for reference in Case C-915/19 are as follows.

14 By means of successive legislative measures and with a view to opening up a national biodiesel market, the Italian Republic has implemented three different multiannual intervention programmes. Those programmes received the prior approval of the Commission under Article 108(3) TFEU.

15 By two judgments, the Consiglio di Stato (Council of State) annulled certain provisions of those legislative measures, namely Article 4(2) of Ministerial Decree No 256/2003 and Article 3(4) of Ministerial Decree No 156/2008. The annulled provisions both related to the criteria used to allocate quantities of product exempt from excise duty to biodiesel producers.

16 In order to comply with those judgments, the Minister for Economic Affairs and Finance adopted Ministerial Decree No 37/2015, which reworded the annulled provisions.

17 Eco Fox was one of the beneficiaries of the preferential biodiesel quotas under the relevant programmes. It brought an action for annulment of Ministerial Decree No 37/2015 before the Tribunale amministrativo regionale per il Lazio (Regional Administrative Court, Lazio, Italy), arguing that that ministerial decree provides for new State aid.

18 By judgment of 26 July 2018, that court dismissed that action. It held, inter alia, that Ministerial Decree No 37/2015 did not create a new State aid programme but retroactively established, without modifying the duration of the programmes, certain coefficients for allocating biodiesel quotas which qualify for tax concessions, following the annulment by the Consiglio di Stato (Council of State) of the provisions setting out the previous criteria, and considered that there was therefore no obligation to notify that ministerial decree to the Commission under Article 108(3) TFEU.

19 Eco Fox brought an appeal against that judgment before the referring court, in which it argues, inter alia, that the national legislation at issue in the main proceedings constitutes new State aid, the preceding aid having been annulled with retroactive effect, or, in any event, aid modifying the pre-existing aid which, in accordance with Article 108(3) TFEU, had to be notified in advance to the Commission.

20 Fallimento Mythen, a biodiesel producer, takes the view that the action is partly inadmissible and entirely unfounded.

21 The referring court points out that Articles 1 and 2 of Ministerial Decree No 37/2015 did not have the effect of extending the duration of the aid already in place, but amended the criteria for allocating that aid, by laying down new regulations with retroactive effect. Article 3 of that ministerial decree is unequivocal in that regard, providing that, notwithstanding the historical data on the basis of which each undertaking was permitted to take part in the programmes and received the preferential biodiesel quotas, for financial years 2006 to 2009, the product allocations were to be reformulated for those undertakings taking into account the criteria set out, respectively, in Articles 1 and 2 of that ministerial decree.

22 Before the referring court, Eco Fox asserts that, according to the case-law of the Court of Justice, any modification to State aid must be notified in advance to the Commission. According to the referring court, however, the judgments relied on in that regard, namely the judgments of 27 June 2017, *Congregación de Escuelas Pías Provincia Betania* (C-74/16, EU:C:2017:496), and of 11 June 2009, *AEM* v *Commission* (T-301/02, EU:T:2009:191), do not appear to be decisive, in so far as, apart from statements of principle, they seem to refer, respectively, to instruments creating aid or to instruments extending aid to a new category of beneficiaries.

23 Moreover, it would appear that the Commission, having received a complaint from a party to the proceedings, was aware of Ministerial Decree No 37/2015, but did not initiate proceedings against the Italian Republic in that regard. That circumstance could mean that the Commission did not consider that the national legislation at issue in the main proceedings created new State aid, within the meaning of EU law.

24 It was in those circumstances that the Consiglio di Stato (Council of State) decided to stay the proceedings and to refer the following question to the Court of Justice for a preliminary ruling in Case C-915/19, the questions referred in Cases C-916/19 and C-917/19 being worded in identical terms:

‘In the view of the Court … – in the light of Articles 107 and 108 TFEU, [Regulation No 659/1999], [Regulation No 794/2004] and any further relevant provisions of [EU] law – does the definition of State aid, as such subject to an obligation of prior notification to the … Commission, cover a secondary regulatory instrument such as the regulation adopted by means of Ministerial Decree No 37/2015 – which is being challenged in these proceedings – which, in direct enforcement of

judgments of the [Consiglio di Stato (Council of State)] requiring the annulment in part of the previous regulations already notified to the Commission, has retroactively affected the procedures for application of the reduced excise duty on biodiesel by retroactively amending the criteria for distribution of the benefit thereof among the applicant companies without extending the duration of the programme of tax concessions?'

25 By decision of the President of the Court of 10 February 2020, Cases C-915/19 to C-917/19 were joined for the purposes of the written procedure and the judgment.

The questions referred for a preliminary ruling

Admissibility

26 It should be recalled that questions on the interpretation of EU law referred by a national court in the factual and legislative context which that court is responsible for defining, and the accuracy of which is not a matter for the Court to determine, enjoy a presumption of relevance. The Court may refuse to give a ruling on a question referred by a national court for a preliminary ruling, only where, for instance, the requirements concerning the content of a request for a preliminary ruling, set out in Article 94 of the Rules of Procedure of the Court, are not satisfied or where it is quite obvious that the interpretation of a provision of EU law which is sought by the national court bears no relation to the actual facts of the main action or to its purpose or where the problem is hypothetical (judgment of 3 June 2021, *Bankia*, C-910/19, EU:C:2021:433, paragraph 24 and the case-law cited).

27 In the first place, in so far as Fallimento Mythen submits that the requests for a preliminary ruling are inadmissible on the ground of an alleged infringement of the requirements laid down in Article 94(a) of the Rules of Procedure, it must be recalled that, following a decision of the President of the Court of 10 February 2020, a request for information was indeed sent to the referring court, asking it to specify all the relevant factual matters capable of enabling the Court to provide an answer to its questions and requesting that the referring court set out the content of the relevant national provisions. The responses to that request were received by the Court on 13 July 2020.

28 The information contained in the requests for a preliminary ruling, as subsequently supplemented, is sufficient for the purpose of regarding the requirements of Article 94(a) of the Rules of Procedure as having been fulfilled. It is true that the responses of the referring court mentioned in the preceding paragraph set out only the content of the relevant national provisions and thus do not contain any further details relating to the factual background to the disputes in the main proceedings. However, as clarified by the relevant national provisions provided in response to the Court's questions, the description of the facts contained in the requests for a preliminary ruling allows an adequate understanding of the factual background to those disputes.

29 In the second place, the Italian Government submits, albeit without formally challenging the admissibility of the requests for a preliminary ruling, that the referring court did not state the reasons which led it to submit the question referred in each of the cases in the main proceedings, but merely set out those elements which suggest that the national legislation at issue in the main proceedings does not constitute State aid. However, it is apparent from those requests that the referring court has doubts as to whether the alteration at issue in the main proceedings constitutes

'new aid' subject to the notification requirement laid down by Article 108(3) TFEU and that, in particular, the referring court considers that the relevant case-law of the Court does not actually enable it to answer that question.

30 Moreover, although, as stated by Fallimento Mythen, the referring court, in its questions, refers in a general way to 'any further relevant provisions of [EU] law' in the list of relevant EU rules of which it seeks an interpretation, it is sufficient to note that that court also identifies specific provisions of EU law which it considers to be relevant to the cases in the main proceedings, that is to say, Articles 107 and 108 TFEU and the provisions of Regulations No 659/1999 and No 794/2004.

31 It follows that the information provided by the referring court enables the Court to understand also the reasons which prompted the referring court to inquire about the interpretation of the provisions of EU law concerned and the relationship between those provisions and the national legislation applicable to the disputes in the main proceedings, so that the requirements of Article 94(c) of the Rules of Procedure must also be regarded as having been fulfilled.

32 Consequently, the requests for a preliminary ruling are admissible.

Substance

33 By its questions, the referring court asks, in essence, whether Articles 107 and 108 TFEU and the provisions of Regulations No 659/1999 and No 794/2004 must be interpreted as meaning that an alteration to a preferential tax scheme for biodiesel authorised by the Commission must be regarded as new aid subject to the notification requirement, under Article 108(3) TFEU, where that alteration consists in changing, with retroactive effect, the criteria for allocating biodiesel quotas benefiting from a preferential rate of excise duty under that scheme.

34 It is clear from the evidence before the Court that those questions arise from a series of Commission decisions by which the Commission authorised, in turn, on 3 May 2002 (Aid N 461/2001) (OJ 2002 C 146, p. 7) ('the 2002 approval decision'), the initial aid scheme and then, on 21 June 2005 (Aid N 582/2004) (OJ 2005 C 240, p. 21) and 11 March 2008 (Aid N 326/2007) (OJ 2008 C 134, p. 1) ('the 2005 approval decision' and 'the 2008 approval decision' respectively), subsequent amendments to that scheme (the three decisions together being referred to as 'the approval decisions concerned').

35 The Commission adopted each of those decisions after receiving prior notification from the Italian Republic, under Article 108(3) TFEU, of the version of the aid scheme concerned. However, it is common ground that the national legislation, the legality of which forms the subject matter of the disputes in the main proceedings, had the effect of amending the criteria for the distribution of the advantage granted under that scheme, without that amendment having been notified in advance to the Commission under that provision. While the Italian Republic took the view that that amendment did not require such notification, the applicants in the main proceedings, all of which are biodiesel producers, maintain before the referring court that that amendment is unlawful since, in the light of its significance, it should have been notified to the Commission before it was put into effect.

36 It must be recalled in that regard that in the context of the State aid control system, established in Articles 107 and 108 TFEU, the procedure differs according to whether the aid is existing or new. Whereas existing aid may, in accordance with Article 108(1) TFEU, be lawfully implemented so

long as the Commission has made no finding of incompatibility, Article 108(3) TFEU provides that plans to grant new aid or alter existing aid must be notified, in due time, to the Commission and may not be put into effect until the procedure has resulted in a final decision (judgment of 27 June 2017, *Congregación de Escuelas Pías Provincia Betania*, C-74/16, EU:C:2017:496, paragraph 86 and the case-law cited).

37 As the Court has already noted, the notification requirement laid down by Article 108(3) TFEU and defined in Article 2 of Regulation No 659/1999 is one of the fundamental features of the system of control put in place by the FEU Treaty in the field of State aid (see, in particular, judgment of 5 March 2019, *Eesti Pagar*, C-349/17, EU:C:2019:172, paragraph 56 and the case-law cited).

38 In that regard, the Court has previously stated that measures taken after the entry into force of the FEU Treaty to grant or alter aid, whether the alterations relate to existing aid or initial plans notified to the Commission, must be regarded as new aid subject to the notification requirement laid down by Article 108(3) TFEU (judgment of 14 November 2019, *Dilly's Wellnesshotel*, C-585/17, EU:C:2019:969, paragraph 56 and the case-law cited).

39 According to Article 1(b)(ii) of Regulation No 659/1999, 'existing aid' is understood as being, inter alia, 'authorised aid, that is to say, aid schemes and individual aid which have been authorised by the Commission or by the Council'. It follows that the aid scheme concerned in the present case, both in its initial version approved by the 2002 approval decision and in the amended versions approved by the 2005 and 2008 approval decisions, falls within the concept of 'existing aid', within the meaning of that provision.

40 For its part, the concept of 'new aid' is defined in Article 1(c) of Regulation No 659/1999 as 'all aid, that is to say, aid schemes and individual aid, which is not existing aid, including alterations to existing aid'. The first sentence of Article 4(1) of Regulation No 794/2004 provides, in that regard, that 'for the purposes of Article 1(c) of Regulation [No 659/1999], an alteration to existing aid shall mean any change, other than modifications of a purely formal or administrative nature which cannot affect the evaluation of the compatibility of the aid measure with the [internal] market'.

41 As the Court has held, an alteration cannot be characterised as being of a purely formal or administrative nature within the meaning of Article 4(1) of Regulation No 794/2004, where it is liable to affect the evaluation of the compatibility of the aid measure with the common market (judgment of 13 June 2013, *HGA and Others* v *Commission*, C-630/11 P to C-633/11 P, EU:C:2013:387, paragraph 94).

42 In order to determine whether the national legislation at issue in the main proceedings has made an alteration to the aid scheme which is capable of influencing the assessment of the compatibility of that scheme with the internal market, in which case it should be regarded as an 'alteration to existing aid' and, accordingly, 'new aid' subject to the notification requirement laid down by Article 108(3) TFEU, it is necessary to have regard both to the nature and scope of that alteration and to the Commission's approval decisions relating to the earlier versions of that scheme (see, by analogy, judgment of 20 September 2018, *Carrefour Hypermarchés and Others*, C-510/16, EU:C:2018:751, paragraphs 39 to 59).

43 As regards, in the first place, the nature and scope of the alteration in question in the present case, it must be observed that the national legislation at issue in the main proceedings amended, with retroactive effect, the criteria for allocating, among the undertakings benefiting from the scheme, the quantities of biodiesel to which the preferential rate of excise duty applies for the financial years 2006 to 2009. In particular, it is clear from the information available to the Court that, in the versions of the aid scheme which existed prior to that legislation, the criteria for allocating biodiesel quotas benefiting from preferential tax treatment, laid down at regulatory level by Ministerial Decree No 256/2003 and then by Ministerial Decree No 156/2008, attached less importance to the production capacity of each undertaking concerned – the initial weighting coefficient of 0.4 having been increased to 0.45 by Ministerial Decree No 156/2008 – and, by contrast, emphasised the production history of each of those undertakings, that is to say, the quantity of biodiesel which it had actually placed on the market in the preceding years – the initial weighting coefficient of 0.6 having been reduced to 0.55 by Ministerial Decree No 156/2008.

44 The greater weight given to the criterion of the production history of each undertaking concerned led to 'incumbent' producers, which had been operating in the biodiesel sector for several years, receiving, on each occasion, a greater quantity of biodiesel benefiting from preferential tax treatment than that allocated to producers which, although having a higher production capacity, had entered the market only more recently. Following the annulment by the Consiglio di Stato (Council of State) of the national provisions laying down the criteria for allocating quantities of biodiesel benefiting from preferential tax treatment, the Italian legislature introduced the national legislation at issue in the main proceedings, by which the criterion of the production history of each undertaking concerned and the criterion of its production capacity are weighted by the same coefficient, that is to say, 0.5 for each criterion.

45 Nonetheless, it must be stated, as is clear from the information submitted to the Court, which it is for the referring court to verify, that the national legislation at issue in the main proceedings affects neither the class of beneficiaries which had previously been eligible for the preferential scheme nor the budget of the aid scheme authorised by the Commission in the 2008 approval decision, and does not extend the duration of that scheme. Moreover, neither the definition of the product benefiting from the preferential rate of excise duty nor that rate itself is affected.

46 In the second place, as regards the approval decisions concerned, it should be noted that, as they are derogations from the general principle of incompatibility of State aid with the internal market, laid down in Article 107(1) TFEU, Commission decisions authorising an aid scheme must be interpreted strictly (judgment of 20 September 2018, *Carrefour Hypermarchés and Others*, C-510/16, EU:C:2018:751, paragraph 37 and the case-law cited).

47 Furthermore, according to the settled case-law, in order to interpret such Commission decisions, it is appropriate not only to examine their actual text, but also to refer to the notification made by the Member State concerned (judgment of 20 September 2018, *Carrefour Hypermarchés and Others*, C-510/16, EU:C:2018:751, paragraph 38 and the case-law cited).

48 In the present case, it is clear from the approval decisions concerned that the criteria for allocating, among the undertakings benefiting from the scheme, the quantities of product to which the preferential rate of excise duty applies do not constitute an element on which the Commission based its approval of the previous versions of the aid scheme at issue in the main proceedings.

49 In particular, while it is common ground that the criteria for allocating the quantities of biodiesel benefiting from the preferential tax regime were communicated to the Commission, at least in the context of the notification of the amendments which were the subject of the 2008 approval decision, those criteria were not expressly examined in any of the approval decisions concerned.

50 The examination of the compatibility of the aid scheme concerned with the internal market was based on other elements, inter alia, as regards in particular the 2008 approval decision, on the conditions set out in Section E.3.3 of the Community guidelines on State aid for environmental protection (OJ 2001 C 37, p. 3), which concerns operating aid for the production of renewable energy. Thus, in recitals 32 and 36 of that decision, the Commission verified the compatibility of the definition of the products to which the tax advantage applied with point 6 of those guidelines and with Directive 2003/30/EC of the European Parliament and of the Council of 8 May 2003 on the promotion of the use of biofuels or other renewable fuels for transport (OJ 2003 L 123, p. 42). In recitals 38 to 45 of that decision, the Commission verified that the calculation of the aid was consistent with the criteria set out in point 56 of those guidelines and that it was such as to exclude the risk of overcompensation. In that context, the Commission took into account the fact that the tax advantage coexisted with an obligation to release biofuels for consumption.

51 It is not apparent either from the approval decisions concerned or from the observations submitted to the Court in the present cases that the amendment made by the national legislation at issue in the main proceedings to the criteria for allocating, among the beneficiary undertakings, biodiesel quotas benefiting from preferential tax treatment is capable of influencing any element of the assessments contained in those decisions. Moreover, the mere fact that draft national legislation providing for an aid scheme notified to the Commission is communicated to that institution by the Member State concerned by no means implies that all the elements of that draft must be regarded as essential where, as in the present case, that communication is followed by a decision by which the Commission authorises the aid scheme concerned. Such an approach would be tantamount to rendering ineffective the concept of 'alteration to existing aid', which, as is clear from the actual wording of the first sentence of Article 4(1) of Regulation No 794/2004, as set out in paragraph 40 of the present judgment, rightly does not cover any alteration to existing aid, but includes only those which affect the evaluation of the compatibility of that aid with the internal market.

52 It is clear from recital 23 of the 2002 approval decision, recital 22 of the 2005 approval decision and recital 46 of the 2008 approval decision that the Italian authorities undertook to submit annual reports to the Commission in order to monitor overcompensation. Those reports were to indicate, in particular, the cost of raw materials and the cost of production, the quotas allocated and the companies to which they were allocated, as well as all other data which would enable the Commission to assess whether there was indeed overcompensation. The Italian authorities were also reminded that they had to notify the Commission in advance of each change in the conditions for granting the aid.

53 However, first, it is clear, in particular, from recital 17 of the 2005 approval decision and recital 44 of the 2008 approval decision that the risk of overcompensation does not arise from the criteria for allocating the product benefiting from preferential tax treatment as such, but depends on the relationship between the cost of producing energy from renewable energy sources and the market price of ordinary diesel. As long as the aid is limited to covering the difference between those two amounts, subject to a reasonable profit, overcompensation is excluded.

54 Moreover, although the alteration at issue in the main proceedings has had the effect of changing the importance attached to the two parameters identified by the Italian legislature as relevant for the purposes of allocating the aid, that is to say, the actual production history of each undertaking concerned and its production capacity, those two criteria remain relevant, and are now even placed on an equal footing, in the version of the aid scheme at issue in the main proceedings, so that, in view also of the fact that the rate of excise duty has been maintained, the alteration in question is not likely to call into question the finding made by the Commission in recital 45 of the 2008 approval decision that only part of the production of each beneficiary undertaking is eligible to benefit from the preferential rate of excise duty under the aid scheme concerned.

55 Second, it cannot be held that a general statement, such as that contained in recital 22 of the 2005 approval decision, that the Italian authorities are required to give prior notice to the Commission of each change in the conditions for granting the aid should be interpreted as having the effect of amending the scope of the notification requirement laid down by Article 108(3) TFEU, in that it applies, as follows from paragraphs 39 to 41 of the present judgment, only to alterations to existing aid which may affect the evaluation of the compatibility of the aid measure with the internal market. That is also confirmed by the fact that, in recital 48 of the 2008 approval decision, the Commission refers to that requirement to notify it of changes to the aid scheme, expressly stating that such notification must be made in accordance with Article 108(3) TFEU and the relevant provisions of Regulations No 659/1999 and No 794/2004.

56 Third, the fact that, because of the redefinition of the criteria for allocating the advantage granted by the national legislation at issue in the main proceedings, some beneficiaries are allocated biodiesel quotas benefiting from preferential tax treatment which are smaller than those initially provided for, whereas other beneficiaries' quotas are increased, cannot affect the Commission's evaluation in the approval decisions concerned, by which it considered the aid scheme concerned to be compatible with the internal market. In particular, the information available to the Court, which it is for the referring court to verify, does not suggest that that alteration called into question the aim of the aid scheme concerned, which was to reduce the costs borne by biodiesel producers and blenders, or the assessment consequently made by the Commission that, as an action to promote renewable energy and, therefore, to promote environmental protection, the aid scheme, both in its initial and modified versions, was and continues to be compatible with EU law.

57 It should be added that that interpretation of the approval decisions concerned is also consistent with the case-law of the Court, according to which the Commission may, in the case of an aid scheme, simply examine the general characteristics of the scheme in question and is not required to examine each particular case in which it applies; accordingly, the Commission's review need not cover the individual situation of each undertaking concerned (see, to that effect, judgments of 20 September 2018, *Carrefour Hypermarchés and Others*, C-510/16, EU:C:2018:751, paragraph 32 and the case-law cited, and of 4 March 2021, *Commission* v *Fútbol Club Barcelona*, C-362/19 P, EU:C:2021:169, paragraph 65). In the context of an aid scheme, the Commission may merely assess whether that scheme is necessary for the attainment of one of the objectives specified in Article 107(3) TFEU (judgment of 13 June 2013, *HGA and Others* v *Commission*, C-630/11 P to C-633/11 P, EU:C:2013:387, paragraph 114 and the case-law cited).

58 It follows that the amendment of the criteria for allocating the aid granted under the aid scheme at issue in the main proceedings did not affect the constituent elements of that scheme, as assessed by the Commission in connection with the approval decisions concerned, for the purposes of its evaluation of the compatibility of that scheme with the internal market (see, by analogy, judgment of 13 December 2018, *Rittinger and Others*, C-492/17, EU:C:2018:1019, paragraph 59).

Consequently, that amendment does not constitute an 'alteration to existing aid' for the purposes of Article 1(c) of Regulation No 659/1999 and the first sentence of Article 4(1) of Regulation No 794/2004, and is therefore not 'new aid' subject to the notification requirement laid down by Article 108(3) TFEU. It follows that its implementation cannot be regarded as unlawful solely on the ground that it was not notified to the Commission in advance.

59 In the light of all the foregoing considerations, the answer to the questions referred is that Articles 107 and 108 TFEU and the provisions of Regulations No 659/1999 and No 794/2004 must be interpreted as meaning that an alteration to a preferential tax scheme for biodiesel authorised by the Commission must not be regarded as new aid subject to the notification requirement, under Article 108(3) TFEU, where that alteration consists in changing, with retroactive effect, the criteria for allocating biodiesel quotas benefiting from a preferential rate of excise duty under that scheme, in so far as that alteration does not affect the constituent elements of the aid scheme concerned, as assessed by the Commission for the purposes of its evaluation of the compatibility of the previous versions of that scheme with the internal market.

Costs

60 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Fifth Chamber) hereby rules:

Articles 107 and 108 TFEU and the provisions of Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 108 [TFEU], as amended by Council Regulation (EU) No 734/2013 of 22 July 2013, and of Commission Regulation (EC) No 794/2004 of 21 April 2004 implementing Regulation No 659/1999, must be interpreted as meaning that an alteration to a preferential tax scheme for biodiesel authorised by the European Commission must not be regarded as new aid subject to the notification requirement, under Article 108(3) TFEU, where that alteration consists in changing, with retroactive effect, the criteria for allocating biodiesel quotas benefiting from a preferential rate of excise duty under that scheme, in so far as that alteration does not affect the constituent elements of the aid scheme concerned, as assessed by the Commission for the purposes of its evaluation of the compatibility of the previous versions of that scheme with the internal market.

[Signatures]