Reports of Cases

JUDGMENT OF THE COURT (Fifth Chamber)

14 November 2019*

(Reference for a preliminary ruling — State aid — Alteration of an authorised aid scheme — Article 108(3) TFEU — Notification requirement — Standstill obligation subject to approval from the European Commission — Regulation (EU) No 651/2014 — Exemption — Article 58(1) — Temporal scope of the regulation — Article 44(3) — Scope — National legislation laying down a formula for calculating a partial rebate of energy taxes)

In Case C-585/17,

REQUEST for a preliminary ruling under Article 267 TFEU from the Verwaltungsgerichtshof (Supreme Administrative Court, Austria), made by decision of 14 September 2017, received at the Court on 5 October 2017, in the proceedings

Finanzamt Linz,

Finanzamt Kirchdorf Perg Steyr,

intervener:

Dilly's Wellnesshotel GmbH,

THE COURT (Fifth Chamber),

composed of E. Regan (Rapporteur), President of the Chamber, I. Jarukaitis, E. Juhász, M. Ilešič and C. Lycourgos, Judges,

Advocate General: H. Saugmandsgaard Øe,

Registrar: K. Malacek, Administrator,

having regard to the written procedure and further to the hearing on 21 November 2018,

after considering the observations submitted on behalf of

– Dilly's Wellnesshotel GmbH, by M. Kroner, Rechtsanwalt,

– the Austrian Government, by F. Koppensteiner, H. Schamp, G. Hesse and C. Pesendorfer, acting as Agents,

– the European Commission, by K. Blanck-Putz, K. Herrmann and P. Němečková, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 14 February 2019,

* Language of the case: German.

gives the following

Judgment

1 The request for a preliminary ruling concerns the interpretation of Article 108(3) TFEU, of Commission Regulation (EC) No 800/2008 of 6 August 2008 declaring certain categories of aid compatible with the [internal] market in application of Articles [107 and 108 TFEU] (General block exemption Regulation) (OJ 2008 L 214, p. 3) and of 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 [TFEU] (OJ 2014 L 187, p. 1), and in particular Article 58(1) of the latter regulation.

2 The request has been made in proceedings brought by the Finanzamt Linz (Tax Office, Linz, Austria) and the Finanzamt Kirchdorf Perg Steyr (Tax Office, Kirchdorf Perg Steyr, Austria) concerning a rebate of energy taxes in favour of Dilly's Wellnesshotel GmbH.

Legal context

Union law

Regulation No 994/98

3 Recitals 4 and 5 of Council Regulation (EC) No 994/98 of 7 May 1998 on the application of Articles 107 and 108 [TFEU] to certain categories of horizontal State aid (OJ 1998 L 142, p. 1), as amended by Council Regulation (EU) No 733/2013 of 22 July 2013 (OJ 2013 L 204, p. 11) ('Regulation No 994/98'), were worded as follows:

'(4) … it is appropriate, with a view to ensuring efficient supervision and simplifying administration, without weakening [European] Commission monitoring, that the Commission should be enabled to declare by means of regulations, in areas where the Commission has sufficient experience to define general compatibility criteria, that certain categories of aid are compatible with the [internal] market pursuant to one or more of the provisions of Article [107(2) and (3) TFEU] and are exempted from the procedure provided for in Article [108(3) TFEU];

(5) … group exemption regulations will increase transparency and legal certainty, …'

4 Article 1 of Regulation No 994/98, headed 'Group exemptions', provided as follows:

'1. The Commission may, by means of regulations adopted in accordance with the procedures laid down in Article 8 of this Regulation and in accordance with Article [107 TFEU], declare that the following categories of aid should be compatible with the [internal] market and shall not be subject to the notification requirements of Article [108(3) TFEU]:

(a) aid in favour of:

…

(iii) environmental protection;

…'

Regulation (EC) No 659/1999

5 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) provided, in Article 1, headed 'Definitions', as follows:

'For the purposes 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 [of the European Union];

…

(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;

…'

6 Article 2 of that regulation, headed 'Notification of new aid', provided as follows:

'1. 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. …

…'

Regulation (EC) No 794/2004

7 Article 4 of Commission Regulation (EC) No 794/2004 of 21 April 2004 implementing Council Regulation No 659/1999 (OJ 2004 L 140, p. 1, and corrigendum OJ 2005 L 25, p. 74), headed '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 [internal] 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;

…'

Regulation No 800/2008

8 Article 3 of Regulation No 800/2008, headed 'Conditions for exemption', which was in Chapter I of that regulation, headed 'Common Provisions', provided, in paragraph 1 thereof, as follows:

'Aid schemes fulfilling all the conditions of Chapter I of this Regulation, as well as the relevant provisions of Chapter II of this Regulation, shall be compatible with the [internal] market within the meaning of Article [107(3) TFEU] and shall be exempt from the notification requirement of Article [108(3) TFEU] provided that any individual aid awarded under such scheme fulfils all the conditions of this Regulation, and the scheme contains an express reference to this Regulation, by citing its title and publication reference in the *Official Journal of the European Union*.'

9 Regulation No 800/2008 was repealed by Regulation No 651/2014.

Regulation No 651/2014

10 Recitals 2 to 5 and 64 of Regulation No 651/2014 are worded as follows:

'(2) With its Communication on EU State Aid Modernisation (SAM) [COM(2012) 209 final of 8 May 2012], the Commission launched a wider review of the State aid rules. The main objectives of this modernisation are … (ii) to focus Commission *ex ante* scrutiny of aid measures on cases with the biggest impact on the internal market, while strengthening Member State cooperation in State aid enforcement … The review of Regulation [No 800/2008] constitutes a central element of SAM.

(3) This Regulation should allow for better prioritisation of State aid enforcement activities, greater simplification and should enhance transparency, effective evaluation and the control of compliance with the State aid rules at national and Union levels …

(4) The Commission's experience in applying Regulation [No 800/2008] has allowed it to better define the conditions under which certain categories of aid can be considered compatible with the internal market and to extend the scope of block exemptions. It also revealed the necessity to strengthen transparency, monitoring and proper evaluation of very large schemes in light of their effect on competition in the internal market.

(5) The general conditions for the application of this Regulation should be defined on the basis of a set of common principles that ensure the aid … is granted in full transparency and subject to a control mechanism and regular evaluation …

…

(64) Aid in the form of tax reductions pursuant to Council Directive 2003/96/EC of 27 October 2003 restructuring the Community framework for the taxation of energy products and electricity [(OJ 2003 L 283, p. 51)] favouring environmental protection covered by this Regulation can indirectly benefit the environment. … In order to minimise the distortion of competition, the aid should be granted in the same way for all competitors found to be in a similar factual situation. To better preserve the price signal for undertakings which the environmental tax aims to give, Member States should have the option to design the tax reduction scheme based on a fixed annual compensation amount (tax refund) disbursement mechanism.'

11 Article 2 of that regulation, headed 'Definitions', provides as follows:

'For the purposes of this Regulation the following definitions shall apply:

…

(14) "individual aid" means:

…

(ii) awards of aid to individual beneficiaries on the basis of an aid scheme;

…'

12 Article 3 of that regulation, headed 'Conditions for exemption', provides as follows:

'Aid schemes, individual aid granted under aid schemes and ad hoc aid shall be compatible with the internal market within the meaning of Article 107(2) or (3) [TFEU] and shall be exempted from the notification requirement of Article 108(3) [TFEU] provided that such aid fulfils all the conditions laid down in Chapter I of this Regulation, as well as the specific conditions for the relevant category of aid laid down in Chapter III of this Regulation.'

13 Under Article 44 of that regulation, headed 'Aid in the form of reductions in environmental taxes under Directive [2003/96]':

'1. Aid schemes in the form of reductions in environmental taxes fulfilling the conditions of [Directive 2003/96] shall be compatible with the internal market within the meaning of Article 107(3) [TFEU] and shall be exempted from the notification requirement of Article 108(3) [TFEU], provided that the conditions laid down in this Article and in Chapter I are fulfilled.

…

3. Aid schemes in the form of tax reductions shall be based on a reduction of the applicable environmental tax rate or on the payment of a fixed compensation amount or on a combination of these mechanisms.

…'

14 Article 58 of Regulation No 651/2014, headed 'Transitional provisions' states as follows:

'1. This Regulation shall apply to individual aid granted before its entry into force, if the aid fulfils all the conditions laid down in this Regulation, with the exception of Article 9.

2. Any aid not exempted from the notification requirement of Article 108(3) [TFEU] by virtue of this Regulation or other regulations adopted pursuant to Article 1 of Regulation [No 994/98] previously in force shall be assessed by the Commission in accordance with the relevant frameworks, guidelines, communications and notices.

3. Any individual aid granted before 1 January 2015 by virtue of any regulation adopted pursuant to Article 1 of Regulation [No 994/98] in force at the time of granting the aid shall be compatible with the internal market and exempted from the notification requirement of Article 108(3) [TFEU] with the exclusion of regional aid. Risk capital aid schemes in favour of [small and medium-sized enterprises (SMEs)] set up before 1 July 2014 and exempted from the notification requirement of Article 108(3) [TFEU] under Regulation [No 800/2008], shall remain exempted and compatible with the internal

market until the termination of the funding agreement, provided the commitment of the public funding into the supported private equity investment fund, on the basis of such agreement, was made before 1 January 2015 and the other conditions for exemption remain fulfilled.

4. At the end of the period of validity of this Regulation, any aid schemes exempted under this Regulation shall remain exempted during an adjustment period of six months, with the exception of regional aid schemes. The exemption of regional aid schemes shall expire on the date of expiry of the approved regional aid maps. The exemption of risk finance aid exempted pursuant to Article 21(2)(a) shall expire at the end of the period foreseen in the funding agreement, provided the commitment of public funding to the supported private equity investment fund was made on the basis of such agreement within 6 months from the end of the period of validity of this Regulation and all other conditions for exemption remain fulfilled.'

15 Article 59 of that regulation is worded as follows:

'This Regulation shall enter into force on 1 July 2014.

…'

Austrian law

16 Paragraph 1(1) of the Energieabgabenvergütungsgesetz (Law on the rebate of energy taxes; 'the EAVG') states as follows:

'Taxes paid on the energy resources set out in subparagraph 3 shall, on application, be rebated on the basis of a calendar (financial) year, in so far as (in total) they exceed 0.5% of the difference between

1. supplies within the meaning of Paragraph 1(1), points (1) and (2), of the [Umsatzsteuergesetz 1994 (1994 Law on turnover tax)] and

2. supplies within the meaning of Paragraph 1(1), points (1) and (2), of the 1994 Law on turnover tax which are made to the undertaking [in question] (net output value).'

17 Paragraph 1(1) of the EAVG is supplemented by Paragraph 2(2) of the EAVG, which provides as follows:

'1. Upon application by an undertaking eligible for a rebate, any amount in excess of the proportion of net output value set out in Paragraph 1 shall be rebated once per calendar (financial) year. The application shall specify the amount of energy resources as set out in Paragraph 1(3) which have been used by the business and the values referred to in Paragraph 1. It shall be submitted no later than 5 years from the point at which the conditions for the rebate are satisfied. The application shall be deemed to be a tax return. The application shall be processed by way of a decision and shall indicate the total amount of rebate claimed.

2. The rebate amount shall be calculated on the basis of either the limit of 0.5% of net output value or the following excesses, whichever is the lesser amount to be credited:

A general excess of EUR 400 shall be deducted from the rebate amount. …'

18 Paragraph 2(1) of the EAVG, as amended by the Budgetbegleitgesetz (Law accompanying the budget) of 30 July 2004 (BGBl. I No 92/2004; 'the BBG'), provides as follows:

'All undertakings shall be eligible for a rebate in so far as they do not supply the energy resources set out in Paragraph 1(3) or heating (steam or hot water) produced from the energy resources set out in Paragraph 1(3).'

19 The Budgetbegleitgesetz (Law accompanying the budget) of 30 December 2010 (BGBl. I No 111/2010; 'the BBG 2011') amended Paragraph 2(1) of the EAVG as follows:

'Only undertakings whose activity is shown to consist primarily in the manufacture of goods shall be eligible to a rebate, in so far as they do not supply the energy resources set out in Paragraph 1(3) or heating (steam or hot water) produced from the energy resources set out in Paragraph 1(3).'

20 The following subparagraph 7 was added to Paragraph 4 of the EAVG by the BBG 2011:

'Paragraphs 2 and 3, [in each case as amended by the BBG 2011], shall apply to rebate applications which relate to a period after 31 December 2010, subject to approval by the [Commission].'

21 According to the order for reference, in the 2011 Guidelines on Energy Taxes of 15 April 2011 issued by the Bundesministerium für Finanzen (Federal Ministry of Finance, Austria), which provide assistance with the interpretation of, inter alia, the energy tax rebate, that ministry stated that, with effect from 1 January 2011, eligibility to the energy tax rebate is confined to manufacturing firms.

22 On 29 August 2013, that ministry amended those guidelines by amending that date to the later date of 1 February 2011.

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

23 By an application dated 29 December 2011, Dilly's Wellnesshotel, which is responsible for the management of a hotel, applied for an energy tax rebate in respect of the year 2011.

24 By decision of 21 February 2012, the Tax Office, Linz refused that application on the ground that, following the BBG 2011, in respect of applications made after 31 December 2010, Paragraphs 2 and 3 of the EAVG restricted energy tax rebates to undertakings whose activity is shown to consist primarily in the manufacture of goods. From 31 December 2010, 'service providers' were therefore excluded from the energy tax rebate.

25 Dilly's Wellnesshotel appealed against that decision.

26 By judgment of 23 March 2012, the Unabhängiger Finanzsenat (Independent Finance Tribunal, Austria) dismissed that appeal as being unfounded.

27 Dilly's Wellnesshotel appealed against that judgment.

28 By judgment of 19 March 2013, the Verwaltungsgerichtshof (Supreme Administrative Court, Austria) set aside that judgment. In particular, that court ruled that the Unabhängiger Finanzsenat (Independent Finance Tribunal) erroneously refused to accept that the applicant had a right to an energy tax rebate for the month of January 2011.

29 By decision of 31 October 2014, the Bundesfinanzgericht (Federal Finance Court, Austria), which is the successor to the Unabhängiger Finanzsenat (Independent Finance Tribunal), referred several questions to the Court for a preliminary ruling under Article 267 TFEU.

30 By judgment of 21 July 2016, *Dilly's Wellnesshotel* (C-493/14, EU:C:2016:577), the Court ruled that Article 3(1) of Regulation No 800/2008 must be interpreted as meaning that the absence, in an aid scheme such as that at issue in the case giving rise to that judgment, of an express reference to that regulation, by citing its title and publication reference in the *Official Journal of the European Union*, precludes that scheme from being considered to fulfil the conditions for exemption, under that regulation, from the notification requirement in Article 108(3) TFEU.

31 By judgment of 3 August 2016, the Bundesfinanzgericht (Federal Finance Court) upheld the appeal brought by Dilly's Wellnesshotel and granted it an energy tax rebate for the year 2011 that was not limited to January of that year, on the grounds, inter alia, that, in the absence of an exemption from the notification requirement, the exclusion of service providers from the right to energy tax rebates had not come into force.

32 The appeal by the Tax Office, Linz against that judgment is currently pending before the referring court.

33 By another application dated 25 July 2014, Dilly's Wellnesshotel applied for an energy tax rebate for the period from February 2013 to January 2014.

34 By decision of 9 January 2015, the Tax Office, Kirchdorf Perg Steyr refused that application on the grounds that a hotel establishment is a service provider and not an undertaking whose activity consists primarily in the manufacture of goods. It claimed that, since 1 February 2011, energy tax rebates have been available only to undertakings whose activity consists primarily in the manufacture of goods.

35 By judgment of 13 February 2017, the Bundesfinanzgericht (Federal Finance Court) upheld the appeal brought by Dilly's Wellnesshotel against that decision and granted the energy tax rebate in accordance with the application submitted by Dilly's Wellnesshotel on the basis, in essence, of its judgment of 3 August 2016, as referred to in paragraph 31 of the present judgment.

36 The appeal brought by the Tax Office, Kirchdorf Perg Steyr against the judgment of 13 February 2017 is currently pending before the referring court.

37 The referring court maintains that an energy tax rebate constitutes, under the EAVG, as amended by the BBG, aid having been approved implicitly and without restriction by the Commission under Article 3 and recital 72 of Commission Decision 2005/565/EC of 9 March 2004 on an aid scheme implemented by Austria for a refund from the energy taxes on natural gas and electricity in 2002 and 2003 (OJ 2005 L 190, p. 13).

38 It also states that, where EU law precludes a limitation of those who may benefit from aid, such as the one introduced by the BBG 2011, in accordance with which the right to an energy tax rebate must be granted only to undertakings whose activity is shown to consist primarily in the manufacture of goods, the prior national legislation is to remain in force.

39 The referring court claims that several points of EU law arise in the context of the disputes in the main proceedings and that, in order for it to deal with those points, it is called upon to interpret Paragraph 4(7) of the EAVG, which provides that the legislative amendment introduced by the BBG 2011 is applicable 'subject to approval by the [Commission]'.

40 The referring court has doubts, in the first place, as to whether the limitation to the aid scheme introduced by the BBG 2011 needed to be notified to the Commission.

41 If it was necessary to notify the amended aid scheme at issue in the disputes in the main proceedings, the referring court is uncertain, in the second place, whether the consequence of the fact that the communication to the Commission did not fulfil all the formal conditions laid down in Regulation No 800/2008 is that the aid concerned must continue to be granted to all beneficiaries covered by the EAVG, as amended by the BBG, with the result that there was an obligation to implement the aid scheme existing prior to the legislative amendment introduced by the BBG 2011.

42 In the third place, the referring court is uncertain whether determining the tax reduction by using a specific calculation formula prescribed in national legislation is consistent with the requirement laid down in Article 44(3) of Commission Regulation (EU) No 651/2014, in accordance with which the calculation of the tax reduction must be based on a reduction of the applicable environmental tax rate or on the payment of a fixed compensation amount or on a combination of the two. Further, it is also uncertain of the temporal scope of that regulation.

43 In those circumstances, the Verwaltungsgerichtshof (Supreme Administrative Court) decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

'(1) In a situation such as that in the present case, does an amendment to an approved aid scheme whereby a Member State elects no longer to use the approval of that aid in connection with a particular (separable) group of beneficiaries, and thus simply reduces the level of aid granted under an existing aid measure, constitute an alteration of an aid scheme which is subject (in principle) to the obligation to notify laid down in Article 108(3) TFEU?

(2) In the event of a formal error in the application of [Regulation No 800/2008], is the standstill obligation laid down in Article 108(3) TFEU capable of rendering a restriction of an approved aid scheme inapplicable, with the result that the standstill obligation has the effect of compelling the Member State to pay aid to particular beneficiaries ("implementation obligation")?

(3) (a) Does an energy tax rebate scheme such as that at issue here, under which the amount of the energy tax rebate is clearly determined by law on the basis of a calculation formula, fulfil the conditions laid down in [Regulation No 651/2014]?
(b) Does Article 58(1) of [Regulation No 651/2014] have the effect of exempting such an energy tax rebate scheme for the period from January 2011?'

Consideration of the questions referred

Preliminary observations

44 It should be noted that the Austrian Government submits that a summary of information relating to the aid scheme at issue in the disputes in the main proceedings, under which a partial rebate of energy taxes on natural gas and electricity is envisaged solely for undertakings whose activity is shown to consist primarily in the manufacture of goods, was communicated to the Commission by the Republic of Austria and that that communication must be considered to be a notification under the simplified notification procedure provided for in Article 4 of Regulation No 794/2004.

45 In that regard, it should be borne in mind that, as the Court has found on many occasions, in a reference for a preliminary ruling under Article 267 TFEU, which is based on a clear separation of functions between the national courts and the Court of Justice, the national court alone has jurisdiction to find and assess the facts in the case in the main proceedings. In that context, the Court is only empowered to rule on the interpretation or validity of EU law in the light of the factual and

legal situation as described by the referring court, in order to provide that court with such guidance as will assist it in resolving the dispute before it (judgment of 27 April 2017, *A-Rosa Flussschiff*, C-620/15, EU:C:2017:309, paragraph 35 and the case-law cited).

46 In the present case, the questions put to the Court are based on the premiss that the aid scheme at issue in the disputes in the main proceedings was not notified to the Commission by the Republic of Austria in accordance with Article 108(3) TFEU. In particular, by its first and third questions, the referring court seeks to determine whether that scheme is subject to the notification requirement laid down in that provision or whether it is exempted from that requirement by reason of Regulation No 651/2014, while, by its second question, that court seeks to identify any consequences arising from an infringement of that requirement.

47 The observations submitted to the Court by the Commission and Dilly's Wellnesshotel are also based on that premiss. The Commission points out that the provision of summary information under Regulation No 800/2008 on the national rules at issue in disputes in the main proceedings cannot replace an appropriate notification under Article 108(3) TFEU and, further, that the Republic of Austria did not use the simplified notification form set out in Annex II to Regulation No 794/2004, in accordance with Article 4(2)(c) of that regulation.

48 Consequently, and without prejudice to the issue of the circumstances in which the notification of an aid scheme such as the one at issue in the disputes in the main proceedings can be considered as having been carried out in accordance with Article 108(3) TFEU, which is not the subject of the present reference for a preliminary ruling, the Court will provide answers to the questions put to it in the present case on the premiss that the aid scheme at issue in the main proceedings was not notified to the Commission.

The first question

49 By its first question, the referring court asks, in essence, whether Article 108(3) TFEU must be interpreted as meaning that national legislation which alters an aid scheme by restricting those eligible for such aid is, in principle, subject to the notification requirement laid down in that article.

50 First, it should be noted that the issue of that notification requirement is examined without prejudice to the possibility that the aid scheme at issue is exempted from that requirement because it is covered by a block exemption regulation; that possibility is examined in the context of the answer to the third question.

51 In the present case, as is apparent from paragraph 44 above, it appears that the national legislation at issue in the disputes in the main proceedings provides for a partial rebate of energy taxes on natural gas and electricity only for undertakings whose activity is shown to consist primarily in the manufacture of goods. Therefore, under that legislation, service providers, such as Dilly's Wellnesshotel, are excluded from the energy tax rebate.

52 In its first question, the referring court starts from the assumption — which is not contested in the context of the present case — that the aid scheme preceding the scheme at issue in the disputes in the main proceedings, which granted the right to a partial rebate of energy taxes to both manufacturing undertakings and service providers, was approved implicitly by the Commission in Decision 2005/565.

53 In those circumstances, that assumption must be accepted in the present case, subject always to it being well-founded, for the purposes of providing an answer to that question, with the result that the aid scheme preceding the scheme at issue in the disputes in the main proceedings is to be regarded as existing aid under Article 1(b)(ii) of Regulation No 659/1999.

54 With regard to the substance of the first question, it should be recalled that the notification requirement laid down in Article 108(3) TFEU is one of the fundamental features of the system of control put in place by the FEU Treaty in the field of State aid. Within that system, Member States are under an obligation, first, to notify to the Commission each measure intended to grant new aid or alter aid for the purposes of Article 107(1) TFEU and, secondly, not to implement such a measure until that institution has taken a final decision on the measure (judgment of 5 March 2019, *Eesti Pagar*, C-349/17, EU:C:2019:172, paragraph 56 and the case-law cited).

55 The obligation of the Member State concerned to notify any new aid to the Commission is set out in Article 2 of Regulation No 659/1999 (judgment of 21 July 2016, *Dilly's Wellnesshotel*, C-493/14, EU:C:2016:577, paragraph 32).

56 As the Court has held previously, 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 (see, inter alia, judgments of 9 August 1994, *Namur-Les assurances du crédit*, C-44/93, EU:C:1994:311, paragraph 13, and of 20 May 2010, *Todaro Nunziatina & C.*, C-138/09, EU:C:2010:291, paragraph 46).

57 In accordance with Article 1(c) of Regulation No 659/1999, new aid is defined as all aid schemes and individual aid, which is not existing aid, including alterations to existing aid.

58 In that respect, an alteration to existing aid is defined in Article 4(1) of Regulation No 794/2004 as 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.

59 In particular, under Article 4(2)(c) of Regulation No 794/2004, tightening of the criteria for the application of an authorised aid scheme is one of the alterations to existing aid which must, in principle, be notified.

60 Further, according to the case-law of the Court, the examination of whether a measure constitutes aid, within the meaning of Article 107 TFEU, is to take into account, inter alia, those who are eligible to be granted that aid so as to verify, in particular, the selective nature of that measure (see, to that effect, judgment of 8 November 2001, *Adria-Wien Pipeline and Wietersdorfer & Peggauer Zementwerke*, C-143/99, EU:C:2001:598, paragraphs 33 to 36, 40 and 55).

61 It follows that an alteration of the criteria used to identify those eligible for aid is not merely an alteration that is purely formal or administrative, but can have effects which may influence whether a measure must be classified as aid within the meaning of Article 107(1) TFEU and, consequently, the need to notify that aid in accordance with the requirement set out in Article 108(3) TFEU.

62 As the Commission rightly argues, the review that that institution is called upon to carry out following the notification, in accordance with the latter provision, of a plan to alter who will be eligible to benefit from an aid scheme, is not limited to verifying whether the alteration concerned has led to a reduction of those eligible, but involves, in particular, an assessment of whether the change in the application criteria resulting from that alteration distorts or threatens to distort competition by favouring certain undertakings or certain industries. It is the prior notification of such an alteration that makes it possible to verify precisely whether or not that is the case.

63 In view of the above, the answer to the first question is that Article 108(3) TFEU must be interpreted as meaning that national legislation which alters an aid scheme by restricting those eligible for such aid is, in principle, subject to the notification requirement laid down in that article.

The third question

The second part of the third question

64 By the second part of its third question — which should be examined first as it concerns the temporal scope of Regulation No 651/2014 — the referring court asks, in essence, whether Article 58(1) of that regulation must be interpreted as meaning that aid granted before the entry into force of that regulation, on the basis of an aid scheme such as the one at issue in the disputes in the main proceedings, may be exempted, under that regulation, from the notification requirement laid down in Article 108(3) TFEU.

65 As a preliminary point, it should be noted that, in accordance with Article 109 TFEU, the Council is authorised to make any appropriate regulations for the application of Article 107 TFEU and Article 108 TFEU and may in particular determine the conditions in which Article 108(3) TFEU is to apply and the categories of aid exempt from the procedure under that provision. In addition, as provided for in Article 108(4) TFEU, the Commission may adopt regulations relating to the categories of State aid that the Council has, pursuant to Article 109 TFEU, determined may be exempt from the procedure provided for in Article 108(3) TFEU (judgment of 5 March 2019, *Eesti Pagar*, C-349/17, EU:C:2019:172, paragraph 57 and the case-law cited).

66 Consequently, Regulation No 994/98, in accordance with which Regulation No 800/2008 was subsequently adopted, had itself been adopted pursuant to Article 94 of the EC Treaty (subsequently Article 89 EC and now Article 109 TFEU) (judgment of 5 March 2019, *Eesti Pagar*, C-349/17, EU:C:2019:172, paragraph 58 and the case-law cited). Regulation No 800/2008 was itself repealed and replaced by Regulation No 651/2014, which was also adopted under Regulation No 994/98.

67 It follows from the above that, notwithstanding the obligation of prior notification of each measure intended to grant or alter aid, which is incumbent on the Member States under the Treaties and, as follows from paragraph 54 of the present judgment, is one of the fundamental features of the system of monitoring in the field of State aid, if an aid measure adopted by a Member State fulfils the relevant conditions provided for in Regulation No 651/2014, that Member State may rely on the possibility of being exempt from its obligation to notify (see, with regard to Regulation No 800/2008, judgment of 21 July 2016, *Dilly's Wellnesshotel*, C-493/14, EU:C:2016:577, paragraph 36).

68 Conversely, it is apparent from Article 58(2) of Regulation No 651/2014 that any aid not exempted from the notification requirement of Article 108(3) TFEU by virtue of that regulation or other regulations adopted pursuant to Article 1 of Regulation No 994/98 previously in force shall be assessed by the Commission in accordance with the relevant frameworks, guidelines, communications and notices.

69 In that regard, and as was pointed out in paragraph 30 above, in the judgment of 21 July 2016, *Dilly's Wellnesshotel* (C-493/14, EU:C:2016:577), the Court held that an aid scheme such as the one at issue in the dispute that gave rise to that judgment was not exempt from the notification requirement under Regulation No 800/2008, since that scheme did not contain an express reference to that regulation in accordance with Article 3(1) thereof. It follows from the request for a preliminary ruling in the present case that the aid scheme at issue in the dispute that gave rise to that judgment is the same one at issue in the disputes in the main proceedings. It is apparent from the background to the disputes presented in that application, as set out in paragraphs 30 to 32 and paragraphs 35 and 36 above, that the appeals before the referring court were brought against the judgments by which the Bundesfinanzgericht (Federal Finance Court), following the judgment of 21 July 2016, *Dilly's Wellnesshotel* (C-493/14, EU:C:2016:577), granted the energy tax rebate requested by Dilly's Wellnesshotel.

70 The fact that, because of the absence of an express reference to Regulation No 800/2008 in the aid scheme at issue in the main proceedings, that scheme cannot benefit from an exemption under that regulation does not, in itself, prevent that scheme from fulfilling the relevant conditions laid down in Regulation No 651/2014, which has, as is apparent from paragraphs 9 and 66 above, repealed and replaced Regulation No 800/2008. As follows from recitals 2 to 4 of Regulation No 651/2014, following the review of Regulation No 800/2008, Regulation No 651/2014 aimed, in particular, to define better the conditions under which certain categories of aid can be considered compatible with the internal market and to extend the scope of block exemptions. Therefore, as is apparent from both Article 3 and recital 6 of Regulation No 651/2014, it is in the light of all those conditions — both general and specific to the category of aid concerned — laid down in Regulation No 651/2014, that it is necessary to assess whether aid can benefit from an exemption under the latter regulation.

71 Accordingly, with regard to whether aid granted on the basis of an aid scheme such as the one at issue in the disputes in the main proceedings may be exempted from the notification requirement under Regulation No 651/2014, it should be noted that, much like Regulation No 800/2008, as a qualification of the general rule that there is the obligation to notify, Regulation No 651/2014 and the conditions laid down by it must be interpreted strictly (see, by analogy, judgment of 21 July 2016, *Dilly's Wellnesshotel*, C-493/14, EU:C:2016:577, paragraph 37).

72 Such an approach is supported in the light of the aims of the general block exemption regulations, as referred to in recitals 4 and 5 of Regulation No 994/98. While the Commission is authorised to adopt such regulations, with a view to ensuring efficient supervision of the competition rules concerning State aid and simplifying administration, without weakening Commission monitoring in that area, the aim of such regulations is also to strengthen transparency and legal certainty. Fulfilling the conditions laid down by those regulations, including, therefore, those laid down by Regulation No 651/2014 enables those aims to be fully achieved (see, to that effect, judgment of 21 July 2016, *Dilly's Wellnesshotel*, C-493/14, EU:C:2016:577, paragraph 38).

73 In the present case, the aid at issue in the disputes in the main proceedings concerns a rebate in respect of energy taxes relating to the year 2011 and to the period between February 2013 and January 2014, whereas Regulation No 651/2014 entered into force on 1 July 2014, in accordance with Article 59 thereof.

74 In that respect, it should be observed that, as can be seen from the title itself of Article 58 of Regulation No 651/2014, that article contains transitional provisions applicable to the State aid covered by its provisions. In particular, paragraph 1 of that article provides that Regulation No 651/2014 is to apply to individual aid granted before its entry into force, if the aid fulfils all the conditions laid down in that regulation, with the exception of Article 9 thereof, the latter article laying down publication and information obligations relating to aid measures.

75 According to Article 2(14) of Regulation No 651/2014, the concept of 'individual aid' within the meaning of that regulation is to include, in particular, any award of aid to individual beneficiaries on the basis of an aid scheme. The tax relief requested by the applicant in the disputes in the main proceedings is covered by that definition.

76 It follows that, according to the very wording of Article 58(1) of Regulation No 651/2014, although the aid at issue in the disputes in the main proceedings was granted before the entry into force of that regulation, it may nevertheless be exempted from the notification requirement under that regulation.

77 That interpretation is also consistent with the objective pursued by Regulation No 651/2014, which, as can be seen from recital 3 of that regulation, is to allow a better prioritisation of State aid enforcement activities. As is apparent from recital 2 of that regulation, the review of Regulation No 800/2008

constituted a central element of State aid modernisation, which involved a wider review of the State aid rules and included among its main objectives the objective of focusing Commission *ex ante* scrutiny of aid measures on cases with the biggest impact on the internal market.

78 The argument put forward by Dilly's Wellnesshotel that Article 58(1) of Regulation No 651/2014 must be interpreted in conjunction with paragraphs 2 and 3 of that article does not call into question the interpretation of that paragraph set out in paragraph 76 above. As the Advocate General states in point 53 of his Opinion, Article 58(1) of Regulation No 651/2014 does not impose any requirement that the conditions laid down in the other paragraphs of that article must be fulfilled in order for Article 58(1) to be applicable, since paragraphs 1 to 4 of Article 58 each concern transitional rules for different situations.

79 In view of the above, it must be concluded that, as is argued by the Austrian Government and the Commission, Article 58(1) of Regulation No 651/2014 exempts individual aid granted before 1 July 2014, such as that paid under the scheme at issue in the main proceedings, from the notification requirement provided that it fulfils all the conditions laid down in that regulation, with the exception of Article 9 thereof.

80 Consequently, the answer to the second part of the third question is that Article 58(1) of Regulation No 651/2014 must be interpreted as meaning that aid granted before the entry into force of that regulation, on the basis of an aid scheme such as the one at issue in the disputes in the main proceedings, may be exempted, under that regulation, from the notification requirement laid down in Article 108(3) TFEU.

The first part of the third question

81 In the first part of the third question, the referring court refers generally to the conditions laid down in Regulation No 651/2014 without mentioning a specific provision of that regulation. However, it is apparent from the very wording of that question and from other statements in the request for a preliminary ruling, such as those set out in paragraph 42 above, that, by that question, that court seeks to ascertain whether the condition set out in Article 44(3) of that regulation is satisfied in the context of the disputes in the main proceedings.

82 In particular, the wording of the first part of the third question refers to the fact that the national legislation at issue in the disputes in the main proceedings explicitly lays down the amount of the energy tax rebate in a formula, whereas Article 44(3) of Regulation No 651/2014 provides that aid schemes taking the form of tax reductions must be based on a reduction in the applicable rate of environmental tax, the payment of a fixed amount of compensation or a combination of the two. Further, although the referring court sets out in detail in its request for a preliminary ruling the reasons for its doubts regarding whether the aid scheme at issue in the disputes in the main proceedings may be considered to satisfy the condition laid down in that article, the referring court states expressly that it takes the view that both the conditions in Article 44(1), (2) and (4) of Regulation No 651/2014 and those resulting from various other provisions in Chapter I of that regulation are satisfied in the context of the disputes in the main proceedings.

83 Consequently, it should be concluded that, by the first part of its third question, the referring court asks, in essence, whether Article 44(3) of Regulation No 651/2014 must be interpreted as meaning that an aid scheme, such as the one at issue in the disputes in the main proceedings, in which the amount of an energy tax rebate is specifically fixed in a calculation formula provided for by the national legislation establishing that scheme, complies with that provision.

84 In that regard, it should be noted that Article 3 of Regulation No 651/2014 provides that, inter alia, aid schemes and individual aid granted under aid schemes are to be compatible with the internal market within the meaning of Article 107(2) or (3) TFEU and are to be exempted from the notification requirement of Article 108(3) TFEU provided that such aid fulfils all the conditions laid down in Chapter I of that regulation, as well as the specific conditions for the relevant category of aid laid down in Chapter III of that regulation.

85 The provisions of Article 44 of Regulation No 651/2014, which appear in Chapter III of that regulation, are applicable, as is apparent from the heading itself of that article and from paragraph 1 thereof, to aid in the form of reductions in environmental taxes under Directive 2003/96. Therefore, those provisions are applicable in the context of the disputes in the main proceedings, without prejudice to the matter of whether or not the conditions provided for in that directive are actually satisfied in the case of the aid scheme at issue in the disputes in the main proceedings, which is for the referring court to determine.

86 Thus, as regards the question whether such an aid scheme meets the requirements of Article 44(3) of Regulation No 651/2014, it is clear from the element of choice granted to the Member States by the EU legislature in that article — in so far as those States are allowed to provide for a reduction in the applicable rate of taxation, the payment of a fixed amount of compensation or a combination of the two — that, as the Commission maintains, that provision aims to ensure that the tax reduction mechanism adopted makes it possible to determine in a transparent manner which tax reduction is actually applicable, while leaving some discretion to Member States as regards the detailed rules thereof.

87 In the latter respect, recital 64 of Regulation No 651/2014 specifies, in particular, that, in order better to preserve the price signal which the environmental tax aims to give to undertakings, Member States should have the option to design the tax reduction scheme based on a fixed annual compensation amount (tax refund) disbursement mechanism.

88 It should also be noted that the objective of ensuring the transparency of the mechanism for calculating the tax reduction is in line with the objective pursued by Regulation No 651/2014 and highlighted in recitals 3 to 5 of that regulation of giving greater importance to transparency and control of compliance with the State aid rules at national and EU levels. As is apparent from paragraph 72 above, that objective is one of those pursued, in general, by the general block exemption regulations.

89 In the present case, it is apparent from the evidence put before the Court that the tax reductions which form the aid granted under the aid scheme at issue in the disputes in the main proceedings are based on a formula defined precisely in the national legislation establishing that scheme. In particular, in accordance with that legislation, energy taxes must be refunded once per calendar year if they exceed, in total, 0.5% of the company's net output value. In addition, that legislation limits the amount of the rebate by reference to the minimum taxation amounts provided for in Directive 2003/96. Additionally, the national administration has no discretion as to the amount of the tax reduction arising from that formula.

90 Thus, under that scheme, the amount of energy taxes to be refunded corresponds either to the difference between the full amount of those taxes and 0.5% of the beneficiary undertaking's net output value, or to the difference between the full amount of those taxes and the minimum taxation levels applicable to the energy sources concerned. Of these two methods of calculation, the one that determines the lowest amount of energy taxes to be refunded is applied.

91 It follows that, in accordance with the formula that it lays down, the national legislation at issue in the main proceedings determines two potential reduced rates of environmental tax and dictates which of those two is to be applied for each beneficiary undertaking. Such a formula does not allow the

national authorities freely to determine the amount of tax that the undertaking must actually pay, the latter corresponding to the amount retained by the tax authorities after payment of the rebate calculated in accordance with that formula.

92 In those circumstances, it must be noted that, as the Commission claims, each of the alternative calculation methods comprising the formula laid down in the national legislation at issue in the main proceedings, as set out in paragraphs 89 and 90 of the present judgment, involves a reduction of the applicable rate of environmental tax within the meaning of Article 44(3) of Regulation No 651/2014. In the case of the first of those calculation methods, the applicable tax rate is effectively reduced to 0.5% of the beneficiary undertaking's net output value, whereas, in the case of the second calculation method, the applicable tax rate is effectively reduced to the minimum level of taxation applicable to the energy source concerned.

93 Consequently, it should be stated that a tax scheme such as the one at issue in the disputes in the main proceedings is based on one of the specific environmental tax reduction mechanisms provided for in Article 44(3) of Regulation No 651/2014, which means that the condition laid down in that provision must be considered to be satisfied.

94 That finding is not called into question by the fact that the national legislation at issue in the main proceedings lays down a calculation formula that results in two different reduced rates of taxation, since, as can be seen from paragraphs 89 to 91 above, that legislation also makes it possible to determine which of those two rates must actually be applied in a specific case and the existence of two alternative rates of taxation does not therefore undermine the objective pursued by Article 44(3) of Regulation No 651/2014 as set out in paragraphs 86 and 87 of the present judgment.

95 In the light of the foregoing, the answer to the first part of the third question is that Article 44(3) of Regulation No 651/2014 must be interpreted as meaning that an aid scheme, such as the one at issue in the disputes in the main proceedings, in which the amount of an energy tax rebate is specifically fixed in a calculation formula provided for by the national legislation establishing that scheme, complies with that provision.

The second question

96 By its second question, the referring court seeks, in essence, to determine what inferences it should draw for the purposes of the disputes at issue in the main proceedings if the Court finds that an aid scheme, such as the one at issue in those disputes, should have been notified in accordance with Article 108(3) TFEU, with the result that the aid granted under that scheme should be regarded as being unlawful.

97 However, it follows from the answers to the first and third questions that, notwithstanding the notification requirement that arises in principle under Article 108(3) TFEU in the case of an aid scheme such as the one at issue in the disputes at issue in the main proceedings, aid granted under that scheme during the periods concerned in the context of those disputes is exempted from that obligation under Article 3 of Regulation No 651/2014, in so far as all the conditions laid down in Chapter I and Article 44 of that regulation are met, which is for the national court to determine.

98 In those circumstances, there is no need to answer the second question.

Costs

99 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:

1. **Article 108(3) TFEU must be interpreted as meaning that national legislation which alters an aid scheme by restricting those eligible for such aid is, in principle, subject to the notification requirement laid down in that article.**

2. **Article 58(1) of 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 [TFEU] must be interpreted as meaning that aid granted before the entry into force of that regulation, on the basis of an aid scheme such as the one at issue in the disputes in the main proceedings, may be exempted, under that regulation, from the notification requirement laid down in Article 108(3) TFEU.**

3. **Article 44(3) of Regulation No 651/2014 must be interpreted as meaning that an aid scheme, such as the one at issue in the disputes in the main proceedings, in which the amount of an energy tax rebate is specifically fixed in a calculation formula provided for by the national legislation establishing that scheme, complies with that provision.**

[Signatures]