



Reports of Cases

Case T-101/18

(Publication in extract form)

Republic of Austria

v

European Commission

Judgment of the General Court (Third Chamber), 30 November 2022

(State aid – Nuclear industry – Aid planned by Hungary for the development of two new nuclear reactors at the Paks site – Decision declaring the aid compatible with the internal market subject to compliance with certain commitments – Article 107(3)(c) TFEU – Compliance of the aid with EU law other than State aid law – Inextricable link – Promotion of nuclear energy – First paragraph of Article 192 of the Euratom Treaty – Principle of protection of the environment, ‘polluter pays’ principle, precautionary principle and principle of sustainability – Determination of the economic activity concerned – Market failure – Distortion of competition – Proportionality of the aid – Need for State intervention – Determination of the aid elements – Public procurement procedure – Obligation to state reasons)

1. *State aid – Examination by the Commission – Compatibility of aid with the internal market – Discretion – Compliance with the coherence between the provisions governing State aid and other provisions of the Treaty – Obligation imposed only in relation to aspects of the aid inextricably linked to its purpose – Aid consisting in the provision free of charge of two new nuclear reactors for the purpose of their operation – Award of the contract for the construction of those reactors not constituting an aspect that is inextricably linked to the object of the aid*
(Arts 107(1) and 108 TFEU; European Parliament and Council Directive 2014/25)

(see paragraphs 27-39)

2. *State aid – Examination by the Commission – Compatibility of aid with the internal market – Discretion – Compliance with the coherence between the provisions governing State aid and other provisions of the Treaty – Obligation for the Commission to carry out a fresh examination of its findings in previous infringement proceedings concerning other provisions of the Treaty in the absence of new information – None*
(Arts 107(1) and 108 TFEU)

(see paragraphs 40-49)

3. *State aid – Prohibition – Exceptions – Aid capable of being regarded as compatible with the internal market – Assessment in relation to Article 107(3)(c) TFEU – Criteria – No impact on trading conditions that is contrary to the common interest – Assessment – Weighing-up of the advantages of the aid measures and their adverse effect on the internal market – Judicial review – Limits – Manifest error of assessment – None*
(Art. 107(3)(c) TFEU)

(see paragraphs 55, 56, 98-102, 135-148, 150, 151, 153-155, 157-161, 167-175)

4. *State aid – Prohibition – Exceptions – Aid capable of being regarded as compatible with the internal market – Assessment in relation to Article 107(3)(c) TFEU – Criteria – Pursuit of a public interest objective – Whether the aid is appropriate, necessary and not disproportionate – Obligation to make the aid measure subject to a tender procedure in order to ensure its proportionality – None*
(Art. 107(3)(c) TFEU)

(see paragraphs 58-65)

5. *State aid – Prohibition – Exceptions – Aid capable of being regarded as compatible with the internal market – Assessment in relation to Article 107(3)(c) TFEU – Criteria – No impact on trading conditions that is contrary to the common interest – Weighing-up of the advantages of the aid measures and their adverse effect on the internal market – Components of the internal market*
(Art. 107(3)(c) TFEU)

(see paragraphs 71-78, 131)

6. *State aid – Prohibition – Exceptions – Aid capable of being regarded as compatible with the internal market – Assessment in relation to Article 107(3)(c) TFEU – Measures pursuing an objective covered by the Euratom Treaty – Right of the Member States to determine the structure of their energy supply – Choice of nuclear energy*
(Arts 2(c) and 192 EA; Arts 107(3)(c) and 194(2) TFEU)

(see paragraphs 82-86, 97)

7. *State aid – Prohibition – Exceptions – Aid capable of being regarded as compatible with the internal market – Aid for rescuing an undertaking in difficulty – Guidelines on State aid for rescuing and restructuring undertakings in difficulty – Undertaking in difficulty – Definition*
(Commission Communication 2014/C 249/01, points 20(a) and 21)

(see paragraphs 111-122)

8. *State aid – Prohibition – Exceptions – Aid capable of being regarded as compatible with the internal market – Assessment in relation to Article 107(3)(c) TFEU – Criteria – Whether the aid is appropriate, necessary and not disproportionate – Examination by the*

Commission – Obligation to quantify the grant equivalent arising from the aid measure – None (Art. 107(3)(c) TFEU)

(see paragraph 184)

Résumé

Construction of new nuclear reactors: the General Court dismisses the action brought by Austria to contest Hungarian investment aid approved by the Commission

By decision of 6 March 2017¹ ('the contested decision'), the European Commission approved investment aid, notified by Hungary, for the State-owned undertaking MVM Paks II Nuclear Power Plant Development Private Company Limited by Shares ('the Paks II company'). The aid concerns the operation of two nuclear reactors under construction at the Paks nuclear power station site, which are gradually to replace the four nuclear reactors already in operation on that site.

That investment aid ('the aid at issue'), which consists, in essence, of the provision free of charge of the new nuclear reactors to the Paks II company for the purpose of their operation, is in large part financed by a loan in the form of a revolving credit facility of EUR 10 billion granted by the Russian Federation to Hungary in the framework of an intergovernmental agreement on cooperation on the peaceful use of nuclear energy. In accordance with that agreement, the task of constructing the new reactors was entrusted, by means of a direct award, to the company Nizhny Novgorod Engineering Company Atomenergoproekt ('JSC NIAEP').

In the contested decision, the Commission declared the aid at issue compatible with the internal market, subject to conditions, in accordance with Article 107(3)(c) TFEU. Under that provision, aid to facilitate the development of certain economic activities or of certain economic areas may be considered to be compatible with the internal market, in so far as it does not adversely affect trading conditions to an extent contrary to the common interest.

The Republic of Austria brought an action for annulment of the contested decision.

Findings of the Court

In the first place, the General Court rejects the plea claiming that the contested decision was unlawful in that the Commission declared the aid at issue compatible with the internal market despite the fact that the direct award to JSC NIAEP of the contract for the construction of the new nuclear reactors allegedly constitutes an infringement of EU rules governing public procurement.

In that regard, the Republic of Austria argued in particular that since the award of the contract for the construction of the new reactors was an aspect that was inextricably linked to the aid at issue, the Commission was required to examine it also in the light of the EU rules on public procurement. According to the Republic of Austria, it is apparent, furthermore, from the

¹ Commission Decision (EU) 2017/2112 of 6 March 2017 on State aid SA.38454 – 2015/C (ex 2015/N) which Hungary is planning to implement for supporting the development of two new nuclear reactors at Paks II nuclear power station (OJ 2017 L 317, p. 45).

judgment in *Austria v Commission*² that the Commission should have assessed the aid at issue in the light of the provisions of EU law on public procurement irrespective of whether the award of the construction contract constituted an aspect that was inextricably linked to that aid.

The General Court, first of all, rejects the line of argument put forward by the Republic of Austria on the basis of the judgment in *Austria v Commission*. While it is apparent from that judgment that the economic activity promoted by the aid must be compatible with EU law, no infringement of EU law owing to the activity supported, namely the production of nuclear energy, has been raised by the Republic of Austria in the present case. Moreover, that judgment does not show that the Court of Justice intended to broaden the scope of the review falling to the Commission in the context of a procedure to determine whether State aid is compatible with the internal market by abandoning its case-law under which a distinction should be drawn between aspects that are inextricably linked to the object of the aid and those that are not.

In addition, recognition of an obligation requiring the Commission, in a procedure to determine whether State aid is compatible with the internal market, to adopt a definitive position on the existence or absence of an infringement of provisions of EU law distinct from those relating to State aid, irrespective of the link between the aspect of the aid and the object of that aid, would run counter to, first, the procedural rules and guarantees specific to the procedures specially established for control of the application of those provisions and, second, the principle of autonomy of administrative procedures and remedies.

In the light of those explanations, the Court finds, next, that the decision to award the contract for the construction of the two new reactors, which preceded the aid measure at issue, does not constitute an aspect that is inextricably linked to the object of that aid. The carrying out of a public procurement procedure and the possible use of another undertaking for the construction of the reactors would alter neither the object of the aid, namely the provision free of charge of two new reactors for the purpose of their operation, nor the beneficiary of the aid, which is the Paks II company. Furthermore, assuming that a tender procedure may have had an influence on the amount of the aid, which the Republic of Austria has not proven, such a factor would not by itself have had any effect on the advantage which that aid constituted for its recipient, namely the provision free of charge of two new reactors with a view to their operation.

Lastly, the Court states that, contrary to what is argued by the Republic of Austria, the Commission was justified in referring in the contested decision to its assessment carried out in earlier infringement proceedings, in which it had found that the direct award of the task of constructing the two new reactors to JSC NIAEP did not infringe EU public procurement law. The principle of legal certainty precludes the Commission from carrying out, in the State aid procedure, a fresh examination of the award of the construction contract in the absence of any new information as against the time when it decided to close the infringement proceedings.

In the second place, the Court rejects the pleas alleging disproportionate distortions of competition and unequal treatment which result in the exclusion of producers of renewable energy from the liberalised internal electricity market. In that regard, the Court observes that the Member States are free to determine the composition of their own energy mix and that the Commission cannot require that State financing be allocated to alternative energy sources.

² Judgment of 22 September 2020, *Austria v Commission* (C- 594/18 P, EU:C:2020:742).

In the third place, after rejecting the plea alleging the strengthening or creation of a dominant market position, the Court also dismisses the plea relating to risks to the liquidity of the Hungarian wholesale electricity market.