



PRESS RELEASE No 24/25

Luxembourg, 27 February 2025

Advocate General's Opinion in Case C-59/23 P | *Austria v Commission (Paks II nuclear power station)*

Advocate General Medina proposes to set aside the judgment of the General Court that upheld the Commission's decision to approve aid from Hungary for two new nuclear reactors at Paks

The Commission should have assessed whether the direct award of the construction contract to a Russian undertaking is compatible with EU law on public contracts

By decision of 6 March 2017, ¹ the European Commission approved investment aid which Hungary intended to grant to the State-owned company MVM Paks II ² for the development of two new nuclear reactors at the Paks nuclear power station site, south of Budapest. The new reactors were gradually to replace the four existing reactors. MVM Paks II was intended to become, free of charge, the owner and operator of the two new reactors. Their construction was to be financed entirely by the Hungarian State.

The construction of the new reactors was entrusted, by means of a direct award, to the Russian company Nizhny Novgorod Engineering, ³ in accordance with an agreement between Russia and Hungary on cooperation on the peaceful use of nuclear energy. Russia also agreed under that agreement to provide Hungary with a State loan in order to finance the new reactors. ⁴

Austria ⁵ contested the Commission's approval decision ⁶ before the General Court of the European Union. By judgment of 30 November 2022, ⁷ the General Court dismissed the action. Austria ⁸ subsequently lodged an appeal with the Court of Justice against the judgment of the General Court.

In her Opinion today, Advocate General Laila Medina proposes that the Court of Justice should uphold the appeal and set aside the judgment of the General Court.

According to the Advocate General, Austria is correct in arguing that the Commission, when assessing the aid at issue, should have examined whether the direct award to Nizhny Novgorod Engineering of the contract for the construction of the new reactors is compatible with the European Union's provisions on public contracts.

That award was in fact an aspect of the aid which had an inextricable link with that aid. ⁹ According to the Advocate General, an inextricable link of that kind exists with regard to factors or conditions which are necessary for the attainment of the object of the aid or for its functioning, without which the planned State intervention cannot achieve the objectives that it pursues. In such a situation, the Commission is required to take into account, in assessing the compatibility of State aid with the internal market, a possible infringement of provisions of EU law other than those relating to aid.

According to the Advocate General, the Commission may fulfil its obligation to carry out such an examination by referring to infringement proceedings that it has initiated against the Member State concerned and that it has closed after finding that there was no infringement of the relevant provisions, which in the present concern public

contracts. That is what the Commission had done, in the alternative, in the contested decision. However, since it made a mere reference, without setting out, in the contested decision, the considerations which had led it to find that there had been no infringement, that decision did not provide a sufficient statement of reasons on that issue.

The Advocate General is of the view, in addition, that the General Court failed to carry out a sufficient review of the Commission's assessment of the proportionality of the aid and that the judgment under appeal is vitiated by a failure to state reasons on that issue.

NOTE: The Advocate General's Opinion is not binding on the Court of Justice. It is the role of the Advocates General to propose to the Court, in complete independence, a legal solution to the cases for which they are responsible. The Judges of the Court are now beginning their deliberations in this case. Judgment will be given at a later date.

NOTE: An appeal, on a point or points of law only, may be brought before the Court of Justice against a judgment or order of the General Court. In principle, the appeal does not have suspensive effect. If the appeal is admissible and well founded, the Court of Justice sets aside the judgment of the General Court. Where the state of the proceedings so permits, the Court of Justice may itself give final judgment in the case; otherwise, it refers the case back to the General Court, which is bound by the decision given by the Court of Justice on the appeal.

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The [full text](#) of the Opinion is published on the CURIA website on the day of delivery.

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¹ [Commission Decision \(EU\) 2017/2112](#) of 6 March 2017 on the measure/aid scheme/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 ('the contested decision').

² MVM Paks II Nuclear Power Plant Development Private Company Limited by Shares.

³ Nizhny Novgorod Engineering Company Atomenergoproekt.

⁴ Russia undertook to provide a revolving credit facility of €10 billion. Hungary is to provide an additional amount of €2.5 billion from its own budget.

⁵ Supported by Luxembourg.

⁶ The Commission was supported by Hungary, the Czech Republic, France, Poland, Slovakia and the United Kingdom.

⁷ Judgment of the General Court of 30 November 2022, *Austria v Commission*, [T-101/18](#) (see also [Press Release No 192/22](#)).

⁸ Further supported by Luxembourg. The Commission, by contrast, is supported by Hungary, the Czech Republic, France and Poland.

⁹ The choice of Nizhny Novgorod Engineering as the undertaking responsible for the construction of the new reactors was an integral part of the intergovernmental agreement and the loan granted by Russia to Hungary was linked to such a choice.