



Press and Information

General Court of the European Union

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Judgment in Joined Cases T-80/06 and T-182/09  
Budapesti Erőmű Zrt v Commission

**The General Court confirms that the power purchase agreement made between private company Budapesti Erőmű and Hungarian public undertaking MVM constitutes unlawful State aid**

*Although signed before Hungary's accession to the European Union, the agreement must be examined, as from that accession, in the light of the European Union's rules on State aid*

In the mid-1990s Hungary sought to modernise the infrastructure of power generation in order to ensure security of supply. Since modernisation required significant capital investment, the Hungarian State tried to encourage foreign power generators to invest in Hungary. To that end, Hungary entered into long-term power purchase agreements ('PPAs') under which the State-owned public undertaking Magyar Villamos Művek Zrt (MVM) undertook, as a 'single buyer', to buy a fixed quantity of electricity at a fixed price over a number of years or even decades in order to supply the Hungarian retail market. The long-term PPAs thereby guaranteed a predictable return on investment to the generators.

Budapesti Erőmű Zrt, a Hungarian subsidiary of Électricité de France Internationale SA, was privatised by the Hungarian State in 1996. It manages four power plants which supply district heating for the Budapest region and which also generate electricity. Three of those plants<sup>1</sup> entered into long-term PPAs with MVM, the last of which is due to expire in 2024.

In November 2005, the Commission initiated a procedure to examine the compatibility of the PPAs with European Union law on State aid. Budapesti Erőmű Zrt subsequently brought an action for annulment before the General Court against the Commission's decision to initiate an investigation procedure (Case T-80/06).

The Commission decided on 4 June 2008 that the PPAs constituted State aid that was incompatible with the common market and had to be recovered from the beneficiary companies by the Hungarian State. According to the Commission, the PPAs shielded the power generators concerned from any commercial risk and thus put them in a better position than other power generators on the market. That decision also was challenged by Budapesti Erőmű Zrt before the General Court<sup>2</sup> (Case T-182/09).

In its judgment the General Court first considers whether the fact that the PPAs were concluded before Hungary's accession to the European Union means that they cannot constitute State aid that is contrary to EU law. In that context, the Court notes that the State aid measures adopted by Hungary before 1 May 2004 which remain applicable after that date and compatible with the common market are listed in Hungary's Act of Accession. Since the PPAs are not listed among those measures, they must be regarded as new aid and their compatibility with EU law can be considered by the Commission as from Hungary's accession to the European Union. Furthermore, the Court points out that Hungary's Act of Accession specifically provides that a measure which

<sup>1</sup> The Kelenföld, Újpest and Kispest power plants.

<sup>2</sup> Pannon Hőerőmű ([T-352/08](#)), AES-Tisza Erőmű ([T-468/08](#)) and Dunamenti Erőmű ([T-179/09](#)) have also brought actions against the Commission's decision on the PPAs. Those cases are currently being considered by the General Court.

was not regarded as State aid when it was introduced can become State aid at the time of Hungary's accession to the EU.

Next, the Court addresses the question whether the plants concerned could have negotiated equally favourable contractual terms if the other party to the contract had been a buyer acting on a purely commercial basis, instead of a public undertaking. The Court finds that the fact that power generators are given a guarantee that a fixed quantity of their product will be purchased at a fixed price for periods as long as those laid down in the PPAs does not correspond to European wholesale market conditions in that sector. On that market, the amount of energy that power generators can sell and the sale price that they can expect depend on the amount of energy requested, which is constantly fluctuating.

Thus, by having undertaken to buy fixed quantities of electricity irrespective of actual demand for that product at any given time, MVM runs a serious risk of being obliged to buy excessive quantities of electricity and of suffering losses on resale. A private operator in a comparable situation on the market would not have taken such a risk. In those circumstances, the Court confirms the Commission's conclusion that **the PPAs enabled power generators to enjoy economic advantages which they would not have been able to obtain if MVM had acted in accordance with the rules of a competitive market.**

Lastly, as regards the calculation of the exact amount of the aid to be recovered, the Court observes that this must be based on a simulation of the conditions under which MVM would have bought the electricity in the period between 1 May 2004 and the date of termination of the PPAs if it had not been bound by the constraints imposed on it by the PPAs. The Court finds that the Commission was right to choose a simulation method based on the electricity 'spot' market<sup>3</sup>, as any other available method would have introduced less objective assumptions and would have led to less reliable results.

In those circumstances, **the General Court dismisses in their entirety the actions brought by Budapesti Erőmű Zrt.**

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**NOTE:** An appeal, limited to points of law only, may be brought before the Court of Justice against the decision of the General Court within two months of notification of the decision.

**NOTE:** An action for annulment seeks the annulment of acts of the institutions of the European Union that are contrary to European Union law. The Member States, the European institutions and individuals may, under certain conditions, bring an action for annulment before the Court of Justice or the General Court. If the action is well founded, the act is annulled. The institution concerned must fill any legal vacuum created by the annulment of the act.

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

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<sup>3</sup> 'Spot' markets are mainly day-ahead markets, on which electricity is traded one day before physical delivery takes place, unlike 'forward' markets, on which power is traded for delivery further ahead in time.