



## PRESS RELEASE No 192/22

Luxembourg, 30 November 2022

Judgment of the General Court in Case T-101/18 | *Austria v Commission*

### **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 2017<sup>1</sup> ('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 €10 billion granted by Russia 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.

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, 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 Austria, it is apparent, furthermore, from the judgment in *Austria v Commission*<sup>2</sup> 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.

<sup>1</sup> 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 (OJ 2017 L 317, p. 45).

<sup>2</sup> Judgment of 22 September 2020, *Austria v Commission*, [C 594/18 P](#) (also see [Press release No 112/20](#)).

The General Court, first of all, rejects the line of argument put forward by 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 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 General 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 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 General Court, states that, contrary to what is argued by 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 General 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 General 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.

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

**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.

**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 and ten days of notification of the decision.

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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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