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Antitrust Case Laws e-Bulletin

Preview

The EU Court of Justice confirms that the nuclear energy sector is subject to state aid rules (*Hinkley Point C*)

STATE AID, ENERGY, JUDICIAL REVIEW, PUBLIC ORDER, EUROPEAN UNION, ENVIRONMENT PROTECTION, STATE'S LIABILITY, STATE AID COMPATIBILITY, APPLICABLE LAW, ELECTRICITY

EU Court of Justice, *Hinkley Point C*, C-594/18 P, 22 September 2020

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On 22 September 2020, the Grand Chamber of the Court of Justice ('**Court**') dismissed Austria's appeal against the General Court's Judgment [1] endorsing Commission Decision (EU) 2015/658 [2] ('**the Judgment**'). The Judgment was the first opportunity for the Court to rule whether the nuclear energy sector is subject to State aid rules and indicate when aid for the construction of a nuclear power plant can be declared compatible by the European Commission ('**Commission**') pursuant to Art. 107(3)(c) TFEU. As such, the Judgment provides guidance on the applicability of EU law in the nuclear energy sector as well as the interpretation of Art. 107(3)(c) TFEU.

Background

The contested Commission Decision concerned the approval of three measures adopted by the UK to support NNB Generation Company Limited ('**NNBG**') – a subsidiary of EDF Energy plc ('**EDF**') – for the construction of the Hinkley Point C nuclear power plant ('**Hinkley Point C**'). The three measures covered (i) a 'contract for difference' intended to ensure price stability for electricity sales during the operational phase of Hinkley Point C, [3] (ii) a political agreement providing compensation in case of an early shutdown due to political reasons, and (iii) a credit guarantee.

The measures were notified to the Commission on 22 October 2013. On 8 October 2014, the Commission declared the aid compatible pursuant to Art. 107(3)(c) TFEU after examining the measures under the formal investigation procedure. Austria sought the annulment of that Decision before the General Court, which dismissed the action in its 12 July 2018 Judgment.

In today's ruling, the Court confirmed the General Court's Judgment and answered affirmatively the question whether the construction of a nuclear power plant may benefit from State aid approved by the Commission pursuant to Art. 107(3)(c) TFEU.

Court's ruling

EU law applicable in the nuclear energy sector – Principles

No nuclear exception to State aid rules

The Court confirms the General Court's view that State aid rules included in the TFEU also apply to the nuclear energy sector as the Euratom Treaty does not regulate State aid.

The Court starts by explicitly confirming that the Euratom Treaty has the same legal value as the TFEU. Subsequently, the Court highlights the sectoral nature of the Euratom Treaty and qualifies it as being *lex specialis* compared to the TFEU. Following Advocate General ("AG") Hogan's Opinion, the Court concludes that the Euratom Treaty's specific character does not prevent the TFEU rules to apply in areas which are not regulated by the Euratom Treaty (e.g., for State aid matters).

No nuclear exception to EU environmental rules

Using a similar reasoning, the Court holds that since the Euratom Treaty provisions "*do not deal exhaustively with the environmental issues that concern the nuclear energy sector*" [4], the specific nature of the Euratom Treaty does not preclude the application of EU environmental rules. The Court thus departs from the General Court's Judgment on this point and holds that the relevant environmental principles apply to the nuclear energy sector.

EU law applicable in the nuclear energy sector – Application

State aid measures can be authorized as compatible aid under Art. 107(3)(c) TFEU when two conditions are met:

- The State aid measure must be intended to facilitate the development of certain economic activities or of certain economic areas (the so-called '**positive requirement**'); and
- The State aid measure must not adversely affect trading conditions to an extent contrary to the common interest (the so-called '**negative requirement**'). *An aid does not have to actively pursue an objective of common interest under Art. 107(3)(c) TFEU*

Following AG Hogan's Opinion, the Court notes that Art. 107(3)(c) TFEU only contains the two conditions mentioned above. There is no further separate condition requiring that the aid itself must pursue an objective of common interest (unlike under Art. 107(3)(b) TFEU which concerns aid to promote the execution of an important project of common European interest or to remedy a serious disturbance in the economy of a Member State).

The reference to 'common interest' included in Art. 107(3)(c) TFEU is to be read in light of the negative requirement in which it is embedded (second condition). Such reading makes clear that an aid is not required to actively pursue an objective of common interest but that it simply cannot negatively impact trading conditions to an extent contrary to the common interest. In other words, the focus lies on the measure's impact on the internal market rather than on the public policy it does or does not pursue.

Exploiting nuclear energy is part of the rights conferred to Member States by EU law (Art. 194 TFEU) and as such cannot be considered to automatically violate EU environmental rules

As a rule, State aid violating EU law provisions cannot be declared compatible. Consequently, State aid for an economic activity falling within the nuclear energy sector that is shown upon examination to contravene EU environmental rules cannot be declared compatible with the internal market. [5]

However, Art. 194(2) TFEU grants Member States the right to choose their energy sources, including nuclear energy, and the general structure of their energy supply. By granting State aid to Hinkley Point C, the UK simply exercises its right pursuant to Art. 194(2) TFEU. That is to say, the UK granted State aid in support of an activity authorized under EU law.

As such, State aid for the construction of a nuclear power plant cannot “*in all circumstances*” be precluded by EU environmental law and be automatically deemed incompatible. [6] The Commission needs to assess on case by case basis whether the aid respects environmental rules such as the principle of the protection of the environment, the precautionary principle, the ‘polluter pays’ principle, and the principle of sustainability.

Only negative effects on competition and trade between Member States play a role in the balancing exercise – second condition included in Art. 107(3)(c) TFEU

The Court further clarifies whether environmental considerations should play a role in response to Austria’s claim that the negative effects on the environment were not sufficiently taken into account by the Commission.

The Court makes again a distinction between the two conditions laid out in Art. 107(3)(c) TFEU. The Court finds that, when assessing whether the aid is intended to facilitate the development of certain economic activities or areas (first condition), the Commission has to check the activity’s compliance with EU environmental law. A breach of EU environmental rules would automatically qualify the aid as incompatible.

Only when a planned aid supports an activity that complies with EU environmental rules and the first condition is fulfilled, a proportionality assessment takes place (second condition). When conducting this test, the Commission has to take into account the aid’s positive effects on the activities it seeks to support, and its negative effects on competition and trade between Member States. Negative effects on other interests (*e.g.*, on the environment) are not to be considered under the second limb of the test.

No need to define a market or identify a market failure for the application of Art. 107(3)(c) TFEU

The Court further notes that the Commission is not required to define a market to assess whether an aid facilitates the development of an economic activity. The Court holds that the identification of a market is only relevant to assess whether the planned aid does not adversely affect trading conditions to an extent contrary to the common interest (negative condition).

In addition, the Court rules that the existence of a market failure is not a necessary condition for an aid to be declared compatible pursuant Art. 107(3)(c) TFEU as such conditions is not mentioned in Art. 107(3)(c) TFEU. However, the Commission may take into account the existence of a market failure as a relevant factor when determining whether an aid is compatible with the internal market.

No general obligation to classify aid as operating or investment aid

The Court elaborates on the dichotomy between operating aid, which it deems in principle inherently incompatible, and investment aid. It finds that Art. 107(3)(c) TFEU does not require to formally characterise an aid as ‘investment aid’ or ‘operating aid’. What is determinative is whether the measure incentivises the beneficiary to “do something out of the ordinary” [7] which it would not have done had the aid not taken place (the so-called ‘incentive effect’).

Comment

The Court grasped this opportunity to provide guidance on the applicability of EU law in the nuclear energy sector, as well as on the interpretation of Art. 107(3)(c) TFEU. The Judgment includes several key lessons. In our view, the two main take-aways are the following.

First, the Court clarifies that the nuclear energy sector is subject to both State aid rules and EU environmental rules. Consequently, aid granted in the nuclear energy sector has to respect also these two sets of rules.

Second, the Court further clarifies that a Member State’s choice to opt for nuclear energy within its energy mix is not *per se* in conflict with the objectives and principles of EU environmental law. The Commission needs to assess on a case by case basis whether the aid respects EU environmental rules such as the principle of the protection of the environment, the precautionary principle, the ‘polluter pays’ principle, and the principle of sustainability. In other words, the granting of State aid for the construction or operation of a nuclear power plant cannot be deemed as such to automatically violate these principles. However, if there is such a violation in a certain case, such aid cannot be declared compatible with the internal market.

[1] T-356/15, *Austria v Commission*, 12 July 2018, ECLI:EU:T:2018:439.

[2] Commission Decision (EU) 2015/658 of 8 October 2014, on aid measure SA.34947 (2013/C) (ex 2013/N) which the United Kingdom is planning to implement for support to the Hinkley Point C nuclear power station, *OJ L* 109, 28.4.2015, p. 44–116.

[3] Under this arrangement, the UK government will pay the difference between the strike price and the market price when the market price at which the electricity is sold is lower than the strike price. Conversely, when the market price is higher than the strike price, NNBG will be obliged to pay the difference to the UK government.

[4] The Judgment, para. 41.

[5] Environmental rules that must be respected in order for the aid to be declared compatible include in particular Art. 37 of the Charter of Fundamental Rights of the European Union, Art. 11 and 194 TFEU, as well as the corresponding principles invoked by Austria such as the principle of the protection of the environment, the precautionary principle, the ‘polluter pays’ principle and the principle of sustainability.

[6] The Judgment, para. 49.

[7] Phedon Nicolaidis, *The EU General Court confirms the authorization of a State aid for a new nuclear power plant in UK (Hinkley Point C)*, *Concurrences*, N°88418, p. 18.

