



Reports of Cases

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)

In Case T-101/18,

Republic of Austria, represented by J. Schmoll, F. Koppensteiner, M. Klamert and T. Ziniel, acting as Agents, and by H. Kristoferitsch, lawyer,

applicant,

supported by

Grand Duchy of Luxembourg, represented by A. Germeaux and T. Schell, acting as Agents, and by P. Kinsch, lawyer,

intervener,

v

European Commission, represented by K. Blanck, K. Herrmann and P. Němečková, acting as Agents,

defendant,

supported by

Czech Republic, represented by M. Smolek, J. Vláčil, T. Müller, J. Pavliš and L. Halajová, acting as Agents,

by

* Language of the case: German.

French Republic, represented by E. de Moustier and P. Dodeller, acting as Agents,

by

Hungary, represented by M. Fehér, acting as Agent, and by P. Nagy, N. Gràcia Malfeito, B. Karsai, lawyers, and C. Bellamy KC,

by

Republic of Poland, represented by B. Majczyna, acting as Agent,

by

Slovak Republic, represented by S. Ondrášiková, acting as Agent,

and by

United Kingdom of Great Britain and Northern Ireland, represented by F. Shibli, L. Baxter and S. McCrory, acting as Agents, and by T. Johnston, Barrister,

interveners,

THE GENERAL COURT (Third Chamber),

composed, at the time of the deliberations, of M. van der Woude, President, G. De Baere and G. Steinfatt (Rapporteur), Judges,

Registrar: A. Juhász-Tóth, Administrator,

having regard to the written part of the procedure and further to the hearing on 10 March 2022,

gives the following

Judgment¹

- 1 By its action under Article 263 TFEU, the Republic of Austria seeks the annulment of 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; ‘the contested decision’).

Background to the dispute and the contested decision

- 2 On 22 May 2015, Hungary notified the European Commission, under document C(2017) 1486, of a measure to provide a financial contribution for the development of two new nuclear reactors (units 5 and 6) at the Paks nuclear power station site in Hungary, where four nuclear reactors are already in operation. The beneficiary of the notified measure is MVM Paks II Nuclear Power Plant

¹ Only the paragraphs of the present judgment which the Court considers it appropriate to publish are reproduced here.

Development Private Company Limited by Shares ('the Paks II company'), which is intended to become the owner and operating company of the two new nuclear reactors. The Paks II company is wholly owned by the Hungarian State, to which the shares in that company, originally held in full by the electricity trader and power producer Magyar Villamos Művek Zártkörűen Működő Részvénytársaság ('the MVM Group'), were transferred in November 2014.

- 3 On 23 November 2015, the Commission decided to initiate the formal investigation procedure, under Article 108(2) TFEU, in respect of the notified measure (OJ 2016 C 8, p. 2; 'the opening decision').
- 4 On 6 March 2017, the Commission adopted the contested decision.
- 5 The measure notified by Hungary is described in Section 2 of the contested decision. The measure concerns the development in Hungary of two Russian VVER 1200 (V491) Generation III+ nuclear reactors (units 5 and 6), equipped with water-cooling and water-moderating technology and installed capacity of at least 1 000 megawatts (MW) per unit. Their construction is fully financed by the Hungarian State for the benefit of the Paks II company, which will own and operate the new reactors. Four nuclear reactors are already in operation on that site. Those reactors belong in full to the MVM Group, which is owned by the Hungarian State. The installed capacity of the four existing Russian VVER-440 (V213) units at the plant totals 2 000 MW. Those reactors are due to be shut down progressively by 2037 in order to be replaced by the two new reactors, expected to become operational in 2025 and 2026 respectively.
- 6 In accordance with an intergovernmental agreement on cooperation on the peaceful use of nuclear energy concluded on 14 January 2014 by the Russian Federation and the Hungarian Government, the two countries are to cooperate, within the framework of a nuclear programme, in the maintenance and further development of the current Paks nuclear power station. According to that agreement, the Russian Federation and Hungary both designate one experienced State-owned and State-controlled organisation which is financially and technically responsible for fulfilling its obligations as contractor or owner in respect of the design, construction, commissioning and decommissioning of two new reactors 5 and 6 with VVER-type reactors. The Russian Federation appointed the Joint-Stock Company Nizhny Novgorod Engineering Company Atomenergoproekt ('JSC NIAEP'), which will construct the new reactors, and Hungary designated the Paks II company to own and operate them. For that purpose, JSC NIAEP and the Paks II company signed an agreement on 9 December 2014 relating to a contract for the engineering, procurement and construction of the two new reactors 5 and 6 to be built on the site of the Paks nuclear power station.
- 7 In the intergovernmental agreement, the Russian Federation undertook to provide Hungary with a state loan to finance the development of the new nuclear reactors at the Paks nuclear power station. That loan is governed by the Financing Intergovernmental Agreement of 28 March 2014 and provides a revolving credit facility of EUR 10 billion which is limited to the sole use of the design, construction and commissioning of the new reactors 5 and 6 at the Paks nuclear power plant. Hungary will provide an additional amount of EUR 2.5 billion from its own budget in order to finance those investments.
- 8 Hungary will not transfer the funds required to pay the purchase price for the two new nuclear reactors to accounts belonging to the Paks II company. Most of those funds will be held by Vnesheconombank (the Bank for Development and Foreign Economic Affairs of Russia). For each milestone event that is considered to be fulfilled, the Paks II company will file a request with

the Bank for Development and Foreign Economic Affairs of Russia to pay 80% of the amount due directly to JSC NIAEP. It will also submit a request to the Government Debt Management Agency of Hungary to pay the remaining 20%.

- 9 In the contested decision, the Commission found that the notified measure constituted State aid within the meaning of Article 107(1) TFEU and that Articles 107 and 108 TFEU were applicable even if the investment at issue fell within the scope of the Euratom Treaty. As regards the direct award of the construction work for the two new reactors to JSC NIAEP, the Commission found that that could not create an additional distortion of competition and trade on the relevant market, namely the electricity market. Hungary's compliance with public procurement law was examined by means of a separate procedure. The Commission considered that the measure at issue, aimed at promoting nuclear energy, pursued an objective of common interest enshrined in the Euratom Treaty, while also contributing to security of electricity supply, and that all potential distortions were limited and offset by the identified common objective pursued, which was to be attained in a proportionate manner, in particular taking into account the confirmations made by Hungary during the procedure. The Commission found that the measure at issue, as amended by Hungary on 28 July 2016 and subject to the conditions set out in Article 3 of the contested decision, was compatible with the internal market under Article 107(3)(c) TFEU. Article 3 of the contested decision requires Hungary to take a number of measures in order to ensure that the Paks II company complies with certain obligations and restrictions as regards, in particular, its strategy for investment or reinvestment, the operation of an auction platform and its legal and structural independence.

Forms of order sought

- 10 The Republic of Austria, supported by the Grand Duchy of Luxembourg, claims that the Court should:
- annul the contested decision;
 - order the Commission to pay the costs.
- 11 The Commission, supported by the Czech Republic and the Slovak Republic, contends that the Court should:
- dismiss the action;
 - order the Republic of Austria to pay the costs.
- 12 The French Republic, Hungary, the Republic of Poland and the United Kingdom of Great Britain and Northern Ireland contend that the Court should dismiss the action.

Law

- 13 The Republic of Austria puts forward 10 pleas in law in support of its action. By the first plea, it argues that a public procurement procedure should have been initiated for the award of the work on the construction of the two new reactors at the Paks nuclear power plant. The second plea alleges misapplication of Article 107(3)(c) TFEU in that the construction and commissioning of the two new reactors do not concern the attainment of an objective of common interest. The

third plea claims misapplication of Article 107(3)(c) TFEU, on the basis, first, of an incorrect delineation of ‘economic activities’ and, second, on the basis of erroneous assumptions as regards market failure. The fourth plea seeks to prove the disproportionate nature of the measure. In the fifth plea, the Republic of Austria submits that the measure at issue leads to disproportionate distortions of competition and to unequal treatment which are incompatible with the internal market. By the sixth plea, the Republic of Austria submits that the measure at issue constitutes an investment in a ‘project in difficulty’, which also distorts competition in a disproportionate manner since the Guidelines on State aid for rescuing and restructuring non-financial undertakings in difficulty (OJ 2014 C 249, p. 1; ‘the guidelines on undertakings in difficulty’) were not complied with. The seventh plea alleges the strengthening or creation of a dominant position on the electricity market. The eighth plea concerns a liquidity risk for the Hungarian wholesale electricity market. The ninth plea alleges a failure to define the State aid properly. The tenth plea claims infringement of the obligation to state reasons.

- 14 At the hearing, the Republic of Austria withdrew the second and third pleas, of which the minutes of the hearing took formal note. It follows that there is no longer any need to examine those pleas.

The first plea in law, based on the absence of a public procurement procedure

- 15 By its first plea, the Republic of Austria argues that the contested decision is unlawful since no public procurement procedure was initiated for the construction of the new nuclear reactors for the Paks II company. It submits that the fact that the development and construction of the two new reactors was awarded directly to JSC NIAEP, without a public procurement procedure, constitutes an infringement of Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC (OJ 2014 L 94, p. 65) and Directive 2014/25/EU of the European Parliament and of the Council of 26 February 2014 on procurement by entities operating in the water, energy, transport and postal services sectors and repealing Directive 2004/17/EC (OJ 2014 L 94, p. 243). Accordingly, the contested decision is null and void owing to an infringement of fundamental provisions of public procurement law, compliance with which is inextricably linked to the object of the aid.
- 16 The Republic of Austria submits that, according to the general scheme of the FEU Treaty, the aid procedure must never lead to a result that is contrary to the specific provisions of that treaty. Compliance with the provisions of the Treaty other than those relating to State aid is required in particular where those other provisions are also intended, as is the case of public procurement law, to ensure undistorted competition in the internal market and to guarantee the efficient use of State resources.
- 17 The fact that aspects of the aid which are inextricably linked to the object and purpose of that aid are contrary to EU law necessarily affects the aid’s compatibility with the internal market. The position is different only for those elements of the aid which may be regarded as not being necessary for the attainment of its objective or for its proper functioning.
- 18 In the present case, according to the Republic of Austria, the fact that the development of the new reactors was awarded to JSC NIAEP is an aspect that is inextricably linked to the object of the aid. A tender procedure for competitors could have resulted in a completely different aid measure, in particular in terms of its amount and structure.

- 19 In that context, according to the Republic of Austria, the fact that it is the Paks II company, as the future owner and operator of the two new nuclear reactors, that is the beneficiary of the aid, and not JSC NIAEP, is irrelevant. The Commission, in recitals 281 and 283 of the contested decision, was wrong to deny that the direct award of the construction contract, on the one hand, and the object and purpose of the aid, on the other, were inextricably linked, thus relying on the argument that a potential infringement of Directive 2014/25 could not have led to a finding of additional distortions of competition or trade on the electricity market since no requirement for such additional distortion existed.
- 20 The Republic of Austria, supported by the Grand Duchy of Luxembourg, adds that, in any event, in the light of the judgment of 22 September 2020, *Austria v Commission* (C-594/18 P, EU:C:2020:742), it is of little importance, in the case of the aid at issue, whether the question concerns an ‘inextricable aspect’ or even an ‘aspect’ of the aid, since, in general, State aid which contravenes provisions or general principles of EU law cannot be declared compatible with the internal market. Accordingly, the Commission, in the contested decision, should have assessed the measure in the light of the provisions of EU law on public procurement. It should therefore have found that, since the construction contract was not excluded from the scope of Directive 2014/25 under either Article 20(1) or Article 50(c) thereof, the direct award of the construction contract constituted a serious infringement of that directive.
- 21 An infringement of the binding provisions of Directive 2014/25 is by itself liable, as such, to affect the size and form of the aid to the Paks II company, with the result that the contested decision is, for that reason too, unlawful.
- 22 First, the Republic of Austria takes issue with the fact that the Commission, in recital 285 of the contested decision, refers to the infringement proceedings which it initiated. According to the Republic of Austria, the outcome of infringement proceedings does not predetermine the outcome of the procedure under Article 108 TFEU or that of the present action. The Commission cannot make the examination of the aspects of an aid measure, which it is required to assess under Article 108 TFEU, contingent on the outcome of proceedings under Article 258 TFEU, which are initiated and pursued as a function of its discretionary powers.
- 23 Second, according to the Republic of Austria, the Commission does not explain why it proceeds from the assumption that the conditions for the application of Article 50(c) of Directive 2014/25, which concern the possibility of using a negotiated procedure without prior publication, are satisfied. The Republic of Austria notes that exceptions must be interpreted strictly. Moreover, the burden of proof lies with the party relying on the exception in question.
- 24 The Commission, Hungary, the Czech Republic, the United Kingdom and the French Republic contest the arguments advanced by the Republic of Austria and the Grand Duchy of Luxembourg.
- 25 In the first place, it must be stated that the Commission, in Section 5.3.2 of the contested decision (recitals 279 to 287), examined whether the aid complied with provisions of EU law other than the rules on State aid. According to recital 280 of the contested decision, the Commission proceeded on the basis that it was required, in accordance with the general scheme of the FEU Treaty, to ensure that provisions governing State aid are applied consistently with specific provisions other than those relating to State aid and, therefore, to assess the compatibility of the aid at issue with those specific provisions, but that such an obligation was imposed on the Commission only where the aspects of aid are so inextricably linked to the object of the aid that it is impossible to evaluate them separately. Referring to the judgment of 3 December 2014, *Castelnou Energía v*

Commission (T-57/11, EU:T:2014:1021), it stated that if it were required to adopt a definitive position, irrespective of the link between the aspect of the aid and the object of the aid at issue, in a procedure relating to State aid, on the existence or absence of an infringement of provisions of EU law distinct from those coming under Articles 107 and 108 TFEU, that would run counter to, first, the procedural rules and guarantees – which in part differ significantly and imply distinct legal consequences – 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. According to that case-law, it follows that although the aspect of the aid at issue is inextricably linked to the object of that aid, the Commission must assess its compatibility with provisions other than those relating to State aid in the context of the procedure provided for in Article 108 TFEU and that assessment may result in a finding that the aid concerned is incompatible with the internal market. By contrast, if the aspect at issue can be separated from the object of the aid, the Commission is not required to assess its compatibility with provisions other than those relating to State aid in the context of the procedure provided for in Article 108 TFEU.

- 26 The Commission then found, in recital 281 of the contested decision, that the assessment of the compatibility of the notified measure with the internal market could be affected by possible non-compliance with Directive 2014/25 if that measure were to produce an additional distortion of competition and trade on the electricity market, that being the market on which the aid recipient, the Paks II company, would be active. Since no such additional distortive effect due to non-compliance with Directive 2014/25 was identified, there was no ‘indissoluble link’ between a possible infringement of Directive 2014/25 and the object of the aid, such that the assessment of the compatibility of the aid could not be affected by that possible infringement (recitals 283 and 284 of the contested decision).
- 27 As regards the arguments of the Republic of Austria based on the judgment of 22 September 2020, *Austria v Commission* (C-594/18 P, EU:C:2020:742), first, it should be stated that it is apparent in particular from paragraphs 40, 44 and 45 of that judgment that the economic activity promoted by the aid must be compatible with EU law. However, no infringement of provisions of EU law owing to the activity supported, namely the production of nuclear energy, has been raised in the first plea.
- 28 Second, no conclusions can be drawn from the fact that the Court of Justice did not examine the existence of an inextricable link in its judgment of 22 September 2020, *Austria v Commission* (C-594/18 P, EU:C:2020:742). That is explained by the fact that in the case which gave rise to that judgment the alleged infringement of principles of EU law derived from the actual object of the aid, namely the development of a power plant producing electricity from nuclear power. Accordingly, the question of the existence of a link with an aspect of the aid, separate from its object, did not arise.
- 29 Third, contrary to what is claimed by the Republic of Austria, the judgment of 22 September 2020, *Austria v Commission* (C-594/18 P, EU:C:2020:742), 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 means of a reference to the judgment of 15 April 2008, *Nuova Agricast* (C-390/06, EU:C:2008:224, paragraphs 50 and 51), the Court of Justice observed, in paragraph 44 of the judgment of 22 September 2020, *Austria v Commission* (C-594/18 P, EU:C:2020:742), that it had already held that State aid which contravened provisions or general principles of EU law could not be

declared compatible with the internal market. That principle is in fact part of the settled case-law of the Court of Justice, as is shown by the references in paragraph 50 of the judgment of 15 April 2008, *Nuova Agricast* (C-390/06, EU:C:2008:224).

- 30 Consequently, given that the Court of Justice made a reference to settled case-law in paragraph 44 of the judgment of 22 September 2020, *Austria v Commission* (C-594/18 P, EU:C:2020:742), there is nothing to support the conclusion that it intended to abandon 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.
- 31 In addition, if the Commission were required to adopt a definitive position, irrespective of the link between the aspect of the aid and the object of the aid at issue, in a procedure relating to State aid, on the existence or absence of an infringement of provisions of EU law distinct from those coming under Articles 107 and 108 TFEU, that would run counter to, first, the procedural rules and guarantees – which in part differ significantly and imply distinct legal consequences – 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 (judgment of 12 February 2008, *BUPA and Others v Commission*, T-289/03, EU:T:2008:29, paragraphs 313 and 314; see also judgment of 3 December 2014, *Castelnou Energía v Commission*, T-57/11, EU:T:2014:1021, paragraph 183, and the case-law cited; see also, to that effect, judgment of 15 June 1993, *Matra v Commission*, C-225/91, EU:C:1993:239, paragraph 44).
- 32 It is therefore necessary to reject the Republic of Austria’s interpretation that the Commission, in the light of the judgment of 22 September 2020, *Austria v Commission* (C-594/18 P, EU:C:2020:742), is henceforth required to verify that any aspect of an aid measure or any circumstance relating to the aid, even if it is not inextricably linked to the aid, does not infringe any provision or general principle of EU law.
- 33 It should be added that in a situation where, as in the present case, two separate procedures are at issue, which both fall within the Commission’s competence and whose respective rules it must observe, there would be a risk of a conflict or infringement of those rules if the Commission was required to assess the same aspect of the aid in both the procedure concerning the authorisation of the aid at issue and an infringement procedure.
- 34 It follows that the Commission did not err in law when it considered that it should limit its review, in the procedure under Article 108 TFEU, to the aid measure itself and to the aspects which are inextricably linked to it.
- 35 In the second place, the Republic of Austria is wrong to claim that the fact that JSC NIAEP was entrusted with the construction of the new reactors constitutes an aspect that is inextricably linked to the object of the aid, on the ground that a tender procedure for competitors could have resulted in a completely different aid measure, in particular in terms of its amount and structure.
- 36 In the present case, the aid at issue consists of the provision free of charge of two new nuclear reactors to the Paks II company for the purpose of their operation. The question of whether the award of the contract for the construction of those two reactors should have been subject to a tender procedure concerns the manufacture and supply of the asset to be provided free of charge and thus precedes the aid measure itself. Accordingly, the award decision in respect of the contract for the development and construction of the two new reactors does not constitute an aspect of the aid itself.

- 37 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. In addition, an infringement of the rules on public procurement would produce effects solely on the market for the construction of nuclear power stations and would have no consequences for the market covered by the object of the aid measure at issue.
- 38 As regards the influence of the lack of a public procurement procedure on the amount of the aid, the Commission, Hungary and the French Republic are right to argue that it has not been demonstrated that other tenderers could have supplied the two reactors with VVER 1200 technology on better terms or at a lower price. Furthermore, the Commission also correctly states that the lawfulness of its decision on State aid does not depend on compliance with the EU rules on public procurement when the choice of another undertaking for the construction of reactors would not alter the assessment in the light of the rules on State aid. Even if the use of a tender procedure might have altered the amount of the aid, that factor would not by itself have had any effect on the advantage which that aid constituted for its recipient, the Paks II company, given that that advantage consisted of the provision free of charge of two new reactors with a view to their operation. Consequently, an increase or reduction in the aid amount does not result, in the present case, in an alteration to the actual aid or in a modification of its anticompetitive effect.
- 39 It follows that the Commission was right to find that the award of the contract for the construction of the two new reactors did not constitute an aspect of the aid which was inextricably linked to that aid.
- 40 In the third place, as regards the Republic of Austria's argument that the decision to award the construction contract to JSC NIAEP infringed the provisions of Directive 2014/25 since that contract was not excluded from the scope of that directive under either Article 20(1) or Article 50(c) thereof, it must be observed that the Commission dealt with the question of the applicability of Directive 2014/25 in recital 285 of the contested decision. As regards the question of whether EU law lays down an obligation to carry out a tender procedure for the engineering, procurement and construction of the two new nuclear reactors at the Paks nuclear power plant, the Commission stated in that recital that, in any event, Hungary's compliance with Directive 2014/25 had been assessed by it in a separate procedure, in which the preliminary conclusion, on the basis of the available information, was that the procedures set out in Directive 2014/25 were not applicable, on the basis of Article 50(c) thereof, to the award of work for the construction of two reactors.
- 41 Contrary to what is argued by the Republic of Austria, the Commission was right to take the view that, for the sake of consistency between the outcome of the examination of the aid's compatibility and that of the infringement proceedings, it was entitled to refer to its assessment carried out in the infringement proceedings.
- 42 The Commission had concluded in the infringement proceedings that the direct award of the task of constructing the two new reactors did not infringe EU public procurement law. That conclusion was based on an in-depth analysis of the technical requirements which Hungary had relied on in order to justify the absence of a tender procedure.
- 43 In its reply to the written questions put to it by the Court by way of a measure of organisation of procedure, the Commission confirmed that the 'separate procedure' referred to in recital 285 of the contested decision was infringement procedure NIF 2015/4231-32 brought against Hungary

under Article 258 TFEU. In the context of that procedure and on the basis of the information provided by the competent Hungarian authorities, it concluded that the construction work for the two reactors 5 and 6 could be awarded directly to JSC NIAEP without a prior call for competition because, for technical reasons, no competition existed; as a result, Article 40(3)(c) of Directive 2004/17/EC of the European Parliament and of the Council of 31 March 2004 coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors (OJ 2004 L 134, p. 1) (now Article 50(c)(ii) of Directive 2014/25) was pertinent.

- 44 The Commission's reply is confirmed by the documentation submitted in that regard following the measure of organisation of procedure in question, in particular by two 'NIF files' bearing the numbers 2015/4231 and 2015/4232, which set out the reasons for closing procedure NIF 2015/4231-32. Those documents show, inter alia, that the Commission found that the argument that the contract could be awarded directly to the contractor for technical reasons (Article 40(3)(c) of Directive 2004/17) was justified for the core parts of the project.
- 45 It is also apparent from that document submitted in Annex X.5 that Hungary gave an undertaking to the Commission to follow a transparent public procurement procedure with regard to the majority of the other parts of the project while observing the basic principles of equal treatment and non-discrimination. At the hearing, the Commission explained that that commitment by Hungary was reflected in recital 372 of the contested decision, which had to be read in conjunction with recital 285.
- 46 Furthermore, it is apparent from the documents submitted in Annexes X.1 to X.3 that the Commission's Joint Research Centre (JRC) and experts from the Directorate-General for Energy confirmed the specific technical nature of the VVER 1200 reactor produced by Rosatom and selected by Hungary as a legitimate choice characterised by rational criteria.
- 47 Moreover, it cannot be accepted that the procedure relating to the compatibility of aid with the internal market may lead to calling into question all the decisions taken previously and which have already been the subject of a separate procedure, governed by specific rules within the meaning of the judgment of 15 June 1993, *Matra v Commission* (C-225/91, EU:C:1993:239, paragraph 44), and which are different from the rules applicable in the area of State aid. 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 while not possessing any new information as against the time when it decided to close the infringement proceedings. In that regard, the Commission confirmed in its reply to a question put to it by the Court that, at the time of the adoption of the contested decision, namely on 6 March 2017, it had the same information at its disposal as that which supported its decision of 17 November 2016 to bring an end to the infringement proceedings brought against Hungary owing to the direct award of the construction contract to JSC NIAEP.
- 48 Nor can the Republic of Austria succeed with its argument that since infringement proceedings are governed by the principle of expediency they cannot predetermine the assessment of a potential breach of public procurement law in the framework of the State aid procedure. The fact that infringement proceedings are governed by the principle of expediency is irrelevant, given that the Commission did in fact initiate such proceedings in which it carried out an analysis of the technical reasons relied on by Hungary and at the end of which it came to the conclusion that the conditions of Article 50(c) of Directive 2014/25 were satisfied. At the hearing, the Commission explained that the concept of expediency employed in the decision to close the infringement

proceedings referred to the time of the decision and not its content. In response to the third question raised in the measure of organisation of procedure, the Commission stated in addition that the sole reason that the outcome of those proceedings had been described as a ‘preliminary conclusion’ in recital 285 of the contested decision was that it had the possibility to initiate fresh proceedings of the same nature at any time on the basis of new information.

49 It follows that the Commission did not err in law when it relied, in any event, on the outcome of the infringement proceedings for the purpose of the contested decision.

50 It follows from the foregoing that the first plea must be rejected.

...

The fifth plea in law, alleging disproportionate distortions of competition and unequal treatment that render the aid incompatible with the internal market

89 In the fifth plea, the Republic of Austria submits that the aid is incompatible with the internal market in that its award produces disproportionate distortions of competition and unequal treatment which result in the exclusion of producers of renewable energy from the liberalised internal electricity market.

90 In the first place, the Republic of Austria refers to unequal treatment relating to two aspects, namely a technical aspect and a regulatory aspect.

91 First, the large-scale subsidisation of the provision of high base-load capacities sourced from nuclear power places the producers of cheaper alternative electricity at a disadvantage, obliging them artificially to reduce their input into the network so as not to undermine network stability in the event of a temporary overcapacity in the electricity market. The aid at issue thus leads to long-term structural distortions of competition and to the exclusion of producers from the liberalised internal electricity market. Artificial reductions in production would also affect cross-border producers exporting their electricity to Hungary.

92 Second, the Republic of Austria submits that, in the present case, all the costs entailed by the planning, construction, external financing and commissioning of an uncompetitive and unprofitable project are to be borne by the State, whereas the producers of renewable energy receive far lower amounts of aid and only on condition that they comply with much stricter compatibility conditions, as set out in the AEE Guidelines. The result is unequal treatment in terms of the rules on State aid between producers of the same product competing on the same market.

93 In the second place, the Republic of Austria submits that the aid granted to the Paks II company also distorts competition on the ground that it conflicts with the essential guiding principles of Directive 2009/72/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in electricity and repealing Directive 2003/54/EC (OJ 2009 L 211, p. 55) and, in particular, the objective of creating a level playing field for all electricity undertakings established in the European Union and that of providing energy to consumers at the most competitive price possible.

- 94 In addition, the contested decision serves as a precedent for other large-scale aid measures in favour of other nuclear power stations, which might lead to a structural and disproportionate distortion of competition on the whole of the internal market for electricity.
- 95 Lastly, if, in accordance with the contested decision, the assessment in isolation of each individual aid measure did not harm competition – even in the case of an order of magnitude of EUR 12.5 billion – then, ultimately, all aid would automatically be compatible with the internal market.
- 96 The Commission and Hungary dispute the arguments of the Republic of Austria.
- 97 In the first place, as regards the Republic of Austria’s complaint concerning unequal treatment with respect to the producers of renewable energy, based, in particular, on the guiding principles of Directive 2009/72, it should be borne in mind that the Court of Justice has already held that a Member State is free to determine the composition of its own energy mix (see, to that effect, judgment of 22 September 2020, *Austria v Commission*, C-594/18 P, EU:C:2020:742, paragraphs 79 and 80). Accordingly, the Commission cannot require that State financing be allocated to alternative energy sources. It also follows that a Member State cannot be obliged to provide for absolutely identical financing or operating conditions for all energy producers. Moreover, an obligation of that kind would rule out any aid to a specific project for the production of energy.
- 98 In the second place, as the Commission rightly observed, a threat of some distortion to competition is inherent in any aid. This must therefore be accepted, up to a certain point, in the assessment of whether aid to facilitate the development of certain activities is compatible with the internal market within the meaning of Article 107(3)(c) TFEU, with the limit being exceeded if that aid adversely affects trading conditions to an extent that is contrary to the common interest.
- 99 In recital 391 of the contested decision, the Commission reached the conclusion that any negative effects resulting from the aid at issue would at least be offset by the objective of common interest pursued. The order of magnitude of that aid of EUR 12.5 billion is a factor that must be taken into account in the balancing exercise. However, taken in isolation, that factor cannot be decisive. Since the situation at issue concerns solely the costs of investment in two new reactors intended to replace the four old reactors, which will be gradually closed down on account of their age, and with no operating aid being foreseen, the effect on the energy market will only be limited.
- 100 The Commission set out in reasoned manner the market share which could be achieved, first, by the Paks II company alone after the shutting down of the old reactors and, second, by the MVM Group and the Paks II company together during the limited period of parallel operation on the Hungarian market and, also, on the coupled markets of Romania and Slovakia. As is shown by figure 10 in the contested decision, the Paks II company’s share of those coupled markets will not exceed 10%. The joint market share of the MVM Group and the Paks II company on the Slovak and Romanian markets, coupled with Hungary, would not exceed 20% according to that same figure 10. Consequently, the effects of the two new reactors on the division of market share will be limited.
- 101 As regards the interest of energy consumers in obtaining the most competitive price possible, it should be observed that according to the NERA study, whose findings the Republic of Austria does not call into question, the Paks nuclear power station will remain a price taker, as is apparent from recitals 113, 365, 369 and 376 of the contested decision. As the Commission explained, in particular in recital 365 of the contested decision, electricity prices are mainly

determined by the marginal costs of the producers participating in a particular market. Renewable technologies have low marginal costs, since most of them can operate without fuel costs. Nuclear technology also has low running costs. By contrast, technologies based on fuels, such as coal power stations and gas-turbine power stations, have higher operating costs and can thus increase the price of electricity. As a result, nuclear energy is a price taker rather than a price maker. In that regard, there is therefore no conflict between the aid at issue and the key guiding principles of Directive 2009/72 referred to by the Republic of Austria.

102 Furthermore, in Section 5.3.8.2 of the contested decision, the Commission, inter alia, carried out an in-depth examination of the barriers to entry for new market players. That question was analysed in particular from the perspective of the potential effects of the measure on the Hungarian market (recitals 357 to 365), its potential cross-border effects (recitals 366 to 371) and the potential effects of the parallel operation of the old and new reactors at the Paks nuclear power plant (recitals 372 to 376). The Republic of Austria has not shown that there were any manifest errors in that assessment. Inasmuch as the Republic of Austria does not dispute, as the Commission correctly observes, that the capacity of the new reactors does not lead to a long-term increase in the total installed nuclear capacity in Hungary, which is estimated at 36% of total electricity consumption, the replacement of the four reactors at the Paks nuclear power plant by two new reactors, which produce the same quantity of energy and are financed by means of the investment aid at issue, will not be capable of causing the large-scale exclusion of producers of energy from other sources.

103 In the third place, it is necessary to reject the Republic of Austria's argument that the contested decision serves as a precedent for other large-scale aid measures in favour of other nuclear power stations, which may lead to a structural and disproportionate distortion of competition on the whole of the internal market for electricity. In that regard, the Commission is right to state that the precedential value of the contested decision is not a legal argument, but is a political argument that cannot lead to that decision being declared null and void.

104 It follows from the foregoing considerations that the fifth plea is unfounded and must be rejected.

...

The seventh plea in law, alleging the strengthening or creation of a dominant market position

...

125 The Republic of Austria observes that the two companies operating the old and new reactors at the Paks nuclear power station are wholly owned by the Hungarian State, which is the indirect owner of those companies through MVM Hungarian Electricity Ltd, a fact which, in the opening decision, gave rise to concern that the commissioning of the new reactors at the Paks nuclear power station would lead to a very considerable market concentration in Hungary.

126 According to the Republic of Austria, the two minimal commitments by Hungary provided for in the contested decision are not sufficient. The fact that the management of the two companies is divided between different ministries does not alter the fact that, ultimately, it is the Hungarian State which, as the owner of the capital, holds all the shares in both companies and is in a position to control their conduct. From a functional point of view, it is necessary, when assessing market concentration, to add together the market share of the two undertakings. The reference made by the Commission in recital 353 of the contested decision to its Consolidated

Jurisdictional Notice concerning Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings of 20 January 2004 (OJ 2008 C 95, p. 1) in no way alters the foregoing assessment.

- 127 As regards the operation in parallel of the nuclear power station's old and new reactors, the Republic of Austria states that the fact that that parallel operation is supposed to last for only seven years is not capable of dispelling the concerns in respect of competition law. In reality, competitors will be kept outside the market during that period. In addition, the date foreseen for shutting down the old nuclear reactors is not guaranteed.
- 128 The Commission, moreover, did not examine the repercussions on the possibility for new operators to enter the market, in particular for the period from 2026 to 2032 or 2037. It did not take account of the fact that investment in nuclear power stations contributes in general to a reduction in State investment in renewable energy sources and, at the same time, to a significant increase in the concentration of the entire energy market.
- 129 As regards the finding that the combined market share of the MVM Group and the Paks II company on the coupled market of Hungary, Slovakia and Romania does not exceed 20%, the Republic of Austria submits that that fact alone is not sufficient to conclude that a cross-border effect may automatically be ruled out. According to the Republic of Austria, the Commission should in particular have also taken account of the structure of the market as a whole. Having regard to the fact that the Paks nuclear power plant already has a market share of more than 50% in Hungary with the old reactors, the risk of an abuse of that position and a resulting distortion of competition is evident.
- 130 The Commission, Hungary and the Czech Republic contest the line of argument advanced by the Republic of Austria.
- 131 It should be borne in mind that, in accordance with Article 107(3)(c) TFEU, aid may be authorised only if it does not adversely affect trading conditions to an extent contrary to the common interest, which entails weighing up the positive effects of the planned aid for the development of the activities that it is intended to support and the negative effects that that aid may have on the internal market (judgment of 22 September 2020, *Austria v Commission*, C-594/18 P, EU:C:2020:742, paragraph 101). Such negative effects on competition arise in particular where the aid leads to the creation or maintenance of a dominant position on the market of the recipient of the aid.
- 132 From that point of view, the Commission, in Section 5.3.8.1 of the contested decision, examined whether an increase of possible market concentration resulted from the merged future ownership and operation of the old reactors at the Paks nuclear power station with the new reactors.
- 133 In recital 347 of the contested decision, the Commission noted that the Hungarian electricity generation market was characterised by a relatively high concentration, with the current Paks (MVM Group) nuclear power station providing some 50% of domestic generation. It is apparent from recital 349 of the contested decision that the Commission was concerned by the fact that the legal separation of the Paks II company and the MVM Group was insufficient or might not be maintained without additional guarantees in that respect. However, the Commission took the view that certain items of information addressed its concerns, namely, first, that the objective of the Hungarian measure was the gradual replacement of the existing nuclear capacity at the Paks

nuclear power station between 2025 and 2037, second, that Hungary had submitted that the MVM Group and the Paks II company were independent and unconnected and, third, that, according to Hungary, the Paks II company, its successors and affiliates would be fully legally and structurally separated, and be maintained, managed and operated independently and without connection to the MVM Group and all of its businesses, successors and affiliates and other State-controlled companies active in the generation, wholesale or retail of energy (recitals 350 to 354 of the contested decision).

The power of the Paks nuclear plant on the Hungarian market and on the EU internal market

- 134 The Republic of Austria argues that the aid at issue leads to the creation of a dominant market position.
- 135 In the first place, the Republic of Austria asserts that the Paks nuclear power plant already has a market share of more than 50% in Hungary with the old reactors, giving rise to a non-rebuttable presumption of the existence of a dominant position. However, that argument is based on an error as to the facts.
- 136 According to recital 43 of the contested decision, ‘as generator, the State-owned MVM Group has a significant market presence, due to its main generation asset, [the Paks nuclear power plant] which provided 52.67% of domestically generated electricity in 2015’. That finding, like recitals 18 and 347 of the contested decision, concerns the Paks nuclear power plant’s share of the energy produced in Hungary. However, those percentages do not show the Paks nuclear power plant’s share of the Hungarian market for electricity. That is instead apparent from figure 1, also reproduced in recital 43 of the contested decision, which refers to ‘total electricity consumption in Hungary in 2015’ and according to which the market share of the Paks nuclear power plant amounts to 36.19%. Since Hungary is a net importer of electricity, with imports accounting for approximately 30% of electricity consumption, as the Commission explained in recital 47 of the contested decision, the market share of the Paks nuclear power plant is automatically reduced by those imports, which cover a substantial part of domestic consumption in Hungary.
- 137 The Commission is therefore right to point out that it relied in recital 358 of the contested decision on the fact that the electricity generated by the Paks nuclear power plant covered 36% of total electricity consumption in Hungary. Furthermore, the Commission found in recital 358 of the contested decision that, first, the electricity generated at that time by the Paks nuclear power plant provided 36% of Hungary’s overall consumption of electricity, second, that that proportion would decrease in view of the expected growth in demand and, third, that the production output of the new reactors at the Paks nuclear power plant was to be similar once its old reactors had been phased out.
- 138 It should be added that market share does not by itself determine a dominant position, as Hungary rightly indicates, but serves merely as a starting point for an analysis of the market which must take into account all the other relevant circumstances, such as barriers to entry and the development of the market over a longer period (see, to that effect, judgment of 14 February 1978, *United Brands and United Brands Continentaal v Commission*, 27/76, EU:C:1978:22, paragraph 66), or the structure of the market concerned. In that regard, Hungary rightly notes, first, that the construction of the new reactors at the Paks nuclear power plant is a project that seeks to maintain electrical generation capacity, and not increase it, and that it provides a solution for an anticipated future shortage, while contributing to the stabilisation of the

network, and, second, that the contested decision includes conditions, in Article 3, in particular on the use of profits, on commercial trading arrangements and on a guarantee of the legal and structural separation of the Paks II company and the MVM Group, which are intended to limit the anticompetitive effects of the aid and in respect of which, moreover, Hungary has undertaken to submit annual reports.

- 139 In the contested decision, the Commission based its assessment of a possible distortion of the market on all of those factors, while the Republic of Austria does not call into question the economic studies on the current situation and the forecasts for developments on the Hungarian and interconnected markets that the Commission relied on.
- 140 In that regard, it should be observed in particular that, according to those studies and as the Commission explained in recitals 360 and 388 of the contested decision, the situation of an energy shortfall in Hungary will continue, with the result that the country will remain a net importer after the phase-out of the four units at the Paks nuclear power plant currently in operation. Furthermore, according to recital 373 of the contested decision, it is apparent from the NERA study that even during the operation in parallel of the new and old reactors at the Paks nuclear power plant from 2025 to 2037, the expected growing national peak demand will not be satisfied solely from domestic plants (see also recital 389 of the contested decision). Accordingly, there is no basis for the Republic of Austria's assertion that, during the operation in parallel of the old and new reactors at the Paks nuclear power station between 2026 and 2032, there will be a foreclosure of the Hungarian electricity market with a barrier to market entry for new players, something which the Commission allegedly failed to take into account in the contested decision.
- 141 As regards the complaint relating to the competitors active on the Hungarian market and on the coupled markets of Hungary, Slovakia and Romania, the effects on those markets were analysed in recital 357 et seq. and in recital 366 et seq. of the contested decision and taken into account in the conclusion on distortions of competition and the overall balancing in recital 388 of the contested decision. In that regard, it should be borne in mind that, contrary to the Republic of Austria's submission, it is not necessary to take into account the combined market share of the two undertakings since the independence of the Paks II company from the MVM Group has been proved and secured, as set out in paragraph 152 et seq. below.
- 142 Irrespective of the foregoing, the Republic of Austria is not founded in its criticism that the seven years of parallel production would constitute a period in which competitors would be kept out of the market, with the result that a foreclosure effect is inevitable in the long term. In that regard, it should be observed that the Commission, in recital 387 of the contested decision, and on the basis of studies presented in that decision, reached the conclusion that any barrier to entry for other types of generating capacity, especially in the limited period of the parallel operation of the old and new reactors at the Paks nuclear power plant, was restricted owing to the fact that the gap in future overall installed capacity identified by the Hungarian transmission system operator would permit the penetration of other generating technologies, such as renewable and non-low-carbon energy sources, irrespective of whether the new reactors were constructed or not.
- 143 Lastly, as regards, the possible foreclosure of producers of energy from new and renewable sources, it is necessary to take into account the fact, set out in the pleadings and not disputed by the Republic of Austria, that that energy is by nature intermittent and may contribute only with difficulty to the base-load to be covered (see recital 181 of the contested decision).

144 In the second place, it is necessary to reject the Republic of Austria's argument that the Commission, when assessing possible market concentration, should have taken into account a study carried out by Candole Partners, on which it relied in order to establish the advantages of the aid at issue and which contains estimates concerning market concentration. The Republic of Austria infers from that study that investment in nuclear power stations generally contributes to a reduction in State investment in renewable energy sources and, at the same time, to a significant increase in market concentration on the whole energy market.

145 First, it should be borne in mind that it is for the Member State to determine freely its energy mix.

146 In addition, in that regard, it is apparent from recital 362 of the contested decision that Hungary's National Energy Strategy provides for renewable energy in its energy mix, in accordance with the European Union's 2020 climate and energy package, the national renewable energy targets on the internal market for electricity, set out in Directive 2009/28/EC of the European Parliament and of the Council of 23 April 2009 on the promotion of the use of energy from renewable sources and amending and subsequently repealing Directives 2001/77/EC and 2003/30/EC (OJ 2009 L 140, p. 16), and the key targets of the 2030 climate and energy framework. Furthermore, in view of those EU and national renewable energy targets and obligations, Hungary is not an exception as regards deploying support mechanisms in order to commission new power plants which generate electricity from renewable sources. The Commission also noted that part of Hungary's renewable energy scheme had been operational since January 2017, while other parts of the scheme related to larger producers from renewable sources were, at the time of the contested decision was adopted, awaiting Commission approval in the light of the rules on State aid.

147 Second, the indices measuring market concentration reproduced by the Republic of Austria merely confirm in figures what the Commission's findings in the contested decision already show: the Herfindahl-Hirschman Index (HHI) is at values which correspond to a level of 'high market concentration' at 2 594 at present, 6 889 in 2030 (overlap period) and 2 582 in 2040. In so far as the Republic of Austria does not specify to what extent the data from that study may influence the assessment of the extent of a possible distortion of competition, it is necessary to reject the argument related to the failure to include the study carried out by Candole Partners in the balancing exercise.

148 In conclusion, the Commission was right to consider, in recital 372 of the contested decision, that the impact of the aid at issue on the market was proportionate in view of the objectives of security of supply and of the need to prepare carefully the decommissioning of the units at the Paks nuclear power station. The Republic of Austria has not shown that the Commission made a manifest error of assessment in its examination of the market concentration that may result from the aid at issue. The present complaint must therefore be rejected.

Extension of the parallel operation of the old and new reactors at the Paks nuclear power station

149 According to the Republic of Austria, the Commission should have provided for an obligation in the contested decision to close the old reactors at the Paks nuclear power station as a condition for authorising the aid. In the absence of such a condition, the parallel operation of the old and new reactors could in theory continue for a long period of time, with the result that there is no certainty as to the fact that reactors 1 to 4 at the Paks nuclear power station will not continue to operate beyond 2032, 2034, 2036 and 2037, since many States wish to extend lifetimes or are implementing such extensions.

150 In the present case, the setting of a condition in the operative part of the contested decision does not constitute an essential requirement for ensuring that that circumstance can be relied upon. It is apparent from recital 350 of the contested decision, first, that the period of overlap should be limited to the period from 2026 to 2032 and, second, that the retirement of all the nuclear capacities of the old reactors of the Paks nuclear power station is to be completed by 2037. The scheduled retirement of nuclear capacities is also included in the description of the aid in Section 2 of the contested decision, entitled ‘Detailed description of the measure’, in which the Commission stated, in recital 10, that ‘the operation of units 5 and 6 is intended to compensate for the loss in capacity when units 1 to 4 (2 000 MW) retire’ and that ‘Hungary submitted that units 1 to 4 would be in operation until the end of 2032, 2034, 2036 and 2037 respectively, without [an] envisaged prospect of further lifetime extension’. Consequently, in the description of the aid, the measure is described as consisting of a gradual replacement of the nuclear capacities of the old reactors at the Paks nuclear power station. The Commission’s decision to declare the aid compatible with the internal market relates only to the aid as described in that decision, with the result that the contested decision authorises the aid only in so far as it remains consistent with the notified measure.

151 Moreover, the arguments of the Republic of Austria that call into question the reliability of the assertion by Hungary, that the expected period for the parallel operation of the four reactors currently in use with the two new reactors is to be limited to the period from 2026 to 2032, with the retirement of all their nuclear capacities by 2037, have not been substantiated by evidence capable of showing that the Commission committed a manifest error of assessment as to the likelihood of a dominant position.

The independence of the undertaking operating the old reactors at the Paks nuclear power plant in relation to the undertaking operating the new reactors at the same nuclear power plant

152 As regards the second and third factors on which the Commission relies, in recitals 351 to 353 of the contested decision, with a view to dispelling its concerns as to increased influence on the Hungarian energy market, namely the fact that the operator of the old reactors at the Paks nuclear power plant, the MVM Group, on the one hand, and the Paks II company, which operates the new reactors, on the other are not combined, or that their activities are not coordinated, the Republic of Austria submits, in essence, that the four characteristics on which the Commission bases its finding of a legal and structural separation are not sufficient for that purpose. Those characteristics consist of management by different government departments (the Ministry for National Development for MVM and the Prime Minister’s Office for the Paks II company); the absence of shared or common directorships on the governing board of each company; the existence of safeguards to ensure that the companies do not exchange commercially sensitive and confidential information; and the fact that the decision-making powers of each company are separate and distinct from one another.

153 In the first place, the Court must reject the Republic of Austria’s argument as to the Paks II company being part of the MVM Group at the time of its creation. It is apparent from recital 27 of the contested decision that the shares in the Paks II company, originally held by the MVM Group, were transferred to the Hungarian State in 2014. The contested decision was adopted on 6 March 2017, with the result that, when the Commission adopted that decision, the fact that the shares in the Paks II company were initially owned by the MVM Group was irrelevant.

- 154 In the second place, the claim by which the Republic of Austria seeks to challenge the validity of the second criterion set out in recital 352 of the contested decision (see paragraph 152 above), namely the existence of an independent power of decision, fails to convince. The Republic of Austria submits that, despite the legal and structural separation of the two energy producers, the fact that the management of the two companies is divided between different ministries does not alter the fact that, ultimately, it is the Hungarian State which holds all the shares in the two companies and that the State is in a position to direct or coordinate their conduct, especially since ministers of the same government are involved and since, in particular, the ‘Minister President’ plays a special role in the Hungarian Government.
- 155 However, Hungary is right to observe that the Republic of Austria has not provided any evidence to support the claim that the special role played by the Hungarian Prime Minister within the Hungarian Government would enable that person to control and guide the strategy of the company operating the old reactors and the undertaking operating the new reactors. Nor has the Republic of Austria provided any information regarding any rights to issue directions. In particular, it cannot be assumed that the mere fact that the Prime Minister has the right under the Hungarian Constitution to propose the removal of ministers, as the Republic of Austria maintained at the hearing, is sufficient evidence of coordinated management of those legally separate companies.
- 156 In the third place, the Republic of Austria disputes the Commission’s approach in recital 353 of the contested decision for determining the legal and structural independence of the Paks II company, and of its successors and affiliates, with regard to the MVM Group. In that regard, the Commission relied on paragraphs 52 and 53 of its Consolidated Jurisdictional Notice under Regulation No 139/2004. Paragraph 52 of that notice concerns concentrations involving State-owned undertakings and, as a criterion to distinguish an internal restructuring from a concentration, it uses the fact that undertakings have an ‘independent power of decision’.
- 157 In that regard, the Republic of Austria does not explain why that approach is incorrect. It merely proposes the application of a different approach by referring to public procurement law.
- 158 However, the present case does not concern contracts concluded between two entities belonging to the same legal person. The criteria laid down for that situation, in Article 28(2) of Directive 2014/25, cannot be transposed to the question of whether it is necessary to add together the power of two entities on the same market, which both belong to the State but are structurally separate. The objective pursued by Article 28(2) of Directive 2014/25 is not to prevent the creation or strengthening of a dominant position. It is not in fact possible to compare the question of whether, in an ‘in-house’ situation, where one of the entities is to provide services for the other, that entity should be able to perform those services without competing with external undertakings, with that of whether there may be a concentration on the market on which the two entities are active. The subject matter of the abovementioned rule of public procurement law is not the concertation of two entities’ activities on the same market, rather it concerns a situation where a contract has been concluded between those respective entities. Accordingly, the fact that the MVM Group, on the one hand, and the Paks II company, on the other, should, on the basis of the case-law of the Court of Justice in the field of public procurement law concerning so-called ‘in-house’ situations, be attributed to the State, as the Republic of Austria claims, has no relevance for the present case.

159 As regards the reference by the Republic of Austria to a judgment concerning competition law, that reference likewise does not call into question the approach adopted by the Commission. In the judgment of 10 January 2006, *Cassa di Risparmio di Firenze and Others* (C-222/04, EU:C:2006:8, paragraphs 112 and 113), the Court of Justice did not in fact find that all the entities which were legally or de facto controlled by the same entity were regarded as a single undertaking, but held that an entity which did not carry out any economic activity other than the control of another undertaking was itself to be classified as an undertaking. That particular situation, which was specific to the case which gave rise to that judgment, has no relation, however, to the circumstances of the present case.

160 In the fourth place, it should be observed that the establishment and maintenance of the structural guarantees ensuring independent decision-making on the part of MVM Group and the Paks II company are provided for in the fifth paragraph of Article 3 of the contested decision, which includes the following condition: ‘In addition, Hungary shall undertake that [the Paks II company], its successors and affiliates are fully legally and structurally separated and subject to [an] independent power of decision within [the meaning of] paragraphs 52 and 53 of the Merger Jurisdictional Notice and shall be maintained, managed and operated [in a manner that is] independent and unconnected from the MVM Group and all of its businesses, its successors and affiliates and other State-controlled companies active in the generation, wholesale or retail of energy.’ In addition, Article 4 of the contested decision provides that ‘Hungary shall submit to the Commission annual reports on the fulfilment of the undertakings referred to in Article 3’, and that ‘the first report shall be submitted one month after the closing date of the first financial year of commercial operation of Paks II’. As Hungary and the Czech Republic state, that condition and recital 381 of the contested decision mean that the market situation after the launch of the new reactors at the Paks nuclear power plant is under constant review by the Commission. Hungary rightly adds that failure to comply with those conditions would lead to a new State aid investigation by the Commission, which would compromise Hungary’s ongoing investment in the project.

161 It follows from the foregoing that the Commission’s finding that the Paks II company is independent from the MVM Group does not contain any error of assessment and that there is no evidence to support the Republic of Austria’s concern that the Hungarian State may be able to exercise influence over both undertakings in a coordinated manner and, therefore, strengthen its dominant position.

162 The seventh plea must therefore be rejected.

The eighth plea in law, relating to risks to the liquidity of the Hungarian wholesale electricity market

163 By the eighth plea, the Republic of Austria submits that the Commission failed to take sufficient account of risks to the liquidity of the Hungarian wholesale electricity market.

164 The Republic of Austria submits that when examining the negative economic repercussions of aid, it is necessary to scrutinise the effects on the downstream markets. Approval of the aid was unlawful since the risk of a reduction in market liquidity, conceded by the Commission itself in recital 377 of the contested decision, still exists and has even worsened. A number of factors increase the risks to liquidity, including the operation in parallel of the old and new reactors at the Paks nuclear power station over a relatively long period of time and the high level of concentration on the Hungarian electricity market. According to the Republic of Austria, the

Commission agreed without any real justification to set aside its concerns that the market, in which production capacities are largely controlled by the State, could become even less liquid as the small number of players on the market could limit offers of supply. It was not sufficient to find, as did the Commission, that links between the Paks II company and State-owned operators on the retail market could be excluded and to point to the other framework conditions established in the contested decision, which make provision for a guarantee by Hungary that sales will take place on the power exchange and by auction. In reality, those links still exist since the Paks II company, like the MVM Group, is controlled by the State, which, even in the case of an intermediate undertaking, is in a position as 100% owner to take all the necessary decisions, inter alia with regard to personnel. Similarly, the division of powers between different ministries could easily be altered under national law and, within government, there is a minimum degree of communication and concerted action. Despite the two undertakings being legally and structurally separate, the State could therefore exercise an influence over the two undertakings in a coordinated manner, with the result that a dominant position on the market cannot be ruled out. As regards the guarantee of power exchange sales and sales by auction, the Republic of Austria argues that subsidised electricity will arrive on the market and produce direct effects on the market price of electricity, irrespective of the method of sale. Since there is no provision for a minimum amount of electricity that must be sold in that way, it is perfectly possible to envisage a business strategy on the part of the MVM Group and the Paks II company which would consist in reducing the supply of electricity in order to increase prices.

- 165 The Commission and Hungary contend that the eighth plea should be rejected.
- 166 The Republic of Austria bases its eighth plea, alleging that the Commission failed to take sufficient account of risks to the liquidity of the Hungarian wholesale electricity market, on two sets of arguments.
- 167 In the first place, it is necessary to reject at the outset the Republic of Austria's arguments that are based on the assertion of a dominant position on the part of the Paks II company.
- 168 In that regard, first, reference should be made to the assessment carried out in the examination of the seventh plea in paragraph 131 et seq. above. Second, it must be pointed out that the condition laid down in the fifth paragraph of Article 3 of the contested decision, cited in paragraph 160 above, which is intended to prevent the creation of a dominant position on the energy market during the period when the old and new reactors operate in parallel, provides that the guarantee of the independent management and operation of the new reactors and of the absence of any link with the MVM Group explicitly applies to other undertakings under State control which are active in the wholesale or retail of electricity. The Commission's conclusion, in recital 379 of the contested decision, that the exclusion of links between the Paks II company and State operators on the retail market contributed to addressing some of its concerns, is not undermined by the Republic of Austria's argument that the situation could easily be altered under national law and that there is a minimum degree of communication and concerted action within the government. In that regard, Hungary correctly observes that the Commission declared that the aid was compatible with the internal market subject to conditions that also included the abovementioned undertaking concerning the separation of the two undertakings. In the light of the obligation to submit an annual report, laid down in Article 4 of the contested decision, compliance with that condition remains subject to the scrutiny of the Commission.

169 In the second place, as regards the distribution of the power generated, the Commission, in particular in Section 2.6 of the contested decision, expressed its concern as regards the situation with respect to the structures in place for the wholesale of the power generated by the Paks nuclear power plant and the MVM Group. In recital 377 of the contested decision, it stated that the most common transactions of the Hungarian wholesale power sector were concluded by means of bilateral power purchase agreements and that the Hungarian power exchange had not yet triggered an adequate level of liquidity. It noted that the markets could become less liquid as the players involved could limit the number of supply offers available in the market. In recital 378 of the contested decision, the Commission also considered that, depending on the way the electricity produced by the new reactors was sold on the market, liquidity could be significantly affected and the costs borne by downstream competitors could be increased by restricting their competitive access to an important input (input foreclosure), and that that could happen if the electricity produced by the Paks II company was sold primarily by way of long-term contracts only to certain suppliers, thus moving the market power of the Paks II company in the generation market to the retail market.

170 On the basis of its analysis of that situation, the Commission provided for conditions intended to limit the risks to liquidity by means of an undertaking by Hungary to ensure compliance with various rules for the trading of the power output of the Paks II company. Those rules are incorporated in the third and fourth paragraphs of Article 3 of the contested decision and they provide as follows:

‘Hungary shall ensure that Paks II’s power output trading strategy will be an arms-length commercial profit-optimising strategy which is carried out through commercial trading arrangements concluded through bids cleared on a transparent trading platform or exchange. The strategy for the trading of Paks II’s power output (excluding own consumption of Paks II) shall be as follows:

Tier 1. Paks II shall sell at least 30% of its total electricity output on the day ahead, intraday and future markets of the Hungarian Power Exchange (HUPX). Other similar electricity exchanges can be used subject to the agreement or consent of the Commission’s services to be granted or refused within 2 weeks from the request by the Hungarian authorities.

Tier 2. The rest of Paks II’s total electricity output shall be sold by Paks II on objective, transparent and non-discriminatory terms by way of auctions. The conditions for such auctions shall be determined by the Hungarian energy regulator, similar to the auctioning requirements imposed on MVM Partner (decision 741/2011 of the Hungarian Regulator). The Hungarian energy regulator shall also oversee the conduct of these auctions.

Hungary shall ensure that the auction platform for Tier 2 is operated by Paks II and that offers and bids are equally available to all licensed or registered traders on the same market terms. The bid clearing system shall be verifiable and transparent. No restrictions shall be imposed on the final use of the electricity purchased.’

171 As is apparent from Article 4 of the contested decision, Hungary also undertook to submit to the Commission annual reports on the fulfilment of the undertakings referred to in Article 3 of the contested decision, so that their implementation remains under constant review by the Commission.

172 The Commission, in recitals 383 and 384 of the contested decision, rightly found that steps had thus been taken to ensure that the electricity produced by the new reactors would be available on the wholesale market for all market players, in a transparent manner, and that there was therefore

no risk that the electricity produced by the Paks II company would be monopolised in long-term contracts, since that type of contract poses a risk to market liquidity. It is therefore apparent that the Commission was right to find that the market liquidity risks which could arise were minor.

- 173 The Republic of Austria does not explain how the conditions laid down by the Commission are insufficient for remedying the problems identified at the time of the grant of aid which leads to the replacement of the output of the old reactors with that of the new ones. Liquidity will actually be increased and there is no evidence that the situation resulting from the conditions for the aid in Article 3 of the contested decision would lead to disproportionate distortions of competition on the market.
- 174 The Republic of Austria fails to convince with its criticism that the failure to set a minimum amount of electricity that it is mandatory to sell could lead to a commercial strategy, on the part of the MVM Group and the Paks II company, consisting in reducing the supply of electricity in order to increase prices also during the sale of electricity on the power exchange or in sales by auction. The Commission rightly notes that the two nuclear power stations are expected to produce so-called base-load capacity, with the result that they will not be able arbitrarily to reduce the power of the reactors solely for the purpose of limiting the supply of electricity, since the re-starting of nuclear power stations involves high costs and leads to a high workload.
- 175 Consequently, the Commission did not make a manifest error of assessment by finding that the grant of State aid to the Paks II company for carrying out the replacement of the old reactors of the Paks nuclear power plant with new reactors was compliant with Article 107(3)(c) TFEU so far as concerned the aspect of the liquidity of the wholesale electricity market.
- 176 Accordingly, the eighth plea is unfounded and must be rejected.

The ninth plea in law, alleging inadequate definition of the State aid

- 177 By the ninth plea, the Republic of Austria submits that the Commission failed to make the aid element clearly identifiable. In particular, the costs of financing the debt and the costs of waste treatment were not referred to.

...

On those grounds,

THE GENERAL COURT (Third Chamber)

hereby:

- 1. Dismisses the action;**
- 2. Orders the Republic of Austria to bear its own costs and to pay those incurred by the European Commission;**
- 3. Orders the Czech Republic, the French Republic, the Grand Duchy of Luxembourg, Hungary, the Republic of Poland, the Slovak Republic and the United Kingdom of Great Britain and Northern Ireland to bear their own costs.**

van der Woude

De Baere

Steinfatt

Delivered in open court in Luxembourg on 30 November 2022.

[Signatures]