



Reports of Cases

OPINION OF ADVOCATE GENERAL
WATHELET
delivered on 1 July 2015¹

Case C-357/14 P

**Electrabel SA,
Dunamenti Erőmű Zrt.**
v

European Commission

(Appeals — Aid awarded by the Hungarian authorities to certain electricity generators — Power purchase agreements concluded between the public undertaking ‘MVM’ and certain electricity generators — Terms and conditions placing such generators at an economic advantage — Decision declaring the State aid incompatible with the common market)

I – Introduction

1. Electrabel SA (‘Electrabel’) and Dunamenti Erőmű Zrt. (‘Dunamenti Erőmű’) have brought this appeal against the judgment in *Dunamenti Erőmű v Commission* (T-179/09, EU:T:2014:236, ‘the judgment under appeal’), by which the General Court dismissed Dunamenti Erőmű’s action for the annulment of Commission Decision 2009/609/EC of 4 June 2008 on the State aid C 41/05 awarded by Hungary through Power Purchase Agreements (‘the contested decision’).²

2. This case is highly important in that it raises three difficult issues. First of all, the Court will have an opportunity to clarify whether, with regard to a measure potentially constituting State aid implemented before the accession of the Member State concerned to the European Union, the relevant date for the assessment of the existence of aid is the date on which the measure was implemented or the date of the Member State’s accession to the European Union. Secondly, in the event that the date of accession is to be taken as the relevant date, the Court will be required to decide whether facts and matters prior to that date must be excluded from the assessment of the existence of State aid. Thirdly, the case offers the Court an opportunity to revisit its judgments in *Banks* (C-390/98, EU:C:2001:456) and *Germany v Commission* (C-277/00, EU:C:2004:238).

¹ — Original language: French.

² — OJ 2009 L 225, p. 53.

II – Background and current context of the dispute

3. Dunamenti Erőmű is an electricity generator on the Hungarian electricity market which operates a power plant located approximately 30 km south of Budapest (Hungary). It is a former public undertaking which was privatised in December 1995. At the material time it was 74.82% owned by Electrabel SA, which belongs to the group of companies headed by GDF Suez SA, and approximately 25% owned by Magyar Villamos Művek Zrt. ('MVM'), a Hungarian public undertaking whose activities comprise electricity generation as well as wholesale, transmission and retail activities on the Hungarian electricity market.

4. In March and June 2014, the GDF Suez group sold its shareholding in Dunamenti Erőmű, which now forms part of the MET group of companies.

5. In the mid-1990s, the most urgent objectives in the Hungarian energy sector were security of supply at the lowest possible cost, modernisation of the infrastructure, with particular regard to the prevailing standards of environmental protection, and the necessary restructuring of the power sector. However, since the power plants were essentially former Soviet plants, those objectives apparently could not be achieved without the help of foreign investors.

6. Consequently, long-term power purchase agreements ('PPAs') were proposed to foreign investors that would undertake to invest in the construction and modernisation of power plants in Hungary, with MVM purchasing the power generated.

7. The PPAs established a balanced production portfolio enabling MVM to meet its obligation of ensuring security of supply. They also enabled MVM to satisfy both base load demand (with lignite-fired and nuclear power stations) and peak load demand (with gas-fired power plants).

8. The PPAs required the power generators to maintain and operate their generation facilities appropriately. They reserved all or the bulk of the power plants' generation capacities (MW) for MVM. This capacity allocation was independent of the actual use of the power plant. Beyond the reserved capacities, the PPAs required MVM to purchase a specific minimum quantity of electricity (MWh) from each power plant.

9. The PPAs were concluded in view of the privatisation of the power plants. They all conformed to a standard agreement drafted by an international law firm on the instructions of the Hungarian Government. By contrast with the privatisation of the power plants, there was no tendering procedure for the conclusion of the PPAs. However, it is common ground that the PPAs signed before privatisation formed part of the privatisation package.

10. On 10 October 1995, just before its privatisation, Dunamenti Erőmű entered into a PPA with MVM in respect of the 'F block' and 'G2 block' of its power plant. That agreement, which entered into force in 1996, was to continue until 2010, in so far as concerned the gas-fired 'F block', and until 2015, in so far as concerned the 'G2 block', a combined cycle gas turbine unit.

11. Two months after the conclusion of the PPA, in December 1995, Electrabel acquired Dunamenti Erőmű from the Hungarian State after a public competitive tendering procedure.

12. It is important to note that, at the time when the PPAs were signed, the Hungarian market in electricity was not yet liberalised and was structured around a single buyer, namely MVM. Electricity generators could supply energy directly only to MVM, and MVM was the only company authorised to supply electricity to the regional distribution companies. That regime was in force between 31 December 1991 and 31 December 2002.

13. When Hungary acceded to the European Union on 1 May 2004 the Hungarian market in electricity was comprised of a public utility sector that accounted for approximately 70% of power generation and a competitive sector that accounted from approximately 30% of power generation. In the public utility sector, MVM was the only wholesaler whereas, in the competitive sector, other traders also operated, with MVM's activities in that sector intended only to release the surplus quantities purchased under the PPAs and not needed by the public utility sector. That new regime entered into force on 1 January 2003 and was abolished, with effect from 1 January 2008, by Law No LXXXVI of 2007.

14. On 4 May 2005, in accordance with Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article [108 TFEU],³ the Commission registered, of its own motion, a State aid file concerning the PPAs under number NN 49/2005.

15. On 4 June 2008, the Commission adopted the contested decision, in which it took the date of Hungary's accession to the European Union, 1 May 2004, as the relevant date for its assessment of whether the PPAs constituted State aid.

16. In Article 1 of the contested decision, the Commission classified the purchase obligations set out in the PPAs as State aid, within the meaning of Article 107 TFEU, to electricity generators, declared the aid incompatible with the common market and ordered Hungary to refrain from granting the aid within six months. Article 2 required Hungary to recover from the beneficiaries the aid which they had received from 1 May 2004 onwards.

17. On 10 November 2008, the Hungarian Parliament adopted Law No LXX of 2008, which terminated the PPAs with effect from 31 December 2008.

18. In so far as concerns the calculation of the amount of aid to be recovered from the beneficiaries, the Hungarian Government decided, with regard to three of the beneficiaries of the PPAs, including Dunamenti Erőmű, to put in place a stranded costs compensation scheme in accordance with the Commission's Communication relating to the methodology for analysing State aid linked to stranded costs ('the methodology').⁴

19. Under this scheme, which was notified to and approved by the Commission,⁵ the stranded costs correspond to the difference between the investment costs of each of the beneficiaries and their operating profits, both historic (from the date of entry into force of the PPAs to their early termination) and projected (between the date of early termination and the expiry dates of the PPAs as initially stipulated).⁶

3 — OJ 1999 L 83, p. 1.

4 — The text of the methodology is available on the Commission's website at: http://ec.europa.eu/competition/state_aid/legislation/stranded_costs_en.pdf. Directive 96/92/EC of the European Parliament and of the Council of 19 December 1996 concerning common rules for the internal market in electricity (OJ 1997 L 27, p. 20) laid down the principles for opening up the European electricity industry to competition. Article 24(1) of that directive provided that '[t]hose Member States in which commitments or guarantees of operation given before the entry into force of this Directive [might] not be honoured on account of the provisions of this Directive [could] apply for a transitional regime'. According to the Commission, '[s]uch commitments or guarantees of operation are normally referred to as "stranded costs". They may, in practice, take a variety of forms: long-term purchase contracts, investments undertaken with an implicit or explicit guarantee of sale, investments undertaken outside the scope of normal activity, etc.' (see p. 3 of the methodology). However, a system of levies introduced by a Member State via a fund to offset stranded costs might constitute State aid and would, therefore, need to fulfil the criteria set out in the methodology and be notified to and approved by the Commission before implementation.

5 — See letter C(2010) 2532 final of 27 April 2010 from the Vice-President of the Commission, Mr Almunia, to the Hungarian Minister for Foreign Affairs, available only in English on the Commission's website at: http://ec.europa.eu/competition/state_aid/cases/234326/234326_1114108_42_1.pdf.

6 — Ibid., paragraph 8.

20. The scheme established a two-stage compensation process.⁷ During the first stage, the stranded costs of each beneficiary were to be deducted from the amount of aid to be repaid to the Hungarian State. If the difference between the aid to be repaid and the stranded costs was positive, the beneficiary was to pay that amount to the State. If the difference was negative, the Hungarian State would not make any payment to the beneficiary.⁸

21. The second stage is to begin on the expiry date of the PPA of each beneficiary (that being, in Dunamenti Erőmű's case, 31 December 2015), at which point the Hungarian authorities are to recalculate the stranded costs on the basis of real costs and revenues. In the event that the real stranded costs prove to be less than the amount of recoverable aid, the beneficiary will have to pay the difference to the Hungarian State. If they prove to be greater, the Hungarian State will not pay to the beneficiary of the PPA the excess of the definitive amount of stranded costs.

22. At the present time, Dunamenti Erőmű's stranded costs are estimated at 22 171 991 000 Hungarian forints (HUF) (approximately EUR 73 million).

23. On 13 June 2007, Electrabel initiated arbitration proceedings against Hungary before the International Centre for Settlement of Investment Disputes ('ICSID') in which the Commission intervened as a non-disputing party. Electrabel claimed, among other things, that by terminating the PPAs without providing full compensation for stranded costs, Hungary had breached the obligations of fair and equitable treatment of investments contained in Article 10 of the Energy Charter Treaty of 17 December 1994, to which the Kingdom of Belgium, Hungary and the European Union are contracting parties.⁹

24. Electrabel and Hungary agreed to the 'bifurcation' of the proceedings into two separate phases: 'jurisdiction and liability' and 'quantum'.

25. Given that the final amount of Dunamenti Erőmű's and Electrabel's net stranded costs cannot be calculated until after 31 December 2015, the Arbitral Tribunal decided to reserve to the quantum phase of the proceedings its decision as to whether the scheme for the compensation of stranded costs implemented by Hungary infringed Article 10 of the Energy Charter Treaty.¹⁰ Nevertheless, the Arbitral Tribunal expressed its 'current, provisional and tentative view that the non-payment of HUF [22 171 991 000] or a lesser sum at the end of Hungary's legislative scheme [did] not strike the Tribunal as necessarily amounting to a breach of the [fair and equitable treatment] standard; but that non-payment (in cash or otherwise) of a significantly higher sum for Net Stranded Costs most probably could'.¹¹

26. That does not appear to be the approach adopted by the Arbitral Tribunal that presided over the arbitration initiated by Électricité de France (EDF), a shareholder in Budapesti Erőmű, in connection with the termination of its PPA, in which Hungary was ordered to pay EDF EUR 107 million.¹²

7 — For a detailed description, see *ibid.*, paragraphs 10 to 24.

8 — See Article 5(1) and (3) of Law No LXX of 2008.

9 — It should be noted that, as a result of Electrabel's decision to initiate the arbitration proceedings against Hungary alone and solely in relation to that State's own acts and omissions, the compatibility of the contested decision with the Energy Charter Treaty was not addressed in the arbitration. See *Electrabel S.A. v. The Republic of Hungary* (ICSID Case No ARB/07/19) Decision on Jurisdiction, Applicable Law and Liability, paragraphs 3.21, 4.11 and 6.76 (available on the Investment Treaty Arbitration website at: <http://italaw.com/sites/default/files/case-documents/italaw1071clean.pdf>). Moreover, in its action for annulment before the General Court, Dunamenti Erőmű did not dispute the validity of the contested decision in the light of this Treaty. Consequently, as a result of the decisions taken by Electrabel and Dunamenti Erőmű, the contested decision escaped any review of its legality in the light of this Treaty.

10 — *Ibid.* (paragraph 6.118).

11 — *Ibid.*: 'It is therefore best, in all the circumstances, for the Tribunal to say little more here, save to express the Tribunal's current, provisional and tentative view ...'

12 — The arbitration award has not been made public. See the article by Thomson, D., entitled 'EDF wins claim against Hungary', published on 11 December 2014, on the website of the Global Arbitration Review, available at: <http://globalarbitrationreview.com/news/article/33251/edf-wins-claim-against-hungary/>.

27. Independently of Dunamenti Erőmű and Electrabel's action for annulment of the contested decision (the General Court's dismissal of which is the subject of the present appeal), on 10 January 2014 Dunamenti Erőmű and Electrabel brought before the General Court an action for damages, on the basis of the second paragraph of Article 340 TFEU, in which they sought compensation for the loss allegedly suffered as a result of the contested decision.

28. On 13 November 2014, the General Court dismissed that action for damages as inadmissible on the ground that it was time-barred.¹³ An appeal is currently pending against that order before the Court of Justice.¹⁴

III – The action before the General Court and the judgment under appeal

29. A number of actions for annulment of the contested decision have been brought before the General Court by the beneficiaries of the PPAs.¹⁵

30. By its action before the General Court, Dunamenti Erőmű requested that the contested decision be annulled.

31. By its first ground of appeal, alleging misapplication of the concept of 'State aid' within the meaning of Article 107(1) TFEU, and by its second ground of appeal, alleging that the Commission should have classified the measures at issue as 'existing aid' within the meaning of Article 108(1) TFEU, Dunamenti Erőmű took issue with the Commission's finding of State aid, with its classification of that aid as 'new aid' and with its identification of the relevant date for the purposes of assessing the aid contained in the PPA at issue. Dunamenti Erőmű also took issue with the application of the private operator in a market economy test and disputed MVM's position as a market player at the time of Hungary's accession to the European Union. It also alleged infringement of the principles of the protection of legitimate expectations and of legal certainty and incorrect assessment on the Commission's part of the specific features of the PPA at issue.

32. By its third ground of appeal, Dunamenti Erőmű claimed that the Commission had misconstrued the aid contained in the PPA at issue as operating aid rather than investment aid and took issue with the scheme for the compensation of stranded costs implemented by the Hungarian authorities.

33. By its fourth ground of appeal, Dunamenti Erőmű disputed the lawfulness of the order for the recovery of the aid.

34. By the judgment under appeal, the General Court dismissed the action in its entirety.¹⁶

IV – Procedure before the Court

35. By their appeal lodged on 21 July 2014, Electrabel and Dunamenti Erőmű ask the Court to set aside the judgment under appeal, to give final judgment and annul the contested decision or, in the alternative, refer the case back to the General Court, and to order the Commission to pay the costs of the proceedings before the General Court and the Court of Justice.

13 — See order in *Electrabel and Dunamenti Erőmű v Commission* (T-40/14, EU:T:2014:1004).

14 — See *Electrabel and Dunamenti Erőmű v Commission* (C-32/15 P), currently pending before the Court of Justice.

15 — See order in *Alpiq Csepel v Commission* (T-370/08, EU:T:2011:116); judgment in *Budapesti Erőmű v Commission* (T-80/06 and T-182/09, EU:T:2012:65); order in *Pannon Hőerőmű v Commission* (T-352/08, EU:T:2013:379); judgments in *Tisza Erőmű v Commission* (T-468/08, EU:T:2014:235); and *Dunamenti Erőmű v Commission* (T-179/09, EU:T:2014:236).

16 — The actions for annulment brought by the other beneficiaries were also dismissed. See judgments in *Budapesti Erőmű v Commission* (T-80/06 and T-182/09, EU:T:2012:65), and *Tisza Erőmű v Commission* (T-468/08, EU:T:2014:235). Only the judgment in *Dunamenti Erőmű v Commission* (T-179/09, EU:T:2014:236) has been appealed.

36. In its response lodged on 4 September 2014, the Commission asks the Court to declare the appeal inadmissible in so far as it is brought by Electrabel, to dismiss the appeal in so far as it is brought by Dunamenti Erőmű and to order the latter to pay the costs.

37. Electrabel and Dunamenti Erőmű lodged a reply on 20 November 2014, which the Commission answered by rejoinder lodged on 25 November 2014.

38. On 26 March 2015, pursuant to Article 61(2) of the Rules of Procedure of the Court of Justice, the Court invited the parties to concentrate in their oral pleadings at the hearing on the second and third grounds of appeal and, pursuant to Article 62(2) of the Rules of Procedure, put two questions to the parties to be answered at the hearing.

39. A hearing was held on 20 April 2015 at which Electrabel, Dunamenti Erőmű and the Commission made oral submissions.

V – The appeal

40. I shall begin my analysis by considering the Commission's objection that the appeal is inadmissible in so far as it is brought by Electrabel. Next, I shall address the fourth, fifth and first grounds of appeal, which, in my view, may be dismissed without any particular difficulty. Lastly, I shall focus on the second and third grounds of appeal, which I believe could lead the Court to annul the contested decision.

A – The admissibility of the appeal in so far as it is brought by Electrabel

41. In its response, the Commission objects that the appeal is inadmissible in so far as it is brought by Electrabel, since Dunamenti Erőmű alone brought an action for annulment in the proceedings at first instance.

42. In their reply, Electrabel et Dunamenti Erőmű contest that objection of inadmissibility, explaining that, when the action for annulment was brought, they formed part of the same group of undertakings and their economic and legal interests could be defended by either of them. Now that its shareholding in Dunamenti Erőmű has been sold, Electrabel ought to be allowed to bring an appeal before the Court of Justice, so that it may defend its own interests.

43. In my opinion, the appeal, in so far as it is brought by Electrabel, must be declared inadmissible.

44. First, as the Commission points out, the second paragraph of Article 56 of the Statute of the Court of Justice of the European Union states that an appeal against a judgment of the General Court 'may be brought by any party which has been unsuccessful, in whole or in part, in its submissions'. That does not, however, include Electrabel, which was not a party to the proceedings before the General Court.

45. Secondly, Electrabel is not one of the privileged parties which, in accordance with the third paragraph of Article 56, may bring an appeal against a judgment of the General Court without having been a party to the proceedings before that Court. That privilege is reserved to the 'Member States and the institutions of the Union', and Electrabel is not one of them.

46. It is therefore necessary to examine the present appeal as if it had been brought by Dunamenti Erőmű alone.

B – The fourth ground of appeal, alleging that the General Court erred in law by concluding, without proving the existence of a structural risk, that MVM’s minimum off-take obligation conferred an advantage

47. By its fourth ground of appeal, Dunamenti Erőmű maintains that the General Court erred in law and failed in its duty of judicial review by concluding, without demonstrating the actual existence of a structural risk, that MVM’s minimum off-take obligation implied an advantage, even though it recognised, in paragraph 112 of the judgment under appeal, that MVM had regularly purchased greater quantities of electricity than it had been required to purchase in accordance with that obligation.

1. Admissibility

48. According to the Commission, this ground of appeal is inadmissible since Dunamenti Erőmű fails to identify the part of the judgment under appeal that is vitiated by the error of law.

49. That objection must, in my view, be rejected. Dunamenti Erőmű’s argument consists in a complaint that the General Court failed to demonstrate the actual existence of a structural risk, and it cannot therefore be criticised for not identifying specific passages in the judgment under appeal containing the alleged error of law.

2. The substance

50. According to the Commission, in each of paragraphs 112, 113 and 114 of the judgment under appeal the General Court gave a separate reason for refuting the argument that MVM’s having regularly purchased, since 2004, more electricity from Dunamenti Erőmű than it was required to purchase demonstrates that Dunamenti Erőmű could not have derived any advantage from that obligation.

51. The Commission states that, since Dunamenti Erőmű does not take issue with paragraphs 113 and 114 of the judgment under appeal, neither does it call into question the finding in paragraph 112 of the judgment that the minimum take-off obligation went beyond standard commercial practice on the European electricity markets, which itself provided the basis for the conclusion that the PPA had conferred an advantage on it.

52. In its reply and at the hearing, Dunamenti Erőmű did not dispute the Commission’s analysis, which it too regarded as well founded.

53. The fourth ground of appeal should therefore be dismissed.

C – The fifth ground of appeal, alleging that the General Court erred in law by confirming the methodology adopted by the Commission for calculating the quantum of the aid

54. By its fifth ground of appeal, which concerns the method used to calculate the amount of aid, Dunamenti Erőmű claims that the examination, in paragraphs 185 to 192 of the judgment under appeal, of its revenues rather than its profits renders it impossible to ascertain precisely the advantage allegedly derived from the PPA, since revenue that covered additional fuel charges is treated as an advantage that must be repaid.

55. It is therefore necessary to consider whether the General Court was right to confirm the approach adopted by the Commission, which was to quantify the amount of aid to be recovered by reference to revenue rather than profits.

56. In my view, this ground of appeal should be dismissed for the reasons set out by the General Court in paragraphs 187 and 188 of the judgment under appeal. Dunamenti Erőmű does not dispute that the objective of the recovery of aid is to have the recipient forfeit the advantage which it had enjoyed over its competitors in the market.¹⁷ The advantage that must be recovered must be assessed by reference to the sums which have been paid to the beneficiary and, as the Commission asserts, the General Court was right to take an approach based on the sums paid by MVM to Dunamenti Erőmű (that is to say, on the latter's revenue) rather than on the profits which it made.

57. In any event, as the Commission points out, a method of aid recovery based on profits, as opposed to revenue, could lead to absurd results that would render the State aid rules entirely nugatory. Taking Dunamenti Erőmű's reasoning to its logical extreme, every time an undertaking was able to sell its products or services at an unbeatable price as a result of State subsidies, there would be no State aid because the undertaking would have increased only its revenues, not its profits. However, the very purpose of the State aid rules is to keep that kind of distortion of competition in check.

58. I would also reject the argument which Dunamenti Erőmű bases on the judgment in *Ferring* (C-53/00, EU:C:2001:627), namely that, in paragraphs 30 to 33 of that judgment, the Court laid down the principle that, if an aid measure entails both additional profits and additional costs, it is the difference between those additional profits and additional costs that must be recovered.

59. In that judgment, which concerned an advantage, derived by wholesale distributors from not being assessed to a tax on direct sales of medicines, that exceeded the additional costs which they incurred in performing their public service obligations, the Court held:

'32. If it is the case that the advantage for wholesale distributors in not being assessed to the tax on direct sales of medicines exceeds the additional costs that they bear in discharging the public service obligations imposed on them by national law, that advantage, to the extent that it exceeds the additional costs mentioned, cannot, in any event, be regarded as necessary to enable them to carry out the particular tasks assigned to them.

33. Consequently, the answer must be that Article [106(2)] of the [FEU] Treaty is to be interpreted as meaning that it does not cover a tax advantage enjoyed by undertakings entrusted with the operation of a public service such as those concerned in the main proceedings in so far as that advantage exceeds the additional costs of performing the public service.'

60. It is thus clear that, while the amount of any State subsidies in excess of the additional costs of performing a public service constitutes aid which is incompatible with Article 107 TFEU and must be recovered, that principle is applicable only where the beneficiary falls within the scope of Article 106(2) TFEU, that is to say, where it is entrusted with the operation of services of general economic interest or having the character of a revenue-producing monopoly. That is not the case for Dunamenti Erőmű.

61. For those reasons the fifth ground of appeal should be dismissed.

D – The first ground of appeal, alleging that the General Court erred in law by classifying the PPA at issue as new aid without first determining whether it constituted State aid

62. By its first ground of appeal, Dunamenti Erőmű argues that the General Court erred in law, in paragraph 60 of the judgment under appeal, by classifying the PPA at issue as 'new aid', within the meaning of Annex IV to Hungary's Act of Accession, without first verifying whether the four conditions for the existence of State aid were fulfilled. It argues in this connection that the General Court's reasoning is inadequate and circular.

¹⁷ — See, in particular, the judgment in *Unicredito Italiano* (C-148/04, EU:C:2005:774, paragraph 113).

63. The first ground of appeal cannot, in my view, succeed.

64. As the Court of Justice has already held, ‘the General Court has the freedom to structure and to expound its reasoning in whatever way it deems necessary for the purposes of responding to the pleas raised before it. Accordingly, the way in which the General Court chooses to structure and reason its response are not open to challenge, in the context of an appeal, through claims seeking to establish that the General Court should have undertaken its analysis in the manner expected by the applicant’.¹⁸

65. In the present case, even though the General Court did indeed begin by ruling (in paragraphs 49 to 60 of the judgment under appeal) on the nature of the aid in question, and namely whether it was existing aid or new aid, before deciding (in paragraphs 74 to 98 and 110 to 121 of the judgment under appeal) whether the PPA was State aid, I do not think that structuring its reasoning in that way had any bearing on the General Court’s analysis.

66. In any event, as the Commission states, the General Court examined and rejected all of the arguments put forward by Dunamenti Erőmű in the context of its first and second grounds of appeal.

67. I also concur with the Commission’s remark that the General Court’s conclusion that the PPA at issue constituted State aid was not dependent on its prior finding that the aid at issue was new aid. Consequently, there is no circularity in the General Court’s reasoning.

68. For those reasons the first ground of appeal should be rejected.

E – The second ground of appeal, alleging that the General Court erred in law by taking the view that the four criteria for classifying a measure as State aid were to be assessed as at the date of Hungary’s accession to the European Union

69. By its second ground of appeal, Dunamenti Erőmű complains that the General Court erred in law by taking the date of Hungary’s accession to the European Union, 1 May 2004, as the date of reference for its determination of whether the PPA at issue constituted State aid, as alleged by the Commission in recitals 156 to 173 of the contested decision.

70. By the first limb of this ground of appeal, Dunamenti Erőmű asserts that the General Court erred in law in paragraphs 55 and 65 of the judgment under appeal in that, by contrast with the conclusions formulated in those paragraphs, no provision of Annex IV to the Act of Accession establishes, either directly or by inference, the relevant date for the assessment of whether a public measure constitutes State aid.

71. By the second limb of this ground of appeal, Dunamenti Erőmű argues that the reasoning on which the General Court based its choice of date of reference for the purpose of establishing the existence of aid (and, in particular, the existence of an advantage for the beneficiary, by reference to the private investor in a market economy test) runs counter to ‘legal practice’, that is to say the Commission’s guidelines and its decision-making practice, and to the case-law of the Courts of the European Union.

¹⁸ — Judgment in *British Telecommunications v Commission* (C-620/13 P, EU:C:2014:2309, paragraph 29).

1. The first limb of the second ground of appeal

72. As the General Court observed in paragraph 50 of its judgment in *Budapesti Erőmű v Commission* (T-80/06 and T-182/09, EU:T:2012:65), ‘State measures put into effect before accession, but which are still applicable after accession and which comply at the date of accession with the four cumulative conditions laid down in Article [107(1) TFEU] are subject to the specific rules set out in Annex IV to the Act of Accession, either as existing aid within the meaning of Article [108(1) TFEU] if they fall within one of the three categories mentioned in that annex, or as new aid upon accession for the purpose of the application of Article [108(3) TFEU] if they do not fall within one of those three categories’.

73. Paragraph 1 of Chapter 3, entitled ‘Competition Policy’, of Annex IV to the Act of Accession, states:

‘1. The following aid schemes and individual aid put into effect in a new Member State before the date of accession and still applicable after that date shall be regarded upon accession as existing aid within the meaning of Article [108(1)] of the [FEU] Treaty:

- (a) aid measures put into effect before 10 December 1994;
- (b) aid measures listed in the Appendix to this Annex;
- (c) aid measures which prior to the date of accession were assessed by the State aid monitoring authority of the new Member State and found to be compatible with the *aquis*, and to which the Commission did not raise an objection on the ground of serious doubts as to the compatibility of the measure with the common market, pursuant to the procedure set out in paragraph 2.

All measures still applicable after the date of accession which constitute State aid and which do not fulfil the conditions set out above shall be considered as new aid upon accession for the purpose of the application of Article [108(3)] of the [FEU] Treaty.

...’

74. Dunamenti Erőmű submits that that provision does not mention the date with reference to which a public measure is to be examined in the light of the State aid rules. It merely addresses the question whether aid that is still applicable at the time of accession (and which, in the ordinary sense of the word, ‘exists’ at that time) is to be regarded as existing aid or new aid for the purposes of the Act of Accession. Therefore, according to Dunamenti Erőmű, a measure which did not constitute aid at the time when it was granted does not fall within the scope of that provision. Consequently, it submits that the General Court should have taken as the date of reference the date on which the PPA was granted, that is to say, December 1995.

75. I do not concur with that analysis, which, in my view, confuses the definition of the term ‘existing’ given in the Act of Accession with the ordinary meaning of that word. Indeed, aid that is ‘existing’ within the ordinary meaning of the word, like the PPA, which had already been granted prior to the Commission’s examination of it, may constitute new aid for the purposes of the Act of Accession simply because it does not fit within the definition of ‘existing aid’ given in the Act of Accession.

76. I would mention paragraphs 60 to 64 of the judgment in *OTP Bank* (C-672/13, EU:C:2015:185), which concerned the application of that same provision of the Act of Accession to a guarantee granted by the Hungarian State in 2001, three years before its accession to the European Union. Given that the guarantee at issue did not fulfil any of the three conditions set out in Chapter 3 of

Annex IV, the Court held that it ‘must, accordingly, in that case, be regarded as new aid’.¹⁹

77. Similarly, in the present case, as the General Court held in paragraph 59 of the judgment under appeal, the PPA at issue does not fall within any of the three categories of aid classified as existing aid under paragraph 1 of Chapter 3 of Annex IV to the Act of Accession. The PPA was not implemented before 10 December 1994, was not listed in the appendix to Annex IV and was not assessed by the Hungarian State aid monitoring authority prior to the date of accession and found to be compatible with the *aquis*, with no objection being raised by the Commission.

78. Moreover, to take as a reference any earlier date, such as the date on which the PPA at issue was granted, would be to disregard the intention of the drafters of the Act of Accession, who, as the General Court held in paragraph 60 of the judgment under appeal,²⁰ meant to depart from the earlier case-law of the Courts of the European Union according to which ‘existing aid is, in particular, aid introduced before the Treaty came into force or before the accession of the Member State concerned to the European Union’.²¹

79. In any event, as the Court held in paragraph 65 of the judgment under appeal, ‘it is clear from the wording of Annex IV to the Act of Accession that a measure which was not regarded as State aid when it was introduced can subsequently become State aid’.²²

80. Indeed, as the Commission stated in recital 165 of the contested decision, ‘the PPAs, entered into in substantially different economic conditions (as recognised by the interested parties) before accession to the liberalised internal energy market, [could] very well become State aid in the new legal and economic circumstances [resulting from accession to the European Union]’.

81. As the Court held in paragraph 58 of its judgment in *Budapesti Erőmű v Commission* (T-80/06 and T-182/09, EU:T:2012:65), ‘[a]fter the PPAs came into effect, Hungary, initially on its own initiative, then in transposing the EU legislation applicable to the internal market in electricity, substantially altered the legal framework under which power generators conducted their business’.

82. The Commission, and subsequently the General Court, in the context of the action for annulment, were therefore required to consider whether, at the time of Hungary’s accession to the European Union and in the context of a liberalised market in electricity, the PPAs constituted State aid and, if so, whether they were, within the meaning of Annex IV to the Act of Accession, new aid or existing aid.

83. Consequently, in so far as the PPA at issue is aid, there is no question but that it constitutes new aid within the meaning of the Act of Accession.

2. The second limb of the second ground of appeal

84. As regards Dunamenti Erőmű’s argument relating to the ‘legal practice’ of the Commission and of the Courts of the European Union, I would point out that, as the Commission observes, the Court of Justice has already proposed that the date of accession should be taken as the reference date.

19 — Judgment in *OTP Bank* (C-672/13, EU:C:2015:185, paragraph 64). It is appropriate, in this connection, to note the conclusion drawn by the Arbitral Tribunal, which took the view that Electrabel had not furnished the necessary evidence to support its argument that Hungary had infringed its obligations under Article 10 of the Energy Charter Treaty by failing to take steps to bring the PPAs within the definition of existing aid, for the purposes of Annex IV. See, to that effect, *Electrabel S.A. v. The Republic of Hungary* (ICSID Case No ARB/07/19) Decision on Jurisdiction, Applicable Law and Liability, paragraph 6.66.

20 — See also, to that effect, the judgment in *Budapesti Erőmű v Commission* (T-80/06 and T-182/09, EU:T:2012:65, paragraph 60).

21 — Judgment in *Banco Exterior de España* (C-387/92, EU:C:1994:100, paragraph 19). See also, to that effect, the judgments in *Piaggio* (C-295/97, EU:C:1999:313, paragraph 48), and *Alzetta and Others v Commission* (T-298/97, T-312/97, T-313/97, T-315/97, T-600/97 to T-607/97, T-1/98, T-3/98 to T-6/98 and T-23/98, EU:T:2000:151, paragraph 142).

22 — See also, to that effect, the judgment in *Budapesti Erőmű v Commission* (T-80/06 and T-182/09, EU:T:2012:65, paragraph 54).

85. Indeed, as the Court has already held in relation to the provision in Annex V to Bulgaria's Act of Accession (which corresponds to paragraph 1 of Chapter 3 of Annex IV to Hungary's Act of Accession), 'measures implemented before accession but which, firstly, are still applicable post-accession and, secondly, satisfy the cumulative requirements of Article [107(1) TFEU] *on the date of accession*, are subject to the specific rules laid down in Annex V to the Act of Accession, either as existing aid for the purposes of Article [108(1) TFEU] when [they come] within one of the three categories referred to in that annex, or as new aid on the date of accession for the purposes of application of Article [108(3) TFEU] where [they do] not come within one of those three categories'.²³

86. In my opinion, it is clear from that case-law that, in the present case, the Commission and the General Court correctly applied the rules set out in the Act of Accession of Hungary to the European Union.

87. In any event, as the Commission emphasises, none of the judgments of the General Court and of the Court of Justice cited by Dunamenti Erőmű²⁴ concerns measures adopted by a Member State prior to its accession to the European Union and still applicable after its accession. Since the question of observance of the temporal restrictions on the European Union's jurisdiction did not arise in those cases it is hardly surprising that the Courts of the European Union held that the existence of aid had to be assessed by reference to the time when the measure was granted.

88. As regards the Commission's practice²⁵ of including in its analyses of aid measures granted prior to a Member State's accession factors which precede that accession, I would observe that the Commission decisions cited by Dunamenti Erőmű²⁶ do not support its argument that the date of reference should be the date on which the aid in question was granted.

89. As regards, first of all, Commission Decision 2008/214 in the GE Capital Bank case, the aid measure in question consisted in warranties and indemnities and a put option granted by the Czech State in the context of the restructuring and privatisation of the bank Agrobanka, Praha a.s.

90. Although those measures were granted prior to the Czech Republic's accession to the European Union, they remained 'applicable after accession'²⁷ in the sense that the beneficiaries were still able to derive a benefit from them after accession. The date of reference chosen by the Commission was therefore the date of accession.

91. The aid measure at issue in Commission Decision 2009/174 in the Postabank case consisted in an indemnity in respect of unknown claims granted by the Hungarian State in the context of the restructuring and privatisation of Postabank for the benefit of its successor Erste Bank.

92. As the Commission stated in recital 47 of its decision, this was a measure that remained in effect after accession which, as in the present case, was to be regarded as new aid for the purposes of the Act of Accession.

23 — See judgment in *Kremikovtzi* (C-262/11, EU:C:2012:760, paragraph 52); my emphasis. See also, to that effect, the judgment in *Rousse Industry v Commission* (T-489/11, EU:T:2013:144, paragraphs 61 to 64, 66 and 67).

24 — See judgments in *France v Commission* (C-482/99, EU:C:2002:294, paragraphs 71 and 76 to 83); *Commission v EDF* (C-124/10 P, EU:C:2012:318, paragraph 104); *Cityflyer Express v Commission* (T-16/96, EU:T:1998:78, paragraph 76); *Westdeutsche Landesbank Girozentrale and Land Nordrhein-Westfalen v Commission* (T-228/99 and T-233/99, EU:T:2003:57, paragraph 246); and *Netherlands and ING Groep v Commission* (T-29/10 and T-33/10, EU:T:2012:98, paragraph 78).

25 — Which is somewhat paradoxical if one considers the Commission's position in this case (see my analysis of the third limb of the third ground of appeal, in points 125 to 127 of this Opinion).

26 — Namely, Commission Decisions 2008/214/EC of 18 July 2007 on State aid C 27/2004 which the Czech Republic has implemented for GE Capital Bank a.s. and GE Capital International Holdings Corporation, USA (OJ 2008 L 67, p. 3); 2009/174/EC of 21 October 2008 on measure C 35/04 implemented by Hungary for Postabank and Takarékpénztár Rt./Erste Bank Hungary Nyrt. (OJ 2009 L 62, p. 14); and 2010/690/EU of 4 August 2010 on State aid C 40/08 (ex N 163/08) implemented by Poland for PZL Hydral S.A. (OJ 2010 L 298, p. 51).

27 — Decision 2008/214, recital 58.

93. The same applies to Commission Decision 2010/690 in the PZL Hydral case, which concerned aid measures, in the context of a plan for PZL Hydral's rescue, including the non-enforcement, during the period 1998 to 2007, of the company's public liabilities.

94. Despite the fact that the unenforced claims had become enforceable before the Republic of Poland's accession to the European Union and remained enforceable after its accession, the measure formed part of a rescue plan put in place in 2007, three years after accession. Consequently, the date of reference in that case was again taken to be the date of the Republic of Poland's accession, rather than the date on which the aid in question was granted.

95. It should be noted that in all these decisions the Commission took into account factors pre-dating accession, which is what Dunamenti Erőmű claims it should have done in this case. However, that point concerns the question whether, in cases such as the present, the Commission should, when applying the private investor test, take account of facts prior to accession, such as privatisation and the objectives thereof, and the intrinsic link between privatisation and the PPA. That question (to which I shall return in the context of the third ground of appeal) is different from the question of the relevant date for the purposes of deciding whether a public measure should be classified as State aid.

96. For those reasons the second ground of appeal should be dismissed.

F – The third ground of appeal, alleging that the General Court erred in law by holding that the PPA at issue conferred an advantage on Dunamenti Erőmű within the meaning of Article 107(1) TFEU

97. By its third ground of appeal, Dunamenti Erőmű claims that the General Court erred in law in paragraphs 67 to 70 of the judgment under appeal, in that, having taken 1 May 2004 as the date of reference, it excluded Dunamenti Erőmű's privatisation from its assessment of the existence of aid. According to Dunamenti Erőmű, the analysis of whether the PPA at issue constituted State aid could not lawfully be carried out without taking into account the privatisation and its context, since the PPA was a pre-privatisation measure and, as such, formed an integral part of the package of privatisation measures.

98. Next, in paragraphs 49 to 66 of its appeal, Dunamenti Erőmű puts forward three arguments to demonstrate that, if the General Court had taken account of the circumstances of the privatisation, it would have held that the PPA did not constitute an advantage or, in any event, that Dunamenti Erőmű had not retained that advantage.

99. First of all, MVM had acted as a private investor seeking to maximise the financial outcome of the sale of Dunamenti Erőmű (paragraphs 49 to 54 of the appeal).

100. Secondly, even if the PPA had entailed an advantage, the acquisition of Dunamenti Erőmű by Electrabel at the conclusion of the tendering procedure compensated any alleged advantage (paragraphs 55 to 62 of the appeal).

101. Thirdly, Hungary's accession did not affect the link between the PPA and Dunamenti Erőmű's privatisation and did not alter the fact that the PPA conferred no advantage on Dunamenti Erőmű (paragraphs 63 to 67 of the appeal, read together with paragraphs 41 to 62 of the appeal).

1. Admissibility

102. According to the Commission, the third ground of appeal relates to a question of fact and is therefore inadmissible. Having correctly taken the date of Hungary's accession to the European Union to be the date of reference for establishing the existence of aid, the General Court rightly held, in paragraphs 68 to 70 of the judgment under appeal, that the determination of whether the PPA conferred an advantage on Dunamenti Erőmű had to be made with reference to that date alone and to the likely development of the situation at that time.

103. I do not concur with the Commission's approach, which, in my opinion, is based upon a misreading of the appeal. Indeed, this ground of appeal does not raise the question of what facts may be associated with the period commencing on 1 May 2004, but the question whether the Court was entitled, notwithstanding the reference date of 1 May 2004, to exclude from its assessment certain facts and circumstances, and in particular the intrinsic link between the privatisation and the PPA at issue, simply because they preceded that date.

2. Substance

a) The third limb of the third ground of appeal, concerning the General Court's refusal, on reviewing the contested decision with regard to the question of the existence of aid, to take into account the circumstances of Dunamenti Erőmű's privatisation on the ground that they preceded the date of accession

104. By its third ground of appeal, Dunamenti Erőmű submits that, in paragraphs 68 to 70 of the judgment under appeal, the General Court wrongly held that the arguments set out in paragraph 67 of the judgment were 'based essentially on the circumstances of the privatisation in the mid-1990s [and had to] be rejected in the light of the relevant period for assessing the PPAs which [commenced] on 1 May 2004'.²⁸

105. It should immediately be noted that neither the Commission nor the General Court has disputed the intrinsic link between the grant of the PPA to Dunamenti Erőmű and its privatisation. Indeed, in recital 174 of the contested decision, the Commission recognised that 'most of the power generators acknowledged ... that they could not have invested in those plants without the guarantees offered by the PPAs', one of those power generators arguing that '[t]he PPAs [were] an important element for the banks to agree to finance the investment and pre-finance the operating costs on a continuous basis'.

106. In recital 186 of the contested decision, the Commission stated that 'in the market circumstances of the mid-1990s in Hungary, the governing principle of the PPAs, that is the guarantee of the return on investment, was the essential condition under which the necessary investments could take place'.

107. As I explained in points 5 to 11 of this Opinion, it is clear that the grant of the PPAs to the power plants and their privatisation were part of the same operation and that one cannot be considered without the other being taken into account.

108. Accordingly, Dunamenti Erőmű criticises the General Court for endorsing the Commission's approach of, on the one hand, recognising that, in the context of the privatisation, the PPA was an 'essential condition' for the sale of Dunamenti Erőmű at a profit, or at least 'on market terms' and, on the other hand, totally ignoring that 'essential condition' when evaluating the PPA with regard to the State aid rules, and consequently misapplying the private investor test.

²⁸ — Paragraph 68.

109. According to the Commission, that line of argument should be rejected if the General Court was right to find that the relevant reference date was the date of Hungary's accession to the European Union, since it would in that case be inappropriate to take into account transactions that preceded that date by almost a decade.

110. At the hearing the Commission observed that '[i]t is a matter of indifference, to be quite brutal, as to what happens in the acceding Member State in the period prior to accession from the point of view of the State aid discipline, unless it spills over into the internal market after the accession has taken place'.²⁹ According to the Commission, the exclusion of any factual matters prior to the date of accession, especially those relating to the objectives pursued by MVM in the 1995 privatisation, is dictated by the Act of Accession and the intentions of those who drafted it, which must be respected.

111. I do not share the Commission's view.

112. In my opinion, the utility of taking the date of accession as the reference date lies, first of all, in identifying the moment at which it is necessary to verify whether the measure which might constitute State aid is still applicable. If the measure is no longer applicable it cannot form the subject of a Commission evaluation under the State aid rules.³⁰

113. Where, as in the present case, the measure in question remains applicable at the time of accession, the reference date also serves to identify the moment at which it is necessary to assess whether the measure constitutes State aid, bearing in mind that a measure that does not constitute State aid when it is granted may become State aid later, if the structure of the market in question is altered.³¹

114. However, taking the date of accession as the reference date does not in itself automatically mean, as the General Court held in paragraphs 68 to 70 of the judgment under appeal, that matters prior to that date which would be relevant to the proper application of the private investor test cannot be taken into account.

115. Moreover, the Court of Justice has emphasised, admittedly in a context different from the specific context of accession, the importance of making a global assessment of all the relevant facts when applying the private investor test. In paragraph 86 of its judgment in *Commission v EDF* (C-124/10 P, EU:C:2012:318), the Court held that, '[i]t is for the Commission to carry out a *global assessment*, taking into account — in addition to the evidence provided by that Member State — all other relevant evidence enabling it to determine whether the Member State took the measure in question in its capacity as shareholder or as a public authority. In particular ... the nature and subject-matter of that measure *are relevant in that regard, as is its context, the objective pursued* and the rules to which the measure is subject'.³²

116. The Court then added, in paragraphs 104 and 105 of that judgment, that '[the Commission] cannot refuse to examine that information unless the evidence produced has been established *after* the adoption of the decision to make the investment in question' and that, 'for the purposes of applying the private investor test, the only relevant evidence is the information which was available, and the developments which were foreseeable, at the time when the decision to make the investment

29 — English original.

30 — See, *a contrario*, Decisions 2008/214, 2009/174 and 2010/690.

31 — See points 79 to 82 of this Opinion.

32 — My emphasis. See also, to that effect, the judgment in *Italy and SIM 2 Multimedia v Commission* (C-328/99 and C-399/00, EU:C:2003:252, paragraph 41).

was taken [even if], as in the present case, the Commission is seeking to determine whether there has been State aid in relation to an investment which was not notified to it and which, at the time when the Commission carries out its examination, has already been made by the Member State concerned'.³³

117. In paragraph 41 of its judgment in *Italy and SIM 2 Multimedia v Commission* (C-328/99 and C-399/00, EU:C:2003:252), applying the private investor test to a recapitalisation that took place in 1994, the Court took into account the net result for the financial year 1993 and the fact that 'that result came within the framework of an economic recession which had caused a slowdown in growth, stronger competition and a sharp fall in prices in the European consumer electronics sector, which had started to decline in 1992', before concluding that a private investor would not have made the capital contributions in question.

118. Again in a context unconnected with accession, the Court annulled a Commission decision precisely because 'the Commission [had] misapplied the criterion of the private investor operating in a market economy in that it [had] not [examined] the loans and guarantees granted to Stardust in the context of the period in which they were granted'.³⁴

119. Those considerations apply equally to a case such as the present in which the measure at issue was granted before the accession of the Member State in question to the European Union. Indeed, there is a danger of the Commission's application of the private investor test, endorsed by the General Court, and the resulting analysis of the existence of State aid becoming artificial if relevant factors are excluded, as the General Court excluded them in paragraphs 68 to 70 of the judgment under appeal, solely because they relate to a period prior to accession.

120. That artificiality would consist in posing the question, in the context of applying the private investor test, of 'whether under the conditions prevailing when Hungary joined the European Union, a market operator would have granted the generators a similar guarantee as that enshrined in the PPAs',³⁵ rather than considering the position of a hypothetical market operator that, like the Hungarian State in 1995, wished to sell a power plant whose physical and financial condition was such that no investor could have sufficient certainty of being able to continue its operation or any long-term view of the investment, while at the same time pursuing the privatisation objectives referred to in point 5 of this Opinion.

121. If, in the context of applying the private investor test, it is necessary to ask the question whether, at the time of accession, a hypothetical market operator would have acted in the same way as the State had acted, then the relevant factual circumstances which dictated the grant of the aid measure at issue cannot be excluded solely because they precede accession, since that would place the State and the hypothetical market operator in situations that are not comparable, which could obviously lead them to take different decisions.

33 — My emphasis.

34 — Judgment in *France v Commission* (C-482/99, EU:C:2002:294, paragraph 81).

35 — Recital 177 of the contested decision.

122. That implies that the proper application of the private investor test involves asking what a hypothetical market operator, in the same economic circumstances as those which prevailed in 1995, in a market that was about to be liberalised,³⁶ would have done on 1 May 2004 in order to sell Dunamenti Erőmű at the highest possible price while at the same time pursuing the same economic and commercial objectives as the Hungarian State was pursuing in 1995, that is to say, security of supply at the lowest possible cost, modernisation of the infrastructure, with particular regard to the prevailing standards of environmental protection, and the necessary restructuring of the power sector.

123. Contrary to the Commission's submission at the hearing, I do not consider that applying the private investor test in that way runs counter to the Act of Accession or the intentions of those who drafted it. Indeed, while the PPA is to be regarded as new aid within the meaning of that act, that is to say, as aid granted for the first time on 1 May 2004, there is nothing in the act to prevent the Commission, when applying the test, from taking into account the economic and commercial objectives which MVM was pursuing by granting the PPA.

124. Consequently, I consider that relevant factors prior to accession may be taken into account when applying the private investor test as at the moment of accession.

125. Paradoxically, and as I have already stated³⁷ and as Dunamenti Erőmű has stated in the context of its second ground of appeal, that approach accords with the Commission's practice, notably in its decisions in the GE Capital Bank, Postabank and PZL Hydral cases in which it systematically took into account, in its assessment of the existence of aid, factual circumstances prior to the date of reference,³⁸ that being the date of the relevant Member State's accession.

126. I would refer in particular to Decision 2009/174 in the Postabank case, which also concerned an aid measure implemented by Hungary before its accession. In recitals 55 and 56 of that decision, the Commission stated, correctly in my view, that, '[w]hen assessing the action of the Hungarian authorities in the light of the market economy investor principle in 2003, it has to be noted that the Commission does not question the way Postabank was privatised and acknowledges that it was sold to the highest bidder under an open competitive tender procedure' and that, 'this fact is not [however] a sufficient condition to exclude the existence of an advantage in the present case'.³⁹

127. That passage, in my view, reflects the proper approach, that is to say that, in a case such as the present, relevant circumstances prior to accession must be taken into account when applying the private investor test, without that in itself being a sufficient condition for excluding the existence of an advantage.

128. It follows from the foregoing that, by rejecting Dunamenti Erőmű's arguments regarding the Commission's refusal to take into account the intrinsic link between the PPA and its privatisation when reviewing the Commission's application of the private investor test solely because that factor preceded Hungary's accession to the European Union, the General Court erred in law and, in that respect, its judgment should be set aside.

36 — The process leading to the liberalisation of the European market in electricity began with Directive 96/92, which opened the market in electricity up to competition. The time-frame for liberalisation of the market in electricity was laid down in Directive 2003/54/EC of the European Parliament and of the Council of 26 June 2003 concerning common rules for the internal market in electricity and repealing Directive 96/92/EC (OJ 2003 L 176, p. 37), which was to be transposed by 1 July 2004 for non-household customers and by 1 July 2007 for household customers. On the date of reference, therefore, the Hungarian market in electricity was about to be liberalised.

37 — See points 89 to 94 of this Opinion.

38 — See, in particular, recitals 81 and 82 of Decision 2008/214, recital 57 of Decision 2009/174 and recital 169 et seq. of Decision 2010/690.

39 — I cannot concur with the General Court's view that the Commission's decision in the Postabank case can be of no assistance in the present context simply because it addressed a specific case and has no connection with the contested decision; see the judgment in *Tisza Erőmű v Commission*, (T-468/08, EU:T:2014:235, paragraph 89).

b) The first limb of the third ground of appeal, alleging that no advantage was conferred on Dunamenti Erőmű as a result of MVM's grant of the PPA, since MVM acted as a private investor seeking to maximise the financial outcome of the sale of Dunamenti Erőmű

129. According to Dunamenti Erőmű, neither it nor Electrabel derived any advantage from the PPA since, by entering into the PPA with Dunamenti Erőmű on 10 October 1995, MVM had simply sought to maximise the financial outcome of the sale of Dunamenti Erőmű, just as a private operator would.

130. That argument cannot succeed, since the fact that Dunamenti Erőmű was privatised by means of a public, competitive tendering procedure and that the highest bid (namely, Electrabel's bid) was accepted would be relevant only if the measure under scrutiny and potentially constituting State aid were the sale itself of Dunamenti Erőmű. However, that is not the case, the measure at issue here being the PPA granted by MVM to Dunamenti Erőmű.

131. Moreover, as the Commission has remarked, Dunamenti Erőmű is confusing a possible advantage for Electrabel as purchaser of Dunamenti Erőmű with an advantage for itself. Indeed, the fact that Electrabel may not have derived an advantage does not mean that Dunamenti Erőmű cannot have derived an advantage.

132. I therefore think that the arguments which Dunamenti Erőmű draws from the judgment in *AceaElectrabel v Commission* (T-303/05, EU:T:2009:312) in order to demonstrate that it formed a single economic entity with Electrabel in no way alter the foregoing analysis. Indeed, even if Electrabel and Dunamenti Erőmű were to be regarded as a single economic entity, that would not exclude the possibility of that entity having derived an advantage as the beneficiary of the PPA.

133. Consequently, in rejecting Dunamenti Erőmű's argument that, in granting it the PPA at issue, MVM acted as a private investor seeking to maximise the financial outcome of the sale of the company, the General Court did not err in law.

c) The second limb of the third ground of appeal, concerning the question whether the aid is to be recovered from the undertaking sold or from the seller where the privatisation price includes the value of the aid

i) Arguments of the parties

134. According to Dunamenti Erőmű, even if an advantage was granted to it before its privatisation, its purchaser reimbursed the Hungarian State for that advantage, since the PPA was included in the price paid by the purchaser to the State in the company's privatisation following the tendering procedure.

135. Dunamenti Erőmű relies on paragraph 78 of the judgment in *Banks* (C-390/98, EU:C:2001:456), in which the Court held that, 'in principle, where a company which has benefited from aid has been sold at the market price, the purchase price reflects the consequences of the previous aid, and it is the seller of that company that keeps the benefit of the aid. In that case, the previous situation is to be restored primarily through repayment of the aid by the seller'.

136. On that basis, Dunamenti Erőmű concludes that, since the PPA was valued in the privatisation price paid to the Hungarian State, it is the latter that has kept any advantage and it cannot itself be regarded as the beneficiary of any advantage flowing from public resources within the meaning of Article 107(1) TFEU.

137. The Commission, on the other hand, contends that Dunamenti Erőmű is once again confusing aid granted to a purchased (aided) entity with aid granted to the purchaser of that entity.

138. The Commission regards the content of paragraph 78 of the judgment in *Banks* (C-390/98, EU:C:2001:456) as *obiter dictum*, and instead relies on paragraph 81 of the judgment in *Germany v Commission* (C-277/00, EU:C:2004:238), in which the Court observed that, '[i]n the present case, the undertaking to which unlawful State aid was granted retains its legal personality and continues to carry out, for its own account, the activities subsidised by the State aid' and held: '[t]herefore, it is normally this undertaking that retains the competitive advantage connected with that aid and it is therefore this undertaking that must be required to repay an amount equal to that aid. The buyer cannot therefore be asked to repay such aid'.

139. According to the Commission, in its judgment in *Germany v Commission* (C-277/00, EU:C:2004:238), the Court clearly drew a distinction from the case in *Banks* (C-390/98, EU:C:2001:456).

ii) Assessment

– Preliminary observations

140. I would observe at the outset that the judgments in *Banks* (C-390/98, EU:C:2001:456) and *Germany v Commission* (C-277/00, EU:C:2004:238) both concern the identity of the party from which aid is to be recovered, and not the question of whether there has been aid.

141. Consequently, although Dunamenti Erőmű presents its arguments in the context of its third ground of appeal, which concerns the existence of aid, they in fact amount to a separate ground of appeal which the Court must address even if, contrary to the suggestion I made in point 128 of this Opinion, it should find that the General Court was right to reject the arguments concerning the fact that the intrinsic link between the PPA and Dunamenti Erőmű's privatisation was not taken into account when the private investor test was applied.

142. Indeed, if the Court does not follow my suggestion, then, necessarily, there will be aid which Hungary must withdraw and recover. If, on the contrary, the Court does follow my suggestion, the proper application of the private investor test might still result in a finding of aid, of either the same or a different amount.

143. It would, therefore, be necessary in either case to determine whether the aid at issue must be recovered from the undertaking sold, which is the Commission's position, or from the seller, which is Dunamenti Erőmű's position, bearing in mind that 'the buyer cannot ... be asked to repay such aid'⁴⁰ if the undertaking which benefited from the aid has been sold on market terms.

– The obligation to repay aid must fall on the party which retains the competitive advantage which the aid has created

144. It is clear that the judgments in *Banks* (C-390/98, EU:C:2001:456) and *Germany v Commission* (C-277/00, EU:C:2004:238) propound apparently contradictory positions. The only point on which they concur is that the purchaser cannot be held liable to repay the aid.⁴¹

40 — Judgment in *Germany v Commission* (C-277/00, EU:C:2004:238, paragraph 81). See also judgment in *Commission v France* (C-214/07, EU:C:2008:619, paragraph 16).

41 — See judgments in *Banks* (C-390/98, EU:C:2001:456, paragraph 77), and *Germany v Commission* (C-277/00, EU:C:2004:238, paragraph 81).

145. Although the judgment in *Germany v Commission* (C-277/00, EU:C:2004:238) is later than that in *Banks* (C-390/98, EU:C:2001:456), it was handed down by a chamber of 5 judges, namely the Sixth Chamber, whereas the judgment in *Banks* was handed down by a bench of 11 judges (the Grand Chamber at the time) and has subsequently been cited on a number of occasions.⁴²

146. As Advocate General Tizzano remarked in point 82 of his Opinion in *Germany v Commission* (C-277/00, EU:C:2003:354), ‘the Court vacillates between two positions: the view that the aid must in every case be repaid by the beneficiary company and the view that, if the shares are sold at a price which reflects the market value of the company after the aid is granted, it is to be repaid by the seller’.

147. Moreover, after its judgment in *Germany v Commission* (C-277/00, EU:C:2004:238), the Court continued to vacillate between those same two positions. After stating in paragraph 58 of its judgment in *Commission v France* (C-214/07, EU:C:2008:619) that, ‘[where, the beneficiary having ceased its activity and transferred its assets,] the aid element was assessed at the market price and included in the purchase price, ... the buyer cannot be regarded as having benefited from an advantage in relation to other market operators (*Germany v Commission*, paragraph 80)’, it held in paragraph 83 of its judgment in *Commission v France* (C-37/14, EU:C:2015:90) that the sale of the beneficiary of the aid on market terms, ‘even if proven, does not, as such, affect the obligation to recover the aid and the Member State in question must still recover the aid, either from the undertaking sold (judgment in *Germany v Commission* (C-277/00, EU:C:2004:238, paragraph 81) or from the seller (judgments in *Banks*, C-390/98, EU:C:2001:456, paragraph 78, and *Falck and Acciaierie di Bolzano v Commission*, C-74/00 P and C-75/00 P, EU:C:2002:524, paragraph 180), as appropriate’,⁴³ once again leaving open the possibility of recovering the aid either from the seller or from the undertaking sold, without proposing any criterion for deciding which of the two cases might be ‘appropriate’.

148. To complicate matters further, the fact that the judgment in *Germany v Commission* (C-277/00, EU:C:2004:238) concerned two aid measures, one granted to a company whose shares were sold (a ‘share deal’) and the other granted to a company whose assets were sold (an ‘asset deal’),⁴⁴ created the impression that it was necessary to distinguish between those two types of sale.

149. Accordingly, in point 57 of her Opinion in *Commission v France* (C-214/07, EU:C:2008:343), Advocate General Sharpston attempted to explain the discrepancy between the judgments in *Banks* (C-390/98, EU:C:2001:456) and *Germany v Commission* (C-277/00, EU:C:2004:238) by reference to the fact that ‘[the case in *Banks*] concerned the sale of shares. The present case is concerned with assets, and the proper test is that set out in *Germany v Commission*. In its judgment, the Court adopted the approach set out in *Banks*, modified that approach to the peculiarities of a purchase of assets rather than shares and applied the modified approach to a sale of assets. I see no reason to depart from the approach set out in *Germany v Commission*’.

150. The uncertainty increases still further when one analyses the differing, not to say contradictory, positions adopted by the Commission in these various cases.

42 — See judgments in *Falck and Acciaierie di Bolzano v Commission* (C-74/00 P and C-75/00 P, EU:C:2002:524, paragraph 180); *Italy and SIM 2 Multimedia v Commission* (C-328/99 and C-399/00, EU:C:2003:252, paragraph 83); and *Commission v France* (C-37/14, EU:C:2015:90, paragraph 83).

43 — My emphasis.

44 — See paragraphs 78 and 84 of the judgment.

151. In paragraph 38 of its reply in the case which gave rise to the judgment in *Commission v France* (C-214/07, EU:C:2008:619), the Commission '[thought] it worthwhile to recall that, in a sale of assets (asset deal), as opposed to a sale of shares (share deal), it is important to examine the financial terms and conditions of the transaction. Where assets are sold on normal market terms, the Court takes the view that the aid element has been valued at the market price in the purchase price, with the result that the purchaser of the assets cannot, in principle, be regarded as having benefited from any advantage, since the benefit of the aid then remains in the hands of the transferor'.

152. In paragraphs 87 to 89 of its application in the case of *Commission v France* (C-37/14, EU:C:2015:90), the Commission maintained that, in the case of a sale 'of all or some of the shares in a beneficiary company',⁴⁵ '[f]ollowing the sale of a beneficiary of aid at the market price, it is necessary to establish which party is the real beneficiary of the aid and must then repay it. Depending on the particular circumstances of the case, it could be either the seller or the company sold. According to the case-law of the Court, the aid must, in principle, be recovered from the company sold ... However, *the Court has held that the aid should be repaid by the seller* where the seller has retained the advantage conferred by the aid, which has been included in the sale price. *That applies where it can be proven with certainty that the sale price takes into account the unlawful, potentially recoverable aid* or that the contract for the sale of the beneficiary of the aid expressly provides that the seller must repay any aid received by the entity sold if it is declared unlawful and incompatible'.⁴⁶

153. The Commission went on to say that '[a]bsent this type of clause, most sale contracts stipulate that the seller guarantees the liabilities of the company sold. In such case, the company sold will be liable to repay any unlawful aid and the clause guaranteeing its liabilities will give the purchaser recourse against the seller. The matter will then be decided in accordance with the applicable contractual rules rather than in the context of a ... recovery procedure, in the strict sense'.

154. In the present case, the Commission maintains⁴⁷ that the judgment in *Germany v Commission* (C-277/00, EU:C:2004:238) modified the principle expressed in paragraph 78 of the judgment in *Banks* (C-390/98, EU:C:2001:456) to the effect that the aid must be recovered from the beneficiary, even if the beneficiary has been sold on market terms and the value of the aid has been included in the sale price.

155. The present case should, in my view, be taken as an opportunity to establish clearly the principles which apply to the recovery of aid in cases, such as the present case and those which gave rise to the judgments in *Banks* (C-390/98, EU:C:2001:456), *Italy and SIM 2 Multimedia v Commission* (C-328/99 and C-399/00, EU:C:2003:252), *Germany v Commission* (C-277/00, EU:C:2004:238) and *Commission v France* (C-37/14, EU:C:2015:90), where the beneficiary of the aid has been sold on market terms and the value of the aid has been included in the sale price.

156. As the Court held in paragraph 81 of its judgment in *Germany v Commission* (C-277/00, EU:C:2004:238), it is, in my opinion, '[the] undertaking that retains the competitive advantage connected with [the] aid ... that must be required to repay an amount equal to that aid'. Thus, recovery of the aid must follow the advantage, in the sense that the entity which has benefited, or continues to benefit from the advantage must repay it, whether there has been a sale of assets or a sale of shares. The reasons are as follows.

⁴⁵ — See paragraph 85.

⁴⁶ — My emphasis.

⁴⁷ — See points 137 to 139 of this Opinion.

157. First of all, the facts of the present case, that is to say, the grant of aid to a company immediately followed by the company's privatisation, demonstrate that the principle set out in paragraph 78 of the judgment in *Banks* (C-390/98, EU:C:2001:456), according to which the aid is to be recovered from the seller, leaves open the possibility that abuses of State aid law will go unpunished, in that it enables Member States to grant aid to public undertakings in the knowledge that, even if the aid ultimately has to be withdrawn as regards the future, such undertakings will, as a result of their privatisation, be able to retain the historical advantage which they have acquired up to the time of the aid's withdrawal.

158. Secondly, 'if the company that has received aid is not wound up and remains active in the market, the distortion of competition caused by the aid can be removed (or at least reduced) only by placing the obligation to repay on that company: only in that way does [the recipient] actually "[forfeit] the advantage which it had enjoyed over its competitors on the market, and the situation prior to payment of the aid is restored" [(judgment in *Commission v Italy* (C-348/93, EU:C:1995:95, paragraph 27). To the same effect, see also, the judgment in *Spain v Commission* (C-480/98, EU:C:2000:559, paragraph 35)]'.⁴⁸

159. Thirdly, 'although it is true that [the seller of] the shares of the beneficiary company at a price which reflects their market value after the grant of aid gains an advantage from the revaluation of the company, it is nonetheless clear that any such advantage does not remove that which the beneficiary company secures over its competitors. And indeed, it is this latter advantage which causes distortions of competition and which therefore needs to be removed by recovery of the aid, whilst the financial advantage obtained from sale of the shares may even not have an effect on the competitive operation of the markets, since the person selling the shares will not necessarily be an economic operator'.⁴⁹

160. Lastly, '[t]he opposite view, namely that in specific circumstances aid must be recovered from the seller, creates considerable uncertainty, because it is often difficult to establish whether the selling price fully reflects the market value of the beneficiary company after aid has been granted and in no way discounts the risk that the company will have to repay at least part of the aid'.⁵⁰

161. For those reasons, where 'the undertaking to which unlawful State aid was granted retains its legal personality and continues to carry out, for its own account, the activities subsidised by the State aid ... it is normally this undertaking that retains the competitive advantage connected with that aid and it is therefore this undertaking that must be required to repay an amount equal to that aid'.⁵¹

162. The principle is, therefore, that the aid must be recovered from the undertakings sold, in this case Dunamenti Erőmű, and not from the seller, in this case MVM or the Hungarian State.

163. It should be added that, as the Court indicated in paragraphs 84 to 97 of its judgment in *Germany v Commission* (C-277/00, EU:C:2004:238), the rule that the party which has retained the competitive advantage linked with the aid must repay the aid also applies in the case where, as a result of an asset sale or other transaction, the beneficiary of the aid has been stripped of all its assets with the intention or effect of making it impossible to recover the aid (which is not the case in the present dispute), while

48 — See point 83 of the Opinion of Advocate General Tizzano in *Germany v Commission* (C-277/00, EU:C:2003:354).

49 — Ibid. (point 84).

50 — Ibid. (point 85).

51 — Judgment in *Germany v Commission* (C-277/00, EU:C:2004:238, paragraph 81).

the activities of the beneficiary have been taken over by another undertaking, which, retaining the competitive advantage, must repay the aid.⁵² Conversely, where the beneficiary has ceased operating and no other undertaking has taken over its activities, it is, according to the Court, absolutely impossible to recover the aid.⁵³

164. It is important to bear in mind in this connection that, although the Court appeared, in paragraph 81 of its judgment in *Germany v Commission* (C-277/00, EU:C:2004:238), to draw a distinction between beneficiaries according to whether or not they had retained their legal personality,⁵⁴ Article 107 TFEU, like the provisions of the Treaty on competition, speaks of ‘undertakings’, not of companies having legal personality.

165. As the Court held in paragraph 43 of its judgment in *ETI and Others* (C-280/06, EU:C:2007:775) in connection with infringements of competition law, ‘the legal forms of the entity that committed the infringement and the entity that succeeded it are irrelevant. Imposing a penalty for the infringement on the successor can therefore not be excluded simply because, as in the main proceedings, the successor has a different legal status and is operated differently from the entity that it succeeded’.

166. Consequently, the principle that the obligation to repay aid rests upon the *undertaking* which retains the competitive advantage linked to the aid enables the aid to be recovered from the undertaking which has taken over the activities subsidised by the State.

– Application to the present case

167. In the present case, the advantage in question being the PPA, it is Dunamenti Erőmű that has benefited from and retained the competitive advantage generated by that PPA, that is to say, the long-term guarantee of electricity selling prices. It is, therefore, Dunamenti Erőmű that must repay the aid to the State.

168. Moreover, it would be absurd to suppose, on the one hand, that the advantage lay with Dunamenti Erőmű, inasmuch as it forms part of its asset base and, on the other, that the State which sold the undertaking benefited from the aid. It is obviously impossible to eliminate the advantage enjoyed by the undertaking and to insist that the competitive advantage is preserved elsewhere, particularly as, in the present case, it was the PPA that distorted competition and rendered the liberalisation of the Hungarian market in electricity virtually impossible by making it more expensive for new participants to enter that market.

169. Admittedly, this conclusion could lead to the situation where Hungary must, as it has already done, withdraw the PPA and yet is able to keep the purchase price, including the value of the aid, paid by the purchaser, while Dunamenti Erőmű is required to repay the value of that aid.

170. However, as the Commission stated in its application in the case which gave rise to the judgment in *Commission v France* (C-37/14, EU:C:2015:90), ‘[t]he matter will ... be decided in accordance with the applicable contractual rules rather than in the context of [an aid] recovery procedure’. Indeed, ‘most sale contracts stipulate that the seller guarantees the liabilities of the company sold. In such case, the company sold will be liable to repay any unlawful aid and the clause guaranteeing its liabilities will give the purchaser recourse against the seller’.

52 — See, to that effect, the judgments in *Germany v Commission* (C-277/00, EU:C:2004:238, paragraphs 86 to 97); *Commission v France* (C-214/07, EU:C:2008:619, paragraph 58); and *Commission v Spain* (C-610/10, EU:C:2012:781, paragraph 104).

53 — See judgments in *Commission v Italy* (C-454/09, EU:C:2011:650, paragraph 36), and *Commission v Spain* (C-610/10, EU:C:2012:781, paragraph 104).

54 — This distinction is also drawn in the judgment in *Commission v France* (C-214/07, EU:C:2008:619, paragraphs 48 and 55).

171. In the present case, in addition to its contractual ties with the Hungarian State, Electrabel also has the benefit of the guarantees afforded by the Energy Charter Treaty, which enable it to claim, as it has done, the *full* reimbursement of its stranded costs before an ICSID arbitral tribunal.⁵⁵

iii) Conclusion

172. By refusing to analyse Dunamenti Erőmű's arguments relating to the recovery of possible aid, the General Court erred in law.

173. Nevertheless, should the Court endorse the substance of my conclusion regarding the second limb of the third ground of appeal, it must hold that the approach adopted by the General Court (and the Commission) places the obligation to repay the aid on Dunamenti Erőmű and that the judgment under appeal should not, therefore, be set aside on this point.

VI – The effects of setting aside the judgment under appeal

174. Since I concluded, in point 128 of this Opinion, that the General Court had erred in law and that the judgment under appeal should be set aside, it is necessary to consider the effects of that setting aside of that judgment.

175. In accordance with the first paragraph of Article 61 of the Statute of the Court of Justice, after quashing the decision of the General Court, '[the Court of Justice] may itself give final judgment in the matter, where the state of the proceedings so permits, or refer the case back to the General Court for judgment'. It is therefore appropriate to establish whether the state of the proceedings is such that judgment may be given.

176. Judgment may be given in a matter when the Court has available to it all the information necessary to rule on the action.⁵⁶

177. As I explained in point 122 of this Opinion, the proper application of the private investor test involves asking what a hypothetical market operator, in the same economic circumstances as those which prevailed in 1995, in a market that was about to be liberalised, would have done on 1 May 2004 in order to sell Dunamenti Erőmű at the highest possible price while at the same time pursuing the same economic and commercial objectives as the Hungarian State was pursuing in 1995, that is to say, security of supply at the lowest possible cost, modernisation of the infrastructure, with particular regard to the prevailing standards of environmental protection, and the necessary restructuring of the power sector.

178. The proper application of the private investor test unquestionably involves a complex economic assessment. According to settled case-law, 'the Commission's examination of the question whether a given measure may be classified as State aid because the State did not act as an ordinary economic operator involves a complex economic assessment. Where it adopts a measure involving such assessments, the Commission has a wide discretion, and review of that measure by the courts must therefore be limited ... to checking that the rules of procedure and on the statement of reasons have

⁵⁵ — See points 23 to 25 of this Opinion.

⁵⁶ — See judgments in *Chronopost and La Poste v UFEX and Others* (C-341/06 P and C-342/06 P, EU:C:2008:375, paragraph 134), and *Spain v Commission* (C-513/13 P, EU:C:2014:2412, paragraph 42).

been complied with, that the facts relied on in making the contested decision are accurate, and that there has been no obvious error in assessing those facts or any misuse of powers. In particular, the [Courts of the European Union] must not substitute [their] own economic assessment for that of the Commission'.⁵⁷

179. Given that the proper application of the private investor test is not a matter for the General Court, the setting aside of the judgment under appeal entails the annulment of the Commission's decision, in so far as it concerns Dunamenti Erőmű.

180. In the present case, the error of law consists in the Commission's failure to take relevant factors into account when applying the private investor test, a failure which was not called into question by the General Court.

181. The third limb of the third ground of appeal is therefore well founded and must entail the annulment of the contested decision in so far as it concerns Dunamenti Erőmű.

VII – Costs

182. Under Article 184(2) of the Rules of Procedure, where the appeal is well founded and the Court itself gives final judgment in the case, the Court is to make a decision as to costs.

183. Under Article 138(1) of those Rules, applicable to appeal proceedings by virtue of Article 184(1) thereof, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings.

184. As the applicant has applied for costs against the Commission, and the latter has been unsuccessful, the Commission must be ordered to bear its own costs and to pay those incurred by the applicant both at first instance and on appeal.

VIII – Conclusion

185. Having regard to all the foregoing considerations, I propose that the Court:

- (1) Set aside the judgment in *Dunamenti Erőmű v Commission* (T-179/09, EU:T:2014:236) in so far as the General Court refused to take into account the intrinsic link between the power purchase agreements and privatisation when reviewing the Commission's application of the private investor test solely because that factor preceded Hungary's accession.
- (2) Annul Commission Decision 2009/609/EC of 4 June 2008 on the State aid C 41/05 awarded by Hungary through Power Purchase Agreements in so far as it concerns Dunamenti Erőmű.
- (3) Order the European Commission to pay the costs at first instance and on appeal.

⁵⁷ — See order in *DSG v Commission* (C-323/00 P, EU:C:2002:260, paragraph 43). See also, to that effect, the judgments in *Spain v Lenzing* (C-525/04 P, EU:C:2007:698, paragraph 57); *GlaxoSmithKline Services and Others v Commission and Others* (C-501/06 P, C-513/06 P, C-515/06 P and C-519/06 P, EU:C:2009:610, paragraph 163); *Commission v Scott* (C-290/07 P, EU:C:2010:480, paragraphs 64 to 66); *Ryanair v Commission* (T-196/04, EU:T:2008:585, paragraph 41); and *Budapesti Erőmű v Commission* (T-80/06 and T-182/09, EU:T:2012:65, paragraphs 65 and 66).