Reports of Cases

JUDGMENT OF THE COURT (Third Chamber)

1 October 2015 *

(Appeal — State aid — Aid granted by the Hungarian authorities to certain electricity generators — Power purchase agreements concluded between a public undertaking and certain electricity generators — Decision declaring that aid incompatible with the common market and ordering its recovery — Meaning of 'party' capable of bringing an appeal before the Court — Accession of Hungary to the European Union — Date relevant to the assessment of the existence of aid — Concept of State aid — Advantage — Private investor test — Methodology for calculating the amount of aid)

In Case C-357/14 P,

APPEAL under Article 56 of the Statute of the Court of Justice of the European Union, brought on 21 July 2014,

Electrabel SA, established in Brussels (Belgium),

Dunamenti Erőmű Zrt., established in Százhalombatta (Hungary),

represented by J. Philippe, F.-H. Boret and A.-C. Guyon, avocats, and by P. Turner QC,

appellants,

the other party to the proceedings being:

European Commission, represented by L. Flynn and K. Talabér-Ritz, acting as Agents,

defendant at first instance,

THE COURT (Third Chamber),

composed of M. Ilešič, President of the Chamber, A. Ó Caoimh (Rapporteur), C. Toader, E. Jarašiūnas and C.G. Fernlund, Judges,

Advocate General: M. Wathelet,

Registrar: L. Hewlett, Principal Administrator,

having regard to the written procedure and further to the hearing on 20 April 2015,

after hearing the Opinion of the Advocate General at the sitting on 1 July 2015,

gives the following

* Language of the case: English.

Judgment

1 By their appeal, Electrabel SA ('Electrabel') and Dunamenti Erőmű Zrt. ('Dunamenti Erőmű') ask the Court to set aside the judgment of the General Court of the European Union in *Dunamenti Erőmű* v *Commission* (T-179/09, EU:T:2014:236; 'the judgment under appeal'), whereby the General Court dismissed the action brought by Dunamenti Erőmű 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 (OJ 2009 L 225, p. 53; 'the contested decision') and, in the alternative, the annulment of Articles 2 and 5 of that decision.

Legal context

2 Article 2 of the Act concerning the conditions of accession of the Czech Republic, the Republic of Estonia, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Republic of Hungary, the Republic of Malta, the Republic of Poland, the Republic of Slovenia and the Slovak Republic and the adjustments to the Treaties on which the European Union is founded (OJ 2003 L 236, p. 33; 'the 2003 Act of Accession') provides:

'From the date of accession, the provisions of the original Treaties and the acts adopted by the institutions and the European Central Bank before accession shall be binding on the new Member States and shall apply in those States under the conditions laid down in those Treaties and in this Act.'

3 Chapter 3 of Annex IV to the 2003 Act of Accession lays down rules concerning aid put into effect in States including Hungary before the date of its accession to the European Union. Paragraphs (1) to (3) of Chapter 3 are worded as follows:

'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 88(1) [EC]:

(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 acquis, 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 88(3) [EC].

...

2. ...

If the Commission does not object to the existing aid measure on the ground of serious doubts as to the compatibility of the measure with the common market, within 3 months of receipt of complete information on that measure or of receipt of the statement of the new Member State in

which it informs the Commission that it considers the information provided to be complete because the additional information requested is not available or has been already provided, the Commission shall be deemed not to have raised an objection.

All aid measures submitted under the procedure described in paragraph 1(c) prior to the date of accession to the Commission are subject to the above procedure irrespective of the fact that in the period of examination the new Member State concerned has already become member of the Union.

3. A Commission decision to object to a measure, within the meaning of paragraph 1(c), shall be regarded as a decision to initiate the formal investigation procedure within the meaning of Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article [88 EC] [(OJ 1999 L 83, p. 1)].

If such a decision is taken before the date of accession, the decision will only come into effect upon the date of accession.'

Background to the dispute and the contested decision

4 The background to the dispute and the contested decision, as set out in paragraphs 1 to 29 of the judgment under appeal, may be summarised as follows.

The appellants

5 Dunamenti Erőmű is an electricity generator on the Hungarian electricity market which operates a power plant located approximately 30 km south of Budapest (Hungary). That company is a former public undertaking which was privatised in the middle of the 1990s. At the time the General Court examined the facts in the case which gave rise to the judgment under appeal, Dunamenti Erőmű was approximately 75% owned by Electrabel, which is part of a group whose parent company is GDF Suez SA, and approximately 25% owned by Magyar Villamos Művek Zrt. ('MVM'), a public undertaking whose activities comprise power generation as well as wholesale, transmission and retail activities on the Hungarian electricity market.

6 On 10 October 1995, just prior to its privatisation, Dunamenti Erőmű entered into a power purchase agreement with MVM in respect of the 'F-blocks' and 'G2 block' of its power plant ('the PPA at issue'). That agreement, which entered into force in 1996, was to continue until 2010, so far as concerns the gas-fired 'F blocks', and until 2015, so far as concerns the 'G2 block', a Combined Cycle Gas Turbine unit.

The power purchase agreements

7 Like Dunamenti Erőmű, other electricity generators on the Hungarian market entered into long-term power purchase agreements ('PPAs') with MVM.

8 PPAs are characterised, above all, by two elements. First, they reserve for MVM all or a substantial part of the generation capacities of the power plants covered by the agreement.

9 Secondly, the PPAs require MVM to purchase a specific minimum quantity of electricity from each power plant operated under a PPA. There is therefore a certain minimum off-take under the PPAs for each power plant which MVM is required to purchase each year.

10 The prices were fixed in the PPAs as follows. First and second price regulation cycles, as from 1 January 1997 and 1 January 2001 respectively, were established. As from 1 January 2004, the rules provided for the introduction of, first, a capacity fee for the reserved capacities in order to pay for the making available of that capacity, that fee covering fixed costs and the cost of capital, and being paid by MVM, and, second, an electricity fee to pay for the guaranteed minimum off-take, which covers variable costs. However, if MVM does not purchase the fixed minimum quantity, it then has to pay for the fuel costs incurred.

11 The PPAs signed in the 1995-1996 period, which constitute seven of the ten PPAs assessed by the Commission, including the PPA at issue, formed an integral part of the privatisation of the power plants. They were partially amended by the parties after privatisation.

The accession of Hungary to the European Union

12 The Treaty between the Kingdom of Belgium, the Kingdom of Denmark, the Federal Republic of Germany, the Hellenic Republic, the Kingdom of Spain, the French Republic, Ireland, the Italian Republic, the Grand Duchy of Luxembourg, the Kingdom of the Netherlands, the Republic of Austria, the Portuguese Republic, the Republic of Finland, the Kingdom of Sweden, the United Kingdom of Great Britain and Northern Ireland (Member States of the European Union) and the Czech Republic, the Republic of Estonia, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Republic of Hungary, the Republic of Malta, the Republic of Poland, the Republic of Slovenia and the Slovak Republic on the accession of the Czech Republic, the Republic of Estonia, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Republic of Hungary, the Republic of Malta, the Republic of Poland, the Republic of Slovenia and the Slovak Republic to the European Union (OJ 2003 L 236, p. 17; 'the Accession Treaty') was signed by Hungary on 16 April 2003 and entered into force on 1 May 2004.

The procedure before the Commission and the contested decision

13 By letter of 31 March 2004, the Commission received from the Hungarian authorities notification of Government Decree No 183/2002 (VIII.23.) on the detailed rules for the definition and management of 'stranded costs' under the procedure referred to in paragraph 1(c) of Chapter 3 of Annex IV to the 2003 Act of Accession. The decree of which notice was given governs the system of compensation for the costs borne by MVM as an electricity wholesaler.

14 By letter of 13 April 2005, the Hungarian authorities withdrew that notification. On 4 May 2005, in accordance with Regulation No 659/1999, the Commission registered of its own motion a State aid file concerning the PPAs.

15 On 4 June 2008, following correspondence between the Commission and Hungary, the Commission adopted the contested decision.

16 In paragraphs 468 to 470 of that decision, the Commission found that the PPAs conferred illegal State aid within the meaning of Article 87(1) EC on the Hungarian electricity generators and that that State aid was incompatible with the common market. The Commission added that the State aid resulting from the PPAs consisted in the fact that MVM was obliged to purchase a certain capacity and a guaranteed minimum quantity of electricity at a price covering capital, fixed costs and variable costs over a significant part of the lifetime of the generating units, thereby guaranteeing to the generators a return on investment. Accordingly, the Commission ordered that the aid should be ended.

17 The operative part of the contested decision reads as follows:

'Article 1

1. The purchase obligations as set out in the [PPAs] between [MVM] and [Dunamenti Erőmű and six other Hungarian electricity generators] constitute State aid within the meaning of Article 87(1) [EC] to the electricity generators.

2. The State aid referred to in Article 1(1) is incompatible with the common market.

3. Hungary shall refrain from granting the State aid referred to in paragraph 1 within six months following the date of notification of this Decision.

Article 2

1. Hungary shall recover the aid referred to in Article 1 from the beneficiaries.

...

Article 3

1. Within two months following notification of this decision, Hungary shall submit to the Commission information concerning measures already taken and measures planned to comply with this decision, and notably the steps taken to perform an appropriate simulation of the wholesale market in order to establish the amounts to be recovered, the detailed methodology intended to be used and a detailed description of the set of data that it intends to use for that purpose.

...

Article 4

1. The exact amount of aid to be recovered should be calculated by Hungary on the basis of an appropriate simulation of the wholesale electricity market as it would have stood if none of the [PPAs] referred to in Article 1(1) had been in force since 1 May 2004.

2. Within six months following notification of this Decision, Hungary shall calculate the amounts to be recovered on the basis of the method referred to in paragraph 1 and submit to the Commission all relevant information with regard to the simulation, notably its results, a detailed description of the methodology applied, and the set of data used to carry out the simulation.

Article 5

Hungary shall ensure that the recovery of the aid referred to in Article 1 is implemented within ten months following the date of notification of this Decision.

Article 6

This Decision is addressed to the Republic of Hungary.'

The procedure before the General Court and the judgment under appeal

18 By application lodged at the Registry of the General Court on 28 April 2009, Dunamenti Erőmű brought an action for the annulment of the contested decision and, alternatively, Articles 2 and 5 of that decision, in so far as they order recovery from it of aid in excess of any aid which should have been found by the Commission to be incompatible with the common market.

19 In support of its action, Dunamenti Erőmű relied on four pleas in law, claiming that (i) the Commission wrongly found there to be State aid within the meaning of Article 87(1) EC; (ii) if the agreements entered into in 1995 granted it State aid, the Commission should not have considered that aid after 1 May 2004 as constituting new aid but as existing aid within the meaning of Article 88(1) EC; (iii) the Commission committed several errors as regards the compatibility of the State aid at issue with the common market; and (iv) the lawfulness of the order for recovery of that aid was questionable.

20 In the judgment under appeal the General Court rejected all those pleas in law.

Forms of order sought by the parties before the Court

21 By their appeal, the appellants claim that the Court of Justice should:

— set aside the judgment under appeal, in so far as it confirms the contested decision;

— give final judgment and annul the contested decision in so far as it found that the PPAs were illegal and constituted State aid incompatible with the common market, or, in the alternative, refer the case back to the General Court, and

— order the Commission to pay the costs of the proceedings before the General Court and the Court.

22 The Commission contends that the Court should:

— declare the appeal to be inadmissible in so far as it is brought by Electrabel;

— dismiss the appeal in so far as it is brought by Dunamenti Erőmű, and

— order Dunamenti Erőmű to pay the costs.

The appeal

23 The appellants put forward five grounds in support of their appeal.

24 The Commission challenges, first, the admissibility of the appeal in so far as it is brought by Electrabel, and, secondly, the admissibility in particular of the third and fourth grounds of appeal, and the substance of each of the five grounds of appeal submitted by the appellants.

25 The Court must first examine the question of the admissibility of the appeal in so far as it is brought by Electrabel and will address the arguments put forward by the Commission in relation to the inadmissibility of the third and fourth grounds of appeal when undertaking the individual assessment of each of those grounds.

Admissibility of the appeal in so far as it is brought by Electrabel

Arguments of the parties

26 The Commission claims that the Court should declare the appeal to be inadmissible in so far as it is brought by Electrabel, because Electrabel was not a party to the proceedings at first instance.

27 The appellants consider that the appeal is admissible in so far as it is brought by Electrabel. They state that, when the action against the contested decision was brought before the General Court, Electrabel and Dunamenti Erőmű were members of the same group of undertakings and, consequently, their common economic and legal interest could be defended by one of them alone.

28 However, in June 2014 Electrabel sold its shareholding in Dunamenti Erőmű and the common interest of those two entities should, as a result, be defended both by Electrabel and by Dunamenti Erőmű. To interpret the Rules of Procedure of the Court as prohibiting Electrabel from bringing this appeal would be contrary to the principle of good administration and would deny Electrabel effective access to justice.

Findings of the Court

29 It must be recalled that, under the second paragraph of Article 56 of the Statute of the Court of Justice of the European Union, an appeal can be brought before the Court by 'any party which has been unsuccessful, in whole or in part, in its submissions'. In this case, it is undisputed that Electrabel made no submissions at first instance. Further, even if, at the time when the application was brought before the General Court, Electrabel was a member of the same group of undertakings as Dunamenti Erőmű, which was a party to the proceedings at first instance, that circumstance cannot be sufficient ground to confer on Electrabel the status of a 'party', within the meaning of that provision.

30 Moreover, as opposed to what is claimed by the appellants, an interpretation of the Statute of the Court of Justice which prevents Electrabel from bringing this appeal in no way infringes its right of access to justice or the principle of good administration. On the contrary, the purpose of circumscribing the category of persons capable of bringing an appeal before the Court in a given case, as laid down in Article 56 of the Statute, is precisely to safeguard the proper administration of justice, not least by ensuring a degree of foreseeability in the appeals which can be brought against decisions of the General Court and by avoiding the circumvention of time-limits and conditions of admissibility which apply to other legal remedies provided for by EU law.

31 In the light of the foregoing, it must be held that this appeal is inadmissible in so far as it is brought by Electrabel.

The first ground of appeal: error in the reasoning of the General Court in classifying the PPA at issue as new aid

Arguments of the parties

32 Dunamenti Erőmű claims that the General Court erred in law in concluding, in paragraph 60 of the judgment under appeal, that the PPA at issue constitutes new aid, within the meaning of Annex IV to the 2003 Act of Accession, when the General Court had not first determined whether that agreement constituted State aid.

33 Dunamenti Erőmű claims that the approach adopted by the General Court was erroneous for two reasons. First, in relying on an implicit assumption, namely that there was State aid, the General Court failed to state sufficient reasons for its finding of the existence of new aid. In that regard, it is apparent from the very wording of Annex IV to the 2003 Act of Accession that that annex is applicable only to measures which constitute aid. Second, the General Court's reasoning, in paragraphs 55 to 60, 61 to 73 and 77 to 98 of the judgment under appeal is 'circular', in that it was the assumption that there was State aid which ultimately led to the conclusion that the aid in question actually exists.

34 At the hearing before the Court, Dunamenti Erőmű submitted that, in paragraphs 78 and 79 of the judgment in *OTP Bank* (C-672/13, EU:C:2015:185), the Court held that it is necessary to determine whether a State measure constitutes State aid, before examining whether that aid is to be classified as new aid or existing aid.

35 The Commission contends that this first ground of appeal is unfounded.

Findings of the Court

36 It must first be observed that, as the Court has previously 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 an applicant (judgment in *British Telecommunications* v *Commission*, C-620/13 P, EU:C:2014:2309, paragraph 29).

37 Next, as regards paragraphs 78 and 79 of the judgment in *OTP Bank* (C-672/13, EU:C:2015:185), contrary to what is maintained by Dunamenti Erőmű, the Court did not in that case hold that the General Court must always determine that there is State aid before it undertakes the classification of the measure in question as new aid or existing aid. In those paragraphs the Court did no more than state, in essence, that, inter alia, the measure at issue had to be deemed to be new aid in the event that the referring court concluded that that measure constituted State aid. That statement attests precisely to the fact that the classification of a measure as new aid can be made on the basis of an assumption that there is State aid.

38 It follows that, in the case which gave rise to the judgment under appeal, it was open to the General Court to determine whether the PPA at issue constituted State aid only after having examined whether, if that was the case, the aid flowing from that agreement had to be classified as existing aid.

39 Moreover, it is undisputed that, in the judgment under appeal, the General Court examined all the arguments put before it, both in the context of the first plea in law relied on at first instance, that the Commission had erred in finding that there was State aid, within the meaning of Article 87(1) EC, and in the context of the second plea in law raised before the General Court, that the Commission ought to have classified the aid resulting from the PPA at issue not as new aid, but as existing aid, within the meaning of Article 88(1) EC.

40 Last, in its arguments relating to this ground of appeal Dunamenti Erőmű has also failed to demonstrate that the structure of the response chosen by the General Court led that court into error.

41 In particular, Dunamenti Erőmű cannot complain that the General Court failed to state sufficient reasons as regards the classification of the PPA at issue as new aid, by reason solely of the fact that the General Court relied on the assumption that there was State aid for the purposes of that analysis, where the General Court thereafter, in paragraph 67 et seq. of the judgment under appeal, undertook a

comprehensive examination of the arguments concerning the existence of State aid. Further, as maintained by the Commission, the conclusion reached by the General Court in that regard, namely that the existence of State aid could be confirmed, is in no way based on the finding, in paragraph 60 of the judgment under appeal, that the aid flowing from the PPA at issue had to be classified as new aid.

42 It follows that Dunamenti Erőmű can also not complain that the General Court resorted to 'circular' reasoning in order to respond to the first two pleas in law relied on at first instance. The very fact that the General Court undertook an independent examination of the question of the existence of State aid demonstrates that the General Court relied on the assumption that there was aid solely for the purposes of its assessment of the question whether the aid flowing from the PPA at issue had to be classified as new aid or as existing aid. Likewise, that assumption was not the basis of the analysis made by the General Court, in paragraphs 61 to 66 of the judgment under appeal, of the separate question of the determination of the relevant date for the assessment of the existence of State aid.

43 Consequently, the first ground of appeal must be rejected as being unfounded.

The second ground of appeal: error in the date chosen in order to assess whether the PPA at issue contains State aid

Arguments of the parties

44 Dunamenti Erőmű states that it does not dispute that the rules relating to State aid became mandatory for Hungary on the date of its accession to the European Union. None the less, Dunamenti Erőmű maintains that both the General Court and the Commission erred in law in interpreting Annex IV to the 2003 Act of Accession as meaning that that date must be identified as the relevant date for the assessment of whether the PPA at issue contains State aid.

45 By the first part of its second ground of appeal, Dunamenti Erőmű claims that the reasoning followed by the General Court to determine the relevant date for the assessment of the existence of State aid has no legal basis.

46 Contrary to what was held by the General Court in paragraph 55 of the judgment under appeal, paragraph (1) of Chapter 3 of Annex IV to the 2003 Act of Accession refers only to cases in which aid (already classified as such) can constitute new aid or existing aid, and that annex makes no reference to the time when a State measure must be examined in the light of the rules relating to State aid.

47 It is very clear from the wording of the 2003 Act of Accession and, in particular, the expression 'after the date of accession', that Annex IV applies to measures which are still applicable after that date, but does not settle the question of the determination of the relevant date for the assessment of the existence of aid. Moreover, while, in paragraph 55 of the judgment under appeal, the General Court considered that Annex IV provides the relevant time for that purpose, the court held, in paragraph 65 of that judgment, that that rule could merely be inferred from that annex.

48 Dunamenti Erőmű adds that the fact that the measure at issue did not fulfil the four criteria laid down in Article 87(1) EC before the date of accession was not affected by the fact that the State aid rules become mandatory as from that date.

49 By the second part of its second ground of appeal, Dunamenti Erőmű claims that the reasoning of the General Court is contrary to the Commission's practice and to the case-law of the Courts of the European Union.

50 According to that case-law, in particular the 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, paragraphs 104 and 105); *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* v *Commission* (T-29/10 and T-33/10, EU:T:2012:98, paragraph 78), the examination of the existence of aid and, in particular, the private investor analysis should be based on the circumstances prevailing at the date of adoption of the measure concerned.

51 In the opinion of Dunamenti Erőmű, which refers to, inter alia, paragraphs 169 to 180 of Commission Decision 2010/690/EU of 4 August 2010 on State aid C 40/08 (ex N 163/08) implemented by Poland for PZL Hydral SA (OJ 2010 L 298, p. 51), the reasoning followed by the General Court in this case is also contrary to the Commission's guidelines and to its decision-making practice, according to which the circumstances of the period preceding the accession of the Member State concerned to the European Union should also be taken into account.

52 Dunamenti Erőmű adds that it is illogical and incorrect in law to apply the concepts of 'advantage' and 'private investor' to a date when no investment had been made.

53 According to Dunamenti Erőmű, there is no judgment of the Courts of the European Union, other than those relating to the contested decision, in which there is a finding of the existence of State aid on the basis of Annex IV to the 2003 Act of Accession. In particular, the judgment in *Kremikovtzi* (C-262/11, EU:C:2012:760) concerns only the recovery of the aid concerned. In that judgment, the Court referred to the wording of Annex V to the Act concerning the conditions of accession of the Republic of Bulgaria and Romania and the adjustments to the Treaties on which the European Union is founded (OJ 2005 L 157, p. 203; 'the 2005 Act of Accession'). All that can be taken from that case is that the conclusion on the assessment of the existence of aid should still be valid at the date of accession to the European Union of the Member State concerned. Likewise, in the judgment in *Rousse Industry* v *Commission* (T-489/11, EU:T:2013:144, paragraphs 61 to 64), the General Court merely ruled that the Commission had acquired competence on the date of accession of the Member State concerned to the European Union and did not hold that that date was the relevant date for the assessment of the existence of aid.

54 The Commission considers that the second ground of appeal must be rejected as being unfounded.

55 The Commission argues that, in paragraphs 50 to 52 of the judgment in *Kremikovtzi* (C-262/11, EU:C:2012:760), relating to Annex V to the 2005 Act of Accession, the Court has previously rejected an argument comparable to that raised by Dunamenti Erőmű in the second ground of this appeal. In the judgment in *Rousse Industry* v *Commission* (T-489/11, EU:T:2013:144, paragraphs 61 to 64), the General Court also rejected such an argument. Further, none of the judgments on which Dunamenti Erőmű relies concern measures adopted by a Member State before its accession to the European Union which, after that accession, continued to be applicable.

56 Further, the Commission states, referring to the judgment in *Commission* v *Ireland and Others* (C-89/08 P, EU:C:2009:742, paragraphs 72 and 73), that State aid is an objective concept. Consequently, Dunamenti Erőmű cannot criticise the General Court for failing to state reasons for its decision with regard to the position adopted by the Commission in its guidelines.

Findings of the Court

57 By the two parts of its second ground of appeal, which can be examined together, Dunamenti Erőmű claims, in essence, that the General Court erred in law in interpreting Annex IV to the 2003 Act of Accession as meaning that the date of accession must be identified as the relevant date for the assessment of whether the PPA at issue contained State aid.

58 The Court must at the outset observe that, as stated by the General Court in paragraph 53 of the judgment under appeal and as follows from Article 2 of the 2003 Act of Accession, the EU rules in relation to State aid became mandatory in Hungary on 1 May 2004, that is, on the date of Hungary's accession to the European Union.

59 Further, as the General Court stated in paragraph 54 of the judgment under appeal, Chapter 3 of Annex IV to the 2003 Act of Accession laid down specific rules for existing aid in Hungary on the date of its accession to the European Union. In particular, Hungary accepted the introduction into that act of provisions whereby the aid measures still applicable after that accession had to be examined in the light of the EU rules on State aid if those measures could not be classified as existing aid in accordance with the provisions of that act.

60 It follows that the General Court was correct to hold, in the said paragraph 54, that the question of the determination of the relevant date for assessment, under Article 87(1) EC, of a State measure adopted by Hungary before the date of its accession to the European Union and still applicable after that date had to be examined in the light of the 2003 Act of Accession.

61 In that regard, it must be observed that, as stated by the General Court in paragraph 62 of the judgment under appeal, it is apparent from Chapter 3 of Annex IV to the 2003 Act of Accession that the States which were members of the European Union before 1 May 2004 wanted to protect the internal market against measures containing State aid, which had been introduced in the candidate countries before their accession to the European Union and which could potentially distort competition, by making those measures subject, as from 1 May 2004, to the rules relating to new aid, if those measures did not come within the exceptions specifically listed in that annex.

62 Moreover, as the General Court correctly stated in paragraphs 64 and 66 of the judgment under appeal, it follows from the wording of Article 1(b)(v) of Regulation No 659/1999 and, in particular, the first part of that provision, to the effect that existing aid is 'aid which is deemed to be an existing aid because it can be established that at the time it was put into effect it did not constitute an aid, and subsequently became an aid due to the evolution of the common market and without having been altered by the Member State' that a measure of State support which did not constitute State aid at the time when it was put into effect can subsequently become State aid.

63 It must also be borne in mind that the Court has already had occasion to hold, in paragraph 52 of the judgment in *Kremikovtzi* (C-262/11, EU:C:2012:760), relating to the 2005 Act of Accession, which reproduces, in essence, the provisions of the 2003 Act of Accession quoted in paragraphs 2 and 3 of this judgment, that the measures implemented before the accession of the Republic of Bulgaria to the European Union, but which, first, are still applicable post-accession and, second, satisfy the cumulative requirements of Article 87(1) EC on the date of accession, are subject to the specific rules laid down in Annex V to the 2005 Act of Accession.

64 In paragraph 54 of the judgment in *Kremikovtzi* (C-262/11, EU:C:2012:760), the Court stated that, as may be inferred from, inter alia, Article 1(b)(i) and (c) of Regulation No 659/1999, read in conjunction with Article 2 of the 2005 Act of Accession, it is only as from the time of accession that, in Bulgaria, the criteria laid down in Article 87(1) EC may be directly applied as such, and then only in respect of situations that arise on or after that date.

65 It follows that the finding made by the General Court in paragraph 65 of the judgment under appeal, that the date of the accession of Hungary to the European Union is the date on which an aid measure still applicable after that date must be assessed in the light of the four conditions laid down in Article 87(1) EC, is not vitiated by any error of law. As the General Court correctly held in the same paragraph, the effect of any other conclusion would be to render meaningless the objective pursued by the authors of the Accession Treaty, as recalled in paragraph 61 of this judgment. If the approach advocated by Dunamenti Erőmű in the second ground of appeal were to be accepted, the consequence would be that the Commission would not have the power to review, in the case of a Member State such as Hungary, which acceded to the European Union on 1 May 2004, any measure adopted before that date which did not constitute State aid at the time of its adoption but which, subsequently, became State aid and remains so after that date.

66 The General Court was therefore also correct to hold, in paragraphs 61 and 62 of the judgment under appeal, that the question of whether the PPA at issue contained aid compatible with the common market on the date of its conclusion, or on any other date prior to the accession of Hungary to the European Union, is of no relevance to the classification of that agreement as State aid on the date of that accession.

67 The considerations set out in paragraphs 65 and 66 of this judgment cannot be called into question by the argument relied on by Dunamenti Erőmű that the case-law of the Courts of the European Union has laid down a general rule that a State measure must be assessed with respect to Article 87(1) EC on the date of its adoption. As stated by the Commission, the judgments on which Dunamenti Erőmű relies to that end do not concern aid measures which had been adopted by a Member State before its accession to the European Union and which were still applicable after that accession, such as the PPA at issue, which, moreover, is covered by the specific body of rules described in paragraphs 59 and 61 of this judgment.

68 Last, the practice followed by the Commission in its decisions or its guidelines, even if that practice were to support the approach advocated by Dunamenti Erőmű in its second ground of appeal, cannot, in any event, bind the Court in its interpretation of the EU rules relating to State aid. Any argument based on that practice must, therefore, be rejected.

69 In the light of the foregoing considerations, the second ground of appeal must be rejected as being unfounded.

The third ground of appeal: absence of an advantage granted to the appellants

Arguments of the parties

70 By its third ground of appeal, Dunamenti Erőmű claims that the General Court erred in law, in paragraphs 68 and 69 of the judgment under appeal, by rejecting the arguments relating to its privatisation and by concluding that the PPA at issue granted an advantage to the appellants, for the purposes of Article 87(1) EC. In particular, by holding that the relevant date for the assessment of the existence of State aid was that of the accession of Hungary to the European Union, the General Court wrongly ignored the context surrounding the privatisation of Dunamenti Erőmű, since the PPA at issue was an integral part of that privatisation.

71 The third ground of appeal may be broken down into three parts.

72 By the first part of its third ground of appeal, Dunamenti Erőmű claims that the PPA at issue did not confer on the appellants an advantage, for the purposes of Article 87(1) EC, given that MVM acted as a private investor when it entered into that agreement as a preparatory measure to facilitate the privatisation of Dunamenti Erőmű.

73 In that regard, Dunamenti Erőmű argues that, in the middle of the 1990s, Hungary's objectives in terms of energy supplies were to ensure security of supply at the lowest possible cost, to modernise the infrastructure and to comply with new environmental standards, and to implement the required energy sector restructuring. According to Dunamenti Erőmű, those objectives were in part to be achieved through a programme of privatisation.

74 In that context, on 10 October 1995 the PPA at issue was entered into by Dunamenti Erőmű and MVM in order to make possible the imminent privatisation of Dunamenti Erőmű. Accordingly, in December 1995 Dunamenti Erőmű was purchased by Electrabel.

75 Dunamenti Erőmű states that, in the context of a privatisation, the Commission must ascertain whether the Member State concerned sought to maximise the profit or to minimise the loss from the sale. Referring to, inter alia, the judgment in *Spain* v *Commission* (C-278/92 to C-280/92, EU:C:1994:325, paragraph 28), Dunamenti Erőmű adds that a Member State acts as a private investor if it sells public assets through an open, unconditional, competitive call for tenders and sells to the highest bidder.

76 In this case, the correct application of the private investor test would show clearly that the PPA at issue conferred no advantage on the appellants, since the conditions mentioned in the preceding paragraph were met. In particular, an open and competitive call for tenders was published and the highest tender, namely that of Electrabel, was successful. Further, the Hungarian State engaged an independent financial specialist which recommended a privatisation based on the conclusion of such an agreement. Hungary sought to maximise its profit and took due account of the PPA at issue in the privatisation price. The fact that Hungary profited from the sale was recognised by the Hungarian State Audit Office.

77 By the second part of its third ground of appeal, Dunamenti Erőmű claims that, in any event, even if the PPA at issue contained some advantage, that advantage was repaid by means of the sale of Dunamenti Erőmű. That company adds, referring to the 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), that where a company which has benefited from aid has been sold at the market price, the sale price reflects the consequences of the previous aid, and it is the seller of that company that keeps the benefit of that aid.

78 In this case, the advantage flowing from the PPA at issue was included in the price paid by Electrabel for the purchase of Dunamenti Erőmű and, consequently, Electrabel repaid in advance that advantage to the Hungarian State. According to Dunamenti Erőmű, it is therefore Hungary which has retained the advantage after the privatisation undertaken in 1995, since Dunamenti Erőmű was purchased by Electrabel after an open and competitive tendering procedure. It follows that, whatever period is identified for the assessment of the existence of aid, one of the four criteria required for the classification of the PPA at issue as State aid was lacking.

79 Dunamenti Erőmű complains that the General Court failed to examine the question of its legal personality and that of Electrabel in order to respond to its argument that any aid resulting from the PPA at issue had been repaid by virtue of its privatisation. In paragraphs 68 and 69 of the judgment under appeal, the General Court rejected that argument by merely referring to Annex IV to the 2003 Act of Accession in order to conclude that, since that privatisation took place before the accession of Hungary to the European Union, that argument was irrelevant.

80 Dunamenti Erőmű submits that, in the judgment in *AceaElectrabel* v *Commission* (T-303/05, EU:T:2009:312), the General Court held that corporate control and the pursuit of similar or parallel economic activities are key factors to the determination of the existence of an economic unit. Given

that in the situation of Electrabel and Dunamenti Erőmű all those factors were present on the date when the judgment under appeal was delivered, the conclusion must be that they formed a single economic unit.

81 According to Dunamenti Erőmű, the arguments raised, in the alternative, by the Commission to demonstrate that the second part of the third ground of appeal is unfounded are not to be found in the judgment under appeal and must, therefore, be disregarded. Further, paragraphs 66 to 68 of the judgment in *Elliniki Nafpigokataskevastiki and Others* v *Commission* (T-384/08, EU:T:2011:650), to which the Commission refers, are of no relevance, since those paragraphs concerned the selectivity and imputability of a State guarantee.

82 By the third part of its third ground of appeal, Dunamenti Erőmű argues that the accession of Hungary to the European Union had no influence on the fact that the PPA at issue constituted a fundamental part of the privatisation, prior to that accession, which conferred no advantage on the appellants. In particular, that accession could in no way alter the fact that no advantage had been conferred on the appellants as a result of the conclusion of the PPA at issue and that the Hungarian State had acted as a private investor in the sale of Dunamenti Erőmű. The change in the Hungarian legislation which followed the accession of that Member State to the European Union could not create an advantage which did not exist previously.

83 Dunamenti Erőmű considers that the General Court clearly confused the date on which it should assess the criteria for the existence of State aid with the date on which the rules relating to State aid became mandatory in Hungary.

84 The Commission contends, primarily, that the third ground of appeal has to be rejected if the relevant date for the assessment of the existence of aid is that of the accession of Hungary to the European Union. The question of identifying which factors relate to the period commencing 1 May 2004 is a matter of fact which cannot be raised at the stage of appeal, since Dunamenti Erőmű has not claimed that there was any distortion of the sense of the evidence.

85 In the alternative, the Commission contends that none of the three parts set out by Dunamenti Erőmű in its third ground of appeal are founded in law.

86 As regards the first part of the third ground of appeal, the Commission submits, referring to the judgment in *Elliniki Nafpigokataskevastiki and Others* v *Commission* (T-384/08, EU:T:2011:650, paragraphs 66 to 68), that the absence of an advantage to the purchaser does not exclude the presence of an advantage to the purchased business. Moreover, in the judgment in *Commission* v *Scott* (C-290/07 P, EU:C:2010:480, paragraphs 5 to 11, 25 and 26), the finding that aid was granted to an undertaking was unaffected by the purchase of the shares of that undertaking by another undertaking or by the purchase of the assets constructed by means of that aid by a third undertaking. It follows that the fact that a purchaser pays a market price and thus does not itself benefit from aid is not relevant to the assessment of whether the purchased entity received aid.

87 As regards the second part of the third ground of appeal, the Commission contends that Dunamenti Erőmű confuses the aid granted to a purchased entity and that granted to the purchaser of that entity. The fact that a purchaser pays a market price and thus does not itself benefit from aid is not relevant to the assessment of whether the purchased entity received aid.

88 Paragraph 78 of the judgment in *Banks* (C-390/98, EU:C:2001:456) was *obiter* and concerned the issue of recovery of aid and not the issue of its existence. In paragraphs 80 and 81 of the judgment in *Germany* v *Commission* (C-277/00, EU:C:2004:238), the Court clearly distinguished the case which gave rise to the judgment in *Banks*. The Commission states that, in this case, Dunamenti Erőmű continued to operate on the market concerned, while retaining the advantage which it had received.

89 Last, as concerns the third part of the third ground of appeal, given that the circumstances that MVM acted as a private investor in the conclusion of the PPA at issue and that Electrabel paid the market price for the purchase of Dunamenti Erőmű are not relevant factors in the determination of whether Dunamenti Erőmű received an advantage because of the application of that agreement after the accession of Hungary to the European Union, the effect of that accession on those circumstances is also not relevant in that regard.

Findings of the Court

90 The Court must first reject the argument put forward by the Commission that the third ground of appeal is inadmissible, since it rests on a misreading of that ground. What is at issue in the third ground of appeal is not which elements relate to the period commencing 1 May 2004, but whether the General Court could properly exclude certain elements from its assessment of whether the PPA at issue conferred on the appellants an advantage, for the purposes of Article 87(1) EC. The latter question, which is a question of law, can be raised at the stage of appeal.

– The first part of the third ground of appeal

91 By the first part of its third ground of appeal, Dunamenti Erőmű claims, in essence, that the General Court erred in law, in paragraph 69 of the judgment under appeal, in holding that the PPA at issue conferred on the appellants an advantage, for the purposes of Article 87(1) EC, since, first, MVM acted as a private investor when it entered into that agreement and, second, the Hungarian State acted as a private investor in the privatisation of Dunamenti Erőmű.

92 First, it must be observed that, contrary to what is suggested by Dunamenti Erőmű, the General Court did not find, in paragraph 69 of the judgment under appeal, that the PPA at issue conferred on the appellants an advantage, for the purposes of Article 87(1) EC, but confined itself to finding that it was for the Commission to assess whether that company had benefited from an advantage conferred by the PPAs as from 1 May 2004. It is plain from the judgment under appeal, in particular from paragraphs 28 and 29 thereof, that the State aid the existence of which was declared by the Commission in the contested decision, and which, consequently, was the subject of analysis by the General Court in that judgment, took the form of an advantage conferred by that agreement on Dunamenti Erőmű alone and not on its shareholders.

93 Consequently, in so far as, in the first part of the third ground of appeal, the General Court is criticised for having found that the PPA at issue conferred an advantage on Electrabel, that first part rests on a misreading of the judgment under appeal and must, accordingly, be rejected as being unfounded.

94 Secondly, as regards the arguments set out in paragraphs 72 to 74 of this judgment, to the effect that MVM acted as a private market economy investor when it entered into the PPA at issue, it is clear that those arguments cannot demonstrate that that agreement did not confer an advantage on Dunamenti Erőmű, in so far as it applied as from 1 May 2004. As is stated in paragraph 66 of this judgment, the question as to whether that agreement contained State aid compatible with the common market on the date of its conclusion or on any other date prior to the accession of Hungary to the European Union is of no relevance to the issue of determining whether that agreement contained State aid on the date of that accession.

95 Likewise, the arguments relating to the sale of Dunamenti Erőmű to Electrabel, set out in paragraphs 75 and 76 of this judgment, cannot be accepted, since, as follows from paragraph 92 of this judgment, the State aid concerned is not a consequence of the sale itself but stems from the PPA at issue in so far as it applies as from 1 May 2004. It may be added that Dunamenti Erőmű fails, in those arguments, to explain in what way the General Court misapplied the private investor test on the date of Hungary's accession to the European Union.

96 In the light of the considerations in paragraphs 94 and 95 of this judgment, the first part of the third ground of appeal must also be rejected in so far as it relates to the existence of an advantage conferred on Dunamenti Erőmű as a result of the application of the PPA at issue.

97 The first part must, therefore, be rejected in its entirety.

– The second part of the third ground of appeal

98 By the second part of its third ground of appeal, Dunamenti Erőmű argues, in essence, that the General Court erred in law, in paragraphs 68 and 69 of the judgment under appeal, in holding that there was no need to take account of the arguments which Dunamenti Erőmű had relied on at first instance, concerning the claim that the aid at issue had been repaid by Electrabel, on the ground that the change in share ownership had taken place before the accession of Hungary to the European Union. Dunamenti Erőmű claims that, if the General Court had taken account of those arguments, it would have concluded that, by paying the market price for the purchase of Dunamenti Erőmű, Electrabel had repaid in advance any advantage to the Hungarian State and that the existence of an advantage flowing from the PPA at issue to Dunamenti Erőmű was therefore lacking, whatever the period chosen for the assessment of the existence of State aid.

99 It must be recalled that, as stated in paragraph 65 of this judgment, the General Court did not err in law in identifying, as the relevant date, for the assessment of the existence of State aid flowing from the PPA at issue, the date of the accession of Hungary to the European Union.

100 In paragraphs 69 and 70 of the judgment under appeal, the General Court rejected as being ineffective the line of argument pursued by Dunamenti Erőmű at first instance, concerning the claim that aid had been repaid through the privatisation of that company, on the ground that the change in share ownership which took place on the occasion of that privatisation was effected before the relevant date mentioned in the preceding paragraph.

101 In that regard, it must be observed that the Court has emphasised, on several occasions, the importance of the global assessment which must be carried out when examining the existence of an advantage, for the purposes of Article 87(1) EC.

102 In particular, as regards the application of the private market economy investor test, the Court has held that, where the Commission examines whether a State acted as a shareholder and whether, therefore, the private investor test is applicable in the circumstances of the case, it 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. The nature and subject-matter of that measure may be relevant in that regard, as may its context, the objective pursued and the rules to which the measure is subject (see, to that effect, judgment in *Commission* v *EDF*, C-124/10 P, EU:C:2012:318, paragraph 86).

103 Further, where the Commission is determining whether the conditions governing applicability and application of the private investor test are met, it cannot refuse to examine relevant information provided by the Member State concerned unless the evidence produced has been established after the adoption of the decision to make the investment in question. 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 was taken. That is especially so where the Commission is examining whether there is 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 (see, to that effect, judgment in *Commission* v *EDF*, C-124/10 P, EU:C:2012:318, paragraphs 104 and 105).

104 It follows that, when assessing the existence of an advantage in relation to Article 87(1) EC and, in particular, when applying the private investor test, the Commission has a duty to carry out a global assessment of the aid measure at issue, according to the information available and developments foreseeable at the time when the decision to grant that aid was taken, taking into account, inter alia, the context of that aid.

105 Consequently, information relating to events which fall within the period prior to the date of adoption of a State measure and which are available on that date may prove to be relevant to the extent that that information may shed light on the question of whether that measure constitutes an advantage, for the purposes of Article 87(1) EC.

106 It follows from the considerations in paragraphs 99 to 105 of this judgment that, in this case, when assessing the existence of State aid flowing from the PPA at issue, the Commission was obliged to assess that agreement in its context, on the date of the accession of Hungary to the European Union, taking into account all the information available on that date which proved to be relevant, including, where appropriate, information relating to events prior to that date.

107 It is therefore clear that the General Court erred in law, in paragraphs 69 and 70 of the judgment under appeal, by judging ineffective the line of argument submitted by Dunamenti Erőmű at first instance, concerning the claim that the aid flowing from the PPA at issue had been repaid through the sale of Dunamenti Erőmű to Electrabel, on the sole ground that that sale took place before the date of the accession of Hungary to the European Union.

108 It should be borne in mind, however, that if the grounds of a decision of the General Court reveal an infringement of EU law but its operative part is well founded on other legal grounds, such an infringement is not one that should cause that decision to be set aside, and the grounds should be substituted (see, to that effect, judgments in *Lestelle* v *Commission*, C-30/91 P, EU:C:1992:252, paragraph 28, and *FIAMM and Others* v *Council and Commission*, C-120/06 P and C-121/06 P, EU:C:2008:476, paragraph 187 and the case-law cited).

109 That is so in the present case.

110 In accordance with settled case-law, the recovery of unlawful aid seeks to re-establish the previous situation, and that purpose is achieved once the aid in question, together where appropriate with default interest, has been repaid by the recipient or, in other words, by the undertakings which actually benefited from it. By repaying the aid, the recipient forfeits the advantage which it had enjoyed over its competitors on the market, and the situation prior to payment of the aid is restored (see, to that effect, judgment in *Germany* v *Commission*, C-277/00, EU:C:2004:238, paragraphs 74 and 75).

111 Consequently, the main purpose of the repayment of unlawfully paid State aid is to eliminate the distortion of competition caused by the competitive advantage afforded by the unlawful aid (judgment in *Germany* v *Commission*, C-277/00, EU:C:2004:238, paragraph 76).

112 The Court has consistently held that, where an undertaking that has benefited from unlawful State aid is bought at the market price, that is to say at the highest price which a private investor acting under normal competitive conditions was ready to pay for that company in the situation it was in, in particular after having enjoyed State aid, the aid element was assessed at the market price and included in the purchase price. In such circumstances, the buyer cannot be regarded as having benefited from an advantage in relation to other market operators (see judgment in *Germany* v *Commission*, C-277/00, EU:C:2004:238, paragraph 80 and the case-law cited).

113 In a situation 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 that undertaking that retains the competitive advantage connected with that aid and it is therefore that undertaking that must be required to repay an amount equal to that aid. The buyer cannot therefore be asked to repay such aid (see judgment in *Germany* v *Commission*, C-277/00, EU:C:2004:238, paragraph 81).

114 With regard to the present case, it is apparent from paragraphs 1, 68 and 69 of the judgment under appeal, and it is not disputed in this appeal, that the privatisation of Dunamenti Erőmű, carried out in the middle of the 1990s, was achieved by a change in share ownership through a sale of holdings in that company and that, at the time when the General Court made its findings of fact, Dunamenti Erőmű was approximately 75% owned by Electrabel. Further, it is stated in paragraphs 1 and 2 of that judgment, which are not challenged before the Court, that Dunamenti Erőmű is an electricity generator active on the Hungarian electricity market which, after its privatisation, continued to operate the power plant affected by the PPA at issue.

115 In those circumstances, the case-law cited by the General Court in paragraph 70 of the judgment under appeal and relied on by Dunamenti Erőmű in this appeal in support of its arguments concerning the claim that the aid stemming from the PPA at issue was repaid, cannot be interpreted as meaning that the privatisation of that company in the 1990s brought about the effective repayment of the aid granted to it as a result of the application of the PPA at issue. In particular, even if that company was sold by the Hungarian State to Electrabel at the market price and that price fully reflected the value of the advantage resulting from the PPA at issue, it follows from the findings of fact made by the General Court, as set out in the preceding paragraph, that after its privatisation, Dunamenti Erőmű retained its legal personality and continued to carry out the activities affected by the State aid at issue, and consequently Dunamenti Erőmű in fact retained the benefit of the advantage resulting from that agreement, as it applied as from 1 May 2004 and from which Dunamenti Erőmű benefited on the market in relation to its competitors.

116 It follows that, as submitted by the Commission, even if the Hungarian State was able to profit from the privatisation of Dunamenti Erőmű, that circumstance would not have prevented that company from continuing to have the actual benefit, after the change in share ownership brought about by its privatisation in 1995, of the advantage flowing from the PPA at issue, which, as stated in paragraph 6 of this judgment, was to continue, depending on the blocks concerned, until 2010 or 2015. Accordingly, any profit which the Hungarian State might have made on that privatisation could not result in the distortion of competition caused by the competitive advantage conferred on Dunamenti Erőmű by that agreement ceasing to exist.

117 That conclusion cannot be called into question by the argument raised by Dunamenti Erőmű that, at the time when the General Court made its findings of fact, that company formed with Electrabel a single economic unit, within the meaning of the Court's case-law, since the general assertions put forward by Dunamenti Erőmű in support of that argument cannot invalidate the finding of fact made by the General Court and set out in paragraph 114 of this judgment, which, moreover, as stated in that paragraph, have not been challenged by Dunamenti Erőmű in this appeal.

118 Consequently, even though the General Court erred in holding that the fact that the privatisation of Dunamenti Erőmű took place prior to the date on which the existence of State aid, within the meaning of Article 87(1) EC, had to be examined was, in itself, sufficient ground to rule that the argument relied on by Dunamenti Erőmű, concerning the claim that the aid had been repaid through that privatisation, should be excluded from its assessment as to whether the PPA at issue contained State aid within the meaning of that article, it must be held that, in the circumstances of this case, as they appear in the judgment under appeal, it would have been open to the General Court, in order to confirm the existence of such aid, to reject that argument on grounds other than those set out in

paragraphs 69 and 70 of that judgment. That being the case, the error in law identified in paragraph 107 of this judgment has no effect on the conclusion reached by the General Court in that regard and, therefore, also has no effect on the operative part of the judgment under appeal.

119 It follows that the second part of the third ground of appeal must be rejected.

– The third part of the third ground of appeal

120 It must be observed that, in its arguments submitted in relation to the third part of this ground, as set out in paragraph 82 of this judgment, Dunamenti Erőmű does no more than assert, confining itself to general considerations, that the accession of Hungary to the European Union had no influence on the fact that no advantage was conferred on the appellants by the conclusion of the PPA at issue or by the purchase of Dunamenti Erőmű by Electrabel, but fails to explain how the General Court erred in law in confirming the existence of an advantage, for the purposes of Article 87(1) EC, flowing from that agreement on the date of that accession.

121 It is accordingly clear that the arguments relied on by Dunamenti Erőmű in that regard are based on the premise that the question of whether the PPA at issue contained State aid, within the meaning of Article 87(1) EC, on the date on which that agreement was concluded and on the date when the privatisation of Dunamenti Erőmű took place is relevant, even decisive, to the assessment of whether that agreement contained State aid on the date of the accession of Hungary to the European Union. Yet in the light of the considerations set out in paragraphs 65 and 66 of this judgment as part of the examination of the second ground of appeal, those arguments must be rejected as being unfounded.

122 For the remainder, it must be stated that the arguments relied on by Dunamenti Erőmű in this third part of the third ground of appeal, relating to the determination of the relevant date for the assessment of the existence of State aid, as described in paragraph 83 of this judgment, amount merely to a repetition of the arguments which have already been rejected in relation to the second ground of appeal.

123 The third part of the third ground of appeal must therefore be rejected and, accordingly, the third ground of appeal must be rejected in its entirety.

The fourth ground of appeal: absence of an advantage deriving from MVM's binding minimum off-take obligation

Arguments of the parties

124 Dunamenti Erőmű claims that the General Court erred in law and disregarded its obligation to carry out a judicial review by holding, while failing to demonstrate the presence of a structural risk, that the obligation of minimum off-take to which MVM was subject implied the existence of an advantage.

125 The General Court recognised, in paragraph 112 of the judgment under appeal, that Dunamenti Erőmű had adduced evidence tending to show that MVM was never compelled to purchase each year from Dunamenti Erőmű a quantity of electricity greater than it would have chosen to purchase in the absence of the PPA at issue. Notwithstanding that assertion, the General Court, as the Commission had done, confined itself to the conclusion that the fact that in certain years MVM had bought quantities of electricity significantly greater than the obligatory minimum off-take did not imply that MVM had not borne the risk inherent in that obligation.

126 According to Dunamenti Erőmű, by relying solely on the mere possibility of a structural risk and by failing to demonstrate that such a risk actually existed, the General Court disregarded its duty to carry out a judicial review. If the General Court had correctly assessed that risk, it would have concluded that there was no advantage, since the Court would have held that MVM had never been compelled to purchase each year from Dunamenti Erőmű a quantity of electricity greater than it would have chosen to purchase in the absence of the PPA at issue and that MVM had therefore freely chosen the quantity of electricity that it wanted to purchase. Dunamenti Erőmű adds that, if the price paid had not been the market price, MVM would have chosen another generator to replace it, at least for the quantities of electricity that were above the minimum off-take, given that, as the Commission acknowledged in the contested decision, there were free alternative generation capacities and possible additional imports.

127 The Commission considers that the fourth ground of appeal is inadmissible, since Dunamenti Erőmű has not indicated the part of the judgment under appeal which it claims is vitiated by an error of law. Dunamenti Erőmű makes a passing reference to paragraph 112 of that judgment, but does not explain why that paragraph should be overturned (see, to that effect, the judgments in *Bergaderm and Goupil* v *Commission*, C-352/98 P, EU:C:2000:361, paragraph 34, and *France* v *Monsanto and Commission*, C-248/99 P, EU:C:2002:1, paragraphs 68 and 69).

128 If the Court were to consider that that ground of appeal is directed against paragraph 112 of the judgment under appeal, the Commission argues, in the alternative, that that ground is ineffective.

129 As a further alternative, the Commission contends that the fourth ground appeal is, in any event, unfounded.

Findings of the Court

130 The Court must at the outset reject the argument relied on by the Commission that the fourth ground of appeal is inadmissible, since that ground does not identify with sufficient precision the part of the judgment under appeal which is vitiated by an error of law. Indeed, by the arguments submitted in support of that ground, Dunamenti Erőmű refers explicitly to paragraph 112 of the judgment under appeal.

131 Further, to the extent that Dunamenti Erőmű's arguments concern the claim that the General Court erred in law because it failed to demonstrate the presence of a structural risk when examining whether there was an advantage, for the purposes of Article 87(1) EC, the criticism cannot be made of that company that it failed to identify specific parts of that judgment (see, to that effect, the judgment in *Limburgse Vinyl Maatschappij and Others* v *Commission*, C-238/99 P, C-244/99 P, C-245/99 P to C-247/99 P, C-250/99 P to C-252/99 P and C-254/99 P, EU:C:2002:582, paragraph 423).

132 None the less, the fourth ground of appeal must be rejected as being ineffective. Even if the MVM's binding minimum off-take obligation did not imply the existence of an advantage, Dunamenti Erőmű does not call into question, inter alia, the finding made in paragraph 117 of the judgment under appeal, that it had not been disputed before the General Court that the incorporation of guarantees to cover the cost of capital constitutes an advantage in the light of existing practices on the competitive markets.

133 It follows that, even if it were established as fact that MVM's binding minimum off-take obligation did not imply the existence of an advantage, that cannot, in any event, be sufficient, in itself, to demonstrate that no advantage derived from the PPA at issue.

134 That being the case, the criticism cannot be made of the General Court that it disregarded its duty to carry out judicial review in failing to demonstrate the presence of a structural risk, for the purposes of its assessment of the existence of an advantage, under Article 87(1) EC.

135 It follows that the fourth ground of appeal must be rejected.

The fifth ground of appeal: error in the method for calculation of the amount of aid to be repaid

Arguments of the parties

136 Dunamenti Erőmű claims that the General Court erred in law in confirming the methodology adopted by the Commission for the calculation of the amount of aid to be repaid and disregarded the degree of judicial review required in that regard.

137 The Commission asked Hungary to estimate the amount of the aid to be recovered by comparing the difference between the revenues actually obtained within the system in which the PPAs were in force ('the actual scenario') and the revenues which would have been obtained if no agreements of that kind had been concluded ('the counterfactual scenario'). Yet costs should also be taken into account, since to examine solely revenue does not permit an exact evaluation of the advantage allegedly flowing from the PPAs. In the approach advocated by the Commission, the additional revenues received by Dunamenti Erőmű in the actual scenario to cover additional fuel charges would be classified as advantages.

138 Dunamenti Erőmű maintains that it is necessary to take account of fuel costs, since such costs represent nearly 100% of the variable production costs. It would therefore be appropriate to examine not all costs, but solely costs linked to the purchase of gas. In this case, if fuel costs were taken into account that would call into question the very existence of aid. The economic experts employed by Hungary calculated a negative amount of approximately EUR 100 million on a comparison of profits and a positive amount of approximately EUR 482 million on a comparison of revenues alone.

139 It is also untrue that the method based on profits rests on speculative assumptions linked to Dunamenti Erőmű's conduct, given that the extra consumption of gas was dictated by the extra production of electricity, not because of a choice by that company as to its conduct.

140 Dunamenti Erőmű states that the General Court recognised, in paragraph 185 of the judgment under appeal, that the method based on the difference in profits would be more appropriate. None the less, it is apparent from paragraphs 184 and 189 of the judgment under appeal that the General Court considered that the Commission had not erred in adopting the approach based on revenues, because the application of the approach based on profits would be more complicated to implement. Yet the fact that a methodology involved in a counterfactual scenario would be too complicated to implement is obviously not a relevant factor for the purposes of assessment of the amount of the aid to be repaid. In paragraph 186 of the judgment under appeal, the General Court referred to the judgment in *Budapesti Erőmű* v *Commission* (T-80/06 and T-182/09, EU:T:2012:65) in support of that approach. However, in the case which gave rise to that judgment, the respective volumes in the counterfactual scenario and the actual scenario were very similar.

141 According to Dunamenti Erőmű, the Commission cannot rely on what is stated in paragraph 188 of the judgment under appeal, that the advantage must 'be assessed on the basis of the conduct of the public undertaking conferring the advantage ..., not on the basis of the conduct of the beneficiary of that advantage', since there is no legal basis for that assertion and it is contradicted by the Court's case-law. In point 2 of the operative part of the judgment in *Ferring* (C-53/00, EU:C:2001:627), the

Court clearly laid down the principle that if the alleged State aid measure results in both extra revenues and additional costs, then it is the difference between those two amounts that may give rise to an advantage constituting State aid.

142 Last, by rejecting, in paragraphs 184 and 189 of the judgment under appeal, the method based on profits, mainly because of its complexity, the General Court failed to carry out a full review of the Commission decision, although it had a duty to do so when carrying out complex economic assessments in the context of an action for annulment, as the Court held in the judgment in *CB* v *Commission* (C-67/13 P, EU:C:2014:2204).

143 The Commission considers that the General Court did not err in law in confirming the method adopted in the contested decision for the calculation of the amount of aid to be repaid. Likewise, the assertion that the General Court did not carry out a full review of the contested decision in that regard is unfounded.

Findings of the Court

144 The Court must first reject the argument that the General Court erred in law, in paragraph 188 of the judgment under appeal, in considering that the existence of an economic advantage must, in accordance with the principle of the private market economy operator, be assessed in the light of the conduct of the public undertaking conferring the advantage at issue, and not in the light of the conduct of the beneficiary. According to settled case-law, for the application of the private investor test, it is necessary to determine whether the same advantage as that made available to the beneficiary undertaking through State resources would have been granted by a private investor in normal market conditions (see, to that effect, the judgment in *Commission* v *EDF*, C-124/10 P, EU:C:2012:318, paragraphs 78 and 79).

145 As regards, more particularly, the choice of method for the calculation of the amount of aid to be repaid, contrary to what is claimed by Dunamenti Erőmű, in the judgment in *Ferring* (C-53/00, EU:C:2001:627) the Court did not lay down a general principle in favour of the method of calculation based on profits. While, in that judgment, the Court found that the measure at issue constituted State aid, since the advantage granted was greater than the additional costs borne by the beneficiaries, the Court held that only the additional costs resulting from the discharge of the public service obligations imposed on the beneficiaries by the national legislation were to be taken into account in the assessment of the existence of an advantage for the purposes of Article 92(1) of the EC Treaty (later Article 87(1) EC). Dunamenti Erőmű does not claim that it had any such obligations to discharge.

146 Next, while, in paragraph 185 of the judgment under appeal, the General Court recognised that if the cost of fuel were taken into account the result might be that 'the amount of the aid to be recovered [would be] far lower than would be the case if the [method adopted in the contested decision] were followed', the General Court did not at all in that paragraph recognise, contrary to what is claimed by Dunamenti Erőmű, that the method of calculation based on profits is more appropriate than that based on revenues.

147 On the contrary, it is apparent from an overall reading of paragraphs 184 to 192 of the judgment under appeal that the General Court held that the method adopted by the Commission in the contested decision would more readily ensure that the beneficiary forfeited the advantage it had enjoyed on the market over its competitors than the method based on profits, in accordance with the case-law set out in paragraph 110 of this judgment and mentioned by the General Court in paragraph 187 of the judgment under appeal.

148 In particular, in paragraph 184 of the judgment under appeal, the General Court held that the Commission had correctly taken as its starting point the premise that the advantages flowing from the PPAs went far beyond any potential positive difference between PPA prices and prices which could have been achieved on the market without PPAs, and that finding is not challenged in this appeal. The General Court then stated, again in paragraph 184, that the Commission had decided to limit the recovery order to any difference between the revenues of the electricity plants subject to the PPA rules and the revenues those plants could have achieved without PPAs in the period commencing 1 May 2004, since it was impossible to calculate accurately the overall value of all the conditions attached to MVM's long-term purchase obligations for that period.

149 That being the case, Dunamenti Erőmű cannot complain that the General Court erred in law on the sole ground that the amount of the aid resulting from the method of calculation confirmed by the General Court would be higher than the amount resulting from the application of the method Dunamenti Erőmű advocates.

150 Further, as is apparent from paragraphs 146 to 148 of this judgment, the General Court rejected the method based on profits not because of its complexity, but because the method based on revenues would more readily ensure that Dunamenti Erőmű forfeited the advantage flowing from the PPA at issue. Since Dunamenti Erőmű's argument in that regard is based on a misreading of the judgment under appeal, that argument must be rejected as being unfounded.

151 It follows that the argument concerning disregard of the degree of judicial review carried out by the General Court, in that it did not examine the approach proposed by Dunamenti Erőmű because of its complexity, can also not be accepted.

152 Last, since it was open to the General Court to reject, without any error in law, the method based on profits for the calculation of the amount of aid to be repaid in this case, the arguments directed to proving that the General Court erred in its assessment of the type of analysis that would be necessary for the application of that method are irrelevant.

153 The fifth ground of appeal must, therefore, be rejected.

154 It follows from all the foregoing that the appeal must be dismissed.

Costs

155 Under Article 184(2) of the Rules of Procedure of the Court of Justice, where the appeal is unfounded, the Court is to make a decision as to costs.

156 Under Article 138(1) of those rules, which apply to the procedure on appeal by virtue of Article 184(1) thereof, the unsuccessful party must be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since Dunamenti Erőmű has been unsuccessful and the Commission has applied for costs against Dunamenti Erőmű alone, Dunamenti Erőmű must be ordered to bear its own costs and to pay those incurred by the Commission.

157 Since the appeal is inadmissible in so far as it was brought by Electrabel, the latter must bear its own costs.

On those grounds, the Court (Third Chamber) hereby

1. Dismisses the appeal;

2. Orders Dunamenti Erőmű Zrt. to bear its own costs and to pay those incurred by the European Commission;

3. Orders Electrabel SA to bear its own costs.

[Signatures]