



ANTITRUST CLIENT BRIEFING

EU State Aid Rules for Large Infrastructure Projects

Review of the European Court of Justice's Hinkley Point Judgment (C-594/18P)

29 September 2020

The Development

- On 22 September 2020, the European Court of Justice (ECJ) delivered a judgment confirming the prior ruling by the General Court that validated the European Commission's (EC's) decision that the UK government could lawfully grant State aid to support the construction of the Hinkley Point C nuclear power station in Somerset, England.
- This is the first time that the European Courts have been called on to clarify whether the construction of a nuclear power station may benefit from State aid approved by the EC pursuant to Article 107(3)(c) of the Treaty of the Functioning of the European Union (TFEU).

Key Points

- The judgment includes the following key rulings.
 - State aid in the nuclear sector falls within the scope of the TFEU, rather than the Euratom Treaty.
 - Aid measures for construction of a nuclear power station can be authorized as compatible aid with the internal market under Article 107(3)(c) TFEU if two conditions are met: the aid (i) must be intended to facilitate the development of certain economic activities or of certain economic areas and (ii) must not adversely affect trading conditions to an extent contrary to the common interest. Under this provision, there is no further condition that the aid must itself pursue an objective of common interest (unlike under Article 107(3)(b) TFEU which concerns aid to promote the execution of an important project of common European interest or to remedy a serious disturbance in the economy of a Member State).
 - The requirement to preserve and improve the environment and rules of EU law on the environment apply in the nuclear energy sector. Therefore State aid for an economic activity falling within the nuclear energy sector that is shown upon examination to contravene environmental rules cannot be declared compatible with the internal market.
 - The principle of protection of the environment, the precautionary principle, the 'polluter pays' principle and the principle of sustainability, cannot be regarded as precluding, in all circumstances, the grant of State aid for the construction or operation of a nuclear power plant. This is because each Member State is free to determine the conditions for exploiting its energy resources, its choice between different energy sources, and the general structure of its energy supply, and thus may include nuclear energy as part of its energy mix.
 - Aid for construction or operation of a nuclear plant can thus be declared compatible with the internal market in principle. In other words, the grant of such aid is not precluded by the application of EU environmental law.
- Following this judgment, new nuclear builds and large infrastructure projects requiring long-term investment will benefit from a clearer framework of assessment, if, as expected, public support is needed.

Takeaways

- An EU Member State's choice to opt for nuclear energy within its energy mix is not *per se* in conflict with the objectives and principles of EU environmental law.
- EU Member States may plan to grant State aid for existing or new nuclear plants (construction and operation) and will have to obtain validation from the EC under the TFEU State aid rules.
- In assessing its compatibility with the internal market, the EC will carefully scrutinize the amount, nature and structure of the aid. In that assessment it will pay attention to whether the grant of such aid can be considered compliant with the principles of EU environmental law and other general principles of EU law. But the grant of such aid is not precluded, as such, by the application of EU environmental law.

The Hinkley Point C State Aid Investigation – Timeline of Events

- **July 2013:** Draft proposals for State aid guidelines in the energy sector had included provisions to give nuclear power status similar to renewables, which are effectively exempt from State aid legislation. However, there was strong opposition from some EU Member States, and the EC dropped any special status for nuclear power in its 2014 Guidelines on State aid for environmental protection and energy.
- **October 2013:** The UK notified to the EC measures in support of the creation of new nuclear energy generating capacity at the Hinkley Point C nuclear power station. The beneficiary of the notified measures was NNB Generation Company Limited (NNBG), a subsidiary of EDF Energy plc (EDF).
- **December 2013:** The EC opened an in-depth 11-month State aid investigation.
 - During the investigation, the UK authorities agreed to modify significantly the terms of the proposed State financing.
- **October 2014:** The EC granted approval to the revised State support. The approved measures comprise:
 - A “Contract for Difference”, intended to ensure price stability for electricity sales during the operational phase of Hinkley Point C. Under this arrangement, when the market price at which the electricity is sold is lower than the strike price, the UK government will pay the difference between the strike price and the market price. Conversely, when the market price is higher than the strike price, NNBG will be obliged to pay the difference to the UK government.
 - An agreement between NNBG's investors and the UK's Secretary of State for Energy and Climate Change, guaranteeing compensation in the event of an early shutdown of the nuclear power station on political grounds.

- A credit guarantee by the UK on bonds to be issued by NNBG, intended to ensure the timely payment of principal and interest of qualifying debt.
- **March 2017:** The EC approved a Hungarian State aid package for a new Russian-built nuclear power reactor in Paks, Hungary. Austria has challenged this decision before the General Court, and judgment is pending.
- **July 2018:** The General Court dismissed an action brought by Austria (supported by Luxembourg) to annul the EC's 2014 Hinkley Point C approval decision.

The Ruling

The ECJ ruled as follows:

The Promotion of Nuclear Energy and the Common Interest

- In order to be declared compatible with the internal market under Article 107(3)(c) TFEU, State aid must meet both of the following conditions:
 - It must be intended to facilitate the development of certain economic activities or of certain economic areas.
 - It must not adversely affect trading conditions to an extent contrary to the common interest.
- Article 107(3)(c) TFEU does not require planned aid to pursue an objective of common interest.
 - The ECJ therefore rejected as unfounded Austria's various arguments to the effect that the construction of a new nuclear power station does not constitute an objective of common interest.

Significance of Euratom Treaty

- The ECJ dismissed Austria's argument that the Euratom Treaty does not allow State aid for the construction of nuclear power plants for two main reasons:
 - (i) The rules contained in the TFEU concerning competition and State aid should apply to the nuclear energy sector when the Euratom Treaty does not contain specific rules, since:
 - The Euratom Treaty is a specific treaty dealing with a particular sector and it does not contain rules concerning State aid.
 - The TFEU has more far-reaching aims and confers upon the EU extensive competences in numerous areas and sectors.
 - (ii) The objectives pursued by the Euratom Treaty cover the construction of nuclear power stations or the creation of new nuclear energy production capacities and, as such, the granting of State aid in their favor is not contrary to these goals.

Environmental Protection

- State aid for an economic sector falling within the nuclear energy sector that is shown to contravene EU environmental rules cannot be declared compatible with the internal market pursuant to Article 107(3)(c) TFEU.
- An EU Member State is free to determine the conditions for exploiting its energy resources, its choice between different energy sources and the general structure of its energy supply, and may include nuclear energy as part of its energy mix.
 - The principle of the protection of the environment, the precautionary principle, the 'polluter pays' principle, and the principle of sustainability cannot be regarded as precluding, in all circumstances, the grant of State aid for the construction or operation of a nuclear power plant.

Definition of the Relevant Sector

- When determining whether aid is such as to facilitate the development of an economic activity, Article 107(3)(c) TFEU does not require the product market within which the economic activity falls to be identified. Identification of that market is relevant only for examining the second condition of whether the planned aid does not adversely affect trading conditions to an extent contrary to the common interest.

Market Failure

- While the existence of a market failure may be a relevant factor for declaring State aid compatible with the internal market, the absence of such a failure does not necessarily mean that the conditions laid down in Article 107(3)(c) of the TFEU are not satisfied.

Proportionality

- The General Court had examined the proportionality of the measures at issue, not in the light solely of the objective of creating new nuclear energy generating capacity, but in the light of the UK's electricity supply needs, whilst rightly pointing out that the UK is free to determine the composition of its own energy mix.
- When examining the condition that the planned aid must not adversely affect trading conditions to an extent contrary to the common interest, the EC was not required to take into account the negative effect that the measures at issue may have on the implementation of the principle of protection of the environment, the precautionary principle, the 'polluter pays' principle, and the principle of sustainability. Without prejudice to the check that the activity supported does not infringe the rules of EU law on the environment, examination of that condition does not require the EC to take into account any negative effects other than the negative effects of the aid on competition and trade between Member States.

Investment Aid / Operating Aid

- When checking that the measures at issue were compatible with the internal market, neither the EC nor the General Court was required to characterise the measures formally as investment aid (which may satisfy the conditions for application of Article 107(3)(c) TFEU), or as operating aid (the authorization of which under Article 107(3)(c) TFEU is in principle precluded).

Source

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