LEXCELLENCE

STATE AID CASES FROM CENTRAL AND EASTERN EUROPE II.

SUMMARIES OF INTERESTING CASES FROM THE REGION (COMPLETING OUR SELECTION OF EMBLEMATIC JUDGMENTS OF THE EU COURTS)

Budapest, 20 September 2019

Lexcellence Ltd. Budapest © 2019

Judgment of 13 December 2018, *AlzChem AG v European Commission*, T-284/15, EU:T:2018:950

Relevance: imputability of a national court's decision to the state

Facts

The applicant, *AlzChem AG* (hereinafter: *AlzChem*), a company active in the fine chemicals market brought an action in June 2015 before the General Court claiming that Slovakia granted unlawful aid to one of its competitors, *Novácké chemické závody, a.s. v konkurze* (hereinafter: NCHZ).

The antecedents of the case dated back to October 2009 when NCHZ having declared its inability to continue its operation became the subject of insolvency proceedings. At the end of the same year, on the basis of the new legislation (the law on strategic companies) which had entered into force on 1 December 2009, NCHZ was classified as a strategic company which meant that the State was entitled to purchase it. NCHZ was practically the one and only company that was subject to the application of this law and eventually benefited from it. NCHZ enjoyed the so-called strategic company status for one year during which the relevant legislation was in force (the first insolvency proceedings). After its expiry from 1 January 2011, it became subject to the law on insolvency (second insolvency proceedings). According to the Slovak insolvency law the operation during the (second) insolvency proceedings was managed by the instructions of the creditors' committee, the decisions of which were implemented by the appointed insolvency administrator.

The insolvency administrator informed the creditors at the creditors' committee meeting in January 2011 that NCHZ's operating costs were higher than the operating income, providing an economic analysis as well. The analysis concluded that the interests of the creditors were to continue the operation and sell the company later on as a going concern. The creditors' committee (the representative body of non-secured creditors, the majority of which were private companies) together with the secured creditors (including public and private bodies) decided that NCHZ's operations were to be continued.[1] The creditors' decision was then approved by the Regional Court in *Trenčín* in February 2011.

The Commission received a complaint in October 2011, alleging that Slovakia granted unlawful aid to NCHZ. In its decision, adopted in October 2014, the Commission found that during the first insolvency proceedings, "NCHZ's strategic company status constituted a selective advantage, was attributable to the State, led to the use of State resources and distorted competition in a market open to trade between Member States"[2].

However, regarding the second insolvency proceedings the Commission took the view that NCHZ's continued operation pursuant to the creditors' decision did not constitute state aid mainly because the advantage was not attributable to the State. The Commission found that

---

[1] See Commission Decision of 15.10.2014 on State aid SA.33797 – (2013/C) (ex 2013/NN) (ex 2011/CP) implemented by Slovakia for NCHZ, C(2014) 7359 final, https://ec.europa.eu/competition/state_aid/cases/249230/249230_1632730_355_2.pdf, paragraph 33-34

[2] See Judgment of 13 December 2018, *AlzChem AG v European Commission*, T-284/15, EU:T:2018:950, paragraph 14

NCHZ's continued operation was based on the decision of private creditors, and that public creditors were not in a position according to the Slovak law to veto this decision.[3]

AlzChem challenged the Commission's decision alleging among others that the Commission infringed its obligation to state reasons in the contested decision. *Alzchem's* main argument was that national courts' decisions are in general attributable to the State, however the Commission in its reasoning did not even mention the role of national courts in this context, neither explaining why the court's approval was irrelevant in evaluating the question of imputability nor if it was relevant why its decision was not adequate to confirm that the measure was attributable to the State.

Held

The Court pointed out that a measure may be regarded as a decision attributable to the State following a decision by a national court and concluded that the Commission had failed to indicate in its decision the precise role of the national court and the reasons why the national court's decision was not attributable to the State. Although the decision on the continuation of the operation of the company was based on the decision of the private creditors, as the national court was also a member of the relevant committee, the Commission should have stated its arguments which led to the conclusion that the decision was not attributable to the decision of the national court, thus imputable to the State. In other words, although the decision of the private creditors was obviously not attributable to the State, the court's decision clearly was, but the Commission failed to explain the contrary.

However, the Court also held that the lack of reasoning in and of itself in that context is not sufficient to state that the second insolvency proceedings was attributable to the State. It is also necessary to confirm the existence of an economic advantage. Nonetheless, when applying the private creditor test, the Commission must carry out an assessment of the individual situation of each and every public creditor at issue and must not regard them as a single entity.

Findings of the Court

"100 As a preliminary point, it must be understood that, by its line of argument, the applicant alleges, in essence, infringement of the obligation to state reasons regarding the role of the súd v Trenčíne (Regional Court of Trenčín) in the decision-making process.

[…]

104 It is common ground that, having regard to the circumstances of the case and in accordance with the provisions of the law on insolvency, the súd v Trenčíne (Regional Court of Trenčín) formed part of the relevant committee responsible for deciding whether to continue the operation of NCHZ and that, in accordance with Article 83(4) of the law on insolvency, the administrator was bound by the decision of 17 February 2011.

105 However, it should be noted that, in the contested decision, the Commission did not clearly indicate how it had considered the role of the súd v Trenčíne (Regional Court of Trenčín) in the decision-making process. In recitals 14, 26 and 32 and Article 2 of that decision, it mentioned only the decision of 26 January 2011, without referring to the intervention of that court (see paragraph 78 above), whereas, in recitals 33, 35, 36 and 102 of the contested decision, it referred to the decision of that court, without explaining its

[3] See the Commission Decision in case SA.33797, *op. cit.* paragraph 104

precise role in the present case, having regard to the wording of Article 83(4) of the law on insolvency, thus suggesting that it only had to approve the decision of 26 January 2011 and make it binding (see, in particular, recital 33 of the contested decision).

[…]

107 In addition, as stated by the Commission at the hearing, it cannot be ruled out that a measure may be regarded as a decision attributable to the State within the meaning of Article 107(1) TFEU because of a decision of a national court (see, to that effect, judgments of 26 October 2016*, DEI and Commission v Alouminion tis Ellados*, C-590/14 P, EU:C:2016:797, paragraphs 59, 77 and 81, and of 3 March 2016, *Simet v Commission*, T-15/14, EU:T:2016:124, paragraphs 38, 44 and 45).

108 In that context, it must be held that the Commission should have explained, in the contested decision, the reasons which led it to conclude that the decision to continue NCHZ's operations was not attributable to the súd v Trenčíne (Regional Court of Trenčín).

111 In addition, at the hearing, the Commission was questioned by the Court, which was seeking to understand, in the light of the provisions of the law on insolvency, if a court involved pursuant to Article 83(4) of that law, such as, in this case, the súd v Trenčíne (Regional Court of Trenčín), was merely to assess compliance with the formal aspects of the creditors' decision or whether it was also required to check the validity of the decision and, where applicable, could come to a different decision. It must be stated, however, that the Commission was not able to provide an answer in that regard. It merely claimed that, in the present case, the súd v Trenčíne (Regional Court of Trenčín) had no choice but to confirm the decision of 26 January 2011, without arguing that the review by that court was restricted in law.

112 It follows that, having regard to the particular circumstances in which the súd v Trenčíne (Regional Court of Trenčín) intervened in the present case, since it was a member of the relevant committee, the contested decision is vitiated by a lack of reasoning concerning whether the decision to continue NCHZ's operations during the second insolvency period was attributable to the State.

[…]

117 However, the lack of reasoning noted as regards whether the decision to continue NCHZ's operations during the second insolvency period was attributable to the State is not sufficient for the annulment of Article 2 of the contested decision. The Commission, supported by the Slovak Republic, correctly argues that the conditions in Article 107(1) TFEU are cumulative. Accordingly, the action may be upheld, and Article 2 annulled, only if the Commission incorrectly concluded that there was no economic advantage or if the statement of reasons for the contested decision does not meet the requirements of Article 296 TFEU in that regard."

Judgment of 13 February 2012, *Budapesti Erőmű v Commission*, Joined Cases T-80/06 and T-182/09, EU:T:2012:65

Relevance: Economic advantage and distortion of competition

Facts

In order to attract investment for the modernization of the Hungarian power generation sector, state-owned Magyar Villamos Művek Zrt. (hereinafter: MVM) entered into long-time power purchase agreements (hereinafter: PPAs) with the new operators of the privatised power plants. These PPAs obliged MVM to buy a fixed amount of electricity (covering the whole or the substantial part of the generation capacities of the power plants concerned) for a fixed price, thereby guaranteeing a return on investment. PPAs were signed between 1995 and 2001, when the Hungarian electricity market was closed, so there was no competition at all, and MVM as an incumbent was responsible for ensuring security of supply at the lowest cost. In 2003 approximately 30 % of the market was opened to competition, but MVM remained responsible for supplying the public utility sector and the power generators were obliged to offer their generating capacity to MVM, first for a regulated price, then, after 2004, for a price calculated on the basis of the prices fixed in the PPAs.

The applicant, Budapesti Erőmű Zrt. at the time of the proceedings a subsidiary of *Électricité de France International SA* operated 4 power plants in Budapest, 3 of which had a PPA with MVM. The PPA relating to the Kelenföld power plant was concluded in 1996 and expired on 31 December 2011. The PPA relating to the Újpest power plant was concluded in 1997 and was to expire in 2021. The PPA relating to Kispest power plant was signed in 2001 and was to expire in 2024.

Before accession to the EU, the Hungarian authorities notified to the Commission the stranded costs compensation scheme of the power plants, and the Commission started to investigate the PPAs. In its decision of 4 June 2008, it found that PPAs contained illegal State aid, since they shielded power generators from any commercial risk, because the fixed prices covered the fixed, the variable and also the capital costs of the power plants over a significant lifetime of the unites. In the decision contested by the applicant, Hungary was obliged to stop granting the aid and to recover the aid previously granted to the beneficiaries, the amount of which had to be calculated on the basis of a market simulation on the wholesale electricity market as it would have stood if none of the long-term PPAs had been in force on the 1st of May 2004. The result of this market simulation was that the applicant had nothing to pay back.

Held

The General Court dismissed the action for annulment, maintaining that the PPAs contained illegal State aid. First it stated that the Commission did not err in law when it took the date of Hungary's accession to the EU as the relevant date for the purpose of determining the existence of aid. It also maintained, that the aid at issue could not be considered as existing aid. Second, it maintained that the PPA's granted economic advantage to the power plants, since – comparing with the typical conditions of power purchase agreements available on the market in the relevant period (i.e. after Hungary's accession to the EU) – PPA's structurally provided power generators with a better guarantee than that provided under standard commercial contracts. As regards the distortion of competition, the General Court reminded that the fact that a sector has been liberalised at Community level – like the electricity sector in the case concerned – may serve to indicate that the aid has a real or potential effect on competition and

effects the trade between Member States, and the Commission is not required to carry out an economic analysis of the actual situation of the market concerned.

Findings of the Court

“67 In the present case, it is apparent from the contested final decision that, in assessing whether there was an economic advantage, the Commission took as its point of reference a market operator who is subject to the same obligations and who has the same opportunities as MVM, and who is faced with the same legal and economic conditions as those existing in Hungary during the period examined.

68 In order to carry out that analysis, the Commission identified the main practices of commercial operators on European electricity markets and assessed whether the PPAs were in line with those practices or provided the generators concerned with guarantees that a buyer would not accept if it were acting on purely commercial grounds (recital 191 to the contested final decision).

[..]

76 The comparison of the PPAs and those contracts has a certain relevance to the assessment of any advantage conferred under the PPAs, which reserve for MVM all or a substantial part of the capacities of the generating units operating under those PPAs. In addition, a minor part of the capacities reserved under PPAs is intended for ‘the provision of balancing services to the TSO’ by MVM.

77 It follows from that comparison that the combination of long-term capacity reservation, a minimum guaranteed off-take and price-setting mechanisms covering variable, fixed and capital costs as laid down by the PPAs does not correspond to the usual contracts on European wholesale markets.

78 By comparison with ‘spot’ and ‘forward’ contracts, the PPAs involve fewer risks for power generators by offering them security from the point of view of the recovery of fixed and capital costs and, moreover, the level of utilisation of generating capacities. As to the ‘drawing rights’, the essential difference between that form of agreement and the PPAs lies in the fact that ‘drawing rights’ are not usually coupled with any minimum guaranteed off-take obligation. Similarly, the Commission was entitled to find, in recital 215 to the contested final decision, that the ‘long-term’ purchase contracts concluded by ‘large consumers’ are much more advantageous for the buyer than the PPAs are to MVM, since the price fixed in those contracts, which is not normally indexed on parameters such as fuel costs, is not designed in such a way as to cover fixed and capital costs and, moreover, those contracts are usually concluded for much shorter periods than the PPAs. Lastly, as regards ‘balancing services’ contracts, the comparison shows that power generators benefiting from a PPA do not bear the risks associated with calls for tenders and the uncertainty regarding the amount of electricity they are required to supply.

79 Therefore, at the end of its examination, the Commission correctly came to the conclusion that, structurally, PPAs provide power generators with a better guarantee than that provided under standard commercial contracts (recital 217 to the contested final decision).

80 After examining standard commercial practices on the European electricity market, the Commission went on to analyse the constraints faced by MVM and its commercial objectives.

81 It has been established that if MVM had acted as a prudent market operator, it would have implemented supply strategies (which might take the form of short-term or longer-term contracts) ensuring that it would have sufficient electricity to meet the needs of such regulated segments as were supposed to evolve over time. The ‘advantages’ which MVM derived from the PPAs did not ensure the electricity price stability that any operator on the market might have expected of a long-

term agreement. In addition, they were accompanied by the serious risk of MVM being obliged to buy more electricity than actually needed and of suffering losses when re-selling the excess.

82 It follows from this that the Commission did not make a manifest error of assessment in its assessment of the PPAs from the perspective of a private investor in a market economy.

83 It also follows that the Court must reject the applicant's argument that the return on investment enjoyed by the power generators ought to be regarded as consideration for the guarantee given by the PPAs in relation to the sale of electricity and, therefore, as a benefit enjoyed by MVM, when the test of a private operator in a market economy is applied. MVM's commercial objective, like that of any electricity wholesaler faced with the same obligations and market conditions as MVM, was to supply the regulated segment of the Hungarian retail market at the lowest prices. It must be noted, as the Commission did, that in a normal transaction between a generator and a buyer of electricity, the commercial risks linked to the operation of a power plant are generally borne by the power generators. It has not been established that MVM had an interest in bearing the risk associated with power generation assets which did not, at any time, have to be transferred to it. Furthermore, while it is by no means inconceivable that the creation of the PPAs might have been regarded by the Hungarian authorities as a lever for attracting investment in the Hungarian electricity market, that does not preclude the PPAs from conferring an advantage on those investors. The political reasons underpinning a measure are immaterial for the purposes of determining whether or not there is aid, given that the interpretation of Article 87(1) EC depends on objective factors.

84 The applicant also submits that its PPAs did not offer a full guarantee on the return on investment in view of the 'system of periodical reviews' provided for by the PPAs and the 'regulatory risks'.

85 With regard to the argument that there was a system of reviews in the PPAs, it must be observed that that argument does not cast doubt on the fact that the entire structure of the applicant's PPAs, which is based on the notion that the price must cover both variable and fixed costs, including a return on investment, freed the applicant from the risks normally borne by power generators on a competitive market.

86 With regard to the applicant's argument that it bore the 'risk that public authorities might renege on the conditions of the PPA', for example, by imposing a price control regime which might have temporarily replaced the price fixing mechanism of the PPAs, it should be noted that the electricity markets are universally regulated. It is, therefore, always possible that public authorities will take decisions affecting the basis of the business plan. As the Commission correctly stated in recital 211 to the contested final decision, that risk, and the constructional, environmental, maintenance, fiscal and financial risks correspond 'to normal risks any market player on the electricity generation market would need to bear, including in the case of sales in the form of standard spot or forward markets'.

87 Similarly, the existence of regulated prices which, at certain times, took precedence over the price formulae included in the PPAs cannot be regarded as altering the underlying principle of the PPA, but merely as a temporary mechanism overriding certain provisions of the PPAs.

[..]

89 It follows from all of the foregoing that the argument that there was no economic advantage, put forward in Case T-182/09, cannot be accepted. The same applies with regard to the similar argument put forward in Case T-80/06.

[..]

95 For the purpose of categorising a national measure as State aid, it is not necessary to establish that the aid has a real effect on trade between Member States and that competition

is actually being distorted, but only to examine whether that aid is liable to affect such trade and distort competition (see Case C-222/04 Cassa di Risparmio di Firenze and Others [2006] ECR I-289, paragraph 140 and the case-law cited).

96 Moreover, if the Commission has correctly explained how the aid in question was capable of having such effects, it is not required to carry out an economic analysis of the actual situation on the relevant market, of the market share of the undertakings in receipt of the aid, of the position of competing undertakings and of the trade flows in respect of the goods or services in question between the Member States (see, to that effect, Case T-55/99 CETM v Commission [2000] ECR II-3207, paragraph 102, and judgment of 6 September 2006 in Joined Cases T-304/04 and T-316/04 Italy and Wam v Commission, not published in the ECR, paragraph 64).

97 Furthermore, the fact that an economic sector has been liberalised at Community level, as in the present case, may serve to indicate that the aid has a real or potential effect on competition and affects trade between Member States (see Cassa di Risparmio di Firenze and Others, cited in paragraph 95 above, paragraph 142 and the case-law cited).

98 In that regard, it is appropriate to refer to recitals 319 to 330 to the contested final decision. These reveal a series of factors that establish the existence of a distortion of competition and a potential effect on intra-Community trade, due in particular to the difficulties encountered by eligible final users in switching to the free market (recital 324) and to the obstacles to the entry of new generators on the wholesale market (recital 325). The minimum guaranteed off-take restricts actual or potential imports, as it prevents imports which might prove more favourable with regard to replacing some of the quantities sold under the PPAs on the wholesale market. Therefore, contrary to what is maintained by the applicant, the link between the economic advantage resulting from the PPAs and the impact on competition and trade between States has been sufficiently established both in the contested final decision and in the opening decision.”

Judgment of 30 April 2014, *Tisza Erőmű v Commission*, T-468/08, EU:T:2014:235

Relevance: Economic advantage (private investor test), the existence of State aid when, at the stage of recovery, there is no sum to be paid back in respect of that aid, imputability to the State, distortion of competition

Facts

In order to attract investment for the modernization of the Hungarian power generation sector, state-owned Magyar Villamos Művek Zrt. (hereinafter: MVM) entered into long-time power purchase agreements (hereinafter: PPAs) with the new operators of the privatised power plants. These PPAs obliged MVM to buy a fixed amount of electricity (covering the whole or the substantial part of the generation capacities of the power plants concerned) for a fixed price, thereby guaranteeing a return on investment. PPAs were signed between 1995 and 2001, when Hungarian electricity market was closed, so there was no competition at all and MVM as an incumbent was responsible for ensuring security of supply at the lowest cost. In 2003 approximately 30 % of the market was opened to competition, but MVM remained responsible for supplying the public utility sector and the power generators were obliged to offer their generating capacity to MVM, first for a regulated price, then, after 2004, for a price negotiated by the parties, calculated on the basis of the prices fixed in the PPAs. MVM was entitled to sell the surplus bought under the PPAs and not necessary for the public utility sector on the market.

The applicant, Tisza Erőmű Kft. (formerly AES-Tisza Erőmű Kft.) was an indirect subsidiary of *AES Corp*. at the time of the proceedings. Its PPA concerned the Tisza II power plant, which, at the time of the conclusion of the PPA, namely in 1995, was owned by MVM and the Hungarian Privatisation and State Holding Company. AES bought the power plant in 1996 and took on the PPA at issue.

After compensation scheme for stranded costs of the power plants were notified to the Commission, the Commission started to investigate the PPAs. In its decision of 4 June 2008, it found that PPAs contained illegal State aid, since they shielded power generators from any commercial risk, because the fixed prices covered the fixed, the variable and also the capital costs of the power plants over a significant lifetime of the unites. In the decision contested by the applicant, Hungary was obliged to stop granting the aid and to recover the aid previously granted to the beneficiaries, the amount of which must had been calculated on the basis of a market simulation on the wholesale electricity market as it would have stood if none of the long-term PPAs had been in force on the 1st of May 2004. The result of this market simulation was that the applicant had nothing to pay back.

Held

The General Court dismissed the action for annulment, maintaining that the PPAs contained illegal State aid. First it stated that the Commission did not err in law when it took the date of Hungary's accession to the EU as the relevant date for the purpose of determining the existence of aid. It also maintained, that the aid at issue could not be considered as existing aid. Second, it maintained that the PPA's granted economic advantage to the power plants, since – comparing with the typical conditions of power purchase agreements available on the market in the relevant period (i.e. after Hungary's accession to the EU) – PPA's structurally provided power generators with a better guarantee than that provided under standard commercial contracts and shielded them from commercial risks Applying the private investor test, the Commission was right to conclude that the PPAs provided much less benefit to MVM than

long-term power purchase contracts usual on the market, and that a prudent operator acting purely on commercial grounds would not have entered into contracts like PPAs, when agreements in line with standard commercial practice available on the market could provide much more benefit to a buyer. The General Court dismissed the applicant's claim that the fact that the aid to be recovered from it was equal to zero calls in question the existence of an advantage and so the existence of a State aid. The Court held that it was in the context of the implementation of Commission's contested decision and applying the market simulation prescribed in it for calculating the amount to be repaid, that the Hungarian authorities concluded that there was no sum for Tisza Erőmű to repay. In that regard, the General Court emphasized that disputes arising in connection with the enforcement of recovery are a matter for the national courts alone.

The General Court furthermore held that the Commission did not err in law when concluding that PPAs were imputable to the State, even in the period when the prices were negotiated by the parties, because even in that period purchased quantities could not be less than the minimum guaranteed off-take established in the PPAs, and also the prices must had been set in the framework of the price-setting mechanism laid down in the PPAs.

As regards the distortion of competition, the General Court reminded that the fact that a sector has been liberalised at Community level – like the electricity sector in the case concerned – may serve to indicate that the aid has a real or potential effect on competition and effects the trade between Member States. According to the General Court, the Commission established the casual link between the advantage conferred by the PPAs and the distortion of competition on the electricity market.

Findings of the Court

"84 As a preliminary point, it must be borne in mind that in order to determine whether a State measure constitutes aid for the purposes of Article 87 EC, it is necessary to establish whether the recipient undertaking receives an economic advantage which it would not have obtained under normal market conditions (Case C-342/96 Spain v Commission [1999] ECR I-2459, paragraph 41).

85 To that end, application of the test of a private investor in a market economy entails comparing the way in which the public authorities acted with the way in which a private operator of a comparable size would have acted in the same circumstances. That test is thus satisfied in the situation where the State in fact merely acts in the same way as any private operator would do acting in normal market conditions. In such circumstances, there is no advantage attributable to intervention by the State, because the beneficiary could theoretically have derived the same benefits from the mere functioning of the market (see, to that effect, the judgment of 13 December 2011 in Case T-244/08 Konsum Nord v Commission, not published in the ECR, paragraph 62, and Budapesti Erőmű v Commission, paragraph 67).

[..]

89 As regards the use, in argument, of decisions on State aid to challenge the validity of another decision of the same type, it has been held that each case of State aid must be assessed separately by the Court; consequently, decisions cited by an applicant, which concern specific cases and have no connection with the decision in issue, cannot be relevant for the Court's assessment (see, to that effect, Joined Cases T-81/07 to T-83/07 KG Holding and Others v Commission [2009] ECR II-2411, paragraph 201).

[..]

93 In the present case, it is apparent from recitals 177 to 236 of the contested decision that, in order to assess the existence of an

advantage, the Commission analysed the application of the private operator in a market economy test. The Commission took as a reference a market operator subject to the same obligations and having the same opportunities as MVM, and facing the same legal and economic conditions as those prevailing in Hungary during the period of assessment.

94 The Commission therefore took the view, in recitals 177 and 180 to 190 of the contested decision, that it had to examine whether, under the conditions prevailing when Hungary acceded to the European Union, a market operator would have granted a similar guarantee to the electricity generators as that enshrined in the PPAs, namely an obligation on the part of MVM to purchase the generation capacities reserved in the PPAs and a guaranteed minimum quantity of electricity, at a price which covered the fixed and variable costs. As is apparent from recital 194 of that decision, the Commission therefore ascertained to what extent, in the absence of PPAs, a market operator entrusted with supplying the regional distribution companies with sufficient amounts of electricity, and acting on purely commercial grounds, would have offered similar guarantees to those enshrined in the PPAs.

95 For the purposes of that analysis, the Commission used its final report of 10 January 2007 on the electricity sector in Europe (SEC (2006) 1724) ('the 2007 Commission report'). It thus identified and described the main practices of commercial operators on European electricity markets and assessed whether the PPAs were in line with those practices or provided generators with guarantees that a buyer would not accept if it acted on purely commercial grounds. The comparison of the PPAs with standard commercial practices consisted in comparing the purchase obligation stipulated in the PPAs with the main features of standard contracts on the electricity market, in particular 'forward' and 'spot' contracts, 'drawing rights' contracts, and long-term contracts concluded by large end-consumers (recitals 191 to 215 of the contested decision).

96 That approach must be endorsed. In order to assess the conduct of an operator who is trying to procure a certain volume of electricity on the best possible commercial terms, it is necessary to examine all the contractual arrangements to which such a purchase might be subject (Budapesti Erőmű v Commission, paragraph 69).

97 As the Commission contends in recital 209 of the contested decision, the PPAs entail less risk for electricity generators than spot contracts, which are mainly day-ahead contracts in which electricity is traded one day before physical delivery takes place and therefore entail a significant degree of uncertainty concerning the remuneration of fixed and capital costs, and the level of utilisation of generation capacities. Trade in power on 'spot' market exchanges is based on marginal pricing, which guarantees only that short-run marginal costs, and not all fixed and capital costs, are covered. Owing to the impossibility of storing electricity economically, after generation, there is no assurance about the level of use of generating capacities.

98 That is also true in part for 'forward' contracts, whose prices are fixed in advance. As is apparent in particular from recital 210 of the contested decision, a standard forward contract places on the generator the obligation to provide a certain amount of energy at a price agreed in advance, over a period of one year starting within at most six years of the conclusion of the contract. Those contracts do not therefore provide assurance to generators that all their fixed and capital costs are covered, because production costs may increase if fuel costs increase. The fluctuation in fuel cost for forward contracts is therefore borne by the generators and not, as in the present case, by MVM. In addition, even though, for forward contracts, the uncertainty concerning the level of utilisation of generation capacities is lower than in the case of spot contracts, due to the longer time horizon of forward contracts, those contracts cover only a limited period of time, however, compared to the lifetime of their power generation units.

99 It can be seen from that comparison that the combination of 'long-term capacity reservation, a minimum guaranteed off-take and price-setting mechanisms covering variable, fixed and capital costs', as provided for by the PPAs, do not correspond to usual contracts on European wholesale markets.

100 By comparison with spot and forward contracts, PPAs entail a lower level of risk for generators, by providing them with certainty both concerning the remuneration of fixed and capital costs and the level of use of generation capacities.

101 As regards 'drawing rights', referred to in recital 214 of the contested decision, the main difference between that form of agreement and the PPAs is that drawing rights are normally not associated with minimum guaranteed off-take.

102 Similarly, the Commission was entitled to conclude, in recital 215 of the contested decision, that 'the long-term purchase contracts concluded by large consumers' provided much more benefit to the buyer than the PPAs provided to MVM because, first, the price set in those contracts, which is normally not indexed on parameters such as fuel costs, was not designed in such a way as to cover fixed and capital costs and, secondly, those contracts were concluded for much shorter periods than the PPAs.

103 Consequently, at the end of its analysis, the Commission correctly concluded that, structurally, PPAs provided generators with a better guarantee than that provided under standard commercial contracts (recital 217 of the contested decision).

104 The Commission then correctly underlined the foreseeable consequences of the PPAs for the public authorities, namely that, while MVM would be able to find enough electricity to fulfil the needs of the public utility sector over a long period of time, the public authorities, however, had no assurance concerning the level of price that would have to be paid for electricity over that same period, because the PPAs do not provide hedging against risks of price fluctuations, which are due in particular to fluctuation in fuel costs. Furthermore, as the Commission stated, the combination of long-term capacity reservation and the associated minimum guaranteed off-take deprive the public authorities of the possibility of benefiting from more attractive prices offered by other generators (see, in particular, recitals 218 to 220 and 221 to 234 of the contested decision).

105 It follows that the Commission correctly concluded, in recital 235 of the contested decision, that the benefits derived by the public authorities from the PPAs did not provide the hedging on energy prices that a market operator would expect from a long-term contract. A prudent operator acting on purely commercial grounds would not have accepted such effects, and would have entered into different types of agreements, in line with standard commercial practice. The Commission must thus be held to have correctly assessed the PPA at issue from the perspective of the private operator in a market economy test.

[..]

132 In its written observations lodged at the Court Registry on 19 February 2013, the applicant submitted that following commencement of the present action before the Court, application of the calculation method, in connection with the implementation of the contested decision, had resulted in it having no sum to repay. According to the applicant, such a circumstance calls into question the significance of any advantage conferred by the PPA at issue and thus the very existence of any State aid for the purposes of Article 87(1) EC.

133 The applicant maintained its position at the hearing. In that regard, noting that in fact there was no amount for the applicant to repay following application of the method set out in the contested decision, the Commission responded that, in its view, it was necessary to distinguish the principle of the actual existence of State aid, for the purposes of Article 87(1) EC, from the recovery of State aid, which may result in the situation in which the applicant finds itself in the present case.

134 The Court recalls that it is settled case-law that the legality of a decision concerning

State aid is to be assessed in the light of the information available to the Commission when the decision was adopted (Case C-276/02 Spain v Commission [2004] ECR I-8091, paragraph 31, and Case T-62/08 ThyssenKrupp Acciai Speciali Terni v Commission [2010] ECR II-3229, paragraph 248).

135 Furthermore, according to well-established case-law, no provision of EU law requires the Commission, when ordering the recovery of aid declared incompatible with the common market, to fix the exact amount of the aid to be recovered. It is sufficient for the Commission's decision to include information enabling the addressee to work out that amount itself, without overmuch difficulty (Case C-480/98 Spain v Commission [2000] ECR I-8717, paragraph 25, and Case C-415/03 Commission v Greece [2005] ECR I-3875, paragraph 39).

136 Moreover, the recovery of aid which has been declared incompatible with the common market is to be carried out in accordance with the relevant provisions and procedures laid down by national law (Case C-382/99 Netherlands v Commission [2002] ECR I-5163, paragraph 91, and Case C-403/10 P Mediaset v Commission [2011] ECR, paragraph 126; see also, to that effect, ThyssenKrupp Acciai Speciali Terni v Commission, paragraph 251). Furthermore, disputes arising in connection with the enforcement of recovery are a matter for the national court alone (see Case T-354/99 Kuwait Petroleum (Nederland) v Commission [2006] ECR II-1475, paragraph 68, and ThyssenKrupp Acciai Speciali Terni v Commission, paragraph 251).

137 Lastly, the obligation on a Member State to calculate the exact amount of aid to be recovered — particularly where that calculation is dependent on information which that Member State has not provided to the Commission — forms part of the more general reciprocal obligation incumbent upon the Commission and the Member States to cooperate in good faith in the implementation of Treaty rules concerning State aid (Netherlands v Commission, paragraph 91, and Mediaset v Commission, paragraph 126; ThyssenKrupp Acciai Speciali Terni v Commission, paragraph 250).

138 Concerning the calculation of the amount to be repaid, it is common ground that the Commission did not itself calculate the amount of aid which each of the generators was to repay, but decided, in accordance with the case-law, to set apart a section of the contested decision, namely recitals 442 to 465, for the recovery method in order to provide guidance enabling the Hungarian authorities to calculate the amount to be repaid.

139 In the present case, as the Commission in essence pointed out in recital 444 of the contested decision, calculating the amount to be recovered was complex. In those circumstances, the approach taken by the Commission, described in paragraph 138 above, can only be endorsed.

140 It must be noted that it was in the context of implementing the contested decision and applying the method for calculating the amount to be repaid that the Hungarian authorities concluded that there was no sum for the applicant to repay.

141 That circumstance does not, however, undermine the assessment made by the Commission in the contested decision, which has been endorsed by the Court in the present judgment and which is based on the characteristics of the PPAs, including the PPA at issue, which combine an obligation concerning reserved generation capacity with a minimum guaranteed off-take of electricity and a pricing mechanism covering fixed, capital and variable costs.

142 It follows that even if application of the recovery method set down in the contested decision results, for the period from 1 May 2004 to the actual date of termination of the PPAs, in the applicant having no amount to repay, that cannot in any case affect the validity of the contested decision as regards the actual principle that the PPA at issue confers an advantage and accordingly that

there is State aid within the meaning of Article 87(1) EC, but only the procedures for recovering the aid.

143 Accordingly, as the Commission rightly submitted, a distinction must be drawn between the existence in principle of State aid which is incompatible with the common market and recovery of that aid, which may result in the beneficiary having no amount to repay in respect of that aid.

144 It follows that the Commission did not make either manifest errors of assessment or errors of law in concluding that an advantage existed for the purposes of Article 87(1) EC. The first plea must therefore be rejected as unfounded.

[..]

168 Furthermore, even if the State is in a position to control a public undertaking and to exercise a dominant influence over its operations, actual exercise of that control in a particular case cannot be automatically presumed. A public undertaking may act with more or less independence, according to the degree of autonomy left to it by the State. Therefore, the mere fact that a public undertaking is under State control is not sufficient for measures taken by that undertaking to be imputed to the State. It is also necessary to examine whether the public authorities must be regarded as having been involved, in one way or another, in the adoption of those measures (Case C-482/99 France v Commission [2002] ECR I-4397, paragraph 52).

169 In that regard, it cannot be required that it be demonstrated, on the basis of a precise inquiry, that in the particular case the public authorities specifically incited the public undertaking to take the aid measures in question. For those reasons, it must be accepted that the imputability to the State of an aid measure taken by a public undertaking may be inferred from a set of indicators arising from the circumstances of the case and the context in which that measure was taken (France v Commission, paragraphs 53 and 55).

170 According to the same judgment, certain indicators might, in some circumstances, be relevant in concluding that an aid measure taken by a public undertaking is attributable to the State, such as, in particular, its integration into the structures of the public administration, the nature of its activities and the exercise of those activities on the market in normal conditions of competition with private operators, the legal status of the undertaking (in the sense of its being subject to public law or ordinary company law), the intensity of the supervision exercised by the public authorities over the management of the undertaking, or any other indicator showing, in the particular case, an involvement by the public authorities in the adoption of a measure or the unlikelihood of their not being involved, having regard also to the compass of the measure, its content or the conditions which it contains (France v Commission, paragraph 56).

[..]

175 Taking the applicant's argument in that regard into account, the Commission acknowledged, in recital 311 of the contested decision, that the exact amount of resources transferred to the beneficiaries did not solely depend on the clauses set out in the PPAs, but also on periodic bilateral negotiations conducted by MVM with the generators. In that regard, it stated that PPAs offered a certain latitude to the parties to negotiate the quantities of electricity actually purchased by MVM as well as certain components of the price, notably with respect to the calculation of the capacity fees, which depended on a number of factors and necessitated periodic adjustments.

176 However, the Commission added that negotiations on purchased quantities could never lead to the purchase of quantities below the minimum guaranteed off-take established in the PPAs and that negotiations on prices could be conducted only in the framework of the price-setting mechanisms laid down in the PPAs. It thus concluded that the price negotiations thus did not call in question the principle of the purchase obligation covering justified costs and that the provision for the reservation of capacities and a payment for

those capacities entailed in itself a transfer of State resources to the beneficiaries, independently of any periodic negotiations between MVM and the generators.

177 Accordingly, the Commission, in the course of its examination, took account of the bilateral negotiations between the applicant and MVM regarding the price formula in the PPA at issue. In doing so, it none the less reached the conclusion that neither the price negotiations nor the amendments of the PPAs had affected the underlying principles governing the PPAs, namely the existence of a purchase obligation intended to guarantee a return on investment, together with the principle of covering fixed and variable costs.

178 Furthermore, contrary to the applicant's contention and in keeping with what has been stated above, MVM's behaviour cannot be regarded as having been consistent, objectively, with that of a private market operator.

179 It follows that this complaint, concerning manifest error of assessment in relation to the criterion of State resources and imputability to the State, must be rejected.

[..]

181 The Court observes that, for the purpose of categorising a national measure as State aid, it is not necessary to establish that the aid has a real effect on trade between Member States and that competition is actually being distorted, it being necessary only to examine whether that aid is liable to affect such trade and distort competition (see Budapesti Erőmű v Commission, paragraph 95 and the case-law cited).

182 Moreover, if the Commission correctly explained how the aid in question was capable of having such effects, it was not required to carry out an economic analysis of the actual situation on the relevant market, of the market share of the undertakings in receipt of the aid, of the position of competing undertakings and of the trade flows in respect of the goods or services in question between the Member States (see Budapesti Erőmű v Commission, paragraph 96 and the case-law cited).

183 Furthermore, the fact that an economic sector has been liberalised at European Union level, as in the present case, may serve to indicate that the aid has a real or potential effect on competition and affects trade between Member States (see Budapesti Erőmű v Commission, paragraph 97 and the case-law cited).

[..]

186 In that regard, the Commission observed that, once the electricity market was opened up to competition and, in particular, once Directive 96/92 entered into force, measures favouring undertakings in the energy sector in one Member State were capable of impeding the ability of undertakings from other Member States to export electricity to the first Member State, or of favouring the export of electricity from that State to other Member States (recitals 319 and 320 of the contested decision). The Commission also stated, rightly, that that was particularly true in the case of Hungary, given its centrally-located geographic position in Europe (recital 321 of the contested decision).

[..]

188 The Commission then noted that the reserved capacities were a barrier to new generators entering the wholesale market and that the PPAs led to foreclosure of the competitive market by, inter alia, limiting the scope for eligible customers to switch to the free market (recitals 325 and 326 of the contested decision).

[..]

299 The finding made in paragraph 298 above is all the more justified given that the question whether an economic advantage exists must, in accordance with the principle of a private operator in a market economy, be assessed on the basis of the conduct of the public undertaking conferring the advantage under consideration. The Court therefore approves the Commission's approach whereby that advantage is reflected in the difference between the amounts which MVM would, under normal market conditions, have paid for the purchase of the electricity needed and

the amounts which it actually paid for the electricity purchased (Budapesti Erőmű v Commission, paragraph 115).

Judgment of 30 April 2014, *Dunamenti Erőmű v Commission*, T-179/09, EU:T:2014:236

Judgement of 1 October 2015, *Electrabel and Dunamenti Erőmű v Commission*, C-357/14 P, EU:C:2015:642

Relevance: private investor test (advantage), protection of legitimate expectations, recovery of unlawful aid

Facts

In order to attract investment for the modernization of the Hungarian power generation sector, state-owned Magyar Villamos Művek Zrt. (hereinafter: MVM) entered into long-time power purchase agreements (hereinafter: PPAs) with the new operators of the privatised power plants. These PPAs obliged MVM to buy a fixed amount of electricity (covering the whole or the substantial part of the generation capacities of the power plants concerned) for a fixed price, thereby guaranteeing a return on investment. PPAs were signed between 1995 and 2001, when Hungarian electricity market was closed, so there was no competition at all and MVM as an incumbent was responsible for ensuring security of supply at the lowest cost. In 2003 approximately 30 % of the market was opened to competition, but MVM remained responsible for supplying the public utility sector and the power generators were obliged to offer their generating capacity to MVM, first for a regulated price, then, after 2004, for a price negotiated by the parties, calculated on the basis of the prices fixed in the PPAs. MVM was entitled to sell the surplus bought under the PPAs and not necessary for the public utility sector on the market.

The applicant, Dunamenti Erőmű Zrt. was 75 % owned by *Electrabel SA*, part of the *GDF Suez* group and 25 % by MVM at the time of the proceeding. The PPA at issue was concluded in 1995, just before the privatisation of the power plant and concerned two blocks. It was to continue until 2010 as regards one block and until 2015 as regards the other.

Following the notification of the compensation scheme for stranded costs of the power plants, the Commission started to investigate the PPAs. In its decision of 4 June 2008, it found that PPAs contained illegal State aid, since they shielded power generators from any commercial risk, because the fixed prices covered the fixed, the variable and also the capital costs of the power plants over a significant lifetime of the unites. In the decision contested by the applicant, Hungary was obliged to stop granting the aid and to recover the aid previously granted to the beneficiaries, the amount of which must had been calculated on the basis of a market simulation on the wholesale electricity market as it would have stood if none of the long-term PPAs had been in force on the 1st of May 2004.

Held (the General Court)

The General Court dismissed the action for annulment, maintaining that the PPAs contained illegal State aid. First it stated that the Commission did not err in law when it took the date of Hungary's accession to the EU as the relevant date for the purpose of determining the existence of aid. It also maintained, that the aid at issue could not be considered as existing aid. Second, it maintained that the PPA's structurally provided power generators with a better guarantee than that provided under standard commercial contracts. Applying the private investor test, the Commission was right to conclude that the benefits derived by the public authorities from the PPAs did not provide the limiting on energy prices that a market operator would expect from a long-time contract. It follows that a prudent operator acting purely on commercial grounds would not have entered into contracts like PPAs, when agreements in line with standard

commercial practice available on the market could provide much more benefit to a buyer. As regards the protection of legitimate expectations, the Court reminded that the beneficiary of an unnotified aid cannot rely on the lawfulness of the grant of the aid. The Court also held that it is true that Hungary's accession to the European Union resulted in significant changes in the legal and economic features of the electricity market, and as a result a former measure still in force could become State aid, but this consequence does not undermine the legitimate expectations of the interested parties, since the relevant rules of EU law (especially rules in the Accession Treaty and the Act of Accession) were clear and precise.
The General Court dismissed the applicant's claim regarding the unlawfulness of the recovery order. It held that recovery must be assessed and calculated on the basis of the conduct of the public undertaking conferring the advantage (in this case MVM) and not on the basis of the conduct of the beneficiaries (i.e. the power plants). For this reason the Commission was entitled to order Hungary to calculate the amount of aid to be recovered on the basis of actual and possible revenues, and not on the basis of actual and possible profits of the power plants, because the advantage is reflected in the difference between the amounts which MVM would, under normal market conditions, have paid for the purchase of the electricity needed and the amounts which it actually paid for the electricity purchased, whether it was needed or not.

Held (the Court)

Appeal against that judgment was dismissed by the Court. The Court held that the General Court erred in law when not taking into account Dunamenti's claim that the aid stemming from the PPA at issue had been repaid through the privatisation of the power plant, on the sole ground that the privatisation took place before the relevant date for assessment, namely the date of Hungary's accession to the EU. However, according to the Court, the judgement of the General Court dismissing the action of Dunamenti was well founded on other grounds, so that error in law did not make it necessary to set aside the judgement at first instance. The Court held that even if Dunamenti Erőmű was sold to *Electrabel* at market price fully reflecting the value of the advantage resulting from the PPA at issue, Dunamenti Erőmű retained the benefit of the advantage resulting from the PPA at issue after its privatisation and even as it applied from 1 May 2004. So, the Court dismissed Dunamenti's claim on the ground that even if the aid stemming form the PPA at issue had been repaid through the privatisation of the power plant, it still benefited from the advantage after 1 May 2004.

Findings of the General Court in T-179/09

"76 First of all, it must be noted that the test of a private operator in a market economy is satisfied where the State in fact merely acts in the same way as any private operator would do acting in normal market conditions. In such circumstances, there is no advantage attributable to intervention by the State, because the beneficiary could theoretically have derived the same benefits from the mere functioning of the market (see, to that effect, the judgment of 13 December 2011 in Case T-244/08 *Konsum Nord v Commission*, not published in the ECR, paragraph 62, and *Budapesti Erőmű v Commission*, paragraph 67).

[..]

81 Secondly, as regards the application of the test of a private operator in a market economy by the Commission, criticised by the applicant, it must be recalled that the assessment by the Commission of whether a measure satisfies that test involves a complex economic appraisal. When the Commission adopts a measure involving such an appraisal, it therefore enjoys a wide discretion and judicial review is limited to verifying whether

the Commission complied with the relevant rules governing procedure and the statement of reasons, whether there was any error of law, whether the facts on which the contested finding was based have been accurately stated and whether there has been any manifest error of assessment of those facts or any misuse of powers. In particular, the Court is not entitled to substitute its own economic assessment for that of the author of the decision (*Budapesti Erőmű v Commission,* paragraph 65; see also, to that effect, the order in Case C-323/00 P *DGS v Commission* [2002] ECR I-3919, paragraph 43, and Case T-196/04 *Ryanair v Commission* [2008] ECR II-3643, paragraph 41).

82 However, while the Courts of the European Union recognise that the Commission has a margin of assessment in economic or technical matters, that does not mean that they must decline to review the Commission's interpretation of economic or technical data. Taking due account of the parties' arguments, the Courts of the European Union must, inter alia, not only establish whether the evidence put forward is factually accurate, reliable and consistent but also determine whether that evidence contains all the relevant information that must be taken into account in appraising a complex situation and whether it is capable of substantiating the conclusions drawn from it (Case C-290/07 P *Commission v Scott* [2010] ECR I-7763, paragraph 65, and *Budapesti Erőmű v Commission*, paragraph 66).

83 In the present case, it is apparent from recitals 177 to 236 of the contested decision that, in order to assess the existence of an advantage, the Commission analysed the application of the private operator in a market economy test. The Commission took as a reference a market operator subject to the same obligations and having the same opportunities as MVM, and facing the same legal and economic conditions as those prevailing in Hungary during the period of assessment.

84 The Commission therefore took the view, in recitals 177 and 180 to 190 of the contested decision, that it had to examine whether, under the conditions prevailing when Hungary acceded to the European Union, a market operator would have granted a similar guarantee to the electricity generators as that enshrined in the PPAs, namely an obligation on the part of MVM to purchase the generation capacities reserved in the PPAs and a guaranteed minimum quantity of electricity, at a price which covered the fixed and variable costs. As is apparent from recital 194 of that decision, the Commission therefore ascertained to what extent, in the absence of PPAs, a market operator entrusted with supplying the regional distribution companies with sufficient amounts of electricity, and acting on purely commercial grounds, would have offered similar guarantees to those enshrined in the PPAs.

85 For the purposes of that analysis, the Commission used its final report of 10 January 2007 on the electricity sector in Europe (SEC (2006) 1724) ('the 2007 Commission report'). It thus identified and described the main practices of commercial operators on European electricity markets and assessed whether the PPAs were in line with those practices or provided generators with guarantees that a buyer would not accept if it acted on purely commercial grounds. The comparison of the PPAs with standard commercial practices consisted in comparing the purchase obligation laid down in the PPAs with the main features of standard contracts on the electricity market, in particular 'forward' and 'spot' contracts, 'drawing rights' contracts, and long-term contracts concluded by large end-consumers (recitals 191 to 215 of the contested decision).

86 That approach must be endorsed. In order to assess the conduct of an operator who is trying to procure a certain volume of electricity on the best possible commercial terms, it is necessary to examine all the contractual arrangements to which such a purchase might be subject (*Budapesti Erőmű v Commission*, paragraph 69).

[..]

89 By comparison with spot and forward contracts, PPAs entail a lower level of risk for generators, by providing them with certainty both concerning the remuneration of fixed and capital costs and the level of use of generation capacities.

[..]

91 Similarly, the Commission was entitled to conclude, in recital 215 of the contested decision, that 'the long-term purchase contracts concluded by large consumers' provided much more benefit to the buyer than the PPAs provided to MVM because, first, the price, which is normally not indexed on parameters such as fuel costs, was not designed in such a way as to cover fixed and capital costs and, secondly, those contracts were concluded for much shorter periods than the PPAs.

92 Consequently, at the end of its analysis, the Commission correctly concluded that, structurally, PPAs provide generators with a better guarantee than that provided under standard commercial contracts (recital 217 of the contested decision).

93 The Commission then correctly underlined the foreseeable consequences of the PPAs for the public authorities, namely that, while MVM would be able to find enough electricity to fulfil the needs of the public utility sector over a long period of time, the public authorities, however, had no assurance concerning the level of price that would have to be paid for the electricity over that same period, because the PPAs do not provide hedging against risks of price fluctuations, which are due in particular to fluctuation in fuel costs. Furthermore, as the Commission stated, the combination of long-term capacity reservation and the associated minimum guaranteed off-take deprive the public authorities of the possibility of benefiting from more attractive prices offered by other generators (see, in particular, recitals 218 to 220 and 221 to 234 of the contested decision).

94 It follows that the Commission correctly concluded, in recital 235 of the contested decision, that the benefits derived by the public authorities from the PPAs did not provide the hedging on energy prices that a market operator would expect from a long-term contract. A prudent operator acting on purely commercial grounds would not have accepted such effects, and would have entered into different types of agreements, in line with standard commercial practice.

[..]

104 In any event, a recipient of unlawfully granted aid, implemented without prior notification to the Commission, as in the present case, cannot have a legitimate expectation that the grant of the aid is lawful (Case 223/85 *RSV v Commission* [1987] ECR 4617, paragraph 17; Case C-183/91 *Commission v Greece* [1993] ECR I-3131, paragraph 18; and Joined Cases C-183/02 P and C-187/02 P *Demesa and Territorio Histórico de Álava v Commission* [2004] ECR I-10609, paragraph 51). Furthermore, as the Commission has stated, the possibility for that recipient of relying on exceptional circumstances, which may legitimately have caused it to assume the aid to be lawful, can play a role only in resisting the possible recovery of that aid.

105 Secondly, as already stated in paragraphs 50 to 54 above, in the case of an accession of a State to the European Union, a major change in legal and economic features of a market occurs and, in that context, a measure may become incompatible State aid, without that undermining the legitimate expectations of the interested party or the principle of legal certainty. In that regard, the rules in the Europe agreement including Hungary, in the Accession Treaty and in the Act of Accession, regarding both the substantive and the procedural rules of EU law on State aid, are clear and precise.

[..]

112 Although the applicant does adduce evidence, in the application, tending to support its submission, the fact remains that, even if the minimum off-take obligation did not force MVM to purchase quantities of electricity in excess of its commercial needs, it is established that the minimum off-take obligation imposed on MVM, in conjunction with the obligation concerning reserved electricity-generation capacity and a pricing

mechanism covering fixed, capital and variable costs, goes beyond standard commercial practices on the European electricity markets. Moreover, as the Commission correctly states, the fact that MVM bought significantly more than the minimum guaranteed off-take in certain years does not mean that the structural risk of having to purchase, overall, more electricity than it needed to cover its needs would not have existed for the whole period under assessment.

[..]

119 The applicant's argument based on the need to incorporate that fee in order to carry out the privatisation process must be rejected for the same reasons as those set out in paragraph 116 above. In addition, notwithstanding the guarantee of variable costs recovery provided for in the PPA at issue, it is not disputed, as the Commission correctly notes, that, in the competitive sector, there are no long-term contracts with both a minimum guaranteed off-take and a price system covering fixed, variable and capital costs, concluded outside any State intervention by a buyer having similar characteristics to those of MVM in a regulatory and economic context comparable to that prevailing in Hungary during the period under assessment. Thus, in fact, in the light of each of the features of the PPA at issue, but above all in the light of their combined effect and the whole structure of that PPA, it is apparent that the applicant was relieved of the risks normally borne by electricity generators on a competitive market.

[..]

187 As stated in paragraph 168 above, it must be borne in mind that the objective pursued by the Commission when it requires the recovery of aid found to be incompatible with the common market is to have the recipient forfeit the advantage which it had enjoyed over its competitors on the market.

188 The existence of an economic advantage must, in this instance, in accordance with the principle of a private operator in a market economy, be assessed on the basis of the conduct of the public undertaking conferring the advantage under consideration, not on the basis of the conduct of the beneficiary of that advantage. Therefore, as the Court confirmed in Budapesti Erőmű v Commission, that advantage is reflected in the difference between the amounts which MVM would, under normal market conditions, have paid for the purchase of the electricity needed and the amounts which it actually paid for the electricity purchased, whether it was needed or not (*Budapesti Erőmű v Commission*, paragraph 115).

[..]

198 It has been held that, when the Commission decides to order the recovery of a specific amount, it must assess as accurately as the circumstances of the case will allow, the actual value of the benefit received from the aid by the beneficiary. In restoring the situation existing prior to the payment of the aid, the Commission is, on the one hand, obliged to ensure that the real advantage resulting from the aid is eliminated and it must thus order recovery of the aid in full. The Commission may not, out of sympathy with the beneficiary, order recovery of an amount which is less than the value of the aid received by the latter. On the other hand, the Commission is not entitled to mark its disapproval of the serious character of the illegality by ordering recovery of an amount in excess of the value of the benefit received by the recipient of the aid (Case T-366/00 *Scott v Commission*, paragraph 95).

[..]

204 It must be noted that, in the circumstances of the present case, the restoration of the previous situation must be understood as meaning that the Hungarian electricity market would have functioned without PPAs as from 1 May 2004. In that regard, contrary to the applicant's claims, the contested decision clearly shows that the market simulation carried out by the Commission is indeed based on a market without any PPAs. As stated in paragraph 178 above, in recitals 447

to 465 of that decision the Commission carried out a careful and precise examination of the documents in the case in order to determine the price level and the structure of the electricity market in the absence of PPAs from 1 May 2004."

Findings of the Court in C-357/14 P

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.

Judgment of 15 May 2019, *Achema*, C-706/17, EU:C:2019:407

Relevance: Intervention by the State or through State resources

Facts

The Lithuanian national law contained provisions of public interest services ('PIS') in the electricity sector and of their financing mechanism ('the PIS scheme'). All electricity consumers paid the PIS price (public charges) on the basis of the quantity of electricity actually consumed to meet their own needs. The payment of the PIS price was either included in the price of the purchased electricity or made separately to network operators. The network operators transferred the monies paid by the consumers ('PIS monies) to the administrator of PIS monies, *UAB Baltpool* which was a State-controlled private law entity. *Balpool* paid PIS providers for their services, in accordance with the procedure laid down by law. The administrative costs of *Balpool* were financed from the PIS monies. Outstanding amounts from consumers who failed to pay the PIS price were recovered in accordance with the general procedure laid down for civil matters. Furthermore, in accordance with those provisions, the network operators were obliged to purchase energy from renewable energy producers for a price higher than the market price. The additional costs arising from this obligation were compensated in a compensation mechanism.

The applicants – amongst others – operated combined heat and power plants, so they produced electricity, part of which they used for their own needs, the other part of it they sold. They also bought electricity. After the amount of the electricity they used they had to pay for the PIS services provided to them. The applicants challenged the provisions determining the amount of the PIS price before the national court. The national court made a reference for a preliminary ruling. The essential question was whether the PIS scheme involved the use of State resources, so whether the PIS and PIS scheme had to be regarded as giving rise to State aid.

Held

In line with settled case-law, the Court held that the Lithuanian PIS scheme used State resources. It is because the payment of PIS monies was imposed on electricity end-users by law, it was obligatory without a derogation. The amount of the PIS monies were fixed by the national regulatory authority and were collected by the State-owned administrator of the scheme. While it was collected and distributed amongst the PIS providers, it remained under constant public control. The Court reconfirmed its earlier case-law according to which a mechanism for offsetting additional costs which is financed by all end-users of electricity, where the sums collected are apportioned and distributed to the recipient undertakings by a public entity, must be regarded as financed by State resources.

The Court also held that the beneficiaries of the PIS scheme were the PIS providers, including the renewable energy producers, and not the transmission and distribution system operators, on whom the purchase obligation was imposed, because their additional costs were compensated from the PIS monies. The Court also held that the PIS scheme conferred selective advantage on the beneficiaries and that it had to be regarded as liable to affect trade between Member States.

Finally, the Court held that the Lithuanian PIS scheme could not be regarded as a compensation mechanism for public services obligations, since PIS providers were not obliged to provide any kind of service. For example, renewable energy generators and operators of combined heat and power plants were not obliged to produce electricity. They were entitled in the scheme to sell

the electricity they generated for a price higher than the market price, but they were not obliged to provide any service.

Findings of the Court

"46 It should be recalled at the outset that categorisation as 'State aid' within the meaning of Article 107(1) TFEU requires four conditions to be satisfied, namely, that there be intervention by the State or through State resources, that that intervention be liable to affect trade between Member States, that it confer a selective advantage on the recipient and that it distort or threaten to distort competition (judgments of 17 March 1993, *Sloman Neptun*, C-72/91 and C-73/91, EU:C:1993:97, paragraph 18; of 19 December 2013, *Association Vent De Colère! and Others*, C-262/12, EU:C:2013:851, paragraph 15; and of 13 September 2017, *ENEA*, C-329/15, EU:C:2017:671, paragraph 17).

47 It should also be borne in mind that, in order for it to be possible to categorise advantages as 'State aid' within the meaning of Article 107(1) TFEU, they must be granted directly or indirectly through State resources and be attributable to the State (judgments of 19 December 2013, *Association Vent De Colère! and Others*, C-262/12, EU:C:2013:851, paragraph 16, and of 13 September 2017, *ENEA*, C-329/15, EU:C:2017:671, paragraph 20 and the case-law cited).

48 In the first place, in order to assess whether a measure is attributable to the State, it is necessary to examine whether the public authorities were involved in the adoption of that measure (judgments of 19 December 2013, *Association Vent De Colère! and Others*, C-262/12, EU:C:2013:851, paragraph 17, and of 13 September 2017, *ENEA*, C-329/15, EU:C:2017:671, paragraph 21).

[..]

50 In the second place, in order to determine whether the advantage has been granted directly or indirectly through State resources, it should be borne in mind that, according to the Court's settled case-law, the prohibition laid down in Article 107(1) TFEU covers both aid granted directly by the State and aid granted through a public or private body appointed or established by that State to administer it (judgments of 22 March 1977, *Steinike & Weinlig*, 78/76, EU:C:1977:52, paragraph 21; of 19 December 2013, *Association Vent De Colère! and Others*, C-262/12, EU:C:2013:851, paragraph 20; and of 13 September 2017, *ENEA*, C-329/15, EU:C:2017:671, paragraph 23).

51 EU law cannot permit the rules on State aid to be circumvented merely through the creation of autonomous institutions charged with allocating aid (judgments of 16 May 2002, *France* v *Commission*, C-482/99, EU:C:2002:294, paragraph 23, and of 9 November 2017, *Commission* v *TV2/Danmark*, C-656/15 P, EU:C:2017:836, paragraph 45).

52 It is also apparent from the Court's case-law that a measure consisting, inter alia, of an obligation to purchase energy may come within the concept of 'aid', even though it does not involve a transfer of State resources (see, to that effect, judgments of 19 December 2013, *Association Vent De Colère! and Others*, C-262/12, EU:C:2013:851, paragraph 19, and of 13 September 2017, *ENEA*, C-329/15, EU:C:2017:671, paragraph 24).

53 Article 107(1) TFEU covers all the financial means by which the public authorities may actually support undertakings, irrespective of whether or not those means are permanent assets of the public sector. Even if sums corresponding to the aid measure in question are not permanently held by the Treasury, the fact that they constantly remain under public control, and are therefore available to the competent national authorities, is sufficient for them to be categorised as 'State resources' (judgments of 19 December 2013, *Association Vent De Colère! and Others*, C-262/12, EU:C:2013:851, paragraph 21, and

of 13 September 2017, *ENEA*, C-329/15, EU:C:2017:671, paragraph 25 and the case-law cited).

54 The Court has, more specifically, held that funds financed through compulsory charges imposed by State legislation, and administered and apportioned in accordance with that legislation, may be regarded as State resources within the meaning of Article 107(1) TFEU even if they are administered by entities separate from the public authorities (judgments of 2 July 1974, *Italy* v *Commission*, 173/73, EU:C:1974:71, paragraph 35, and of 19 December 2013, *Association Vent De Colère! and Others*, C-262/12, EU:C:2013:851, paragraph 25).

55 The decisive factor in that regard is that such undertakings are appointed by the State to administer a State resource and are not merely bound by an obligation to purchase by means of their own financial resources (see, to that effect, judgments of 17 July 2008, *Essent Netwerk Noord and Others*, C-206/06, EU:C:2008:413, paragraph 74; of 19 December 2013, *Association Vent De Colère! and Others*, C-262/12, EU:C:2013:851, paragraphs 30 and 35; and of 13 September 2017, *ENEA*, C-329/15, EU:C:2017:671, paragraphs 26 and 30).

[..]

63 As a result, the PIS regime is based, first, on several obligations that it imposes on both economic operators and end consumers and, second, on the intervention, as the sole entity responsible for administering PIS monies, of a body controlled directly or indirectly by the State.

64 Thus, PIS monies are collected by the distribution and transport system operators from all end consumers of electricity without any legal possibility of derogation. Such a payment obligation imposed by the PIS regime is therefore in the nature of an obligatory contribution. In addition, those system operators are required under that regime to purchase PIS from various providers, without being able to refuse to comply with that obligation either.

65 In the light of the case-law recalled in paragraph 54 above, however, such funds may be regarded as State resources within the meaning of Article 107(1) TFEU, even if they are administered by entities separate from the public authorities.

66 Moreover, PIS monies are apportioned among PIS providers, in accordance with the PIS regime, by a body under public control, which has, according to the information in the file available to the Court, no discretion as to the determination and intended use of those funds. Resolution No 1157 and the decisions of the NCECP, which is a public body, determine precisely the detailed rules for calculating PIS monies which must be paid to PIS providers. This shows that those monies must, as observed by the Advocate General in point 32 of his Opinion, strictly follow the path set out by that regime.

67 Consequently, in such circumstances, the PIS monies must be regarded as remaining under public control.

68 As the Court has already held, a mechanism for offsetting additional costs that is financed by all end consumers of electricity in the national territory and where the sums thus collected are apportioned and distributed to the recipient undertakings, under the legislation of a Member State, by a public entity must be regarded as constituting an intervention by the State or through State resources within the meaning of Article 107(1) TFEU (see, to that effect, judgment of 19 December 2013, *Association Vent De Colère! and Others*, C-262/12, EU:C:2013:851, paragraph 37, and order of 22 October 2014, *Elcogás*, C-275/13, not published, EU:C:2014:2314, paragraph 30).

69 Furthermore, a situation such as that in the main proceedings differs from those in respect of which the Court has held that the obligation imposed on private electricity supply undertakings to purchase electricity generated from renewable energy sources at fixed minimum prices cannot be regarded as an intervention through State resources in so far as it does not lead to any direct or indirect transfer of State resources to the undertakings

producing that type of electricity (see, to that effect, judgments of 13 March 2001, *PreussenElektra*, C-379/98, EU:C:2001:160, paragraph 59, and of 19 December 2013, *Association Vent De Colère! and Others*, C-262/12, EU:C:2013:851, paragraph 34).

70 In such cases, the Court noted that private undertakings had not been appointed by the Member State concerned to administer a State resource, but were bound by an obligation to purchase by means of their own financial resources (see, to that effect, judgments of 17 July 2008, *Essent Netwerk Noord and Others*, C-206/06, EU:C:2008:413, paragraph 74, and of 19 December 2013, *Association Vent De Colère! and Others*, C-262/12, EU:C:2013:851, paragraph 35).

71 In the present case, it appears, first, that the administrator of PIS monies is appointed to administer an obligatory contribution, which constitutes a State resource, imposed on all end consumers of electricity and, second, that the PIS obligation to purchase imposed on distribution and transport system operators is offset by the payment to those operators of PIS monies.

72 As a result, the answer to the first question is that Article 107(1) TFEU must be interpreted as meaning that the funds earmarked for financing a public interest service scheme, such as the PIS, constitute State resources within the meaning of that provision.

[..]

74 In that regard, it must be borne in mind that measures which, whatever their form, are likely directly or indirectly to favour certain undertakings or which fall to be regarded as an economic advantage that the recipient undertaking would not have obtained under normal market conditions are regarded as State aid (judgments of 17 July 2008, *Essent Netwerk Noord and Others*, C-206/06, EU:C:2008:413, paragraph 79, and of 27 June 2017, *Congregación de Escuelas Pías Provincia Betania*, C-74/16, EU:C:2017:496, paragraph 65).

75 It must also be borne in mind that the case-law has acknowledged that an advantage directly granted to certain natural or legal persons may constitute an indirect advantage and, therefore, State aid for other natural or legal persons that are undertakings (see, to that effect, judgment of 13 June 2002, *Netherlands* v *Commission*, C-382/99, EU:C:2002:363, paragraphs 38 and 60 to 66).

76 In the present case, it follows from Article 20 of the Law on renewable energy sources that distribution and transport system operators, as undertakings purchasing electricity, are required to purchase the electricity generated from renewable energy sources at a fixed rate, which may be higher than the cost of electricity sold by the producers of such electricity. Nonetheless, the losses sustained by those operators are offset through PIS monies, paid by the administrator of PIS monies.

77 Although the sums intended to offset those losses are paid to distribution and transport system operators, it appears that, in a situation such as that in the main proceedings, it is the producers of energy generated from renewable energy sources that are the actual recipients of the aid which that compensation mechanism involves.

[..]

83 In the first place, it must be borne in mind that measures which, whatever their form, are likely directly or indirectly to favour certain undertakings or are to be regarded as an economic advantage which the recipient undertaking would not have obtained under normal market conditions are considered to constitute State aid (judgments of 17 July 2008, *Essent Netwerk Noord and Others*, C-206/06, EU:C:2008:413, paragraph 79, and of 27 June 2017, *Congregación de Escuelas Pías Provincia Betania,* C-74/16, EU:C:2017:496, paragraph 65).

84 In that regard, the Court has ruled that, in order to assess that condition relating to the selectivity of the advantage, it is necessary to determine whether, under a particular legal regime, the national measure in question is such as to favour ‘certain undertakings or the production of certain goods’ over others, which, in the light of the objective pursued by that regime, are in a comparable factual and

legal situation and which are accordingly subject to different treatment that can, in essence, be classified as 'discriminatory' (judgments of 14 January 2015, *Eventech*, C-518/13, EU:C:2015:9, paragraphs 53 to 55, and of 21 December 2016, *Commission* v *World Duty Free Group and Others*, C-20/15 P and C-21/15 P, EU:C:2016:981, paragraph 54).

85 All of the economic operators mentioned in paragraph 82 above benefit from PIS monies, which, although they are intended to offset additional costs incurred or losses sustained by those operators, can be categorised as a 'selective advantage granted through State resources'.

86 Article 107(1) TFEU does not distinguish between measures of State intervention by reference to their causes or their aims but defines them in relation to their effects, and thus independently of the techniques used (judgments of 15 November 2011, *Commission and Spain* v *Government of Gibraltar and United Kingdom*, C-106/09 P and C-107/09 P, EU:C:2011:732, paragraph 87, and of 21 December 2016, *Commission* v *Hansestadt Lübeck*, C-524/14 P, EU:C:2016:971, paragraph 48).

[..]

89 In the second place, in order to categorise a national measure as 'State aid', it is necessary, not to establish that the aid has an actual effect on trade between Member States, but only to examine whether the aid is liable to affect such trade (judgments of 26 October 2016, *Orange* v *Commission*, C-211/15 P, EU:C:2016:798, paragraph 64, and of 18 May 2017, *Fondul Proprietatea*, C-150/16, EU:C:2017:388, paragraph 29).

90 However, the adverse effect on trade between Member States cannot be purely hypothetical or presumed. Thus, it is necessary to determine why the measure concerned is liable, by reason of its foreseeable effects, to have an impact on trade between Member States (judgment of 18 May 2017, *Fondul Proprietatea*, C-150/16, EU:C:2017:388, paragraph 30 and the case-law cited).

91 In that regard, it is apparent from the information provided by the referring court and from the observations submitted by Baltpool during the hearing that, in 2014, there was already trade between the Republic of Lithuania and other Member States on the electricity market by reason of connections with the electricity systems of the Republic of Estonia and the Republic of Latvia, which were used to import electricity. That information, which is not disputed by the Lithuanian Government, weakens that government's argument that the electricity market in that country was relatively isolated.

92 In addition, when aid granted by a Member State strengthens the position of one undertaking in comparison with other undertakings competing in intra-Community trade, the latter must be regarded as being affected by that aid (judgments of 10 January 2006, *Cassa di Risparmio di Firenze and Others*, C-222/04, EU:C:2006:8, paragraph 141, and of 18 May 2017, *Fondul Proprietatea*, C-150/16, EU:C:2017:388, paragraph 31).

93 In that regard, it is not necessary that the recipient undertakings are themselves involved in intra-Community trade. Where a Member State grants aid to undertakings, internal activity may be maintained or increased as a result, so that the opportunities for undertakings established in other Member States to penetrate the market in that Member State are thereby reduced (judgments of 14 January 2015, *Eventech*, C-518/13, EU:C:2015:9, paragraph 67, and of 18 May 2017, *Fondul Proprietatea*, C-150/16, EU:C:2017:388, paragraph 32).

94 Moreover, the fact that an economic sector, such as the energy sector, has been involved in a significant liberalisation process at EU level may serve to determine that the aid has a real or potential effect on trade between Member States (see, to that effect, judgments of 5 March 2015, *Banco Privado Português and Massa Insolvente do Banco Privado Português*, C-667/13,

EU:C:2015:151, paragraph 51, and of 18 May 2017, *Fondul Proprietatea*, C-150/16, EU:C:2017:388, paragraph 34).

95 In that regard, it should be noted that Directive 2009/72 has completely liberalised the electricity market within the European Union and, at the time of the facts in the main proceedings, the Member States were required to have adopted the laws, regulations and administrative provisions necessary to transpose that directive.

96 In so far as electricity is the subject of cross-border trade, the grant of PIS funds to the PIS providers mentioned in paragraph 82 above is liable to affect trade between those States (see, to that effect, judgment of 18 May 2017, *Fondul Proprietatea*, C-150/16, EU:C:2017:388, paragraph 35).

[..]

100 In that regard, the Court has stated that, where a State measure must be regarded as compensation for the services provided by the recipient undertakings in order to discharge public service obligations, with the result that those undertakings do not enjoy a real financial advantage and the measure thus does not have the effect of placing them in a more favourable competitive position than the undertakings competing with them, such a measure is not caught by Article 107(1) TFEU (judgments of 24 July 2003, *Altmark Trans and Regierungspräsidium Magdeburg*, C-280/00, EU:C:2003:415, paragraph 87, and of 8 March 2017, *Viasat Broadcasting UK* v *Commission*, C-660/15 P, EU:C:2017:178, paragraph 25).

101 In accordance with paragraphs 88 to 93 of the judgment of 24 July 2003, *Altmark Trans and Regierungspräsidium Magdeburg* (C-280/00, EU:C:2003:415), in order for such a measure not to be categorised as 'State aid', a number of conditions must be met. First, the recipient undertaking must in fact have public service obligations to discharge, and those obligations must be clearly defined. Second, the parameters on the basis of which the compensation is calculated must be established in advance in an objective and transparent manner. Third, the compensation cannot exceed what is necessary to cover all or part of the costs incurred in discharging the public service obligations. Fourth, the level of compensation needed must be determined on the basis of an analysis of the costs which a typical undertaking, well run and adequately equipped so as to be able to meet the necessary public service requirements, would have incurred in discharging those obligations.

102 The purpose of the verification of the conditions laid down in the *Altmark* case-law is to determine whether the measures at issue must be categorised as 'State aid', which is an issue that must be resolved before that which consists in examining, where necessary, whether incompatible aid is nevertheless necessary for the performance of the tasks assigned to the recipient of the measure at issue, under Article 106(2) TFEU (judgment of 8 March 2017, *Viasat Broadcasting UK* v *Commission*, C-660/15 P, EU:C:2017:178, paragraph 34).

103 By contrast, the conditions laid down in the *Altmark* case-law are no longer to be applied where it has been found that a measure must be categorised as 'aid', in particular in so far as the recipient undertaking is unable to pass the test of comparison with a typical undertaking, well run and adequately equipped so as to be able to meet the necessary public service requirements, and it is necessary to examine whether that aid can be justified under Article 106(2) TFEU (judgment of 8 March 2017, *Viasat Broadcasting UK* v *Commission*, C-660/15 P, EU:C:2017:178, paragraph 35).

[..]

107 In the second place, it is apparent from the reasoning underlying the exception established by the judgment of 24 July 2003, *Altmark Trans and Regierungspräsidium Magdeburg* (C-280/00, EU:C:2003:415), that the first condition laid down by that judgment presupposes, as noted by the Advocate General in point 78 of his Opinion, that the recipient undertaking is under a genuine obligation to provide the service in question under given conditions,

and that it is not merely authorised to provide such a service.

Judgment of 18 June 2019, *Micula and others v Commission*, T-624/15, T-694/15 and T-704/15, EU:T:2019:423

Relevance: competence of the Commission, payment of compensation to certain economic operators, tax advantage scheme applied and withdrawn before accession of the Member State

Facts

In 1998, Romania introduced a tax advantage scheme in order to attract investments in disfavoured regions. The scheme was to apply for 10 years, but Romania withdrew it in 2004 because during the accession negotiations the Commission's experts raised that the scheme constituted illegal State aid. The applicants, *Ioan* and *Viorel Micula,* Swedish citizens but resident in Romania and the companies controlled by them brought the case before the *International Centre for the Settlement of Investment Disputes* (ICSID). They claimed that by withdrawing the tax advantage scheme before its planned expiration Romania breached the bilateral investment treaty between Romania and Sweden. The ICSID upheld the claim of the applicants and ordered Romania to pay cca. 178 million euros as a compensation for the damage the applicants suffered. The Commission intervened in this proceeding, claiming that a compensation to be paid to the applicants would constitute illegal State aid. Right after ICSID had delivered its award, the Commission informed Romania that implementation of the award (e.g. paying the awarded compensation for the applicants) would constitute illegal State aid. In its response, Romania informed the Commission that part of the compensation was already paid by way of offsetting against taxes owed by the applicants. The Commission's reaction was to initiate the formal investigation procedure. In its final decision it qualified the compensation awarded by ICSID to the applicants as illegal State aid and called on Romania to immediately stop implementing the award and to recover the amounts of the compensation already paid to the applicants.

The applicants started proceedings before Romanian courts to get the award implemented. Romania asked the suspension of the implementation before many forums, with different results. Finally, after cca 10 million euros were seized form the bank accounts of the Romanian Ministry of Finance by an executor, Romania decided to implement the award in a way that it transferred the remaining amount of the compensation to a blocked bank account in favour of the applicants. Transferring the money to the applicants from that account depended on the condition that the Commission gives a positive answer in the State aid procedure, e. g. it decides that the payment of the compensation to the applicants does not constitute illegal State aid. However, the Commission gave a negative answer. The applicants contested the Commission's decision before the General Court.

Held

The General Court annulled the Commission's decision because it held that the Commission had no competence to assess a measure introduced and withdrawn before the accession of a Member State to the EU. The General Court held that the Commission considered that the compensation to be paid for the illegal withdrawal of the tax advantage scheme according to the ICSID award would constitute illegal State aid on the ground that the tax advantage scheme for itself constituted illegal State aid. However, since the Commission had no competence to assess measures applied before accession according to State aid review mechanism, it could neither assess the compensation paid for the illegal withdrawal of that measure for the period predating Romania's accession under the State aid review mechanism, since the withdrawal, which made the right of compensation arose, also happened before Romania's accession. The General Court held that compensation granted for the period after EU accession might be

reviewed under EU State aid law, but because the Commission made no difference between the compensation payable for the pre-accession and the post-accession period, the General Court decided to annul the Commission's decision in its entirety.
The Commission has filed an appeal against the judgement of the General Court.

Findings of the Court

66 Under Article 2 of the Act of Accession, the provisions of the original Treaties and the acts adopted by the institutions before accession are binding on Romania as from that accession and apply in that State under the conditions laid down in those Treaties and in that act.

67 Thus, EU law became applicable in Romania only as from its accession to the European Union on 1 January 2007. It is therefore only on that date that the Commission acquired the competence enabling it to review Romania's actions pursuant to Article 108 TFEU (see, to that effect, judgment of 20 March 2013, *Rousse Industry* v *Commission*, T-489/11, not published, EU:T:2013:144, paragraphs 63 and 64).

[..]

71 It is apparent from the background to the disputes (see paragraphs 5 to 15 above) that all the events relating to EGO, namely Romania's adoption of EGO, the applicant companies' obtaining of the licences enabling them to benefit from the incentives laid down by EGO, the entry into force of the BIT, the revocation of the incentives laid down by EGO and the infringements committed by Romania on that occasion and the initiation of the proceedings brought before the arbitral tribunal by the arbitration applicants, took place before Romania's accession to the European Union on 1 January 2007.

[..]

75 Consequently, the right to receive compensation for the purposes of the case-law referred to in paragraph 69 above arose at the time when Romania repealed the EGO incentives in 2005. Contrary to what the Commission stated, inter alia, in recital 134 of the contested decision, the right to receive the compensation awarded by the arbitral tribunal was therefore not conferred on the applicants only after Romania's accession to the European Union (see paragraph 65 above).

[..]

78 In the light of the foregoing, it must be concluded that the applicants' right to receive the compensation at issue arose and began to take effect at the time when Romania repealed EGO 24, that is to say, before Romania's accession to the European Union, and therefore at the time that that right was conferred on the applicants, within the meaning of the case-law cited in paragraph 69 above, predated accession. First, the arbitral award is simply the recognition of that right and, second, the payments made in 2014 merely represent the enforcement of that right which arose in 2005.

79 As EU law and, more specifically, Articles 107 and 108 TFEU were not applicable in Romania before its accession to the European Union (see, to that effect, judgment of 1 October 2015, *Electrabel and Dunamenti Erőmű* v *Commission*, C-357/14 P, EU:C:2015:642, paragraph 64 and the case-law cited), the Commission could not exercise the powers conferred on it by Article 108 TFEU and could not, in particular, censure the incentives laid down by EGO for the period predating that accession. It is only as from Romania's accession that the Commission acquired the competence enabling it to review Romania's actions pursuant to Article 108 TFEU (see, to that effect, judgment of 20 March 2013, *Rousse Industry* v *Commission*, T-489/11, not published, EU:T:2013:144, paragraph 63, confirmed on appeal by the judgment of 20 March 2014, *Rousse Industry* v *Commission*, C-271/13 P, not published, EU:C:2014:175).

80 It should also be noted, as the applicants have done, that the fact that the compensation was paid after that accession is irrelevant in that context, because those payments made in 2014 represent the enforcement of a right which arose in 2005.

[..]

86 However, as the EGO incentives were repealed in 2005 and thus before Romania's accession to the European Union, the Commission was by no means competent to assess their alleged unlawfulness in the light of EU law, at least with regard to the period predating accession. Likewise, as the right to the compensation at issue arose at the time of that repeal (see paragraph 75 above), nor could the Commission rule on the compatibility of the repeal for that period.

87 In that regard, it must be pointed out that, in the present case, the arbitral tribunal was not bound to apply EU law to events occurring prior to the accession before it, unlike the situation in the case which gave rise to the judgment of 6 March 2018, *Achmea* (C-284/16, EU:C:2018:158, paragraphs 38 to 41).

88 Furthermore, given that all the events of the dispute taken into account by the arbitral tribunal took place before that accession, the arbitral award cannot have the effect of making the Commission competent and EU law applicable to those earlier events in so far as they produced their effects before that accession (see, to that effect and by analogy, judgment of 10 January 2006, *Ynos*, C-302/04, EU:C:2006:9, paragraphs 25 and 36).

89 As the Commission stated in recital 135 of the contested decision, it is apparent from the arbitral award that the amounts granted as compensation for the damage resulting from the infringements committed by Romania were calculated by the arbitral tribunal from the moment that EGO was repealed, on 22 February 2005, until its scheduled expiry, on 1 April 2009. Admittedly, that period covers 27 months during which Romania was already a member of the European Union and the opportunity to stockpile sugar in 2009 and the lost profits for the period from 1 January 2005 to 31 August 2011.

90 It must, however, be stated that the amounts granted as compensation for the period predating Romania's accession to the European Union, that is to say, the period from 22 February 2005 to 31 December 2006, cannot constitute State aid within the meaning of EU law. Therefore, in accordance with the case-law cited in paragraphs 69, 79 and 88 above, it must be held that the Commission exercised its powers retroactively in relation to a situation predating Romania's accession to the European Union, at least with regard to those amounts.

91 Furthermore, as regards the amounts granted as compensation for the period subsequent to Romania's accession to the European Union, namely, the period from 1 January 2007 to 1 April 2009, even assuming that the payment of compensation relating to that period could be classified as incompatible aid, given that the Commission did not draw a distinction between the periods of compensation for the damage suffered by the applicants before or after accession, the Commission has, in any event, exceeded its powers in the area of State aid review.

92 In the light of all the foregoing, it must be concluded that, by adopting the contested decision, the Commission retroactively applied the powers which it held under Article 108 TFEU and Regulation No 659/1999 to events predating Romania's accession to the European Union. Therefore, the Commission could not classify the measure at issue as State aid within the meaning of Article 107(1) TFEU.

[..]

103 In addition, compensation for damage suffered cannot be regarded as aid unless it has the effect of compensating for the withdrawal of unlawful or incompatible aid (see, to that effect, judgment of 27 September 1988, *Asteris and Others*, 106/87 to 120/87, EU:C:1988:457, paragraphs 23 and 24), as recalled by the Commission in recital 104 of the contested decision. That recital 104 confirms that the Commission considers the arbitral award to be incompatible aid because

it compensates for the withdrawal of a measure which it considers to be aid which is incompatible with EU law.

104 However, it follows from the analysis of the first part of the first plea put forward in Case T-704/15 and the first part of the second plea put forward in Cases T-624/15 and T-694/15 that EU law is not applicable to the compensation for the withdrawal of EGO, at least in respect of the period predating accession, because the arbitral award, which found that a right to compensation arose in 2005, did not have the effect of triggering the applicability of EU law and the Commission's competence to that earlier period.

105 Therefore, the compensation for the withdrawal of the EGO scheme, at least in respect of the amounts relating to the period from 22 February 2005 to 1 January 2007, cannot be regarded as compensation for the withdrawal of aid which is unlawful or incompatible with EU law.

[...]

108 Therefore, as the compensation at issue covered, at least in part, a period predating accession (from 22 February 2005 to 1 January 2007) and as the Commission did not draw a distinction, among the amounts to be recovered, between those falling within the period predating accession and those falling within the period subsequent to accession, the decision by which it classified the entirety of the compensation as aid is necessarily unlawful.

109 It follows that the contested decision is unlawful in so far as it classified as an advantage and aid within the meaning of Article 107 TFEU the award, by the arbitral tribunal, of compensation intended to compensate for the damage resulting from the withdrawal of the tax incentives, at least in respect of the period predating the entry into force of EU law in Romania.

110 Consequently, the second part of the second plea put forward in Cases T-624/15 and T-694/15 and the first part of the second plea put forward in Case T-704/15 must also be upheld.

111 In the light of all the foregoing, the contested decision must be annulled in its entirety, without it being necessary to examine the other parts of those pleas or the other pleas.

Judgment of 12 September 2019, *Achemos Grupė and Achema v Commission*, T-417/16, EU:T:2019:597

Relevance: aid compatible with the internal market, the Commission’s abstention to initiate the formal investigation procedure, compensation of services of general economic interest

Facts

The energy strategy of Lithuania for the period of 2008-2012 highlighted the necessity of constructing an LNG terminal in order to create an alternative supply route of natural gas to ensure the security of gas supply of the country. As a consequence, in July 2010, the Lithuanian government appointed *Klaipėdos Nafta AB* to prepare the plans of the LNG terminal and to construct it. 72,3 % of the shares of *Klaipėdos Nafta* were owned by the Lithuanian state. The law on the LNG terminal introduced and regulated three measures to finance the construction and the operation of the terminal:

- the LNG supplement to be paid for 55 years by all the users of the natural gas transmission system,
- a purchase obligation imposed on certain companies supplying heat and electricity, for a period of maximum 10 years, depending on the economic viability of the operation of the terminal,
- a State guarantee for the financing of the construction amounting cca 116 million euros.

The measures were notified to the Commission in October 2013. The Commission declared the aid measures compatible with the internal market in its decision of 20 November 2013, without initiating the formal investigation procedure.

The applicants, *Achema* and its mother company, *Achemos Grupė* are active – amongst others – on the Lithuanian electricity and gas market. They brought proceedings for the annulment of the Commission’s decision claiming that the Commission should have initiated the formal investigation procedure. It turned out from their pleadings that the group supplies nearly half of the Lithuanian natural gas end-user market, and that the group planned to build an LNG terminal the capacity of which would satisfy the group’s needs for its gas supply activities.

Held

The General Court dismissed the action for annulment. In its judgement it reminded the applicants that it had been their task to establish that the Commission should have had serious doubts about the compatibility of the measures at issue and therefore should have initiated the formal investigation procedure. In that regard, the General Court pointed out that the applicants failed to inform the Commission about the LNG terminal they planned to construct when they had the possibility, so they cannot claim that the Commission did not take into account the alternative investment project when making its decision.
As regards the investment aid included in the measures, the General Court held that the Commission was right to conclude that the investment project was necessary to ensure security of gas supply in Lithuania, that it was incentive and proportionate. The alternative infrastructure project of the applicants does not have enough capacity to provide the same level of security of supply as the terminal of *Klaipėdos Nafta* will provide. The General Court also held that the Commission did not err in law when concluding that the whole capacity of the planned terminal was necessary to provide the level of security of gas supply Lithuania sought to achieve by the project, which could not be reached with a smaller terminal.

As regards the operating aid included in the measures, the General Court held that the depreciation period of the most significant assets was set correctly so the aid did not lead to any overcompensation. The Commission was right to accept that it was Lithuania's essential security interest to grant the award directly to *Klaipėdos Nafta*, since the aim of the project was to create an alternative supply route independent from the current only supplier of the Lithuanian market, the *Gazprom*. With a transparent competitive bidding procedure Lithuania would have run the risk that the contractor of the project was not independent both at the corporate and economic level from *Gazprom*. Finally, the General Court dismissed the applicants' claim that the internal rate of return of the LNG terminal project was not appropriate to calculate the reasonable profit of the project since *Klaipėdos Nafta* did not have to bear any commercial risk. The General Court pointed out that the project was not without commercial risk, since the purchase obligation would apply only for 10 years, and after its expiration, the LNG terminal will operate on a competitive market. The General Court also stated that the SGEI compensation did not cover all of the variable costs of the SGEI, which also creates commercial risk.

Findings of the Court

47 It should be observed as a preliminary point that, according to the case-law, where the Commission is unable to reach a firm view, following an initial examination in the context of the procedure under Article 108(3) TFEU, that a State aid measure either is not 'aid' within the meaning of Article 107(1) TFEU or, if classified as aid, is compatible with the Treaty, or where that procedure has not enabled the Commission to overcome all the difficulties involved in assessing the compatibility of the measure under consideration, the Commission is under a duty to initiate the procedure provided for in Article 108(2) TFEU, and has no discretion in that regard (see judgment of 22 December 2008, *British Aggregates* v *Commission*, C-487/06 P, EU:C:2008:757, paragraph 113 and the case-law cited; judgment of 19 September 2018, *HH Ferries and Others* v *Commission*, T-68/15, EU:C:2018:563, paragraph 60).

48 The notion of serious difficulties is an objective one (judgment of 21 December 2016, *Club Hotel Loutraki and Others* v *Commission*, C-131/15 P, EU:C:2016:989, paragraph 31). The existence of such difficulties must be sought both in the circumstances in which the contested measure was adopted and in its content, in an objective manner, comparing the grounds of the decision with the information available to the Commission when it took a decision on the compatibility of the disputed aid with the internal market (see judgment of 28 March 2012, *Ryanair* v *Commission*, T-123/09, EU:T:2012:164, paragraph 77 and the case-law cited). It follows that judicial review by the Court of the existence of serious difficulties will, by its nature, go beyond simple consideration of whether or not there has been a manifest error of assessment (see judgments of 27 September 2011, *3* v *Commission*, T-30/03 RENV, EU:T:2011:534, paragraph 55 and the case-law cited, and of 10 July 2012, *Smurfit Kappa Group* v *Commission*, T-304/08, EU:T:2012:351, paragraph 80 and the case-law cited). A decision adopted by the Commission without initiating the formal examination phase may be annulled on that ground alone, because of the failure to initiate the *inter partes* and detailed examination laid down in the Treaty, even if it has not been established that the Commission's assessments as to substance were wrong in law or in fact (see, to that effect, judgment of 9 September 2010, *British Aggregates and Others* v *Commission*, T-359/04, EU:T:2010:366, paragraph 58).

[..]

51 The onus is on the applicants to prove the existence of serious difficulties, proof that can take the form of a consistent body of evidence (see judgment of 19 September 2018, *HH Ferries and Others* v *Commission*, T-68/15, EU:T:2018:563, paragraph 63 and the case-law cited).

52 Finally, the Commission is required, in the interests of the sound administration of the fundamental rules of the TFEU relating to State aid, to conduct a diligent and impartial examination, so that it has at its disposal, when adopting the final decision, the most complete and reliable information possible for that purpose (judgment of 2 September 2010, *Commission* v *Scott*, C-290/07 P, EU:C:2010:480, paragraph 90), whilst bearing in mind the fact that the aim of the system of State aid control primarily rests on dialogue between the Commission and the Member States in which third parties have only a limited role to play (see, to that effect, judgment of 9 December 2014, *Netherlands Maritime Technology Association* v *Commission*, T-140/13, not published, EU:T:2014:1029, paragraph 60).

[..]

60 In those circumstances, the Commission cannot be criticised for failing to take into account matters of fact or of law which could have been submitted to it during the administrative procedure but which were not, since it is under no obligation to consider, of its own motion and on the basis of prediction, what information might have been submitted to it (see judgment of 16 March 2016, *Frucona Košice* v *Commission*, T-103/14, EU:T:2016:152, paragraph 140 and the case-law cited).

[..]

68 It is appropriate to refer, foremost, to the settled case-law according to which the Commission may declare aid compatible with the internal market for the purposes of Article 107(3) TFEU only if it can establish that the aid contributes to the attainment of one of the objectives referred to in that provision, something which, under normal market conditions, a recipient undertaking would not achieve by using its own resources. In other words, in order for aid to benefit from one of the derogations contained in Article 107(3) TFEU, it must not only comply with one of the objectives set out in Article 107(3)(a), (b), (c) or (d) TFEU, but it must also be necessary for the attainment of those objectives (judgments of 7 June 2001, *Agrana Zucker und Stärke* v *Commission*, T-187/99, EU:T:2001:149, paragraph 74, and of 13 September 2013, *Fri-El Acerra* v *Commission*, T-551/10, not published, EU:T:2013:430, paragraph 49; see also, to that effect, judgment of 17 September 1980, *Philip Morris Holland* v *Commission*, 730/79, EU:C:1980:209, paragraph 17). Indeed, that aid must induce the recipient to act in a manner which assists attainment of those objectives (judgment of 14 May 2002, *Graphischer Maschinenbau* v *Commission*, T-126/99, EU:T:2002:116, paragraph 34).

69 On the other hand, aid which improves the financial situation of the recipient undertaking without being necessary for the attainment of the objectives specified in Article 107(3) TFEU cannot be considered to be compatible with the internal market (judgments of 15 April 2008, *Nuova Agricast*, C-390/06, EU:C:2008:224, paragraph 68; of 14 January 2009, *Kronoply* v *Commission*, T-162/06, EU:T:2009:2, paragraph 65, and of 8 July 2010, *Freistaat Sachsen and Land Sachsen-Anhalt* v *Commission*, T-396/08, not published, EU:T:2010:297, paragraph 47).

70 Finally, while the existence of a market failure may be a relevant factor for declaring State aid compatible with the internal market, the absence of market failure does not necessarily mean that the conditions laid down in Article 107(3)(c) TFEU are not satisfied (judgments of 9 June 2016, *Magic Mountain Kletterhallen and Others* v *Commission*, T-162/13, not published, EU:T:2016:341, paragraphs 78 and 79, and of 18 January 2017, *Andersen* v *Commission*, T-92/11 RENV, not published, EU:T:2017:14, paragraph 69). For example, State intervention may be considered to be necessary for the purposes of that provision where market forces are not capable by themselves of ensuring that the public interest objective of the Member State is achieved in

sufficient time, even if, as such, that market cannot be considered to be failing (judgment of 12 July 2018, *Austria* v *Commission*, T-356/15, under appeal, EU:T:2018:439, paragraph 151).

[..]

72 First, the applicants dispute the finding that there is no interest in investing in alternative infrastructure, giving the example of their own LNG terminal. That argument overlaps with the one rejected as part of the first plea in law and must be rejected for the reasons set out in paragraphs 54 to 60 above.

73 It should be added that, according to the applicants' own submissions, their LNG terminal was intended to cover only the gas needs of Achema. Such a project clearly does not meet the objective of security of supply for all Lithuanian consumers pursued by the aid measures at issue, so that the existence of such a project, if proved, is not such as to call into question the need for the aid measures in question.

[..]

84 In the context of Article 107(3)(c) TFEU, in order to be compatible with the internal market, the planned aid must have an incentive effect. To that end, it must be demonstrated that, in the absence of the planned aid, the investment intended to implement the project at issue would not take place. If, on the other hand, it appears that that investment would take place even without the planned aid, the conclusion must be that the aid serves merely to improve the financial situation of the recipient undertaking, without, however, meeting the requirement in Article 107(3)(c) TFEU that it is necessary for the development of certain activities (see judgment of 13 December 2017, *Greece* v *Commission*, T-314/15, not published, EU:T:2017:903, paragraph 182 and the case-law cited).

85 In accordance with the case-law, a finding that an aid measure is not necessary can arise in particular from the fact that the aid project has already been started, or even completed, by the undertaking concerned prior to the application for aid being submitted to the competent authorities. In such a case, the aid concerned cannot operate as an incentive (see judgment of 13 December 2017, *Greece* v *Commission*, T-314/15, not published, EU:T:2017:903, paragraph 181 and the case-law cited).

[..]

110 According to the case-law, public service compensation not fulfilling the conditions laid down in the judgment of 24 July 2003 in *Altmark Trans and Regierungspräsidium Magdeburg* (C-280/00, EU:C:2003:415) but otherwise meeting the conditions laid down in Article 107(1) TFEU to be classified as State aid may nevertheless be declared compatible with the internal market, in particular under Article 106(2) TFEU (see judgment of 6 April 2017, *Saremar* v *Commission*, T-220/14, EU:T:2017:267, paragraph 131 (not published) and the case-law cited).

111 It should also be observed that, under Article 106(2) TFEU, the undertakings entrusted with the operation of SGEIs are to be subject to the rules on competition in so far as the application of such rules does not obstruct the performance, in law or in fact, of the particular tasks assigned to them, subject to the proviso, however, that the development of trade must not be affected to such an extent as would be contrary to the interests of the Union (see judgment of 6 April 2017, *Saremar* v *Commission*, T-220/14, EU:T:2017:267, paragraph 132 (not published) and the case-law cited).

112 In the absence of EU harmonised rules governing the matter, the Commission is not entitled to rule on the scope of the public service tasks assigned to the public operator, in particular the level of costs linked to that service, or the expediency of the political choices made in that regard by the national authorities, or on the economic efficiency of the public operator (judgment of 6 April 2017, *Saremar* v *Commission*, T-220/14, EU:T:2017:267, paragraph 133 (not published)).

113 However, the broad discretion which the national authorities are recognised as having is not unlimited. In particular, in the application of Article 106(2) TFEU, that broad discretion must not prevent the Commission from verifying that the derogation from the prohibition on State aid provided for in that provision may be granted (judgment of 6 April 2017, *Saremar* v *Commission*, T-220/14, EU:T:2017:267, paragraph 134 (not published)).

114 Having recalled that case-law, it must be observed that, according to paragraph 17 of the SGEI Framework, 'the duration of the period of entrustment [for the provision of the SGEI] should be justified by reference to objective criteria such as the need to amortise non-transferable fixed assets' and that 'in principle, the duration of the period of entrustment should not exceed the period required for the depreciation of the most significant assets required to provide the SGEI'.

[..]

121 Insofar as all of those elements, or at least some of them, may be regarded as 'significant assets required' to provide the SGEI, within the meaning of paragraph 17 of the SGEI Framework, as with the pipeline, the question arises as to which period of entrustment should be used.

122 In the absence of further details in that regard in the wording of paragraph 17 of the SGEI Framework, it is necessary to interpret it in the light of its objective which is to avoid any overcompensation. According to paragraph 16(e) of that framework, the entrustment act which a Member State must adopt in order to ensure that the SGEI at issue complies with Article 106(2) TFEU, must make provision, inter alia, for ways of avoiding any overcompensation.

123 It must therefore be concluded that the duration of the period of entrustment must correspond to the depreciation period of one of the most significant assets required to provide the SGEI, provided that the resulting remuneration does not lead to any overcompensation.

[..]

134 The Court has previously held that measures adopted by the Member States in connection with the legitimate requirements of national interest are not excluded in their entirety from the application of EU law solely because they are taken, inter alia, in the interests of public security (judgment of 20 March 2018, *Commission* v *Austria (State Printing Office)*, C-187/16, EU:C:2018:194, paragraph 76).

135 Moreover, those derogations must, in accordance with the settled case-law relating to derogations from fundamental freedoms, be interpreted strictly (see judgment of 20 March 2018, *Commission* v *Austria (State Printing Office)*, C-187/16, EU:C:2018:194, paragraph 77 and the case-law cited).

136 Furthermore, even though Article 14 of Directive 2004/18 affords the Member States discretion in deciding the measures considered to be necessary for the protection of their essential security interests, that article cannot, however, be construed as conferring on Member States the power to derogate from the provisions of the TFEU simply by invoking those interests. A Member State which wishes to avail itself of those derogations must show that such derogation is necessary in order to protect its essential security interests (judgment of 20 March 2018, *Commission* v *Austria (State Printing Office)*, C-187/16, EU:C:2018:194, paragraph 78).

137 Accordingly, a Member State which wishes to avail itself of those derogations must establish that the protection of such interests could not have been attained within a competitive tendering procedure as provided for by Directive 2004/18 (judgment of 20 March 2018, *Commission* v *Austria (State Printing Office)*, C-187/16, EU:C:2018:194, paragraph 79).

138 In the present case, the Commission found that the Republic of Lithuania had identified its essential security interests which it considered must be protected and the guarantees inherent in the protection of those interests. In that regard, in paragraphs 232 and 233 of the contested decision, the Commission found that, given the nature of the gas market in Lithuania, the project could

be implemented only by an entity which is independent, both on the corporate and economic level, from the sole gas supplier on that market. Subjecting the project at issue to a transparent competitive bidding procedure would run the risk of that supplier having ties with the chosen entity, either at the time of the tender, or by developing those ties subsequently, which would allow the latter to influence the market behaviour of that entity in a way that could negatively affect the provision of the SGEI. For those reasons, the Commission considered that the Lithuanian State could validly conclude that the SGEI operator had to be controlled by the State and made subject to certain security conditions, and that Klaipėdos Nafta satisfied those conditions. The Commission therefore concluded that the direct award to Klaipėdos Nafta of the LNG terminal project as an SGEI complied with Article 14 of Directive 2004/18.

[..]

145 According to paragraph 21 of the SGEI Framework, 'the amount of compensation must not exceed what is necessary to cover the net cost of discharging the public service obligations, including a reasonable profit'. The term 'reasonable profit', according to the principle adopted in paragraph 33 of the SGEI Framework, means the rate of return on capital, or rather the internal rate of return which the undertaking obtains on its capital invested over the lifetime of the project.

146 With regard to the calculation of the rate of return, paragraph 36 of the SGEI Framework stipulates that 'a rate of return on capital that does not exceed the relevant swap rate plus a premium of 100 basis points is regarded as reasonable in any event' ('the risk-free rate of return').

147 Paragraph 37 of the SGEI Framework provides that 'where the provision of the SGEI is connected with a substantial commercial or contractual risk, for instance because the compensation takes the form of a fixed lump sum payment covering expected net costs and a reasonable profit and the undertaking operates in a competitive environment, the reasonable profit may not exceed the level that corresponds to a rate of return on capital that is commensurate with the level of risk'.

148 Paragraph 38 of the SGEI Framework provides that where the provision of the SGEI is not connected with a substantial commercial or contractual risk, for instance because the net cost incurred in providing the service of general economic interest is essentially compensated *ex post* in full, the reasonable profit may not exceed the level that corresponds to the level specified in paragraph 36.

[..]

158 Secondly, after the expiry of the purchase obligation, the LNG terminal will operate on a competitive market, whereas the SGEI will continue to be applied for the remaining 45 years. Once the purchase obligation has expired, the designated purchasers are free to seek supplies of gas from sources of their choice. Therefore, downstream, the LNG demand will be subject to market forces. Upstream, since the regasification tariffs are an additional cost for the LNG importers compared with gas imports through the pipelines, the LNG terminal will also be subject to competitive pressures (paragraph 258 of the contested decision). It is apparent from paragraph 37 of the SGEI Framework that the fact that the undertaking operates in a competitive environment may justify the reasonable profit being equal to a 'rate of return on capital that is commensurate with the level of risk' and therefore greater than the SWAP rate plus 100 basis points.