

# Hinkley Point C: ECJ Confirms Commission's Approval of Aid to Nuclear Energy Plant

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Corinne R  chardt (Greenberg Traurig Germany LLP)

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Months before the prospective final Brexit, the ECJ laid what is in all likelihood the last State aid milestone on the UK's path out of the European Union - at the same time, the ECJ's judgment in the „Hinkley Point C“ case (Case C-594/18 P Austria v Commission) is a farewell gift to the remaining Member States' energy policy.

The judgment confirms a 2018 judgment by the General Court (Case T-356/15), which in turn upheld a Commission decision (no. 2015/658) allowing the UK government to provide long-term support to a nuclear energy plant in southern England. This decision sparked controversy and resistance, in particular from Austria (which does not have any nuclear energy plants in its territory). Notably, other larger Member States also abstaining from nuclear energy, such as Germany, declined to get involved in the case. The ECJ answered the central legal question - whether the aid for the nuclear energy plant could be deemed to be compatible with the internal market pursuant to Article 107 (3) (c) TFEU - in the affirmative, albeit by referring to the general application of this provision, and without limiting its scope by relying on the Euratom Treaty (as the General Court had done).

The ECJ's ruling, on the whole, is not surprising. There were no clear rules demanding another outcome, and the judgment follows the Advocate General's opinion delivered in May 2020. Fundamentally, the ECJ judgment confirms that State aid for nuclear energy is allowed, without strict limitations from the EU State aid rules. The judgment clarifies the application of these rules, providing important guidelines for the future, and corrects the General Court's interpretation of the Euratom Treaty.

## No "nuclear exception" from State aid law

Aid in the nuclear sector is at the unique cross-section of two Treaties: The Euratom Treaty and the Treaty on the Functioning of the European Union. If, where and how the Euratom supersedes the TFEU is thus a crucial question for aid in the nuclear energy sector.

The General Court accorded a broad scope of application to the Euratom Treaty, in particular Article 106a (3) Euratom Treaty. This provision states that the provisions of the Treaty on European Union and of the Treaty on the Functioning of the European Union shall not derogate from the provisions of the Euratom Treaty. The General Court held that Article 106a (3) of the Euratom Treaty prevented principles of EU environmental law from leading to a negative State aid assessment. The ECJ departed from this part of the ruling, holding that aid that violated EU environmental law could not be deemed to be compatible with the internal market and could thus not be authorized.

## Market failure in nuclear energy?

The concern whether the aid to Hinkley Point C was justified because the existence of market failure was raised as a key point by Austria. The court's discussion of this ground of appeal does not deal with the detailed standards of the State aid assessment in the Commission's practice in depth and instead stays close to the wording of the Treaty. Market failure is not mentioned in Article 107 (3) (c) TFEU and is not, in the Court's view, a requirement for the compatibility of aid. It is therefore logically consistent that it does not discuss how the market such a failure occurred in would have to be identified. Contrary to other areas of competition law, market definitions do not traditionally play a significant role in State aid policy. This decision will not cause this to change.

## Broad reading of Article 194 (2), subparagraph 2 TFEU: Right for the Member States to determine their energy mix

While the ECJ gave the Euratom Treaty a narrow reading, it affirmed a broad reading of Article 194 (2) TFEU. This provision, in the ECJ's view, puts the choice of nuclear energy to the Member States. The ECJ justifies this by interpreting Article 194 (2), subparagraph 2 TFEU as enshrining a general right of the Member States to choose their energy mix.

This is a remarkable - albeit neither novel nor unique - reading both in light of the context and the literal wording of the provision: The ECJ itself recalls that "measures adopted by the European Parliament and the Council are not to affect a Member State's right to determine the conditions for exploiting its energy resources, its choice between difference energy sources and the general structure of its energy supply" (para 48 of the ECJ judgment).

It could be argued that EU State aid law is not a measure of the Council or the EU Parliament; rather, EU State aid rules were put in place in the EU Treaties by the Member States themselves. Moreover, it is not the cited bodies (the Council or the European Parliament), but rather the EU Commission which enforces these rules - even if one looked to which entity enforced the rules and adopted any "measure", there would thus be no literal violation of Article 194 (2), subparagraph 2 TFEU, should the Commission adopt a negative State aid decision in the field of energy policy.

The context of the provision supports this reading. The relevant subparagraph of Article 194 (2) TFEU forms part of a paragraph on EU legislation in the field of energy policy. This also supports the reading that the right of EU Member States to determine their energy mix was intended to apply vis-  -vis the EU legislator and not as a tool to limit other provisions in the Treaties, i.e., the EU State aid rules.

This broad reading of Article 194 (2), subparagraph 2 TFEU gives the Member States an important counterargument against a broad application of the EU State aid rules in the nuclear energy sector and, functionally, can in future serve as a substitute to the (limited) protected realm some saw guaranteed by the Euratom Treaty, as creating an exception from the TFEU provisions (the view supported by the General Court in its judgment).

## Literal reading of Article 107 (3) (c) TFEU: Objective in the common interest

The ECJ stressed that pursuant to Article 107 (3) (c) TFEU, it is not a requirement for the compatibility of aid that an objective in the common interest be served. Rather - in line with the literal reading of this provision - the aid may simply not have an adverse effect contrary to the common interest. This reading is at odds with the bulk of the Commission's soft law instruments on the application of Article 107 (3) (c) TFEU - such as the Guidelines on State aid for environmental protection and energy 2014-2020 (OJ 2014 C 200/1, in particular paras 27 (a), 30 ff). The ECJ is not concerned with this discrepancy, pointing out that none of these instruments apply and, even if they did, the Treaty provision prevails. The Commission may, however, be more concerned and adapt the soft law in reaction to this judgment.

## Conclusion

The decision puts an end to a long, contested court procedure and is good news for nuclear energy projects in Europe, such as the Paks II nuclear energy plant in Hungary, which is also the object of an ongoing case before the General Court between Austria and the Commission (Case T-101/18). While the ECJ confirmed the positive aid decision, it refrained from defining nuclear energy as a goal in the common European interest. The divergence of EU Member States' nuclear policy is not directly affected by this judgment and will in all likelihood continue for the foreseeable future. By affirming the application of the EU State aid rules, the ECJ has made a statement that can serve to prevent a subsidy race or moves toward national self-sufficiency in the energy sector, while allowing Member States to maintain distinct national energy policies.

For State aid policy as a whole, it remains to be seen if the literal reading of Article 107 (3) (c) TFEU will be integrated into the Commission's analysis of the compatibility of aid. Notably, several instruments of soft law (not only pertaining to energy) would have to be adapted in order to bring them in line with this judgment.

For energy policy, it remains to be seen if and how the license for Member States to define their energy markets will solidify national borders in the EU energy market or whether market integration will continue despite diverging national policies and their protection under EU law.

The judgment thus strikes a balance between affirming Member States' right to define their national energy policies on the one hand whilst reaffirming the reach of State aid law (as encompassing nuclear energy) on the other hand. It will be exciting to see which way the scales tip in the future.