

The Hinkley Point C ruling

Why and how the Commission must implement the Green Deal in State aid rules

On 22 September 2020, the Court of Justice upheld the General Court's judgment in the "Hinkley Point C" case.¹ In line with the Advocate General's opinion, the Court confirmed the Commission's decision authorising an aid scheme notified by the UK to provide long-term support for the construction of the so-called "Hinkley Point C" nuclear power plant in southern England.

Our analysis of the Hinkley Point C ruling shows that **the Court confirms the Commission's obligation to enforce the Green Deal² objectives in State aid control**. Hence, we hereby make **concrete recommendations** on how the Commission could do so when assessing the compatibility of aid measures.

Summary of the ruling

The Grand Chamber of the Court of Justice confirmed that the Commission may authorise State aid for the construction of a nuclear power plant, under Article 107(3)(c) TFEU, if it is compatible with the internal market.

Based on a literal interpretation of the Treaty, the Court recalled that **State aid must meet two conditions in order to be compatible with the internal market** under Article 107(3)(c) TFEU (para. 18-19):

1. the measure must aim to facilitate the development of certain economic activities or areas; and
2. it must not adversely affect trading conditions to an extent contrary to the common interest.

¹ Judgement of 22 September 2020, *Republic of Austria v European Commission*, C-594/18 P, ECLI:EU:C:2020:742

² Communication from the Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions – 'The European Green Deal', COM(2019) 640 final, 11 December 2019

First, contrary to the Commission's practice to date, the **compatibility of an aid measure with the internal market does not depend on the pursuit of an objective of common interest** (para. 20). Nor does Article 107(3)(c) TFEU require the Commission to examine if the planned aid remedies a market failure (para. 66). Accordingly, the Court dismissed Austria's stance that the construction of a new nuclear power plant would not constitute an objective of common interest (para.18-26). Although this note does not discuss this any further, we believe that the ruling does not prevent the Commission from still assessing whether aid measures are in line with common interest objectives – and we observe that the Commission keeps on doing so in recent decisions.

Second, since the Euratom Treaty does not contain provisions on State aid nor on environmental protection³, the Court confirmed that **the TFEU State aid rules and EU environmental law apply to the nuclear energy sector** (para. 32-33 and para. 40-41). In particular, the principle of protection of the environment, the precautionary principle, the 'polluter pays' principle and the principle of sustainability, are an integral part of EU environmental law and thus apply to the nuclear sector (para 42-43). As environmental protection must be safeguarded in the EU in line with Article 37 EU Charter of Fundamental Rights, Article 11 TFEU and Article 194(1) TFEU, aid to an economic activity – including but not limited to the nuclear sector – that violates EU environmental law **is necessarily incompatible** with the internal market (para. 20, 44-45 and 100).

The ruling stresses that the above-mentioned environmental protection principles do not prevent, *in all circumstances*, State aid for the construction or operation of a nuclear power plant. This finding is based on the right for Member States to freely choose their energy mix pursuant to Article 194(2) TFEU and thus to develop nuclear power in the internal market (para. 48-51), which would not be undermined by other treaty principles such as Article 37 Charter of Fundamental Rights, Article 11 TFEU or Article 194(1) TFEU. Nevertheless, that phrase allows finding, *in a specific case*, that the construction of a nuclear power plant can breach EU environmental law; in which case, the ruling clearly states, an aid to that activity could not be found compatible with the internal market.

Practically, the Court requires **the Commission to check compliance** of the activity to be supported with environmental laws before authorising an aid measure under Article 107(3)(c) TFEU (para. 100). If the aided activity is found to **breach EU law and principles on the environment, it must be declared incompatible with the internal market** without further examination of the other compatibility criteria of aid measures.

Third, the Court of Justice held that Article 107(3)(c) TFEU does not require the Commission to take account of other negative effects of an aid measure, for example on the environment, when assessing whether it affects trade to an extent contrary to the common interest (the second condition of a compatibility assessment under Article 107(3)(c) TFEU) (para. 100-101). We argue that since the assessment of harmful environmental effects must in any case be checked when assessing whether an aid measure can support an economic activity (the first condition), point 101 of the ruling is not detrimental to that assessment.

³ Except for the protection of the health of workers and the general public against the dangers arising from ionizing radiations, see Euratom Treaty Art. 30 *et seq.*

Analysis

We argue that the Hinkley Point C ruling (in particular para. 101) does not prevent the Commission from integrating environmental and climate impacts of aid measures into its compatibility assessment.

To the contrary, in our view, the ruling confirms the Commission's obligation to enforce the EU Charter of Fundamental Rights and Treaties principles, as well as the Green Deal objectives in State aid control⁴; and leaves it ample leeway as to the method for doing it.

Preliminarily, we stress that the principles and Commission's obligation recalled under points 20, 44-45 and 100 of the Hinkley Point C ruling are not limited to the assessment of aid measures under subparagraph (c) of Article 107(3) TFEU; they equally apply to aid measures assessed under Articles 106, 107(2), 107(3)(a) and (b) TFEU.

Although the ruling is explicitly based on Articles 37 EU Charter of Fundamental Rights and 11 TFEU, the **principles of sustainable development** in Article 3(3) TEU, **of consistency and effectiveness** in Article 13(1) TEU and of **sincere cooperation** of Member States in Article 4(3) TFEU, are also relevant. Indeed, a Member State must not support an activity that infringes EU environmental law (until the breaches are remedied) and the Commission must not allow such aid.

As the Commission is well aware, **EU environmental law** has a large scope. As recalled by the Court, the principle of protection of the environment, the precautionary principle, the 'polluter pays' principle and the principle of sustainability are an integral part of EU environmental law acquis; besides specific EU secondary legislation such as the Water Framework Directive, the Waste Framework Directive, the Habitats Directive, or the Birds Directive. A number of upcoming legislation stemming from the Green Deal and from the strategies derived from it will soon also become part of the EU environmental law acquis.⁵

Furthermore, the Commission must integrate new developments of EU environmental law into its assessment. In particular, **EU law on climate** also is EU law on the environment. This stems clearly from Article 191 TFEU, according to which the Union policy on the environment must contribute to fighting climate change. The new **European Climate law**⁶ would bind the EU to reduce its greenhouse gas emissions by at least 55% by 2030 and to reach climate neutrality by 2050.⁷ Article 5(3) of the Proposal on European Climate law requires the Commission to take necessary measures to ensure that the legally binding objectives of climate neutrality in the Union are attained. Article 5(4) requires assessing that all measures and legislative proposals are consistent with the climate neutrality objective. In this respect, we welcome that the Commission is already planning to assess aid against this framework, as proposed in the draft revised Communication on State aid rules for important projects of common interest (IPCEIs).⁸

The clear stances of the Hinkley Point C ruling lead to the conclusion that **the combination** of EU law on the environment and climate (that includes the principle of sustainability), the objectives contained in the Green Deal, the 2030 and 2050 climate targets and the principle of consistency should result in **refusing aid to an activity that undermines environmental and climate protection objectives**.⁹ A Member

⁴ This analysis is shared by different stakeholders in their response to the call for contribution "A competition policy to Support the Green Deal" such as the joint contribution from Prof. Dr. Hans Vedder, Arletta Goreck and Fabian Richter as well as the contribution from Dr. Francisco Costa-Cabral.

⁵ This is notably the case of the revision of the legislation in light of the Zero Pollution Action Plan and of the Chemicals Strategy for Sustainability.

⁶ Commission proposal of 4 March 2020, COM(2020) 80 final; The legal basis for the EU Climate Law is 192(1) TFEU

⁷ Articles 2 and 5(3) of the Commission proposal for a European Climate Law

⁸ This draft Communication is under public consultation. See para. 15 and 21 of the draft.

⁹ See ClientEarth' report on Mainstreaming climate protection requirements in State aid law; and in this sense, the contribution from Francisco Costa Cabral on the Competition and Green Deal consultation

State granting aid in such circumstances would undermine its trajectory to reach the Union's and its own climate targets.

One may estimate that verifying that activities comply with EU environmental law is a significant administrative burden. Nevertheless, this duty unquestionably stems from the Treaties and from the Commission's role to enforce EU law. It is not even new (see e.g. case *Nuova Agricast*¹⁰) and is actually already part of the compatibility assessment of some aid measures (see notification forms in Annex below). The Hinkley Point C ruling is simply a – strong and clear – **reminder of this obligation**. In practice, even if the ultimate responsibility to find that an aid is compatible with the internal market falls with the Commission, the Commission may and should rely on Member States to help it perform this control, as we recommend below.

Recommendations

We therefore highly recommend the Commission to:

1. **Systematically check compliance** of the supported activities with EU law on the environment and climate (as described above) for every notified or unlawful aid measure or scheme, **not only for aid under Article 107(3)(c) TFEU**. As required by the Court (para. 44), this principle shall be **systematised in the whole Commission's State aid decision-making practice**.
 - (a) Member States shall be primarily responsible for verifying that supported activities comply with the law when aid is granted under the GBER, subject to the Commission's and CJEU's control;
 - (b) When notifying an aid measure or responding to Commission's queries on unlawful aid, Member States shall provide all relevant evidence of compliance of the aided activity with environmental law, at the time of the first grant and throughout the duration of the aid measure. In this respect, monitoring and reporting obligations must be reinforced;
 - (c) Mutual assistance and close cooperation between the Commission and national courts to verify compliance should be reinforced¹¹, but the ultimate responsibility to assess compliance and the compatibility of aid lies with the Commission;
 - (d) When the Commission has doubts about the compliance of an activity with its environmental law obligations, **it should open a formal investigation** - as for any other type of doubts about the compatibility of an aid measure. A formal investigation increases the possibility for the Commission to gather evidence, by consulting interested parties and requesting information directly from market participants including the beneficiaries of aid;
 - (e) Commission's decisions must always state reasons for the finding that the activity complies with environmental law (Article 296 TFEU).
2. Apply the Green Deal "do no harm" principle¹² in its compatibility assessment. The draft revised IPCEI Communication¹³ indicates that "*The project must respect the 'do no significant harm' principle and ensure the phasing out of environmentally harmful subsidies, as recalled by the*

¹⁰ Judgement of 15 April 2008, *Nuova Agricast*, C-390/06, EU:C:2008:224, points 50 et 51

¹¹ This is particularly relevant for cases of unlawful aid or misuse of aid.

¹² Section 2.2.5 of the Green Deal

¹³ https://ec.europa.eu/competition/consultations/2021_ipcei/draft_communication_en.pdf, published on 23 February 2021

European Green Deal. By analogy and based on the principle of consistency¹⁴, each aid measure granted by Member States should comply with this principle.

- (a) The Commission could provide **technical guidance** on what activities can be deemed sustainable and compliant with the “do no harm” principle. To do so, the technical guidance on the application of “do not significant harm” principle under the RRF (the Technical Guidance) could be used as a model¹⁵, except for the permission of “*measures related to power and/or heat generation using natural gas, as well as related transmission and distribution infrastructure*”.¹⁶
- (b) Not applying the “do no harm” principle to all State aid would not only consist in a failure to act, but would also create a contradicting and undesirable situation whereby Member States would grant aid stemming from the RRF for sustainable projects and, in parallel, grant aid to unsustainable projects (potentially directly jeopardizing the sustainable projects) from national or other nationally managed EU funds.

3. Adapt the **general State aid notification form**¹⁷:

- (a) The general information form, the simplified notification form and the GBER summary information form should contain a field (or multiple fields) on the conformity of the aid measure with EU law on the environment and climate¹⁸. This is already sporadically the case for a few supplementing forms by sectors (see Annex). Member States should provide all relevant documentation evidencing that the **supported activities comply with all EU law on the environment** (for the protection of air, soil, water, biodiversity, etc.) and climate (contribution of the activity to climate neutrality); prove that relevant permits have been granted or confirm that the grant of adequate permits is a condition for the grant of aid¹⁹;
- (b) The general notification form should also require the Member States to **describe the positive and negative environmental (and climate) impacts of the supported activities**. To this end, Member States could require the beneficiary to produce a “climate and environmental impact report”, similar to what is required in section 3 of the Technical Guidance. Simplified reports could be produced for aid to activities that are not expected to have a particular environmental impact.

¹⁴ Article 13(1) TEU and article 7 TFEU

¹⁵ Commission Notice, Technical guidance on the application of “do no significant harm” under the Recovery and Resilience Facility Regulation, C(2021) 1054 final

¹⁶ See Technical Guidance, p. 8. This permission under the Technical Guidance “on a case-by-case basis” cannot be accepted in State aid at large in light of the precautionary, prevention and sustainability principles mentioned in the Hinkley Point C ruling, and in application of the binding 2030 and 2050 climate targets in the EU Climate Law.

¹⁷ Commission Regulation 2015/2282 of 27 November 2015 amending Regulation 794/2004 as regard the notification forms and information sheets

¹⁸ This should also be incorporated in the conditions for applying the Regulation (EU) No 1407/2013 of 18 December 2013 on the application of Articles 107 and 108 of the Treaty on the Functioning of the European Union to *de minimis* aid

¹⁹ In which case, evidence of the grant of permits shall be added to the file as soon as possible for ensuring adequate monitoring of the grant of aid

Annex: Current questions in aid notification forms on compliance of activities with their environmental law obligations

Regional aid

- Form for individual regional investment aid:
 - o “Contribution to regional objectives”, question 3.1.8: *Did you or do you commit to carry out an Environmental Impact Assessment ("EIA") for the investment (paragraph 39 RAG). If no, please explain why an EIA is not required for this project.*
- Form for regional investment aid scheme:
 - o “Contribution to regional objectives”, question 3.1.1: *Please provide the reference to the relevant provisions of the legal basis containing the requirement to carry out an Environmental Impact Assessment ("EIA") for the investments concerned before granting aid to individual projects, when so required by law (paragraph 39 RAG).*

Agriculture aid

- Common assessment principles – general part, question 2. *Does the State aid measure entail one of the following non-severable violations of European Union law? (...) other non-severable violation of European Union law.*
- Contribution to a common objective – environmental objectives:
 - o Question 1.6: *Does the State aid notification contain an assessment on whether or not the aided activity is expected to have any environmental impact?*
 - o Question 1.7: *Will the aid have a negative environmental impact? If the answer is yes, the Member State must provide with the notification information demonstrating that the aid will not result in an infringement of applicable Union environmental protection legislation.*
 - o Question 1.8: *Where State aid is notified, which forms part of the rural development programme, is the environmental requirement for the State aid measure identical with the environmental requirement of the rural development measure? If the answer is no, please note that in accordance with point (52) of the Guidelines the aid cannot be declared compatible with the internal market.*

Fisheries

- Common assessment principles – general part, question 1.2.: *Does the aid measure or any condition attached to it, including its financing method when that method constitutes a non-severable part of the measure, entail a violation of Union law?*

Aid for environmental protection and energy (quoting certain questions only)

- Section A: general information, question 7: *Please indicate whether such conditions are attached to the measure, including its financing method when it forms an integral part of it, that can entail a non-severable violation of Union law (point 29 of the EEAG). If the answer is yes, please explain how compliance with Union law is ensured.*
- Section B: general compatibility assessment
 - o Contribution to an objective of common interest:
Question 5. *Please explain how you ensure that the generation adequacy investment will not contradict the objective of phasing out environmentally harmful subsidies including for*

fossil fuels, in line with point 220 of EEAG. How are for example demand-side management and interconnection capacity taken into account? Is there for example a preference for low carbon capacity providers in case of equivalent technical performance?

Question 6: *several questions relate to compliance of waste management activities.*

- *Appropriateness of the aid: Please explain why State aid is the appropriate instrument rather than other policy instruments (non-State aid instruments) or the full implementation of the "polluter pays principle" (see points 41 – 44 of the EEAG).*

Aid to airport and airlines

- *General questions on the investment project, question 1.2.6.: Did you or do you commit to carry out an Environmental Impact Assessment ("EIA") for the investment? (point 20 of the Guidelines on State aid to airports and airlines)? If no, please explain why an EIA is not required for this project:*

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