

# COMPETITION & REGULATORY NEWSLETTER

## QUICK LINKS

Main article

Other developments

Antitrust

General competition

## European Court of Justice upholds General Court's ruling on the clearance of UK State aid for the Hinkley Point C nuclear power station

On 22 September 2020 the EU's highest court delivered its [judgment](#) dismissing Austria's appeal of the European Commission's approval of the UK Government's State aid for the Hinkley Point C new nuclear power station (Hinkley Point C). The European Court of Justice (CJ) upheld the General Court's (GC) decision rejecting Austria's application for annulment. The judgment (i) clarifies that an objective of common interest does not require support from all Member States, and (ii) confirms that Member States are able to subsidise new nuclear projects as part of their energy plans. The CJ found that the GC made an error of law in arguing that the Euratom Treaty precludes the application of EU environmental rules to nuclear energy but that this error did not materially affect the judgement. The CJ dismissed Austria's appeal in its entirety.

### BACKGROUND

On 8 October 2014 the Commission approved the UK's proposed State aid package for the construction and operation of Hinkley Point C benefitting NNB Generation Company Limited (NNB Generation), a subsidiary of EDF Energy plc. The package comprised (i) a contract for difference ensuring price stability for electricity sales by NNB Generation during the operational stage of Hinkley Point C, (ii) an agreement between the UK Secretary of State for Energy and Climate Change and NNB Generation's investors guaranteeing compensation in the event of an early shutdown of the power station on political grounds, and (iii) a credit guarantee provided by the UK on bonds to be issued by NNB Generation ensuring timely payment of principal and interest of qualifying debt. In its decision, the Commission found that the measures constituted State aid within the meaning of Article 107(1) TFEU but were compatible with the internal market under Article 107(3)(c) TFEU.

On 6 July 2015 Austria appealed the Commission's approval decision, challenging whether the Commission could give approval for State aid to support the construction of a nuclear power station. Austria has an anti-nuclear policy and banned nuclear energy in 1978. Luxembourg intervened in the proceedings in support of Austria and the Czech Republic, France, Hungary, Poland, Romania, Slovakia and the UK intervened in support of the Commission's decision. On 12 July 2018 the GC published its judgment in support of the Commission's decision and dismissed Austria's appeal.

For further information on any EU or UK Competition related matter, please contact the [Competition Group](#) or your usual Slaughter and May contact.

**Main article****Other developments****Antitrust****General competition**

On 21 September 2018 Austria lodged an appeal to the CJ challenging the GC's judgment and on 7 May 2020 Advocate General Gerard Hogan issued a non-binding legal opinion advising the dismissal of Austria's appeal.

**KEY ISSUES**

The CJ's judgment confirmed that the Commission can approve State support for new nuclear energy projects. It also considers several issues that are of wider importance in State aid cases, summarised below.

*OBJECTIVE OF COMMON INTEREST*

Austria argued that the GC had been wrong to uphold the Commission's view that the promotion of nuclear energy constitutes an objective in the common interest under Article 107(3)(c) TFEU on the basis that it was necessary for the objective to be of common interest to all Member States and the promotion of nuclear energy was not.

The CJ held that compatibility with the internal market under Article 107(3)(c) TFEU is not dependent on the pursuit of an objective of common interest providing that State aid meets the two conditions therein, that (i) it intends to facilitate the development of certain economic activities or of certain economic areas, and (ii) it does not adversely affect trading conditions to an extent contrary to the common interest. There is no third limb to the test that requires State aid to pursue an objective of common interest.

*STATE AID AND THE EURATOM TREATY*

Austria also argued that the GC had been wrong to uphold the Commission's view that the UK was entitled to promote nuclear energy as a public interest objective under Article 107(3)(c) TFEU. Austria contended that as the Euratom Treaty does not allow State aid for the construction of nuclear power stations, the promotion of nuclear energy is not a common interest of the EU.

The CJ dismissed Austria's challenge and confirmed that, as the Euratom Treaty is silent on State aid sector specific rules, the general TFEU rules on State aid apply to the nuclear energy sector, even if individual Member States object to the concept of nuclear power. The CJ noted that the Euratom Treaty does not have exhaustive environmental protection principles and therefore found that the GC was wrong to reject the application of the TFEU environmental principles to the nuclear sector. However, the GC's error of law did not change the outcome of the CJ judgement.

*MEMBER STATES FREE TO CHOOSE THEIR OWN ENERGY MIX*

Another challenge raised in Austria's appeal was whether the GC had accurately applied the proportionality test when assessing the UK's State aid measures. The CJ rejected Austria's argument that the GC had only applied the proportionality test to the UK's aim of creating new nuclear energy generating capacity and held that the GC had rightly applied the test to the UK's electricity supply needs. In its ruling, the CJ reiterated that Member States are free to decide the composition of their energy mix, including the use of nuclear energy. The CJ also noted that when assessing the second condition under Article 107(3)(c) TFEU - to ensure the aid does not adversely affect trading conditions to an extent contrary to common interest - the Commission is not required to take into account any negative effects of planned aid except those on competition and trade between Member States. The Commission therefore did not need to take into account potential negative effects on the environment.

The CJ also found that the generation of nuclear energy constitutes an economic activity under Article 107(3)(c) TFEU and therefore rejected Austria's argument that the GC had incorrectly identified the relevant economic activity within this provision.

**COMMENT**

This judgment ends five years of litigation between the parties, and is notable in confirming for the first time that the Commission may approve proposed State aid to support nuclear energy under Article 107(3)(c) TFEU. The CJ's approval

**Main article****Other developments****Antitrust****General competition**

is a victory for pro-nuclear countries whilst also confirming that all Member States have the freedom to choose their energy mix and clarifying that it is not necessary to show that the aid supports an objective of common interest with unanimous Member State support.

*Slaughter and May acted for the UK Government in obtaining State aid approval for the Hinkley Point C project. The case was led by Special Advisor Jackie Holland.*

**OTHER DEVELOPMENTS****ANTITRUST****SAMR ISSUES ANTITRUST COMPLIANCE GUIDELINES FOR BUSINESS OPERATORS IN CHINA**

On 18 September 2020 China's State Administration for Market Regulation (SAMR) announced the '[Guidelines on Anti-monopoly Compliance for Business Operators](#)' (Guidelines). The Guidelines set out some general and practical guidance to business operators in relation to antitrust compliance.

The Guidelines focus on four key areas, namely the establishment of compliance administration systems, key compliance risks, compliance risk management and safeguards for compliance management. The Guidelines encourage business operators to:

- establish and implement effective antitrust compliance administration systems, spell out clear antitrust commitments and set up dedicated teams/departments in charge of antitrust compliance with clearly-defined terms of reference (Articles 5-10);
- identify the relevant antitrust risks, assess and classify the risks and adopt appropriate measures to contain them (Articles 19-22); and
- adopt reward and punishment mechanisms for employees regarding antitrust compliance, establish whistle-blowing policies and provide resources including training to employees and appropriate information technologies to support antitrust compliance practices (Articles 23-27).

The SAMR also reminds business operators that the SAMR can deal with cases through leniency processes, and notes that a business operator under investigation must fully cooperate with the SAMR (Articles 16-17).

The Guidelines reflect SAMR's expectations on what constitute good antitrust compliance practice, and provide helpful guidance for companies active in China on the compliance measures they should be considering.

**GENERAL COMPETITION****FCA PUBLISHES FINAL REPORT OF ITS MARKET STUDY INTO THE PRICING OF HOME AND MOTOR INSURANCE**

The UK Financial Conduct Authority (FCA) published the [final report](#) of its market study into the pricing of home and motor insurance on 22 September 2020. The FCA is concerned that these markets are not working well for consumers, and is suggesting significant reform. Alongside the report, the FCA has published a [consultation paper](#) for comments by 25 January 2021 which sets out how the remedies would work in more detail. The FCA has also issued a [policy statement](#) alongside the proposed remedies.

The FCA launched a market study in October 2018. The final findings build upon the FCA [interim report](#) published in October 2019.

The FCA has proposed a pricing remedy to combat 'price walking', a practice whereby firms gradually increase prices for customers who renew annually. The FCA has found that price walking is an issue which increases costs for consumers, often without their awareness of the practice, and distorts competition. The FCA has therefore proposed that when a

## Main article

## Other developments

## Antitrust

## General competition

customer renews their retail home or motor insurance policy they should pay no more than if they were new to their provider through the same sales channel. Therefore firms would not be able to increase prices for renewal customers without also increasing the prices they offer new customers. Furthermore, the FCA is consulting on other new measures to boost competition. These include: (i) making it simpler for customers to stop automatic renewal (a practice the FCA has identified as a barrier to switching) across all general insurance products, and (ii) firms being required to consider how they offer fair value to all insurance customers over the longer term.

Christopher Woolard, Interim Chief Executive of the FCA, commented that the package would “ensure that firms focus on providing fair value to all their customers”. The FCA estimates that its proposals will save consumers £3.7 billion over 10 years, and it will monitor the impact of these proposals on the market.

### COMPETITION COMMISSIONER VESTAGER DELIVERS SPEECH ON THE GREEN DEAL AND COMPETITION POLICY

On 22 September 2020 the Executive Vice-President of the European Commission and Commissioner for Competition, Margrethe Vestager, gave a [speech](#) about competition rules and sustainability. Vestager announced that the time has come to launch a European debate on how EU competition policy can best support the [Green Deal](#), which aims to make Europe the first climate-neutral continent by 2050. As part of the debate the Commission plans to consult with industry, environmental groups and consumer organisations, in advance of a conference on the subject early next year.

Vestager explained that competition rules already support sustainability by driving innovation and encouraging the development of new green technology. In a competitive market, industry is incentivised to use scarce resources efficiently, which includes less energy and raw materials consumption. She acknowledged that competition enforcement cannot lead the way on making Europe green, but it must work in conjunction with regulation and investment. She argued: “With the right incentives from competition and public policies, European businesses will be well-placed to become world-leading climate efficient businesses, able to thrive in tomorrow’s green economy”.

Focussing on the EU State aid rules, the Commissioner indicated that in order to be able to meet the Green Deal’s green investment requirements, the Commission will be launching a consultation on revising the 2014 Guidelines on State aid for energy and the environment. Furthermore, Vestager made some suggestions for the future by considering a “green bonus”, which would allow governments to use more State aid for projects that make a real contribution to green goals. She also made reference to the antitrust rules, and whether it could be made easier for companies to “go green” without breaking the competition rules. Vestager spoke of wanting to give clarity and comfort on the point of horizontal agreements between competitors in relation to sustainability agreements, saying: “I want to encourage businesses to get in touch with us, if they think they have a good candidate for that guidance”.

*Note that Slaughter and May plans to organise some discussion events on Sustainability and Competition law, to coincide with the Commission’s planned consultation. If you are interested in participating please get in touch with your usual Slaughter and May contact.*

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