Provisional text

JUDGMENT OF THE COURT (Grand Chamber)

22 September 2020 (*)

(Appeal – State aid – Article 107(3)(c) TFEU – Articles 11 and 194 TFEU – Article 1, Article 2(c) and Article 106a(3) of the Euratom Treaty – Planned aid for Hinkley Point C nuclear power station (United Kingdom) – Decision declaring the aid compatible with the internal market – Objective of common interest – Environmental objectives of the European Union – Principle of protection of the environment, 'polluter pays' principle, precautionary principle and principle of sustainability – Determination of the economic activity concerned – Market failure – Proportionality of the aid – Operating or investment aid – Determination of the aid elements – Guarantee Notice)

In Case C-594/18 P,

APPEAL under Article 56 of the Statute of the Court of Justice of the European Union, brought on 21 September 2018,

Republic of Austria, represented initially by G. Hesse, and subsequently by F. Koppensteiner and M. Klamert, acting as Agents, and by H. Kristoferitsch, Rechtsanwalt,

appellant,

the other parties to the proceedings being:

European Commission, represented by É. Gippini Fournier, T. Maxian Rusche, P. Němečková and K. Herrmann, acting as Agents,

defendant at first instance,

Czech Republic, represented by M. Smolek, J. Vláčil, T. Müller and I. Gavrilová, acting as Agents,

French Republic, represented initially by D. Colas and P. Dodeller, and subsequently by P. Dodeller and T. Stehelin, acting as Agents,

Grand Duchy of Luxembourg, represented initially by D. Holderer, and subsequently by T. Uri, acting as Agents, and by P. Kinsch, avocat,

Hungary, represented by M.Z. Fehér, acting as Agent, and P. Nagy, ügyvéd,

Republic of Poland, represented by B. Majczyna, acting as Agent,

Slovak Republic, represented by B. Ricziová, acting as Agent,

United Kingdom of Great Britain and Northern Ireland, represented by Z. Lavery and S. Brandon, acting as Agents, A. Robertson QC and T. Johnston, Barrister,

interveners at first instance,

THE COURT (Grand Chamber),

composed of K. Lenaerts, President, R. Silva de Lapuerta, Vice-President, A. Arabadjiev, A. Prechal, M. Vilaras, M. Safjan, S. Rodin, L.S. Rossi and I. Jarukaitis (Rapporteur), Presidents of Chambers, T. von Danwitz, C. Toader, D. Šváby, K. Jürimäe, C. Lycourgos and N. Piçarra, Judges,

Advocate General: G. Hogan,

Registrar: M. Krausenböck, Administrator,

having regard to the written procedure and further to the hearing on 28 January 2020,

after hearing the Opinion of the Advocate General at the sitting on 7 May 2020,

gives the following

Judgment

1 By its appeal, the Republic of Austria asks the Court to set aside the judgment of the General Court of the European Union of 12 July 2018, *Austria* v *Commission* (T-356/15, 'the judgment under appeal', EU:T:2018:439), by which the General Court dismissed its action for annulment of Commission Decision (EU) 2015/658 of 8 October 2014 on the aid measure SA.34947 (2013/C) (ex 2013/N) which the United Kingdom is planning to implement for support to the Hinkley Point C nuclear power station (OJ 2015 L 109, p. 44; 'the decision at issue'), in which the European Commission found that that aid measure was compatible with the internal market within the meaning of Article 107(3)(c) TFEU and authorised its implementation.

Background to the dispute

2 On 22 October 2013, the United Kingdom of Great Britain and Northern Ireland notified three aid measures ('the measures at issue'), for Hinkley Point C nuclear power station ('Hinkley Point C'). The beneficiary of the measures at issue is NNB Generation Company Limited ('NNBG'), a subsidiary of EDF Energy plc ('EDF').

3 The first of the measures at issue is a contract for difference, concluded between NNBG and Low Carbon Contracts Ltd – an entity that is to be funded through a statutory obligation on all licensed electricity suppliers collectively – and intended to ensure price stability for electricity sales by NNBG during the operational phase of Hinkley Point C. The second consists in an agreement between the United Kingdom's Secretary of State for Energy and Climate Change and NNBG's investors, which supplements the contract for difference and provides that if, following an early shutdown of Hinkley Point C nuclear power station on political grounds, Low Carbon Contracts defaults on compensatory payments to NNBG's investors, the Secretary of State in question will pay compensation to the investors. It also provides for gain-share mechanisms. The third is a credit guarantee by the United Kingdom on bonds to be issued by NNBG, guaranteeing the timely payment of principal and interest of qualifying debt.

4 On 18 December 2013, the European Commission decided to initiate a formal investigation procedure in respect of the measures at issue. That decision was published in the *Official Journal of the European Union* on 7 March 2014 (OJ 2014 C 69, p. 60).

5 On 8 October 2014, the Commission adopted the decision at issue, in which, in Section 7, it stated that the measures at issue constituted State aid within the meaning of Article 107(1) TFEU. In Sections 9 and 10, the Commission examined whether those measures could be declared compatible with the internal market pursuant to Article 107(3)(c) TFEU and concluded that they could. The first paragraph of Article 1 of the decision at issue is worded as follows:

‘Aid to Hinkley Point C in the form of a Contract for Difference, the Secretary of State Agreement and a Credit Guarantee, as well as all related elements, which the UK is planning to implement, is compatible with the internal market within the meaning of Article 107(3)(c) [TFEU].’

The procedure before the General Court and the judgment under appeal

6 By application lodged at the Registry of the General Court on 6 July 2015, the Republic of Austria brought an action for annulment of the decision at issue.

7 The Grand Duchy of Luxembourg was granted leave to intervene in the proceedings in support of the form of order sought by the Republic of Austria, whilst the Czech Republic, the French Republic, Hungary, the Republic of Poland, Romania, the Slovak Republic and the United Kingdom were granted leave to intervene in support of the form of order sought by the Commission.

8 Taking issue with the Commission for having declared that the measures at issue were compatible with the internal market within the meaning of Article 107(3)(c) TFEU, the Republic of Austria put forward 10 pleas in law in support of its action.

9 In the judgment under appeal, the General Court, having rejected those 10 pleas, dismissed the action.

Forms of order sought by the parties before the Court of Justice

10 By its appeal, the Republic of Austria claims that the Court should:

– set aside the judgment under appeal in its entirety,

– uphold the action for annulment of the decision at issue,

– order the Commission to pay the costs, and

– order all the interveners at first instance participating in the proceedings on appeal to bear their own costs.

11 The Grand Duchy of Luxembourg claims that the Court should:

– grant the appeal in full and set aside the judgment under appeal in its entirety,

– uphold in full the action for annulment brought against the decision at issue, and

– order the Commission to pay the costs.

12 The Commission contends that the Court should:

– dismiss the appeal, and

– order the Republic of Austria to pay the costs.

13 The Czech Republic, the French Republic, Hungary, the Republic of Poland, the Slovak Republic and the United Kingdom contend that the Court should dismiss the appeal.

The appeal

First ground of appeal

14 By its first ground of appeal, the Republic of Austria submits that, in the judgment under appeal, the General Court erred in law in that it failed to hold that the construction of a new nuclear power station does not constitute an objective of common interest.

First part of the first ground of appeal

– *Arguments of the parties*

15 The Republic of Austria, supported by the Grand Duchy of Luxembourg, criticises the General Court for having, in paragraph 79 et seq. of the judgment under appeal, rejected its arguments seeking to call into question the Commission's determination, in recital 374 of the decision at issue, that the promotion of nuclear energy constitutes an objective of common interest. In so ruling, the General Court wrongly proceeded on the basis that, in order to determine whether the promotion of nuclear energy constitutes an objective that may be pursued by the Member States by means of State aid, the issue is not whether that objective is consonant with the interest of all or a majority of the Member States, but whether a public interest and not just a private interest of the recipient of the aid is involved.

16 The General Court thereby departed from the Commission's practice and the prevailing case-law that relate to the application of Article 107(3)(c) TFEU, according to which all aid must, in principle, pursue an objective of common interest, or even an objective of common interest of the European Union, that is to say, an interest which corresponds to the common interest of all the Member States.

17 The Commission, the Czech Republic, the French Republic, Hungary, the Republic of Poland, the Slovak Republic and the United Kingdom contend that this part of the first ground of appeal is unfounded.

– *Findings of the Court*

18 Article 107(3)(c) TFEU states that aid to facilitate the development of certain economic activities or of certain economic areas may be considered to be compatible with the internal market where such aid does not adversely affect trading conditions to an extent contrary to the common interest.

19 Thus, in order to be capable of being considered compatible with the internal market under that provision, State aid must meet two conditions, the first being that it must be intended to facilitate the development of certain economic activities or of certain economic areas and the second, expressed in negative terms, being that it must not adversely affect trading conditions to an extent contrary to the common interest.

20 Unlike Article 107(3)(b) TFEU, which provides that aid to promote the execution of an important project of common European interest or to remedy a serious disturbance in the economy of a Member State may be declared compatible with the internal market, Article 107(3)(c) TFEU therefore does not make the compatibility of aid dependent on its pursuing an objective of common interest, without prejudice to the fact that decisions adopted by the Commission on that basis must ensure compliance with EU law.

21 Contrary to the Republic of Austria's contentions, in the judgments cited by it the Court of Justice placed no reliance on the existence of a condition requiring the aid to pursue an objective of common interest. In its judgments of 17 September 1980, *Philip Morris Holland* v *Commission* (730/79, EU:C:1980:209, paragraphs 24 to 26), of 24 February 1987, *Deufil* v *Commission* (310/85, EU:C:1987:96, paragraph 18), and of 19 September 2002, *Spain* v *Commission* (C-113/00, EU:C:2002:507, paragraph 67), while noting in essence that the Commission has a discretion the exercise of which involves complex economic and social assessments (see judgment of 8 March 2016, *Greece* v *Commission*, C-431/14 P, EU:C:2016:145, paragraph 68), which must be made in an EU context, the Court, as the Advocate General has observed in points 65 to 71 of his Opinion, did not hold that the Commission must establish whether the planned aid pursues an objective of common interest.

22 As to the Commission's practice, it should be pointed out that the Framework for State aid for research and development and innovation (OJ 2014 C 198, p. 1), the Guidelines on State aid for environmental

protection and energy 2014-2020 (OJ 2014 C 200, p. 1), the EU Guidelines for the application of State aid rules in relation to the rapid deployment of broadband networks (OJ 2013 C 25, p. 1) and the Guidelines on regional State aid for 2014-2020 (OJ 2013 C 209, p. 1), which are relied upon by the Republic of Austria, are not applicable to the measures at issue, as none of those instruments covers aid to support the activity of a nuclear power station.

23 In addition, the Republic of Austria refers to a Commission document entitled 'Common principles for an economic assessment of the compatibility of State aid under Article 87.3', which envisages a method of analysis whose first stage consists in examining whether the aid at issue is aimed at a well-defined objective of common interest.

24 However, even on the assumption that such a document may be seen as a framework or communication from which the Commission in principle cannot depart without being found, where appropriate, to be in breach of general principles of law such as equal treatment or the protection of legitimate expectations (see, to that effect, judgment of 8 March 2016, *Greece* v *Commission*, C-431/14 P, EU:C:2016:145, paragraph 69 and the case-law cited), the Commission cannot in any event, by those instruments, improperly reduce the scope of Article 107(3)(c) TFEU by providing for that provision to be applied in a manner that is incompatible with what has been stated in paragraph 20 of the present judgment (see, to that effect, judgment of 11 September 2008, *Germany and Others* v *Kronofrance*, C-75/05 P and C-80/05 P, EU:C:2008:482, paragraph 65).

25 Furthermore, in so far as the Republic of Austria complains that the General Court departed from the Commission's decision-making practice, it must be pointed out that it is in the light of Article 107(3)(c) TFEU – and not of the Commission's previous practice – that it must be assessed whether or not aid satisfies the conditions laid down by that provision for its application (judgment of 21 July 2011, *Freistaat Sachsen and Land Sachsen-Anhalt* v *Commission*, C-459/10 P, not published, EU:C:2011:515, paragraph 38).

26 Since Article 107(3)(c) TFEU does not require planned aid to pursue an objective of common interest in order to be declared compatible with the internal market, the first part of the first ground of appeal is unfounded.

Second part of the first ground of appeal

– *Arguments of the parties*

27 The Republic of Austria, supported by the Grand Duchy of Luxembourg, criticises the General Court for having held, in paragraph 97 of the judgment under appeal, that, 'in the light of the second paragraph of Article 1 and Article 2(c) of the Euratom Treaty, … the Commission did not err in finding that the United Kingdom was entitled to decide upon the promotion [of] nuclear energy and, more specifically, incentives for the creation of new nuclear energy generating capacity, as a public interest objective for the purposes of Article 107(3)(c) TFEU'.

28 It contends, in that regard, that the objective of promoting nuclear energy by supporting the construction of nuclear power stations does not result from the Euratom Treaty and is not shared by all the Member States. Neither Article 2(c) of the Euratom Treaty nor any other provision of that Treaty mentions State aid for investment in nuclear energy and for the construction of nuclear power stations. The General Court interpreted Article 2(c) of the Euratom Treaty selectively by overlooking the fact that that provision concerns not the creation of new nuclear energy generating capacity but the creation of 'basic installations' and the 'development of nuclear energy'. Accordingly, the promotion of nuclear energy in the sense of supporting the creation of new generating capacity is not a common interest or general interest of the European Union.

29 The Commission, the Czech Republic, the French Republic, Hungary, the Republic of Poland, the Slovak Republic and the United Kingdom submit that this part of the first ground of appeal is unfounded.

– *Findings of the Court*

30 As is clear from the examination of the first part of the first ground of appeal, Article 107(3)(c) TFEU does not make the compatibility of aid under that provision dependent on the planned aid having to pursue an objective of common interest. On that ground, the second part of the first ground of appeal is also unfounded.

31 Furthermore, neither can the second part of this ground of appeal succeed in so far as it is submitted that the Euratom Treaty does not permit the grant of State aid for the construction of nuclear power stations or for the creation of new nuclear energy generating capacity to be authorised pursuant to Article 107(3)(c) TFEU.

32 First, the Euratom Treaty and the FEU Treaty have the same legal value, as illustrated by Article 106a(3) of the Euratom Treaty, according to which the provisions of the EU Treaty and the FEU Treaty are not to derogate from the provisions of the Euratom Treaty. As the Advocate General has observed in points 37 and 38 of his Opinion, since the Euratom Treaty is a sectoral treaty directed at the development of nuclear energy, whereas the FEU Treaty has much more far-reaching aims and confers upon the European Union extensive competences in numerous areas and sectors, the rules of the FEU Treaty apply in the nuclear energy sector when the Euratom Treaty does not contain specific rules. Accordingly, since the Euratom Treaty does not contain rules concerning State aid, Article 107 TFEU may be applied in that sector, as the General Court correctly held in paragraph 73 of the judgment under appeal.

33 Second, the Euratom Treaty states, in its preamble, that it seeks to create the conditions necessary for the development of a powerful nuclear industry and provides, in the second paragraph of Article 1, that ‘it shall be the task of the Community to contribute to the raising of the standard of living in the Member States and to the development of relations with the other countries by creating the conditions necessary for the speedy establishment and growth of nuclear industries’. Article 2(c) of that Treaty provides that, in order to perform its task, the Community is to ‘facilitate investment and ensure, particularly by encouraging ventures on the part of undertakings, the establishment of the basic installations necessary for the development of nuclear energy in the Community’. Furthermore, Articles 40 and 41, read in conjunction with point 11 of Annex II to the Treaty, which relate to investment in the nuclear field, show that investment in new installations or the replacement of nuclear reactors of all types and for all purposes is envisaged by the Treaty. It follows that the objectives pursued by the Euratom Treaty cover the construction of nuclear power stations or the creation of new nuclear energy generating capacity, with the result that the grant of State aid for them is not contrary to those objectives.

Third part of the first ground of appeal

– *Arguments of the parties*

34 The Republic of Austria, supported by the Grand Duchy of Luxembourg, criticises the General Court for having, in paragraph 517 of the judgment under appeal, rejected its argument that the principle of protection of the environment, the precautionary principle, the ‘polluter pays’ principle and the principle of sustainability preclude the grant of State aid for the construction or operation of a nuclear power plant, on the ground that such an interpretation would be inconsistent with Article 106a(3) of the Euratom Treaty.

35 In so ruling, the General Court contradicted its own findings, set out in paragraph 72 of the judgment under appeal, which state that the provisions of the Euratom Treaty constitute special rules in relation to the provisions of the FEU Treaty, by denying the obligation to take account of the latter’s objectives without explaining which provision of the Euratom Treaty those objectives derogate from.

36 Since Article 107 TFEU is considered to apply to State aid such as the measures at issue, other provisions of the FEU Treaty laying down objectives, such as the objective of environmental protection envisaged in Articles 11 and 194 TFEU, must also be applicable and their requirements taken into account by the Commission. In so far as the Euratom Treaty does not provide a specific instrument in order to pursue the

objectives of protection of the environment and protection of health, the General Court should have taken account of those objectives and, in connection therewith, the precautionary principle, the 'polluter pays' principle and the principle of sustainability in order to determine whether the measures at issue pursue an objective of common interest, while having regard to Article 37 of the Charter of Fundamental Rights of the European Union ('the Charter') and to the Court's case-law stating that protection of health and of the environment are essential objectives.

37 In its reply, the Republic of Austria adds that the objective of developing nuclear energy, laid down in Article 2 of the Euratom Treaty, must be applied consistently with provisions of EU law, in particular those of the FEU Treaty. However, that article, as interpreted by the General Court, is at odds with the objectives of the FEU Treaty of promoting energy efficiency and the development of new and renewable energy sources, with protection of the environment and health, and with the 'polluter pays' principle, the precautionary principle and the principle of sustainability.

38 The Commission, the Czech Republic, the French Republic, Hungary, the Republic of Poland, the Slovak Republic and the United Kingdom contend that this part of the first ground of appeal is unfounded.

– *Findings of the Court*

39 Since, as is clear from the examination of the first part of the first ground of appeal, Article 107(3)(c) TFEU does not make the compatibility of aid under that provision dependent on the planned aid having to pursue an objective of common interest, the third part of this ground of appeal is also unfounded in so far as the Republic of Austria, supported by the Grand Duchy of Luxembourg, thereby complains that the General Court infringed that provision by failing to take account of the principle of protection of the environment, the precautionary principle, the 'polluter pays' principle and the principle of sustainability in order to determine whether the measures at issue pursue an objective of common interest.

40 Furthermore, in so far as, by this part of the first ground of appeal, the Republic of Austria contends, in essence, that the General Court erred in law by rejecting, on the basis of Article 106a(3) of the Euratom Treaty, its argument that the principle of protection of the environment, the precautionary principle, the 'polluter pays' principle and the principle of sustainability preclude the grant of State aid for the construction or operation of a nuclear power plant, it should be pointed out that such principles are not laid down in that Treaty. In relation to environmental protection, the Euratom Treaty, in Chapter 3, entitled 'Health and safety', contains only provisions relating, inter alia, to basic standards for the protection of the health of workers and the general public against the dangers arising from ionising radiations, to continuous monitoring of the level of radioactivity in the air, water and soil and to ensuring compliance with the basic standards. In particular, the first paragraph of Article 37 of the Treaty provides that 'each Member State shall provide the Commission with such general data relating to any plan for the disposal of radioactive waste in whatever form will make it possible to determine whether the implementation of such plan is liable to result in the radioactive contamination of the water, soil or airspace of another Member State'.

41 It is, however, clear that those provisions do not deal exhaustively with the environmental issues that concern the nuclear energy sector. Therefore, the Euratom Treaty does not preclude the application in that sector of the rules of EU law on the environment.

42 In particular, as the Republic of Austria, supported by the Grand Duchy of Luxembourg, in essence submits, Article 106a(3) of the Euratom Treaty cannot oust the application of, inter alia, Article 37 of the Charter, which states that 'a high level of environmental protection and the improvement of the quality of the environment must be integrated into the policies of the Union and ensured in accordance with the principle of sustainable development', Article 11 TFEU, according to which environmental protection requirements must be integrated into the definition and implementation of the Union's policies and activities, in particular with a view to promoting sustainable development, and Article 194(1) TFEU, according to which Union policy on energy must have regard for the need to preserve and improve the environment. Accordingly, the requirement to preserve and improve the environment, expressed in both the Charter and the FEU Treaty, as well as the principles relied on by the Republic of Austria, which flow

from it, are applicable in the nuclear energy sector (see, by analogy, judgment of 27 October 2009, *ČEZ*, C-115/08, EU:C:2009:660, paragraphs 87 to 91).

43 The same is true of provisions of secondary EU law on the environment. Thus, Directive 2011/92/EU of the European Parliament and of the Council of 13 December 2011 on the assessment of the effects of certain public and private projects on the environment (OJ 2012 L 26, p. 1), under which certain projects are subject to an environmental impact assessment, applies to nuclear power stations and other nuclear reactors (see, to that effect, judgment of 29 July 2019, *Inter-Environnement Wallonie and Bond Beter Leefmilieu Vlaanderen*, C-411/17, EU:C:2019:622, paragraph 76).

44 Furthermore, the Court has already held that State aid which contravenes provisions or general principles of EU law cannot be declared compatible with the internal market (see, to that effect, judgment of 15 April 2008, *Nuova Agricast*, C-390/06, EU:C:2008:224, paragraphs 50 and 51).

45 It follows that, since Article 107(3)(c) TFEU applies to State aid in the nuclear energy sector covered by the Euratom Treaty, State aid for an economic activity falling within that sector that is shown upon examination to contravene rules of EU law on the environment cannot be declared compatible with the internal market pursuant to that provision.

46 The General Court therefore wrongly rejected, in paragraph 517 of the judgment under appeal, the Republic of Austria's argument that the principle of protection of the environment, the precautionary principle, the 'polluter pays' principle and the principle of sustainability preclude the grant of State aid for the construction or operation of a nuclear power plant on the ground that such an interpretation would be contrary to Article 106a(3) of the Euratom Treaty.

47 It should, however, be recalled that, if the grounds of a judgment of the General Court disclose an infringement of EU law but its operative part is shown to be well founded on other legal grounds, the appeal must be dismissed (see, to that effect, judgments of 9 June 1992, *Lestelle* v *Commission*, C-30/91 P, EU:C:1992:252, paragraph 28; of 26 March 2009, *SELEX Sistemi Integrati* v *Commission*, C-113/07 P, EU:C:2009:191, paragraph 81; and of 18 July 2013, *Commission and Others* v *Kadi*, C-584/10 P, C-593/10 P and C-595/10 P, EU:C:2013:518, paragraph 150).

48 First, Article 194(1)(a) and (b) TFEU provides that, in the context of the establishment and functioning of the internal market, Union policy on energy aims to ensure the functioning of the energy market and security of energy supply in the Union. The Court has already observed that Article 194(1)(b) TFEU identifies security of energy supply in the European Union as one of the fundamental objectives of EU policy in the field of energy (see judgment of 29 July 2019, *Inter-Environnement Wallonie and Bond Beter Leefmilieu Vlaanderen*, C-411/17, EU:C:2019:622, paragraph 156). Second, the second subparagraph of Article 194(2) TFEU provides that the 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 different energy sources and the general structure of its energy supply, and does not preclude that choice from being nuclear energy.

49 Thus, since the choice of nuclear energy is, under those provisions of the FEU Treaty, a matter for the Member States, it is apparent that the objectives and principles of EU environmental law and the objectives pursued by the Euratom Treaty, recalled in paragraph 33 of the present judgment, do not conflict, so that, contrary to the Republic of Austria's contentions, the principle of protection of the environment, the precautionary principle, the 'polluter pays' principle and the principle of sustainability cannot be regarded as precluding, in all circumstances, the grant of State aid for the construction or operation of a nuclear power plant.

50 It follows that the error of law committed by the General Court, identified in paragraph 46 of the present judgment, has no effect on the soundness of its rejection of the Republic of Austria's argument referred to in paragraph 40 of the present judgment and, therefore, on the operative part of the judgment under appeal, with the result that the third part of the first ground of appeal is ineffective in that regard.

51 Consequently, the first ground of appeal must be rejected.

Second ground of appeal

52 By its second ground of appeal, the Republic of Austria submits that the measures at issue were wrongly held to be compatible with the internal market pursuant to Article 107(3)(c) TFEU. The General Court defined the relevant economic activity for the purposes of that provision incorrectly in the judgment under appeal and it failed to verify whether there was a market failure.

Arguments of the parties

53 In the first part of this ground of appeal, the Republic of Austria, supported by the Grand Duchy of Luxembourg, complains that the General Court considered that the examination of the compatibility of aid relates to the public interest pursued rather than to the supported economic activity and that it thus stated, in paragraph 105 of the judgment under appeal, that the Commission had found that the purpose of the construction of Hinkley Point C was to develop an economic activity within the meaning of Article 107(3)(c) TFEU although, in the decision at issue, the Commission did not define the activity promoted by the measures at issue and therefore infringed that provision. Furthermore, the General Court did not set out its appraisal as to what that activity is, so that the judgment under appeal is vitiated by a failure to state reasons in that regard.

54 By the second part of the second ground of appeal, the Republic of Austria, supported by the Grand Duchy of Luxembourg, criticises the General Court for having held, in paragraphs 139 and 144 of the judgment under appeal, that the economic activity concerned, for the purposes of Article 107(3)(c) TFEU, was the promotion of nuclear energy and to have thus limited the examination of the compatibility of aid.

55 The economic activity that should have been taken into consideration in order to assess the compatibility of the measures at issue is, in its submission, the production of electricity, given that the term ‘economic activity’ relates to a group of undertakings manufacturing interchangeable products, that Commission Regulation (EU) 2015/2282 of 27 November 2015 amending Regulation (EC) No 794/2004 as regards the notification forms and information sheets (OJ 2015 L 325, p. 1) refers, by means of reference to the NACE code, to that sector of activity and not to nuclear power stations, that derogations concerning State aid are to be interpreted narrowly, that the Commission Guidelines on State aid for environmental protection and energy 2014-2020 provide that aid for renewable energy must contribute to the development of the electricity production sector, and that the Commission generally makes its assessment on the basis of the electricity market. If the General Court had assessed the measures at issue in the light of their contribution to the development of the electricity production sector, it would have come to a different conclusion, in particular as regards whether the aid had to be regarded as permissible and proportionate.

56 In the third part of the second ground of appeal, the Republic of Austria, supported by the Grand Duchy of Luxembourg, submits that the General Court wrongly held, in paragraphs 151 and 240 of the judgment under appeal, that the existence of a market failure is not an essential condition for the compatibility of aid and that, in the present instance, without the United Kingdom’s intervention, investment in new nuclear energy generating capacity would not have been delivered within a reasonable time.

57 The Commission and the Slovak Republic contend that the first part of the ground of appeal is inadmissible. In the Commission’s submission, this part does not satisfy the requirements that the appeal must indicate precisely the points of the judgment under appeal that are contested and must set out in summary form, but intelligibly, the grounds relied on. Furthermore, certain arguments seek to contest the decision at issue and not the judgment under appeal. In the Slovak Republic’s submission, the first part of the ground of appeal either identifies defects in the decision at issue that could not be raised by the General Court of its own motion or, depending on how it is understood, merely repeats an argument put forward at first instance.

58 As regards the substance, the Commission, the Czech Republic, the French Republic, Hungary, the Republic of Poland, the Slovak Republic and the United Kingdom submit that the second ground of appeal is unfounded.

Findings of the Court

59 So far as concerns the admissibility of the first part of the second ground of appeal, it should be pointed out, first of all, that it refers to paragraph 105 of the judgment under appeal. The requirements of Article 169(2) of the Rules of Procedure of the Court of Justice are therefore satisfied. Next, although the Republic of Austria complains, in support of this part of the ground of appeal, that the Commission did not specify what the economic activity promoted by the measures at issue was, this part, as a whole, seeks a finding from the Court that the General Court did not establish this omission which, in its submission, constitutes a defect vitiating the decision at issue. Finally, by this part, the Republic of Austria does not in fact put forward a new argument, as is clear in particular from paragraph 139 of the judgment under appeal, but seeks to criticise, in law, the merits of the answer given by the General Court to its argument, which an appellant is entitled to do before the Court of Justice (see, to that effect, judgment of 6 September 2018, *Czech Republic* v *Commission*, C-4/17 P, EU:C:2018:678, paragraph 24 and the case-law cited). It follows that the pleas of inadmissibility put forward by the Commission and the Slovak Republic must be rejected.

60 As to the substance, so far as concerns, in the first place, the first two parts of the second ground of appeal, it is clear from Article 107(3)(c) TFEU that, in order to be declared compatible with the internal market under that provision, aid must be such as to facilitate the development of certain economic activities or of certain economic areas. When it is to be determined whether certain aid is such as to facilitate the development of an economic activity, that provision does not require the product market within which the economic activity falls to be identified, as identification of that market is relevant only for examining whether the planned aid does not adversely affect trading conditions to an extent contrary to the common interest, which is the second condition upon which the provision makes the compatibility of aid dependent.

61 Here, in paragraph 105 of the judgment under appeal the General Court held that the Commission did not err in finding that the purpose of the construction of Hinkley Point C was to develop an activity within the meaning of Article 107(3)(c) TFEU, while noting, in particular, that it was apparent from the decision at issue that its construction was intended to replace ageing nuclear energy generating capacity that was scheduled for closure, and that the technology to be used in that reactor was more advanced than that used in existing power stations.

62 In paragraphs 139 and 144 of the judgment under appeal, the General Court rejected the Republic of Austria’s arguments that, first, the Commission had failed to specify which economic activity within the meaning of Article 107(3)(c) TFEU was to be promoted by the measures at issue and, second, that provision and Article 2(c) of the Euratom Treaty required the development of activities and not merely a replacement measure. In so doing, it found that recital 392 of the decision at issue made it clear that the activity promoted by the measures at issue was the promotion of nuclear energy, that that objective and, more specifically, the objective of incentivising undertakings to invest in new nuclear energy generating capacity satisfied the requirements of those provisions, and that it could not be concluded from the fact that that new capacity was supposed to replace ageing nuclear energy generating capacity that there was no development within the meaning of those provisions.

63 Even though the General Court referred to the objective of the measures at issue, it is clear from those grounds of the judgment under appeal that it held that the Commission had found, without making an error, that those measures were such as to develop the generation of nuclear energy, which does indeed constitute an economic activity within the meaning of Article 107(3)(c) TFEU.

64 Furthermore, it should be pointed out that in paragraph 231 of the judgment under appeal, which the appeal does not mention, the General Court noted that the Commission had identified the liberalised

market for the generation and supply of electrical power as being the market affected by the measures at issue and had found that those measures could distort competition and affect trade. It follows that the General Court examined whether the Commission had duly identified the market concerned in order to determine whether the second condition laid down in Article 107(3)(c) TFEU was met.

65 In so ruling, the General Court did not therefore err in law and did not fail to comply with the obligation to state reasons.

66 So far as concerns, in the second place, the third part of the second ground of appeal, even though the Commission may consider it necessary in the context of Article 107(3)(c) TFEU to examine whether the planned aid enables a market failure to be remedied when determining whether that aid is compatible with the internal market, the existence of such a failure nevertheless does not constitute a condition for declaring aid to be compatible with the internal market under that provision.

67 The General Court accordingly did not err in law when, in paragraph 151 of the judgment under appeal, it held that, while the existence of a market failure may be a relevant factor for declaring State aid compatible with the internal market, the absence of such a failure does not necessarily mean that the conditions laid down in Article 107(3)(c) TFEU are not satisfied.

68 Likewise, the General Court did not err in law when, in order to reject the arguments of the Republic of Austria and the Grand Duchy of Luxembourg that the Commission was not entitled to find that there was a market failure, it observed in paragraph 240 of the judgment under appeal that Article 107(3)(c) TFEU does not contain a condition requiring such a failure. Furthermore, the General Court's assessment that the considerations set out in the decision at issue supported the conclusion that, without the United Kingdom's intervention, investment in new nuclear energy generating capacity would not have been delivered within a reasonable time is an assessment of a factual nature, which the Court cannot examine in an appeal if there is no claim of distortion (see, to that effect, judgment of 4 February 2020, *Uniwersytet Wrocławski and Poland* v *REA*, C-515/17 P and C-561/17 P, EU:C:2020:73, paragraph 47).

69 Since none of its parts is well founded, the second ground of appeal must be rejected.

Third ground of appeal

70 By its third ground of appeal, the Republic of Austria submits that the General Court erred in law in the judgment under appeal by upholding the examination of the proportionality of the measures at issue that was carried out inadequately by the Commission.

First part of the third ground of appeal

– *Arguments of the parties*

71 The Republic of Austria, supported by the Grand Duchy of Luxembourg, complains that the General Court limited the examination of the proportionality of the measures at issue by reducing the public interest objective pursued by them to solely the objective of creating new nuclear energy generating capacity, whereas the Commission should have examined whether and to what extent there were other more proportionate means of covering electricity needs in the United Kingdom.

72 Thus, in noting, in paragraphs 405, 413 and 507 of the judgment under appeal, that the construction of Hinkley Point C was intended only to limit the decline in the contribution of nuclear energy to electricity needs and to guarantee a greater supply, the General Court assumed that a greater supply could be guaranteed only by high baseload nuclear power generation, although the situation of countries which guarantee their electricity supply without recourse to nuclear energy proves that sufficient generation can be achieved by other means.

73 That approach is arbitrary and infringes the principle of equal treatment guaranteed in Article 20 of the Charter, as the proportionality of aid for the production of electricity from renewable sources is examined by the Commission within the framework not of the renewable energy market but the overall electricity market.

74 The Commission and the Slovak Republic contend that this part of the third ground of appeal is inadmissible inasmuch as it seeks to challenge findings of fact.

75 As regards the substance, the Commission, the Czech Republic, the French Republic, Hungary, the Slovak Republic and the United Kingdom submit that this part of the ground of appeal is unfounded.

– *Findings of the Court*

76 So far as concerns the Republic of Austria's arguments relating to the statements in the judgment under appeal that, in essence, the construction of Hinkley Point C is intended only – for the purpose of ensuring the security of electricity supply – to limit the decline in the contribution of nuclear energy to total electricity needs, which cannot be offset by renewable energy generation, it must be held that those arguments are intended to challenge factual assessments made by the General Court and, consequently, are inadmissible in an appeal, in accordance with the case-law recalled in paragraph 68 of the present judgment.

77 As regards the substance, in paragraph 405 of the judgment under appeal the General Court noted, as regards the positive effects of the measures at issue identified by the Commission, that those measures were part of a set of energy policy measures taken by the United Kingdom in the context of the reform of the electricity market, designed to ensure security of supply, diversification of sources and decarbonisation, that the United Kingdom would need new energy generating capacity capable of supplying approximately 60 gigawatts, that, in the light of the scheduled closure of existing nuclear power stations and coal-fired power stations, the construction of Hinkley Point C was intended to limit the decline in the contribution of nuclear energy to total electricity needs and that, according to the Commission, it would not be possible to address the future gap in energy generating capacity caused, on the one hand, by the increase in demand and, on the other, by the closure of existing nuclear power stations and coal-fired power stations by relying solely on renewable energy sources.

78 In paragraph 413 of the judgment under appeal, the General Court also noted that the Commission had found that the intermittent nature of many renewables technologies did not allow them to be a suitable alternative to a baseload technology such as nuclear energy, that the equivalent of the power to be supplied by Hinkley Point C corresponded to 14 gigawatts of onshore wind or 11 gigawatts of offshore wind capacity and that it was unrealistic to expect such wind energy generation capacity to be built within the same time frame as that envisaged for the construction of Hinkley Point C.

79 In paragraph 507 of the judgment under appeal, the General Court observed that, according to the information provided by the Commission, the project to build Hinkley Point C was intended solely to prevent a drastic fall in the contribution of nuclear energy to overall electricity needs and that, in the light of the United Kingdom's right to determine its own energy mix and to maintain nuclear energy as a source in that mix, which follows from the second subparagraph of Article 194(2) TFEU, and from the second paragraph of Article 1, Article 2(c) and the first paragraph of Article 192 of the Euratom Treaty, the decision to maintain nuclear energy in the supply structure could not be considered to be manifestly disproportionate having regard to the positive effects of the measures at issue.

80 It is apparent from those findings and considerations that, contrary to the Republic of Austria's contentions, the General Court examined the proportionality of the measures at issue not in the light solely of the objective of creating new nuclear energy generating capacity but in the light of the United Kingdom's electricity supply needs, whilst rightly pointing out that the United Kingdom is free to determine the composition of its own energy mix.

81 It follows that the first part of the third ground of appeal is partly inadmissible and partly unfounded.

Second part of the third ground of appeal

– *Arguments of the parties*

82 The Republic of Austria, supported by the Grand Duchy of Luxembourg, criticises the General Court for having, in paragraph 468 et seq. of the judgment under appeal, disregarded the effect of the decision at issue as a precedent, by assessing, as the Commission had done, the effects of the measures at issue in isolation and limiting the examination of proportionality solely to distortions of competition and adverse effects on trade, caused by those measures viewed in isolation, that were actually demonstrable.

83 The Commission, the Czech Republic, the French Republic, Hungary, the Slovak Republic and the United Kingdom submit that this part of the ground of appeal is unfounded.

– *Findings of the Court*

84 In accordance with Article 108(3) TFEU, the procedure for examining a plan to grant or alter aid, initiated by the Commission under that provision, relates to the plan of which it has been notified. For the purpose of applying Article 107(3)(c) TFEU, it is incumbent upon the Commission to examine whether the second condition upon which the compatibility of aid is dependent under that provision is fulfilled by seeking to ascertain whether the planned aid does not adversely affect trading conditions to an extent contrary to the common interest.

85 It follows that the examination to be conducted by the Commission relates only to the effects of the planned aid, in the light of the information available to it at the time when it adopted its decision (see, to that effect, judgment of 20 September 2017, *Commission* v *Frucona Košice*, C-300/16 P, EU:C:2017:706, paragraph 70), and cannot be based on speculation as to the precedent effect of the decision that it is called upon to adopt or on other considerations relating to the cumulative impact of that aid and other aid plans that may arise in the future.

86 Therefore, the General Court did not err in law by limiting the examination of the proportionality of the measures at issue solely to distortions of competition and adverse effects on trade caused by those measures.

87 It follows that the second part of the third ground of appeal is unfounded.

Third part of the third ground of appeal

– *Arguments of the parties*

88 The Republic of Austria, supported by the Grand Duchy of Luxembourg, criticises the General Court for having, in paragraphs 470 and 499 of the judgment under appeal, rejected its complaint that the measures at issue result in disproportionate discrimination against other technologies, the General Court observing that, in recital 403 of the decision at issue, the Commission had indicated that the contract for difference did not discriminate excessively against other technologies as they could be supported satisfactorily with the same type of instrument being used, except for adaptations necessary to take account of the differences in technologies. Maintaining that complaint, it contends that the unequal treatment under State aid law of producers of the same product, who are competitors on the same market, results in structural and disproportionate distortions of competition.

89 The Slovak Republic contends that this part of the third ground of appeal is inadmissible on the ground that it repeats a plea put forward before the General Court, that it is too general and imprecise, failing to set out in what way an error of law is said to have been committed, and that it seeks a fresh examination of the facts.

90 The Commission, the Czech Republic, the French Republic, Hungary and the United Kingdom submit that this part of the ground of appeal is unfounded.

– *Findings of the Court*

91 According to settled case-law, it follows from Article 256 TFEU, the first paragraph of Article 58 of the Statute of the Court of Justice of the European Union and Article 169(2) of the Rules of Procedure that an appeal must indicate precisely the contested elements of the judgment which the appellant seeks to have set aside and also the legal arguments specifically advanced in support of the appeal. Where an appeal merely reproduces the pleas in law and arguments previously submitted to the General Court, without even including an argument specifically identifying the error of law allegedly vitiating the judgment under appeal, it fails to satisfy that requirement. Such an appeal amounts in reality to no more than a request for re-examination of the application submitted to the General Court, which the Court of Justice does not have jurisdiction to undertake (judgment of 26 January 2017, *Villeroy & Boch* v *Commission*, C-625/13 P, EU:C:2017:52, paragraph 69 and the case-law cited).

92 The Republic of Austria, repeating the complaint advanced before the General Court, does not set out the reasons why the General Court is said to have erred in law in paragraphs 470 and 499 of the judgment under appeal.

93 Therefore, the third part of the third ground of appeal is inadmissible.

Fourth part of the third ground of appeal

– *Arguments of the parties*

94 The Republic of Austria, supported by the Grand Duchy of Luxembourg, complains that in paragraph 515 et seq. of the judgment under appeal the General Court failed to carry out an examination of the proportionality of the measures at issue by not weighing their positive effects against their negative effects, in particular their negative impacts on the environment which the Commission was required to take into consideration. The fact that the balancing exercise carried out by the General Court was inadequate is apparent, inter alia, from the fact that no account was taken of the costs of treatment and storage of nuclear waste, which are a necessary consequence of the commissioning of the nuclear power station and, if the operator is released from paying them, form part of the aid at issue. It is accordingly not possible to understand the reasons why, in paragraph 355 of the judgment under appeal, expenditure related to the management of the waste was not regarded as covered by the decision at issue, or the reasoning in paragraph 359 thereof stating that the Republic of Austria did not bring an action against a Commission decision relating to the transfer of the nuclear waste.

95 The Commission, the Czech Republic, the French Republic, Hungary, the Slovak Republic and the United Kingdom submit that this part of the ground of appeal is unfounded.

– *Findings of the Court*

96 In paragraphs 505 to 530 of the judgment under appeal, the General Court examined and rejected all the arguments put forward by the Republic of Austria challenging the Commission’s weighing up in the decision at issue of the positive and negative effects of the measures at issue. The Republic of Austria’s argument that the General Court failed to carry out an examination of the proportionality of those measures by not weighing their positive effects against their negative effects is therefore unfounded.

97 As regards the argument put forward before the General Court that the Commission did not sufficiently take into account the principle of protection of the environment, the precautionary principle, the ‘polluter pays’ principle and the principle of sustainability, the General Court stated, in paragraphs 515 to 517 of the judgment under appeal, that, since the measures at issue were not specifically intended to give effect to

those principles, the Commission was not obliged to take them into account when identifying the advantages that flow from those measures.

98 It noted that, in the context of the application of Article 107(3)(c) TFEU, the Commission must weigh up the advantages of the measures at issue and their negative impact on the internal market. It held, however, that, although protection of the environment must be integrated into the definition and implementation of EU policies, particularly those which have the aim of establishing the internal market, it does not constitute, per se, one of the components of that internal market, defined as an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured.

99 Consequently, it held that, when identifying the negative effects of the measures at issue, the Commission did not have to take into account the extent to which those measures were detrimental to the implementation of the principle of protection of the environment, and this applied equally to the precautionary principle, the 'polluter pays' principle and the principle of sustainability relied on by the Republic of Austria.

100 In that regard, it should be recalled that, as is apparent from the examination of the third part of the first ground of appeal, the requirement to preserve and improve the environment, expressed inter alia in Article 37 of the Charter and in Articles 11 and 194(1) TFEU, and the rules of EU law on the environment are applicable in the nuclear energy sector. It follows that, when the Commission checks whether State aid for an economic activity falling within that sector meets the first condition laid down in Article 107(3)(c) TFEU, noted in paragraph 19 of the present judgment, it must, as has been stated in paragraphs 44 and 45 hereof, check that that activity does not infringe rules of EU law on the environment. If it finds an infringement of those rules, it is obliged to declare the aid incompatible with the internal market without any other form of examination.

101 As regards, however, the question whether such State aid meets the second condition laid down in Article 107(3)(c) TFEU, also noted in paragraph 19 of the present judgment, under which that aid must not adversely affect trading conditions to an extent contrary to the common interest, this condition, as the General Court correctly held, entails weighing up the positive effects of the planned aid for the development of the activities that that aid is intended to support and the negative effects that the aid may have on the internal market. Article 26(2) TFEU states that that market 'shall comprise an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured in accordance with the provisions of the Treaties'. Therefore, examination of the second condition laid down in Article 107(3)(c) TFEU entails the Commission taking into account the negative effects of the State aid on competition and trade between Member States, but does not require any negative effects other than those to be taken into account.

102 Accordingly, the General Court did not err in law in holding that, when identifying the negative effects of the measures at issue, the Commission did not have to take into account the extent to which those measures are detrimental to the implementation of the principle of protection of the environment, the precautionary principle, the 'polluter pays' principle and the principle of sustainability relied on by the Republic of Austria.

103 Nor did the General Court err in law in rejecting, in paragraph 520 of the judgment under appeal, the argument that the Commission failed to take the costs of storing nuclear waste into consideration by referring to the finding in paragraph 355 thereof that the aid measures declared compatible in the decision at issue relate only to the construction and operation of a nuclear power station and not to any State aid intended to cover expenditure related to the management and storage of that waste. Since, as the General Court noted in paragraph 359 of the judgment under appeal, the United Kingdom did not grant such State aid until after the decision at issue was adopted, it was correctly held in that paragraph that the grant of that aid could not be taken into account when examining the legality of the decision at issue.

104 It follows that the fourth part of the third ground of appeal is unfounded. Consequently, the third ground of appeal must be rejected.

Fourth ground of appeal

105 By its fourth ground of appeal, the Republic of Austria submits that the General Court erred in law by disregarding the fact that the measures at issue constitute operating aid and are therefore incompatible with the internal market.

Arguments of the parties

106 The Republic of Austria, supported by the Grand Duchy of Luxembourg, refers to paragraphs 612 and 613 of the judgment under appeal and criticises the General Court for having accepted that operating aid such as that envisaged for Hinkley Point C could be declared compatible with the internal market, holding that the distinction between investment aid and operating aid was irrelevant. Operating aid is authorised on a liberalised product market only quite exceptionally, for a limited period; it does not contribute to the development of an activity, within the meaning of Article 107(3)(c) TFEU, and it distorts trading conditions in the economic sector in which it is granted to an extent contrary to the common interest.

107 Moreover, the General Court erred in law in taking the view that the Commission is not required to make such a distinction outwith the scope of the Community guidelines on State aid for environmental protection (OJ 1994 C 72, p. 3), as this view is contrary to the principle of equal treatment.

108 The Commission, the Czech Republic, the French Republic, Hungary, the Republic of Poland, the Slovak Republic and the United Kingdom submit that this ground of appeal is unfounded.

Findings of the Court

109 The Republic of Austria refers in this ground of appeal only to paragraphs 612 and 613 of the judgment under appeal, in which the General Court held that it was clear from the judgment of 26 September 2002, *Spain* v *Commission* (C-351/98, EU:C:2002:530, paragraphs 76 and 77), that the Community guidelines on State aid for environmental protection, which were applicable in the case that gave rise to that judgment, explicitly distinguished between investment aid and operating aid and that the Commission, which was bound by those guidelines, was required to classify the aid at issue on the basis of the categories laid down by them, but that it did not follow from that judgment that the Commission is required to refer to those categories outwith the scope of the Community guidelines on State aid for environmental protection.

110 However, those paragraphs of the judgment under appeal cannot be read independently of paragraphs 575 to 609 thereof that precede them, since those paragraphs as a whole contain the grounds on which the General Court rejected the Republic of Austria's plea to the effect that the Commission should have characterised the measures at issue as 'operating aid incompatible with the internal market'.

111 As stated in paragraph 575 of the judgment under appeal, that plea concerned the recitals of the decision at issue in which the Commission stated that measures involving operating aid were, in principle, incompatible with Article 107(3)(c) TFEU, but that the measures at issue had to be regarded as being equivalent to investment aid, since they allowed NNBG to commit to investing in the construction of Hinkley Point C. The Commission found in particular in that regard that, 'from a financial modelling point of view, the net present value of the strike price payments could be thought of as the equivalent of a lump sum payment which allowed NNBG to cover construction costs'.

112 In those grounds, the General Court first of all pointed out, in paragraphs 579 and 580 of the judgment under appeal, that, according to settled case-law, aid intended to maintain the status quo or to release an undertaking from costs which it would normally have had to bear in its day-to-day management or normal activities cannot be considered compatible with the internal market, because it does not facilitate the development of an economic activity, within the meaning of Article 107(3)(c) TFEU.

113 Next, in paragraphs 581 to 583 of the judgment under appeal, the General Court noted that the Commission had not called that case-law into question, but had found that it did not apply to the measures at issue because of the specific features of the project and the fact that those measures were intended to allow NNBG to commit to investing in the construction of Hinkley Point C. The General Court held that that approach was not incorrect, as there is nothing to preclude an aid measure which satisfies the requirements of Article 107(3)(c) TFEU from being declared compatible with the internal market under that provision, irrespective of whether it has to be characterised as 'investment aid' or 'operating aid'.

114 Finally, in paragraphs 584 and 585 of the judgment under appeal, the General Court held in particular that the measures at issue cannot be regarded as aid that is limited to maintaining the status quo or as aid that does no more than lower the usual ongoing operating expenditure which an undertaking would have had to bear in any event in the course of its normal business, while observing that, without them, no investment in new nuclear energy generating capacity would be made within a reasonable time and that they have an incentive effect, by reducing the risks associated with investment with a view to ensuring that the latter would be profitable.

115 In particular, the General Court rejected the Republic of Austria's arguments relating to the contract for difference, stating inter alia, in paragraph 589 of the judgment under appeal, that it is a risk-hedging instrument in the form of a price stabiliser, offering revenue stability and certainty, and thus has an incentive effect for investments, guaranteeing as it does a specific and stable price.

116 In paragraph 593 of the judgment under appeal, it noted that the strike price authorised by the Commission took account of both the price of building Hinkley Point C and its operating costs, as 'those costs influence the profitability of the project and therefore have an impact on the amount which the strike price must attain in order to trigger the decision to invest in new nuclear energy generating capacity'.

117 It also held, in paragraph 594 of the judgment under appeal, that the fact that, after 15 and 25 years, the strike price may be reopened and that account is then taken of matters relating to the operating costs does not call into question the link between the measures at issue and the creation of new nuclear energy generating capacity, given that, in view of the fact that the operating costs on the basis of which the strike price was calculated must be estimated *ex ante* and that the operational life of Hinkley Point C will be very long, the possibility of such reopening is intended to mitigate the risks in relation to the long-term costs for both parties, with a view to increasing or reducing the strike price guaranteed by the contract for difference.

118 In rejecting on those grounds in particular the plea put forward before it to the effect that the Commission should have characterised the measures at issue as operating aid incompatible with the internal market, the General Court did not err in law.

119 First, the General Court correctly pointed out that operating aid cannot, in principle, satisfy the conditions for application of Article 107(3)(c) TFEU as such aid, given that it does no more than maintain an existing situation or lower the usual ongoing operating expenditure which an undertaking would have had to bear in any event in the course of its normal business, cannot be regarded as being intended to facilitate the development of an economic activity and is such as to affect trading conditions adversely to an extent contrary to the common interest (see, to that effect, judgments of 6 November 1990, *Italy* v *Commission*, C-86/89, EU:C:1990:373, paragraph 18; of 5 October 2000, *Germany* v *Commission,* C-288/96, EU:C:2000:537, paragraphs 88 to 91; and of 21 July 2011, *Freistaat Sachsen and Land Sachsen-Anhalt* v *Commission,* C-459/10 P, not published, EU:C:2011:515, paragraphs 33 to 36).

120 Second, in holding, in essence, that the Commission did not err in finding that the measures at issue enabled NNBG to embark on the construction of Hinkley Point C and that, without them, new nuclear energy generating capacity could not be created, the General Court duly checked that all those measures were such as to facilitate the development of an economic activity and did not adversely affect trading conditions to an extent contrary to the common interest.

121 Third, the General Court was not required, in order to carry out that check, formally to characterise the measures at issue as ‘investment aid’ or ‘operating aid’ as it would have been in order to assess the Commission’s examination of the compatibility of aid to which the Community guidelines on State aid for environmental protection were applicable. Besides, it is clear from the grounds of the judgment under appeal that the Commission took the view that the measures at issue had to be regarded as equivalent to investment aid and that the General Court upheld that assessment.

122 It follows that the fourth ground of appeal is unfounded and must therefore be rejected.

Fifth ground of appeal

123 By its fifth ground of appeal, the Republic of Austria submits that the General Court erred in law, first, by defining the aid elements insufficiently and, second, by not finding a failure to abide by the Commission Notice on the application of Articles 87 and 88 of the EC Treaty to State aid in the form of guarantees (OJ 2008 C 155, p. 10; ‘the Guarantee Notice’).

First part of the fifth ground of appeal

– *Arguments of the parties*

124 The Republic of Austria, supported by the Grand Duchy of Luxembourg, complains that the General Court defined the aid elements insufficiently. Referring to paragraph 251 et seq. of the judgment under appeal, it pleads that, contrary to what the General Court states, it submitted not that the measures at issue could not be quantified precisely but that the aid elements were determined insufficiently, in breach of a whole series of guidelines and regulations concerning State aid as it set out in its application before the General Court.

125 It is not comprehensible why those regulations and guidelines are not applicable in the present instance, in the light of the principles of equal treatment and non-discrimination. That indeterminateness prevents the proportionality of the aid from being assessed correctly and, since the original budget cannot be determined, also does not allow compliance, if that budget increases, with the obligation to give fresh notification in accordance with Article 1(c) of Council Regulation (EU) 2015/1589 of 13 July 2015 laying down detailed rules for the application of Article 108 of the Treaty on the Functioning of the European Union (OJ 2015 L 248, p. 9), read in conjunction with Article 4(1) of Commission Regulation (EC) No 794/2004 of 21 April 2004 implementing Council Regulation (EC) No 659/1999 laying down detailed rules for the application of Article 93 of the EC Treaty (OJ 2004 L 140, p. 1), under which a 20% increase in the original budget approved by the Commission results in an alteration to the aid. The General Court’s conclusion, in paragraph 361 of the judgment under appeal, that any grant of further State aid is not covered by the decision at issue is therefore incorrect.

126 The Republic of Austria further contends that the indeterminable nature of the costs of treatment and storage of the nuclear waste, and also the aid measure in the event of the early shutdown of Hinkley Point nuclear power station, demonstrate that the aid elements were not determined. As regards the aid measure in the event of an early shutdown, paragraph 279 of the judgment under appeal confirms that the Commission was not aware of the precise details of the compensation mechanism on the date of adoption of the decision at issue and that it therefore did not have information that would have confirmed the impossibility of any overcompensation, which can never be ruled out. That ground alone should have resulted in the measures at issue being rejected.

127 The Commission contends that the Republic of Austria’s argument concerning the applicability of the various regulations and guidelines is inadmissible, since the Republic of Austria does not give the slightest indication of the nature of the error of law that is said to have been committed. In its submission, the other arguments put forward are also inadmissible, as they were not put forward before the General Court. The Slovak Republic also submits that those arguments are inadmissible, either because they repeat arguments put forward before the General Court or because they are too general and imprecise.

128 The Commission, the French Republic, Hungary and the United Kingdom submit that this part of the fifth ground of appeal is, in any event, unfounded.

– *Findings of the Court*

129 First of all, it is to be observed that the Republic of Austria had submitted in paragraph 113 of its application before the General Court that, 'in the absence of sufficient determination of the aid element, it is ultimately not only the amount of the individual aid measures but also the amount of the gross grant equivalent of all the aid that remains uncertain', and that it was therefore impossible for the Commission from the outset to check whether the measures at issue were compatible with the internal market. It accordingly does not appear that the General Court distorted the Republic of Austria's argument in observing, in paragraph 247 of the judgment under appeal, that it maintained, in essence, that it was only after quantifying the precise amount of the grant equivalent of the measures at issue that the Commission could have determined their compatibility with the internal market under Article 107(3)(c) TFEU.

130 Next, the Republic of Austria's argument, already set out in its application before the General Court, that the failure to determine the aid sufficiently results in the breach of 'a whole series of guidelines and regulations' must be declared inadmissible, on the grounds set out paragraph 91 of the present judgment. The appeal makes reference to the arguments set out in this regard before the General Court and does not identify specifically the errors of law that the General Court supposedly committed. The same is true of the argument that it is impossible to assess the proportionality of aid correctly if its elements have not been determined sufficiently, as the contested elements of the judgment under appeal are not specifically indicated.

131 The Republic of Austria's argument relating to the alteration of existing aid, alleging an infringement of Article 1(c) of Regulation 2015/1589, read in conjunction with Article 4(1) of Regulation No 794/2004, is also inadmissible, as it was not put forward before the General Court (see, to that effect, judgments of 19 July 2012, *Alliance One International and Standard Commercial Tobacco* v *Commission*, C-628/10 P and C-14/11 P, EU:C:2012:479, paragraph 111, and of 28 July 2016, *Tomana and Others* v *Council and Commission*, C-330/15 P, not published, EU:C:2016:601, paragraph 33).

132 Furthermore, in its appeal the Republic of Austria did not criticise paragraph 266 of the judgment under appeal, in which the General Court noted that the Commission's authorisation covered only the project as notified to it and that any subsequent amendment liable to affect the assessment of the compatibility of the measures at issue with the internal market would have to be notified anew.

133 The Republic of Austria refers, in this context, to paragraph 361 of the judgment under appeal, in which the General Court stated reasons for rejecting its argument that further aid in favour of Hinkley Point C might be granted in the form of a State guarantee in the future. However, for a reason analogous to that set out in paragraph 103 of the present judgment, the General Court did not err in law in observing that that argument was not capable of affecting the legality of the decision at issue and could not therefore be taken into consideration in the context of the action before it, which concerned only the application for annulment of that decision relating to the measures at issue.

134 Nor, as has been established in paragraph 103 of the present judgment, did the General Court err in law in rejecting the argument as to the indeterminable nature of the costs of treatment and storage of the nuclear waste by stating, in paragraph 355 thereof, that the aid measures declared compatible by the Commission relate only to the contract for difference, the Secretary of State Agreement and the credit guarantee and that the decision at issue does not cover any State aid that may have been granted by the United Kingdom to cover expenditure related to the management and storage of that waste.

135 As regards, finally, the argument relating to the aid measure in the event of the early shutdown of Hinkley Point nuclear power station and any overcompensation, the Republic of Austria has not established that the General Court erred in law by observing, in paragraph 279 of the judgment under appeal, after acknowledging that the Commission was not aware of the precise details of the compensation mechanism

on the date of adoption of the decision at issue, that in that decision the Commission merely authorised the project notified by the United Kingdom and that if, after that decision, the United Kingdom were to decide to pay compensation in excess of the amount necessary to compensate for deprivation of property, that would be an advantage that would not be covered by the decision and which would therefore have to be notified to the Commission.

136 It follows that the first part of the fifth ground of appeal is partly inadmissible and partly unfounded.

Second part of the fifth ground of appeal

– *Arguments of the parties*

137 The Republic of Austria, supported by the Grand Duchy of Luxembourg, complains that, in paragraph 309 of the judgment under appeal, the General Court left open whether the Commission had to apply the Guarantee Notice, merely suggesting that the criteria of that notice were complied with anyway.

138 Point 4.2 of the Guarantee Notice requires in any event that the aid element contained in the guarantee granted, that is to say, the advantage thereby conferred on the recipient, must be quantified. The General Court's assessment, in paragraph 300 of the judgment under appeal, that the credit guarantee was subject to normal market conditions is therefore incomprehensible. The General Court departed from the case-law relating to the advantage conferred, for the purposes of Article 107(1) TFEU.

139 The Republic of Austria refers also to points 3.2 and 4.1 of the Guarantee Notice, under which the Commission must check in the case of individual guarantees whether the borrower is not in financial difficulty, within the meaning of the Community guidelines on State aid for rescuing and restructuring firms in difficulty (OJ 2004 C 244, p. 2; 'the Guidelines on firms in difficulty'). Given that, in the present instance, the conditions for compliance with those guidelines are not met, the Commission could not have declared the credit guarantee compatible with the internal market. Instead of finding that error, the General Court, in paragraph 338 of the judgment under appeal, reversed the burden of proof by stating that the Republic of Austria and the Grand Duchy of Luxembourg had not set out to what extent EDF was experiencing financial difficulties.

140 In addition to determination of the aid element, the Guarantee Notice provides, in point 4.1(b), that the State guarantee must be for a fixed maximum amount and limited in time. The judgment under appeal is vitiated by an error of law in this regard too.

141 The Commission submits that this part of the ground of appeal is inadmissible as it does not make it clear how the General Court is said to have committed errors of law capable of resulting in the judgment under appeal being set aside.

142 In any event, the Commission, the French Republic, Hungary, the Slovak Republic and the United Kingdom contend that this part of the ground of appeal is unfounded.

– *Findings of the Court*

143 It should be pointed out that, in paragraph 309 of the judgment under appeal, the General Court stated that, 'irrespective of whether the Commission was, in the circumstances of this case, obliged to take into account the criteria laid down in the Guarantee Notice, the arguments put forward by the Grand Duchy of Luxembourg and the Republic of Austria must fail for the following reasons'. Those reasons are set out in paragraphs 310 to 349 of the judgment under appeal, in which the General Court responded point by point to all the arguments put forward to show that the Commission had not abided by that notice.

144 Of those paragraphs, the appeal refers only to paragraph 338 of the judgment under appeal, in which the General Court found that the evidence submitted by the Republic of Austria and the Grand Duchy of Luxembourg was not capable of demonstrating that EDF was experiencing financial difficulties within the

meaning of point 9 of the Guidelines on firms in difficulty and that, accordingly, it had to reject their argument that, because EDF was a firm in difficulty, the Commission should have found that the aid element contained in the credit guarantee was as high as the amount effectively covered by that guarantee.

145 It is thus clear that the Republic of Austria's first argument, that the General Court left open whether the Commission had to apply the Guarantee Notice, is unfounded, since the General Court nevertheless examined all the arguments regarding failure to abide by that notice and the responses which the General Court gave to those arguments, with the exception of the response contained in paragraph 338 of the judgment under appeal, are not criticised.

146 In paragraph 300 of the judgment under appeal, referred to in the Republic of Austria's second argument, the General Court rejected its argument that the Commission had erred in law by taking into account, when assessing the risk of the project's failure with a view to setting an appropriate rate for the guarantee, the effects of the contract for difference and the Secretary of State Agreement. The General Court observed, in essence, that there was nothing to preclude those effects from being taken into account, because the measures at issue formed one unit and their effects, notably the revenue stream guaranteed by the contract for difference, were elements that were relevant for the purpose of analysing the likelihood of the risk that the project would fail.

147 However, it is clear that the Republic of Austria's second argument is based on a misreading of the judgment under appeal in that paragraph 300 thereof does not state that, even taking into account of the contract for difference and the Secretary of State Agreement, the credit guarantee was subject to normal market conditions.

148 As regards the Republic of Austria's third argument, that the General Court failed to find that the Commission erred in law in light of the Guarantee Notice which requires it to be examined whether the borrower is not in financial difficulty within the meaning of the Guidelines on firms in difficulty, and that in that regard it reversed the burden of proof in paragraph 338 of the judgment under appeal, it should be pointed out, first, that the parts of that notice upon which the Republic of Austria relies relate not to the assessment of whether aid is compatible with the internal market, but to the existence of State aid.

149 Second, paragraph 338 of the judgment under appeal, which is the only paragraph to which the Republic of Austria refers in support of this argument, merely concludes the examination, carried out in paragraphs 323 to 337 thereof, of the contentions of the Republic of Austria and the Grand Duchy of Luxembourg that the evidence which they submitted for the first time during the proceedings before the General Court showed that EDF was experiencing financial difficulties. In concluding, after examining that evidence, that it was not capable of demonstrating that EDF was experiencing financial difficulties within the meaning of point 9 of the Guidelines on firms in difficulty, the General Court did not reverse the burden of proof as the Republic of Austria asserts. Therefore, this argument is unfounded.

150 The Republic of Austria's final argument, according to which a State guarantee must be for a fixed maximum amount and limited in time, is inadmissible, in accordance with the case-law recalled in paragraph 91 of the present judgment, as it does not indicate precisely the contested elements of the judgment that the Republic of Austria seeks to have set aside.

151 It follows that the second part of the fifth ground of appeal is partly inadmissible and partly unfounded. Consequently, the fifth ground of appeal must be rejected.

152 In the light of all the foregoing considerations, the appeal must be dismissed.

Costs

153 Under Article 138(1) of the Rules of Procedure, which applies to appeal proceedings by virtue of Article 184(1) thereof, the unsuccessful party is to be ordered to pay the costs if they have been applied for

in the successful party's pleadings.

154 In the present case, since the Commission has applied for costs and the Republic of Austria has been unsuccessful, the latter must be ordered to bear its own costs relating to the appeal proceedings and to pay those incurred by the Commission.

155 Article 140(1) of the Rules of Procedure, which applies to appeal proceedings by virtue of Article 184(1) thereof, provides that the Member States and institutions which have intervened in the proceedings are to bear their own costs. The Czech Republic, the French Republic, the Grand Duchy of Luxembourg, Hungary, the Republic of Poland, the Slovak Republic and the United Kingdom must therefore bear their own costs.

On those grounds, the Court (Grand Chamber) hereby:

1. **Dismisses the appeal;**

2. **Orders the Republic of Austria to bear its own costs relating to the appeal proceedings and to pay those incurred by the European Commission;**

3. **Orders the Czech Republic, the French Republic, the Grand Duchy of Luxembourg, Hungary, the Republic of Poland, the Slovak Republic and the United Kingdom of Great Britain and Northern Ireland to bear their own costs.**

[Signatures]

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* Language of the case: German.