JUDGMENT OF THE GENERAL COURT (Sixth Chamber)

13 February 2012 (*)

(State aid – Wholesale electricity market – Favourable terms granted by a Hungarian public undertaking to certain power generators under power purchase agreements – Decision to initiate the procedure laid down in Article 88(2) EC – Decision declaring the aid incompatible with the common market and ordering its recovery – New aid – Private investor test)

In Joined Cases T-80/06 and T-182/09,

Budapesti Erőmű Zrt, established in Budapest (Hungary), represented, in Cases T-80/06 and T-182/09, by M. Powell, C. Arhold and K. Struckmann, lawyers, and also, in Case T-182/09, by A. Hegyi, lawyer,

applicant,

v

European Commission, represented, in Cases T-80/06 and T-182/09, by N. Khan, L. Flynn and K. Talabér-Ritz, and also, in Case T-80/06, by V. Di Bucci, acting as Agents,

defendant,

APPLICATION, in Case T-80/06, for annulment of the Commission's decision, notified to Hungary by letter of 9 November 2005, to initiate the procedure laid down in Article 88(2) EC in relation to State aid C 41/2005 (ex NN 49/2005) – Hungarian Stranded Costs, and, in Case T-182/09, for annulment of Commission Decision 2009/609/EC of 4 June 2008 on the State aid C 41/05 awarded by Hungary through Power Purchase Agreements (OJ 2009 L 225, p. 53),

THE GENERAL COURT (Sixth Chamber),

composed of M. Jaeger, President, N. Wahl (Rapporteur) and S. Soldevila Fragoso, Judges,

Registrar: N. Rosner, Administrator,

having regard to the written procedure and further to the hearing on 22 September 2011,

gives the following

Judgment

Background to the dispute

1 In the mid-1990s, Hungary's main objective in the energy sector was the modernisation of the infrastructure of power generation in order to ensure security of supply. In order to achieve that objective, which required significant capital investment, the Hungarian State entered into long-term power purchase agreements ('PPAs') with a view to encouraging power generators to invest in Hungary. Under these PPAs, signed between 1995 and 2001, the Hungarian State-owned public undertaking Magyar Villamos Művek Zrt (MVM) undertook, as a 'single buyer', to buy a fixed quantity of electricity at a fixed price. These long-term PPAs thereby guaranteed a return on investment to the generators.

2 The Hungarian electricity market has been subject to three consecutive regimes. The first regime, in force from 1992 to 2002, introduced the obligation for MVM to ensure security of supply at the lowest cost. The second, which came into force in 2003, divided the market into two sectors: a liberalised sector that accounted for approximately 30% of production, and a public utility sector, supplied by MVM, that accounted for approximately 70% of production. Under that regime, the power generators were legally obliged to offer MVM the electrical capacities needed at regulated prices for the public utility sector. After the implementation of the third regime in 2004, the power generators were still required to supply MVM,

but the regulation of prices was abolished and the price of electricity was thereafter calculated on the basis of the prices set out in the PPAs.

3 The applicant, Budapesti Erőmű Zrt, a Hungarian subsidiary of Électricité de France International SA, was privatised by the Hungarian State in 1996. It manages four power plants that supply district heating for the Budapest region. Three of the four power plants, namely the Kelenföld, Újpest and Kispest power plants, are cogeneration plants which generate heat and electricity simultaneously. Each of those three power plants entered into a long-term PPA with MVM governing the sale of the electricity produced. The PPA relating to the Kelenföld power plant was concluded in 1996 and expired on 31 December 2011, the PPA relating to the Újpest plant was concluded in 1997 and is due to expire in 2021. The PPA relating to the Kispest plant was signed in 2001 and is due to expire in 2024.

4 By letter of 31 March 2004, the Hungarian authorities notified the Commission of the European Communities of Government Decree 183/2002 (VIII.23) laying down rules for the definition and management of 'stranded costs' in accordance with the procedure referred to in paragraph 1(c) of Chapter 3 of Annex IV to the Act concerning the conditions of accession of the Czech Republic, the Republic of Estonia, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Republic of Hungary, the Republic of Malta, the Republic of Poland, the Republic of Slovenia and the Slovak Republic and the adjustments to the Treaties on which the European Union is founded (OJ 2003 L 236, p. 797; 'the Act of Accession') ('the interim procedure').

5 The notified Decree provides for a system of compensation of the costs borne by MVM as electricity wholesaler.

6 The Commission registered the notification concerned under reference HU 1/2004.

7 A number of official letters were exchanged between the Hungarian authorities and the Commission concerning the measure notified. The Commission also received comments from third parties. In the course of the interim procedure, the Commission discovered that the Hungarian wholesale electricity market was structured around long-term PPAs between MVM and certain power generators.

8 By letter of 13 April 2005, the Hungarian authorities withdrew the notification of Government Decree 183/2002 (VIII.23.).

9 On 4 May 2005, in accordance with Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article [88 EC] (OJ 1999 L 83, p. 1), the Commission registered a State aid file (reference NN 49/2005) concerning the PPAs.

10 After obtaining additional information, the Commission, by letter of 9 November 2005, notified Hungary of its decision to initiate the procedure laid down in Article 88(2) EC in respect of State aid No C 41/2005 (ex NN 49/2005) – Hungarian Stranded Costs ('the opening decision').

11 In the opening decision, the Commission questioned the compatibility of the PPAs with the Community rules on State aid, given that the PPAs shielded the power generators concerned from any commercial risk and thus put them in a better position than other power generators on the market.

12 The Commission took the view that the PPAs were still applicable after accession within the meaning of paragraph 1 of Chapter 3 of Annex IV to the Act of Accession, and that they constituted not existing aid, but new aid upon accession for the purpose of the application of Article 88(3) EC.

13 It expressed the view that the guaranteed return on investment and the high purchase price secured by the PPAs put power generators operating under a PPA in a more advantageous economic situation than other power generators not parties to a PPA, including possible new entrants on the market, and than companies in other, comparable sectors in which such long-term agreements have not been offered to market players.

14 The Commission also noted that the electricity markets had been opened to competition and that electricity had been traded between Member States at least since the entry into force of Directive 96/92/EC of the European Parliament and of the Council of 19 December 1996 concerning common rules for the internal market in electricity (OJ 1997 L 27, p. 20). Consequently, measures favouring particular companies in the energy sector adopted in one Member State were regarded as potentially impeding the scope for companies from other Member States to export electricity to that Member State, or favouring exports of electricity to other Member States.

15 The Commission also expressed the view that this advantage stemmed from the use of State resources, because the decision to sign the PPAs was a consequence of State policy implemented via MVM.

16 The Commission therefore came to the preliminary conclusion that the PPAs constituted State aid within the meaning of Article 87(1) EC.

17 The letter informing Hungary of the opening decision, together with a summary of that decision inviting any interested parties to submit their comments, was published in the *Official Journal of the European Union* of 21 December 2005 (OJ 2005 C 324, p. 12). Following that publication, the Commission received comments from the Hungarian authorities as well as from third parties, including the applicant.

18 On 4 June 2008, the Commission adopted Decision 2009/609/EC on the State aid C 41/05 awarded by Hungary through Power Purchase Agreements (OJ 2009 L 225, p. 53; 'the contested final decision').

19 In the contested final decision, which closed the formal investigation procedure, the Commission found that the PPAs conferred illegal State aid within the meaning of Article 87(1) EC on the power generators, and that that State aid was incompatible with the common market.

20 The State aid relating to the PPAs consisted in the obligation on MVM to purchase a certain capacity and a guaranteed minimum quantity of electricity at a price covering fixed, variable and capital costs over a significant part of the lifetime of the generating units, and which guarantees a return on investment.

21 The operative part of the contested final decision reads as follows:

'Article 1

1. The purchase obligations as set out in the [PPAs] between [MVM] and [the applicant and six other electricity generators] constitute State aid within the meaning of Article 87(1) [EC] to the electricity generators.

2. The State aid referred to in Article 1(1) is incompatible with the common market.

3. Hungary shall refrain from granting the State aid referred to in paragraph 1 within six months following the date of notification of this Decision.

Article 2

1. Hungary shall recover the aid referred to in Article 1 from the beneficiaries.

…

Article 3

1. Within two months following notification of this Decision, Hungary shall submit to the Commission information concerning measures already taken and measures planned to comply with this Decision, and notably the steps taken to perform an appropriate simulation of the wholesale market in order to establish the amounts to be recovered, the detailed methodology intended to be applied and a detailed description of the set of data that it intends to use for that purpose.

…

Article 4

1. The exact amount of aid to be recovered should be calculated by Hungary on the basis of an appropriate simulation of the wholesale electricity market as it would have stood if none of the [PPAs] referred to in Article 1(1) had been in force since 1 May 2004.

2. Within six months following notification of this Decision, Hungary shall calculate the amounts to be recovered on the basis of the method referred to in paragraph 1 and submit to the Commission all relevant information with regard to the simulation, notably its results, a detailed description of the methodology applied, and the set of data used to carry out the simulation.

Article 5

Hungary shall ensure that the recovery of the aid referred to in Article 1 is implemented within ten months following the date of notification of this Decision.

Article 6

This Decision is addressed to the Republic of Hungary.'

Procedure

22 By application lodged at the Registry of the General Court on 3 March 2006, the applicant brought an action for annulment of the opening decision, registered under reference T-80/06.

23 By application lodged at the Registry of the General Court on 4 May 2009, the applicant brought an action for annulment of the contested final decision, registered under reference T-182/09.

24 By decisions of the General Court of 26 January and 14 April 2011, Cases T-80/06 and T-182/09 were assigned to the Sixth Chamber and a new Judge-Rapporteur was designated.

25 On hearing the report of the Judge-Rapporteur, the General Court (Sixth Chamber) decided to open the oral procedure.

26 By decision of the President of the Sixth Chamber taken at the hearing on 22 September 2011, Cases T-80/06 and T-182/09 were joined for the purposes of the hearing and the judgment, pursuant to Article 50 of the Rules of Procedure of the General Court.

27 The parties presented oral argument and their answers to the questions put by the Court at that hearing.

28 Since a member of the Sixth Chamber was prevented from sitting, the President of the General Court designated himself, pursuant to Article 32(3) of the Rules of Procedure, to complete the Chamber.

29 By order of 18 November 2011, the General Court (Sixth Chamber), in its new composition, reopened the oral procedure and the parties were informed that they could present oral argument at a further hearing.

30 By letters of 21 and 28 November 2011 respectively, the Commission and the applicant informed the Court that they were waiving their right to present oral argument again.

31 Consequently, the President of the General Court decided to close the oral procedure.

Forms of order sought

In Case T-80/06

32 The applicant claims that the Court should:

– annul the opening decision or, in the alternative, annul that decision as far as the PPAs concluded by the applicant are concerned;

– order the Commission to pay the costs;

– take such other or further action as justice may require.

33 The Commission contends that the Court should:

– dismiss the action;

– order the applicant to pay the costs.

In Case T-182/09

34 The applicant claims that the Court should:

– annul the contested final decision as far as the PPAs concluded by the applicant are concerned;

– order the Commission to pay the costs;

– take such other or further action as justice may require.

35 The Commission contends that the Court should:

– dismiss the action as unfounded;

– order the applicant to pay the costs.

Admissibility

36 While not formally raising a plea of inadmissibility under Article 114 of the Rules of Procedure, the Commission contends that the action in Case T-80/06 is inadmissible on the ground that the opening decision is not, in this instance, a challengeable act.

37 It must be noted that, according to the case-law, where the Commission classifies as new aid a measure in the course of implementation, that decision entails independent legal effects, particularly in relation to the suspension of the measure concerned (Case C-400/99 *Italy* v *Commission* ('*Tirrenia*') [2001] ECR I-7303, paragraph 59). That is plainly the case not only where a measure in the course of implementation is regarded by the authorities of the Member State concerned as existing aid, but also where the authorities take the view that the measure to be formally investigated does not fall within the scope of Article 87(1) EC (Joined Cases T-346/99 to T-348/99 *Diputación Foral de Álava and Others* v *Commission* [2002] ECR II-4259, paragraph 33).

38 A decision to initiate the formal investigation procedure in relation to a measure in the course of implementation and classified by the Commission as new aid necessarily alters the legal implications of the measure under consideration and the legal position of the recipient firms, particularly as regards the continued implementation of the measure. Until the adoption of such a decision, the Member State, the recipient firms and other economic operators may think that the measure is being lawfully implemented as a general measure not falling within the scope of Article 87(1) EC or as existing aid. On the other hand, after its adoption there is at the very least a significant element of doubt as to the legality of the measure which, without prejudice to the possibility of seeking interim relief from the court, must lead the Member State to suspend its application, since the initiation of the formal investigation procedure excludes the possibility of an immediate decision that the measure is compatible with the common market, which would enable it to continue to be lawfully implemented. Such a decision might also be invoked before a national court called upon to draw all the inferences arising from infringement of the last sentence of Article 88(3) EC. Finally, it is capable of leading the firms which are beneficiaries of the measure to refuse in any event new payments or new advantages or to hold the necessary sums as provision for possible subsequent financial compensations. Businesses will also take account, in their relations with those beneficiaries, of the uncertainty cast on the legal and financial situation of the latter (see *Diputación Foral de Álava and Others* v *Commission*, cited in paragraph 37 above, paragraph 34 and the case-law cited).

39 In this instance, it must be noted that the contested decision is a decision to initiate the formal investigation procedure and relates to the PPAs concluded by the applicant. Furthermore, the measure was in the course of implementation when the contested decision was adopted. Lastly, it is clear that the Commission took the view that the measure at issue constituted new aid and was being implemented without being notified to the Commission.

40 It is the case, as the Commission pointed out, that Hungary did not object during the preliminary investigation procedure to the measure at issue being classified as new aid. However, the fact that it did not raise objections during the preliminary procedure is not relevant to categorisation of that measure as a 'challengeable act', with regard to the applicant.

41 Therefore, in accordance with the case-law cited in paragraphs 37 and 38 above, the contested decision is a challengeable act against which an action for annulment may be brought under Article 230 EC.

42 Moreover, the contested decision is of direct and individual concern to the applicant for the purposes of

the fourth paragraph of Article 230 EC since that decision concerns a measure of which the applicant is the beneficiary (see Case 25/62 *Plaumann* v *Commission* [1963] ECR 95, 107, and Case C-225/91 *Matra* v *Commission* [1993] ECR I-3203, paragraph 18 and the case-law cited).

43 It must therefore be concluded that the action in Case T-80/06 is admissible.

Substance

44 It is appropriate to consider the actions brought in Case T-182/09 against the contested final decision and in Case T-80/06 against the opening decision, together.

45 In support of its action in Case T-182/09, the applicant relies on five pleas in law, alleging, first, infringement of the EC Treaty and rules of law relating to its application; second, lack of competence *ratione temporis*; third, breach of essential procedural requirements; fourth, infringement of Article 253 EC inasmuch as the statement of reasons for the contested final decision is insufficient; and, fifth, misuse of powers.

46 In the action in Case T-80/06, the applicant relies on three pleas in law, alleging, respectively, that the Commission does not have the competence to initiate the formal investigation procedure, manifest errors of law and assessment, and infringement of Article 253 EC.

47 The arguments put forward in connection with those pleas are similar to those relied on in Case T-182/09. They concern in particular the relevant date for assessing the existence of State aid in the PPAs, the absence of an economic advantage, the fact that the Commission's competence extends only to measures of State aid 'still applicable' after the date of accession of a new Member State to the European Union, the fact that the aid allegedly contained in the PPAs should have been considered existing aid, the infringement of Article 88(1) EC and the Commission's erroneous interpretation or application of Annex IV to the Act of Accession and of Regulation No 659/1999.

The first plea in law in Case T-182/09 and the second plea in law in Case T-80/06, alleging infringement of the EC Treaty and of the rules of law relating to its application

48 Under the first plea in law in Case T-182/09 and the second plea in law in Case T-80/06, the applicant complains that the Commission has made a series of errors on a number of important issues. It submits in that regard, in essence, that the Commission erred in its determination of the relevant period for assessment of the PPAs entered into with MVM and in finding that there was an economic advantage and distortion of competition. In Case T-182/09 the applicant submits in the alternative that, in the event that the Commission was right to conclude that the applicant's PPAs contained State aid, that aid was compatible with the common market under Article 87(3) EC or Article 86(2) EC. Lastly, it submits that such aid cannot be considered existing individual aid, and therefore that the Commission could not exercise its power of review and did not have the power to order recovery of the aid concerned. In any event, the Commission erred in determining the manner in which that aid was required to be recovered.

The determination of the relevant period for assessment of the PPAs (T-182/09 and T-80/06)

49 The applicant challenges the reasoning set out in recitals 157 to 173 to the contested final decision, on which the Commission relied in ascertaining whether the PPAs fulfilled the constituent elements of State aid on 1 May 2004, the date of Hungary's accession. According to the applicant, the relevant date is that on which the PPAs were concluded. It challenges, specifically, the use made by the Commission of Annex IV to the Act of Accession and of Regulation No 659/1999.

50 First of all, it must be noted that the State measures put into effect before accession, but which are still applicable after accession and which comply at the date of accession with the four cumulative conditions laid down in Article 87(1) EC are subject to the specific rules set out in Annex IV to the Act of Accession, either as existing aid within the meaning of Article 88(1) EC if they fall within one of the three categories mentioned in that annex, or as new aid upon accession for the purpose of the application of Article 88(3) EC if they do not fall within one of those three categories.

51 The three categories mentioned in Annex IV to the Act of Accession and referred to above are as follows:

– aid measures put into effect before 10 December 1994;

– aid measures listed in the Appendix to Annex IV to the Act of Accession;

– aid measures which prior to the date of accession were assessed by the State aid monitoring authority of the new Member State and found to be compatible with the *acquis*, and to which the Commission did not raise an objection on the ground of serious doubts as to the compatibility of the measure with the common market, pursuant to the interim procedure.

52 In the present case, it is common ground that the applicant's PPAs were signed after 10 December 1994; they were signed in 1996 as regards the Kelenföld power plant, in 1997 as regards the Újpest plant and in 2001 as regards the Kispest plant. On that basis, they do not constitute existing aid within the meaning of Article 88(1) EC. Next, it must be noted that the PPAs do not appear in the appendix to Annex IV to the Act of Accession. Consequently, they do not constitute existing aid on that basis either. Lastly, it must be pointed out that the PPAs at issue were neither assessed nor approved under the interim procedure. Therefore, provided that they are still applicable after the date of accession (see paragraphs 121 to 123 below), they can only be new aid within the meaning of Annex IV to the Act of Accession.

53 Therefore, the argument that the PPAs had been concluded before the date of accession and did not constitute aid on that date has no bearing on their categorisation as State aid on 1 May 2004.

54 It is clear from the wording of Annex IV to the Act of Accession that a measure which was not regarded as State aid when it was introduced can subsequently become State aid. Annex IV also indicates that, in such cases, the aid must be regarded as new aid. A measure that is still applicable after the date of a new Member State's accession must be assessed at that date in the light of the four conditions laid down in Article 87(1) EC. Any other conclusion would have the effect of rendering meaningless the desired objective of the authors of the Treaty between the Kingdom of Belgium, the Kingdom of Denmark, the Federal Republic of Germany, the Hellenic Republic, the Kingdom of Spain, the French Republic, Ireland, the Italian Republic, the Grand Duchy of Luxembourg, the Kingdom of the Netherlands, the Republic of Austria, the Portuguese Republic, the Republic of Finland, the Kingdom of Sweden, the United Kingdom of Great Britain and Northern Ireland (Member States of the European Union) and the Czech Republic, the Republic of Estonia, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Republic of Hungary, the Republic of Malta, the Republic of Poland, the Republic of Slovenia, the Slovak Republic, concerning the accession of the Czech Republic, the Republic of Estonia, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Republic of Hungary, the Republic of Malta, the Republic of Poland, the Republic of Slovenia and the Slovak Republic to the European Union (OJ 2003 L 236, p. 17).

55 The fact that a measure which initially was not State aid may subsequently become existing or new State aid has been accepted both in the case-law and in Regulation No 659/1999. As stated in the first sentence of Article 1(b)(v) of that regulation, existing aid is 'aid which is deemed to be an existing aid because it can be established that at the time it was put into effect it did not constitute an aid, and subsequently became an aid due to the evolution of the common market and without having been altered by the Member State'. However, according to the second sentence of that provision, '[w]here certain measures become aid following the liberalisation of an activity by Community law, such measures shall not be considered as existing aid after the date fixed for liberalisation'. Therefore, it is conceivable, in certain circumstances, that compliance with the four conditions laid down in Article 87(1) EC may be assessed as at a time other than that when a given measure comes into effect.

56 Likewise, the Commission's reference to Article 1(b)(v) of Regulation No 659/1999 in recital 162 to the contested final decision was intended principally to demonstrate that a measure which was not regarded as State aid when it was put into effect could become State aid following significant changes in the legal and economic context of the relevant market.

57 Second, since the only relevant legal framework in this instance is that of Annex IV to the Act of Accession, the Commission was right not to apply the provisions of Article 1(b)(v) of Regulation No 659/1999. Therefore, the arguments put forward by the applicant in relation to that article must be rejected as being of no relevance.

58 Furthermore, as is apparent from recitals 377 to 381 to the contested final decision, although the Commission applied the second sentence of Article 1(b)(v) of Regulation No 659/1999, the result was the same. After the PPAs came into effect, Hungary, initially on its own initiative, then in transposing the

European Union legislation applicable to the internal market in electricity, substantially altered the legal framework under which power generators conducted their business.

59 In that context, it must also be pointed out that the Europe Agreement establishing an association between the European Communities and their Member States, of the one part, and Hungary, of the other part (OJ 1993 L 347, p. 2) was signed in Brussels on 16 December 1991 and entered into force on 1 February 1994, that is to say, before the PPAs were signed. Furthermore, Hungary officially lodged its application for accession on 31 March 1994. Therefore, at the time when the PPAs were concluded, Hungary was already under an obligation, pursuant to Article 62 of the Europe Agreement establishing an association between the European Communities and their Member States, of the one part, and Hungary, of the other part, to harmonise its competition rules with the EC Treaty. In any event, the Accession Treaty referred to in paragraph 54 above was signed by Hungary on 16 April 2003 and entered into force on 1 May 2004. Consequently, from 1 May 2004 the *acquis communautaire*, including Directive 96/92, became mandatory in Hungary, in accordance with Article 2 of the Act of Accession and had to be applied to all agreements concluded in the new Member States, and the only exceptions to those rules should have arisen under the Act of Accession itself.

60 It follows that the Court cannot accept the applicant's argument that the Commission ought to have applied the first sentence of Article 1(b)(v) of Regulation No 659/1999, which would have resulted in the aid being treated as existing aid. Accordingly, the argument that the Commission ought to have applied the 'appropriate measures' procedure provided for by Article 88(1) EC cannot be accepted either. It also follows from the foregoing that the Court must reject the applicant's assertion that the Commission's approach was inconsistent with Article 88(1) EC and Joined Cases T-298/97, T-312/97, T-313/97, T-315/97, T-600/97 to T-607/97, T-1/98, T-3/98 to T-6/98 and T-23/98 *Alzetta and Others* v *Commission* [2000] ECR II-2319. The drafters of the Act of Accession intended that approach to be taken, hence the clear and precise definition with regard to the categorisation of existing aid and new aid in that act.

61 Lastly, the applicant submits that only State aid schemes, not individual measures, may become existing State aid due to the evolution of the common market; that argument must, however, be rejected. Annex IV to the Act of Accession, which is the only relevant framework in the present case, relates expressly and without distinction both to State aid schemes and to individual aid.

62 Therefore, it follows from all of the foregoing that the Commission did not err in law by taking the date of Hungary's accession to the European Union as the relevant date for the purpose of determining the existence of aid, and, in consequence, that the arguments relating to that issue both in Case T-182/09 and in Case T-80/06 must be rejected.

The existence of an economic advantage (Cases T-182/09 and T-80/06)

63 Under this complaint, the applicant first reiterates that the moment of signature of the PPAs is decisive for the purpose of determining whether or not they entail an economic advantage. It goes on to assert that even if its PPAs were assessed at the date of Hungary's accession, they still would not entail any economic advantage. In that regard it casts doubt on the test of a private operator in a market economy used by the Commission, which, according to the applicant, is unduly simplistic, conceptually flawed and empirically incomplete.

64 As regards the time-frame, reference must be made to paragraphs 50 to 54 above.

65 With regard to the argument concerning the application to the present case of the test of a private operator in a market economy, it must be borne in mind that the assessment by the Commission of whether a measure satisfies that test involves a complex economic appraisal. When the Commission adopts a measure involving such an appraisal, it consequently enjoys a wide discretion and judicial review is limited to verifying whether the Commission complied with the relevant rules governing procedure and the statement of reasons, whether there was any error of law, whether the facts on which the contested finding was based have been accurately stated and whether there has been any manifest error of assessment of those facts or any misuse of powers. In particular, the Court is not entitled to substitute its own economic assessment for that of the author of the decision (see, to that effect, order of the Court in Case C-323/00 P *DSG* v *Commission* [2002] ECR I-3919, paragraph 43, and Case T-196/04 *Ryanair* v *Commission* [2008] ECR II-3643, paragraph 41).

66 However, although the Courts of the European Union recognise that the Commission has a margin of

assessment in economic or technical matters, that does not mean that they must decline to review the Commission's interpretation of economic or technical data. Indeed, in order to take due account of the parties' arguments, the Courts of the European Union must not only, inter alia, establish whether the evidence relied on is factually accurate, reliable and consistent but also whether that evidence contains all the relevant information which must be taken into account in order to assess a complex situation and whether it is capable of substantiating the conclusions drawn from it (Case C-290/07 P *Commission* v *Scott* [2010] ECR I-0000, paragraph 65).

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

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

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

70 The Commission therefore 'compared the purchase obligation enshrined in the PPAs with the main features of standard forward and spot contracts, "drawing rights" contracts, long-term contracts concluded by large end-consumers, and contracts concluded between generators and [Transmission System Operators; "TSOs"] for the provision of balancing services' (recital 206 to the contested final decision).

71 It must be noted that in view of the fact that electricity cannot be stored economically, and in order to ensure network stability, its production must constantly be balanced against demand. The amount of energy that power generators and importers can sell and the price that they can expect for that energy on the wholesale market depend on the amount of energy requested, which is constantly fluctuating. This means that the generating and import capacities needed to satisfy demand also fluctuate. This feature also means that power generators and purchasers will have different strategies as regards trade in energy. As is apparent from recital 195 to the contested final decision, the Commission, in its Sector Inquiry on electricity markets in Europe, examined in detail the conditions governing trade in electricity on European wholesale markets.

72 According to the final report of that inquiry, as summarised in recitals 196 to 204 to the contested final decision, bulk electricity can be traded on 'spot' and 'forward' markets. 'Spot' markets are mainly day-ahead markets, on which electricity is traded one day before physical delivery takes place. In 'forward' markets, power is traded for delivery further ahead in time. Both 'spot' and 'forward' products can be traded on power exchanges or over-the-counter ('OTC') markets. As a result of continuous arbitrages, prices for identical products on power exchanges and OTC markets tend to converge.

73 On 'spot' markets trade in power is based on marginal pricing, guaranteeing only that short-run costs are covered, not all fixed and capital costs. Given that it is impossible to store electricity economically once it has been generated, there is no assurance as regards the level of utilisation of generating capacity.

74 On 'forward' markets, there is less uncertainty than on 'spot' markets as regards the level of utilisation of generating capacities, in view of the longer duration of contracts. Nevertheless, such contracts cover only a limited period by comparison with the lifetime of generating units. Therefore, a price that is fixed in advance, that is derived from market operators' expectations with regard to the future evolution of prices on 'spot' markets, does not provide assurance that all fixed and capital costs will be covered. For example, if fuel costs increase unexpectedly, the costs involved in producing electricity may exceed the pre-set price.

75 The final report of the Commission's Sector Inquiry also mentions contracts involving the reservation of generation capacities in the form of 'drawing rights' (involving the payment of a capacity fee to the plant operator), contracts signed with large business or industrial consumers (often signed after tenders on the purchasers' initiative, for a period of approximately one or two years and at a price fixed in advance which is not indexed on parameters such as fuel costs or determined by fixed or capital costs) and contracts concluded for the provision of balancing services by the TSOs (by means of tenders).

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

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

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

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

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

81 It has been established that if MVM had acted as a prudent market operator, it would have implemented supply strategies (which might take the form of short-term or longer-term contracts) ensuring that it would have sufficient electricity to meet the needs of such regulated segments as were supposed to evolve over time. The 'advantages' which MVM derived from the PPAs did not ensure the electricity price stability that any operator on the market might have expected of a long-term agreement. In addition, they were accompanied by the serious risk of MVM being obliged to buy more electricity than actually needed and of suffering losses when re-selling the excess.

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

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

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

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

market.

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

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

88 Lastly, with regard to the applicant's reference to a number of general studies and to specific contracts, it must be noted, first of all, that these were not produced in the administrative procedure and, second, that the applicant did not explain the context in which those contracts were concluded, or their precise provisions.

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

The argument, in Case T-182/09, relating to the existence of a service of general economic interest, from the point of view of Article 87(1) EC or Article 86(2) EC

90 The Court must reject the applicant's argument that the PPAs are not covered by Article 87(1) EC since the conditions set out in Case C-280/00 *Altmark Trans and Regierungspräsidium Magdeburg* [2003] ECR I-7747 ('*Altmark*') are fulfilled. It is clear from *Altmark* that where public subsidies granted to undertakings expressly required to discharge public service obligations in order to compensate for the costs incurred in discharging those obligations comply with a set of four conditions, such subsidies do not fall within Article 87(1) EC. In that regard, it is sufficient to note that the first condition set out in that judgment is that the recipient undertaking must actually have public service obligations to discharge, and the obligations must be clearly defined. That is not the case in this instance, however; there is no document confirming that a service of general economic interest was defined and entrusted to the applicant. As is apparent from recital 260 to the contested final decision, MVM's obligation according to the rules of Hungarian law in force during the period under consideration was to guarantee security of supply. That is merely a general obligation whereby the single buyer at the time had to ensure the necessary supply to cover total energy demand. No obligation to provide services of general economic interest was imposed on any particular power generator.

91 For the reasons given in the preceding paragraph, the Court must also reject the assertion that the PPAs have to be seen as the 'delegation' of part of MVM's 'service of general economic interest' obligation to individual generators.

92 It follows from this that the applicant's argument to the effect that, in so far as its PPAs did not comply with the requirements established in *Altmark*, cited in paragraph 90 above, they should at least have been regarded as containing State aid to which the derogation under Article 86(2) EC was applicable, cannot be accepted either. In that regard, it is important to note that the first condition set out in *Altmark*, cited in paragraph 90 above, according to which the recipient undertaking must actually have public service obligations to discharge, also applies in a case in which the derogation laid down in Article 86(2) EC has been invoked (Case T-289/03 *BUPA and Others* v *Commission* [2008] ECR II-81, paragraph 160, and Case T-189/03 *ASM Brescia* v *Commission* [2009] ECR II-1831, paragraphs 126 and 127). However, as the preceding paragraphs show, that requirement is not satisfied in the present case.

The distortion of competition (Cases T-182/09 and T-80/06)

93 Under this complaint, the applicant argues, first, that Annex IV to the Act of Accession is not an exhaustive list of the aid measures that can be deemed existing aid; second, that the second sentence of Article 1(b)(v) of Regulation No 659/1999 does not apply to its PPAs; and, third, that the Commission has

not established a link between the economic advantage conferred by the PPAs, as of Hungary's accession to the European Union, and the impact that those PPAs were able to have on competition.

94 It must be noted first of all that the applicant does not show how its allegations concerning the non-exhaustive nature of Annex IV to the Act of Accession and the non-application of the second sentence of Article 1(b)(v) of Regulation No 659/1999 relate to the conditions for the application of Article 87(1) EC, under which the public intervention must be liable to affect trade between Member States and, moreover, distorts or threatens to distort competition.

95 For the purpose of categorising a national measure as State aid, it is not necessary to establish that the aid has a real effect on trade between Member States and that competition is actually being distorted, but only to examine whether that aid is liable to affect such trade and distort competition (see Case C-222/04 *Cassa di Risparmio di Firenze and Others* [2006] ECR I-289, paragraph 140 and the case-law cited).

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

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

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

The alleged infringement, in Case T-182/09, of Article 87(3) EC

99 The applicant alleges that the Commission infringed Article 87(3)(c) EC in that it applied the wrong legal framework, that is the guidelines applicable at the time of Hungary's accession to the European Union, namely the Community guidelines on State aid for environmental protection (OJ 2001 C 37, p. 3; 'the 2001 Guidelines'), rather than the guidelines applicable at the time of the conclusion of the PPAs, namely the Community guidelines on State aid for environmental protection (OJ 1994 C 72, p. 3; 'the 1994 Guidelines'). In addition, the applicant takes the view that the Commission ought to have applied the same principles in this instance as those which it applied in Decision C(2002) 5 final of 15 January 2002 relating to State aid N 826/01 – Ireland – Alternative energy requirements (I to IV). Lastly, the applicant submits that, in any event, the PPAs are compatible with the 2001 Guidelines as they compensate for the difference between production cost and market price.

100 The argument relating to the time-frame must be rejected. It is sufficient, in that regard, to refer to paragraphs 50 and 52 above, in which it was held that the Commission was right to consider whether or not the measures at issue fulfilled all the conditions for categorisation as aid as at the date of Hungary's accession to the European Union.

101 As for the remainder, the arguments put forward by the applicant cannot be accepted.

102 First of all, since it follows in particular from paragraph 50 above and from points 81 and 82 of the 2001 Guidelines that the provisions of those guidelines alone are applicable to the present case, the applicant has no justification for relying on the 1994 Guidelines. Moreover, the applicant cannot, in the present dispute, reasonably rely on the case that gave rise, under the 1994 Guidelines, to Decision C(2002) 5 final.

103 Second, it is apparent from the 2001 Guidelines that only a cogeneration installation the effect of which on the environment has been proven to be consistently positive may qualify for operating aid. However, there is nothing to indicate that that condition has been fulfilled in the present case. Next, as is apparent from recital 412 to the contested final decision, while points 58 to 60 of the 2001 Guidelines provide that, under 'Option 1', Member States may grant aid to compensate for the difference between the production cost of renewable energy and the market price of the form of power concerned, it is apparent from the documents on the file that the PPAs were not concluded on the basis of the market price of the energy produced, but solely by reference to the investment and operating costs of the generators concerned. Furthermore, it must be noted that neither the Hungarian authorities nor the applicant have put forward arguments that would support a different conclusion. Consequently, the Court must reject all of the arguments raised by the applicant with regard to an alleged infringement of Article 87(3) EC.

The infringement, in Case T-182/09, of Article 88(3) EC and of Article 14 of Regulation No 659/1999

104 Under this part of the plea the applicant submits, in the first place, that existing individual aid cannot be recovered and, in the second place, that the guidelines on the method of calculating the recoverable amount, as provided by the Commission in the contested final decision, are wrong, and that Article 2(1) of that decision should therefore be annulled.

105 It must be noted that the first allegation is based on the false premiss that a distinction has to be made between individual aid and an aid scheme, and therefore that any aid in the applicant's PPAs must be treated as individual existing aid. As has already been stated in paragraph 61 above, such a distinction is not relevant in the present case. That argument must therefore be rejected.

106 As regards the method used by the Commission to calculate the amount to be recovered, it must be recalled at the outset that the Commission is competent, when it has found that aid is incompatible with the common market, to decide that the State concerned must abolish or alter it (Case 70/72 *Commission* v *Germany* [1973] ECR 813, paragraph 13).

107 Similarly, the obligation on a State to abolish aid found by the Commission to be incompatible with the common market is to restore the previous situation. The Court has held in that regard that that objective is accomplished when the recipients have repaid the sum paid by way of unlawful aid, thereby forfeiting the advantage which they had enjoyed over their competitors on the market, and when the situation prior to payment of the aid is restored (see Case C-75/97 *Belgium* v *Commission* [1999] ECR I-3671, paragraphs 64 and 65 and the case-law cited).

108 Furthermore, it should be borne in mind that no provision of European Union law requires the Commission, when ordering the recovery of aid declared incompatible with the common market, to fix the exact amount of the aid to be recovered. It is sufficient for the Commission's decision to include information enabling the addressee of the decision to work out that amount itself, without overmuch difficulty (Case C-480/98 *Spain* v *Commission* [2000] ECR I-8717, paragraph 25; Case C-415/03 *Commission* v *Greece* [2005] ECR I-3875, paragraph 39; judgment of 14 February 2008 in Case C-419/06 *Commission* v *Greece*, not published in the ECR, paragraph 44; and judgment of 28 July 2011 in Case C-403/10 P *Mediaset* v *Commission*, not published in the ECR, paragraphs 126 to 127).

109 In the present case, the Commission recognised, in recital 443 to the contested final decision, that accurately calculating the amount of the State aid granted to the beneficiaries was complex, as it depended in essence on what the prices and amounts of electricity that could have been produced and sold would have been on the Hungarian wholesale market between 1 May 2004 and the date of termination of the PPAs if none of the PPAs had been in force during that period. The exact amount of the aid to be recovered could not, on the basis of the information available, be calculated during the formal investigation procedure. That is why the Commission required Hungary to calculate the exact amounts to be recovered, within six months from notification of the contested final decision, on the basis of a pre-defined method, namely an appropriate simulation of the wholesale electricity market as it would have stood if none of the long-term PPAs had been in force on 1 May 2004.

110 According to that method, calculation of the exact amount of the aid to be recovered must be based on a simulation of the conditions that would have prevailed on the wholesale electricity market in the period between 1 May 2004 and the date of termination of the PPAs if none of the PPAs had been in force during that period. Recitals 447 to 463 to the contested final decision set out detailed guidance and the principles applicable for the purposes of calculating the sum to be recovered.

111 In essence the applicant challenges the methodology applied by the Commission for two reasons. In the first place, as regards the obligation to choose a ‘spot’ market for the purposes of the simulation, the applicant submits that, in order to reduce risk, buyers and sellers on the wholesale electricity market use both ‘forward’ and ‘shorter-term’ contracts.

112 In the second place, as regards the obligation to calculate the amounts to be recovered on revenues, the applicant takes the view that, in the absence of the PPAs, the power generators concerned would have received different revenues and borne different costs, such as the costs linked to fuel prices, which should have been included in the method of calculation. Furthermore, the Commission’s simulation method does not take account of the fact that, without the PPAs, the power generators would not have invested in power plants in Hungary.

113 It must be observed, first of all, that in the present case the calculation of the amounts to be recovered must necessarily be based on a certain number of assumptions. In this instance, those assumptions relate to the conditions under which MVM would have purchased the electricity if it had not been bound by the constraints imposed on it by the PPAs.

114 Next, it must be held that, as is apparent from recitals 449 and 450 to the contested final decision, the question of the nature of the contracts was duly considered by the Commission. It is stated in those recitals that the proportion of ‘spot’ and ‘forward’ contracts for wholesale electricity sales varies from one market to another and depends on the strategies of market operaters, which are difficult to evaluate. In view of the fact that (i) there are wholesale electricity markets which advertise a very high proportion of electricity sold in the form of ‘spot’ products; (ii) the prices on the ‘forward’ market are, unlike the ‘spot’ market, difficult to simulate; and (iii) ‘spot’ prices normally set references for the entire wholesale market, including for ‘forward’ products, it was reasonable for the Commission to have insisted on the use of a ‘spot’ market model in the simulation of the wholesale market that was required to determine the ‘counterfactual scenario’, that is to say, ‘a fictitious scenario whereby no PPA was in force between 1 May 2004 and the date of termination of the PPAs’. A simulation based on a ‘spot’ market is more reliable, as any other scenario would introduce less objective assumptions. Consequently, the Commission was entitled to use a ‘counterfactual scenario’ in which all electricity, with the exception of the particular elements referred to in recitals 453 to 456 to the contested final decision, was deemed to have been traded through ‘spot’ contracts.

115 As regards the criticism that the ‘counterfactual scenario’ does not incorporate the fact that, in the absence of the PPAs, the power generators concerned would have received different revenues and borne different costs, it must be observed that the approach advocated by the applicant would subject the calculation of the recoverable amounts to a number of speculative assumptions linked to its conduct, or to that of electricity providers, of which no account can be taken. The applicant’s favoured approach would imply reconstructing past events differently on the basis of hypothetical elements such as the choices, often numerous, which could have been made by the operators concerned, since the choices actually made with the aid might prove to be irreversible. It should be noted that this approach was rejected by the Court in Case C-148/04 *Unicredito Italiano* [2005] ECR I-11137, paragraph 118. The same applies as regards the assertion that without the offer of a PPA the power generators would not have invested in power plants in Hungary. Furthermore, the existence of an economic advantage – which must, in this instance, in accordance with the principle of a private operator in a market economy, be assessed on the basis of the conduct of the public undertaking conferring the advantage under consideration, not on the basis of the conduct of the beneficiary of that advantage – is reflected in the difference between the amounts which MVM would, under normal market conditions, have paid for the purchase of the electricity needed and the amounts which it actually paid for the electricity purchased, whether it was needed or not. That, moreover, is why the method of recovery adopted in the contested final decision defines the amounts to be recovered as a difference in revenue and not as a difference in profits.

116 Lastly, as regards the applicant’s reference to two earlier decisions of the Commission in connection with its complaint concerning the method of calculation of the amount to be recovered, it must be observed that these are not conclusive. Commission Decision 2007/374/EC of 24 January 2007 on State aid C 52/2005 (ex NN 88/2005, ex CP 101/2004) implemented by the Italian Republic for the subsidised purchase of digital decoders (OJ 2007 L 147, p. 1) related to a different market and financing mechanism. That case concerned the grant of indirect aid to digital terrestrial television broadcasters and to cable operators offering pay-TV services, in the form of a fixed subsidy granted to individuals for the purchase of digital decoders. As a result, the operators concerned were able to sell their services to many more consumers. The additional revenue obtained by the operators by virtue of that mechanism was thus

financed partly by the public grant and partly by consumers' own resources. By contrast, the Hungarian PPAs concern a direct transfer of State resources for the benefit of the operators in question.

117 As regards Commission Decision 2009/287/EC of 25 September 2007 on State aid awarded by Poland as part of Power Purchase Agreements and the State aid which Poland is planning to award concerning compensation for the voluntary termination of Power Purchase Agreements (OJ 2009 L 83, p. 1), it must be observed that the Polish authorities had notified a compensation scheme for 'stranded costs' before the Commission adopted its final decision on the PPAs. The Commission was therefore entitled to take a view on the PPAs and on the 'stranded costs' compensation scheme in the same decision. Next, it must be noted that the cash flow deduction to which the applicant refers in its pleadings forms part of the calculation of 'stranded costs' and not of the calculation of the aid received under the PPAs. In other words, the Polish authorities' deduction of the cash flow of power generators' investment costs is unconnected to the fact that those power generators received unlawful aid via their PPAs.

118 Therefore, the part of the plea alleging infringement of Article 88(3) EC and of Article 14 of Regulation No 659/1999 must be rejected.

119 It follows from the foregoing that the first plea in law in Case T-182/09 and the second plea in law in Case T-80/06, save for the argument concerning the absence of individual consideration (see paragraph 126 below), must be rejected.

The second plea in law in Case T-182/09 and the first plea in law in Case T-80/06

120 The applicant disputes that the aid granted under its PPAs is 'applicable after' Hungary's accession to the European Union within the meaning of paragraph 1 of Chapter 3 of Annex IV to the Act of Accession and Article 1(b) of Regulation No 659/1999. It refers to the stance taken by the Commission in recitals 49, 51 and 52 to the decision, notified to the Czech Republic on 14 July 2004, initiating the procedure laid down in Article 88(2) EC in respect of State aid C 27/04 (ex CZ 49/03) – Agrobanka Prha, a.s. / GE Capital Bank, a.s.. Thus, according to the applicant, an aid measure which was put into effect before accession and which results in payments after accession must be considered 'not applicable' after accession where the amounts to be paid after accession were already precisely known before accession and, moreover, the decision to pay those amounts was taken unconditionally before accession. In the present case, the applicant maintains that Hungary's financial exposure under the PPAs was known before accession, in view of (i) the formula for calculating the fees payable by MVM, and (ii) the fact that the PPAs were limited in time.

121 It must be observed that the contractual provisions of the PPAs were indeed behind the payments which MVM had to make after accession. However, contrary to what is claimed by the applicant, as those payments depended on the unpredictable evolution of parameters such as the price of fuel, the aid mechanism must be considered 'applicable after' accession.

122 The existence of a price-setting formula is not conclusive. It must be borne in mind that the Commission set out in recitals 348 to 365 to the contested final decision the reasons why the PPAs did not cap at a maximum amount the State's financial exposure, and why it could not be precisely calculated before accession for the entire duration of the PPAs. It has become apparent that the price at which the power generators sold electricity to MVM was the result of calculations made using a formula comprising a series of fluctuating parameters. Thus, the price formula contained in the PPAs included, inter alia, a 'capacity fee' and an 'electricity fee'. It follows from this that the price at which electricity was sold to MVM took into account 'periodic production plans' and fluctuated according, inter alia, to electricity demand, the behaviour of the parties to the contract, and fuel prices.

123 Accordingly, the Commission could legitimately conclude, in recital 363 to the contested final decision and provisionally in the opening decision, that the existence of price-setting formulae did not constitute a sufficient cap on the State's economic exposure.

124 It follows from this that the second plea in law in Case T-182/09 and the first plea in law in Case T-80/06 must be rejected.

The third plea in law in Case T-182/09, alleging breach of essential procedural requirements, and the second plea in law in Case T-80/06, in so far as it concerns the argument as to the absence of individual consideration

125 Under the third plea in law, the applicant submits that the Commission has, on four counts, infringed essential procedural requirements by adopting the contested final decision. First, its right to be heard has been breached because the opening decision of the formal investigation procedure did not allow it to identify the approach the Commission was going to take regarding the relevant period for assessment of the measure in question, and so the applicant could not usefully make observations on these issues. Second, the applicant maintains that since, on the one hand, it could not comment on the Hungarian authorities' position during the formal investigation procedure and, on the other, the Commission failed to take account of information on the power plants as cogeneration units, the Commission failed to conduct a diligent and impartial investigation. Third, the contested final decision is flawed in so far as it rests on the generic assessment of all the PPAs rather than an evaluation of the different PPAs individually. Fourth, the applicant submits that if the PPAs could be considered existing aid schemes, *quod non*, the Commission should have followed the appropriate measures procedure laid down in Article 88(1) EC and Article 18 of Regulation No 659/1999.

126 The third complaint mentioned in the preceding paragraph was also raised under the second plea in law in Case T-80/06.

127 As regards, in the first place, the alleged infringement of the right to be heard, particularly as regards the time-frame, it is apparent from the opening decision that the Commission's doubts stem from its preliminary analysis of the PPAs as applied since 2004. In addition, the arguments put forward in the action against the opening decision and the observations made during the formal investigation procedure show that the applicant was aware of the Commission's intention to check whether there was any State aid under post-accession conditions. Moreover, in those observations, the applicant challenges, in detail, the relevant period of assessment envisaged by the Commission.

128 With regard, in the second place, to the obligation to carry out a diligent and impartial investigation, it must be held that there is nothing on the file to indicate that the Commission failed in its duty. Even if that were established, the fact that the interests of Hungary and those of the recipient of the aid are diametrically opposed cannot reasonably be relied on. Furthermore, contrary to what is claimed by the applicant, the Commission took into account the fact that the applicant's power plants are cogeneration plants. Recitals 410 to 413 to the contested final decision, in which the Commission found that the conditions subject to which those power plants may benefit from the exception provided for by the 2001 Guidelines are not fulfilled, do not cast doubt on that finding.

129 In the third place, the argument that the Commission did not carry out individual assessments of the various PPAs cannot be accepted either. In that regard it must be observed that the Commission stated in recitals 153 and 154 to the contested final decision why it was appropriate, in view of the similarities of the PPAs, to adopt a single decision in respect of all those agreements and to carry out a common assessment of all of them. In recital 153 to that decision, it lists the factors which, from the point of view of the assessment of State aid, are valid in respect of all the PPAs. Furthermore, it is clear from recital 154 to that decision that the Commission took into account the differences existing between the PPAs when the contested final decision was adopted where these were relevant to an assessment of the compatibility of those PPAs with the rules on State aid.

130 The account taken of specific factors relating to individual operators is, in particular, made clear in the contested final decision in the following recitals: 29 (termination agreements in respect of certain PPAs), 36 to 45 (circumstances in which the PPAs were signed), 245 to 247, 249 and 250 (electricity sale prices by generator), and in Tables 3, 4, 10 and 11 (detailed information in relation to the PPAs falling within the scope of the contested final decision). Such specific factors are also mentioned in recitals 73 (determination of the costs that MVM was required to pay if it did not purchase the guaranteed minimum quantity from certain operators), 216 (contracts relating to 'balancing services'), 237 and 266 (importance attached to the use of 'indigenous resources' by the Mátra power plant), as well as 274 and 302 to 307 (tendering procedure in relation to the PPA relating to the Kispest plant).

131 It follows from all the foregoing considerations that the Commission concluded that there was State aid incompatible with the common market to the benefit of eligible power generators, including the applicant, only after (i) examining the purchase obligation enshrined in all the PPAs on the basis of Article 87(1) EC, and (ii) taking into consideration, in addition to the general criteria, the specific features of each PPA that were important for the assessment by which it sought to determine whether there was State aid.

132 In the fourth place, the complaint that the Commission ought to have followed the appropriate measures procedure laid down in Article 88(1) EC must also be rejected on the ground that, as has already been

explained in paragraphs 50 to 52 above, the aid contained in the applicant's PPAs cannot be considered existing aid in the light of the Act of Accession.

133 In conclusion, in Case T-182/09 the third plea in law must be rejected in its entirety.

134 Similarly, as has already been stated in paragraph 126 above, the complaint concerning the absence of individual consideration of the PPAs is also invoked in connection with the second plea in law in Case T-80/06. However, it is apparent from the opening decision that the Commission carried out an overall and individual, albeit succinct, assessment of the features of the PPAs. It follows from the foregoing that this complaint cannot be accepted in the action in Case T-80/06 either. Consequently, the second plea in law in that case must be rejected in its entirety.

The fourth plea in law in Case T-182/09, alleging infringement of Article 253 EC inasmuch as the statement of reasons for the contested final decision is insufficient

135 The applicant submits, in essence, that the Commission did not provide a sufficient statement of reasons for its assessment of the compatibility of the aid received, in the light of the cogeneration provisions of the 2001 Guidelines.

136 In that regard, it will be recalled that, according to settled case-law, the scope of the duty to state reasons depends on the nature of the measure in question and on the context in which it was adopted. The statement of reasons must disclose in a clear and unequivocal fashion the reasoning followed by the institution which adopted the measure, so as to enable the persons concerned to ascertain the reasons for it so that they can defend their rights and ascertain whether or not the measure is well founded and to enable the Courts of the European Union to exercise their power of review. It is not necessary for the statement of reasons to go into all the relevant facts and points of law, since the question whether the statement of reasons meets the requirements of Article 253 EC must be assessed with regard not only to its wording but also to its context and to all the legal rules governing the matter in question. In particular, the Commission is not obliged to adopt a position on all the arguments relied on by the parties concerned and it is sufficient if it sets out the facts and the legal considerations having decisive importance in the context of the decision (see Case T-349/03 *Corsica Ferries France* v *Commission* [2005] ECR II-2197, paragraphs 62 to 64 and the case-law cited).

137 In the present case, it must be noted that recitals 410 to 412 to the contested final decision put forward, as has already been pointed out in paragraph 103 above, concisely but comprehensively, sufficient reasons to support the conclusion that the applicant's cogeneration plants did not fulfil the compatibility criteria set out in the 2001 Guidelines.

138 It follows from this that the fourth plea in law, alleging an insufficient statement of reasons, must be rejected.

The fifth plea in law in Case T-182/09, alleging misuse of powers

139 Under the last plea, the applicant alleges that the Commission used its powers under the State aid rules not in order to remove the competitive advantage enjoyed by the alleged beneficiaries of the aid but in order to open up the Hungarian electricity market and thus to free up the capacity that was covered by those agreements at that time.

140 It has consistently been held that the concept of misuse of powers refers to cases where an administrative authority has used its powers for a purpose other than that for which they were conferred on it. A decision may amount to a misuse of powers only if it appears, on the basis of objective, relevant and consistent factors, to have been taken for such a purpose (Case C-331/88 *Fedesa and Others* [1990] ECR I-4023, paragraph 24, and Case C-400/99 *Italy* v *Commission* [2005] ECR I-3657, paragraph 38). Where more than one aim is pursued, even if the grounds of a decision include, in addition to proper grounds, an improper one, that would not make the decision invalid for misuse of powers, since it does not nullify the main aim (Case 2/54 *Italy* v *High Authority* [1954] ECR 37, 54, and Case T-87/05 *EDP* v *Commission* [2005] ECR II-3745, paragraph 87).

141 It must be noted that the applicant has not produced any evidence to demonstrate that the Commission has, in the present case, used its power for a purpose other than that of determining whether the PPAs contained a State aid measure, assessing the compatibility of that aid with the common market, ordering

the recovery of the aid already paid and requiring Hungary to refrain in the future from granting that aid.

142 Therefore, the plea in law alleging misuse of powers must be rejected.

The third plea in law in Case T-80/06, alleging infringement of Article 253 EC

143 With regard to the third plea in law in Case T-80/06, based on an inadequate statement of reasons, it must be noted that the alleged deficiencies in the reasoning cannot be considered an infringement of Article 253 EC in this instance. The applicant claims that the Commission failed at that stage sufficiently to consider certain issues relating to whether the measures concerned were 'still applicable' after Hungary's accession to the European Union, whether they had an impact on trade between the Member States, whether they had to be categorised as aid and, if so, whether they were new or existing aid. In that regard it must be borne in mind that the requirement under Article 253 EC for a statement of reasons is, in the context of the initiation of the formal investigation procedure, governed by Article 6 of Regulation No 659/1999. Article 6 of that regulation provides that the decision to initiate the procedure must give the interested parties the opportunity effectively to participate in the formal investigation procedure, during which they will have the opportunity to put forward their arguments. For that purpose, it is sufficient for the parties to be aware of the reasoning which led the Commission provisionally to conclude that the measure in issue might constitute new aid incompatible with the common market (see, to that effect, Joined Cases T-195/01 and T-207/01 *Government of Gibraltar* v *Commission* [2002] ECR 2309, paragraphs 136 to 138 and the case-law cited). It must be held that the opening decision makes it clear why a more in-depth investigation was appropriate. It follows that the plea alleging a failure to state reasons is unfounded.

144 It follows from this that the third plea in law, alleging infringement of Article 253 EC, must be rejected.

145 Consequently, it must be concluded that the actions are to be dismissed in their entirety.

Costs

146 Under Article 87(2) of the Rules of Procedure of the General Court, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the applicant has been unsuccessful, it must be ordered to pay the costs, as applied for by the Commission in its pleadings.

On those grounds,

THE GENERAL COURT (Sixth Chamber)

hereby:

1. Dismisses the actions;

2. Orders Budapesti Erőmű Zrt to pay the costs.

Jaeger Wahl Soldevila Fragoso

Delivered in open court in Luxembourg on 13 February 2012.

[Signatures]

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* Language of the case: English.