Provisional text

JUDGMENT OF THE GENERAL COURT (Fifth Chamber)

12 July 2018 (*)

(State aid — Aid planned by the United Kingdom in favour of Hinkley Point C nuclear power station — Contract for Difference, Secretary of State Agreement and Credit Guarantee — Decision declaring the aid compatible with the internal market — Article 107(3)(c) TFEU — Public interest objective — Promotion of nuclear energy — Need for State intervention — Guarantee Notice — Determination of the aid element — Proportionality — Investment aid — Operating aid — Right to submit observations — Public procurement procedure — Obligation to state reasons)

In Case T−356/15,

Republic of Austria, represented initially by C. Pesendorfer and M. Klamert, and subsequently by G. Hesse and M. Fruhmann, acting as Agents, and by H. Kristoferitsch, lawyer,

applicant,

supported by

Grand Duchy of Luxembourg, represented by D. Holderer, acting as Agent, and by P. Kinsch, lawyer,

intervener,

v

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

defendant,

supported by

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

by

French Republic, represented initially by G. de Bergues, D. Colas and J. Bousin, and subsequently by D. Colas and J. Bousin, acting as Agents,

by

Hungary, represented initially by M. Fehér and M. Bóra, subsequently by B. Sonkodi, then by A. Steiner, acting as Agents, and by P. Nagy, lawyer, and finally by A. Steiner,

by

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

by

Romania, represented initially by R. Radu and M. Bejenar, and subsequently by M. Bejenar and C.-R. Canţăr, acting as Agents,

by

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

and by

United Kingdom of Great Britain and Northern Ireland, represented initially by C. Brodie and S. Brandon, subsequently by C. Brodie, S. Simmons and M. Holt, then by C. Brodie, S. Simmons and D. Robertson, then by C. Brodie, and finally by C. Brodie and Z. Lavery, acting as Agents, and by T. Johnston, Barrister, and A. Robertson QC,

interveners,

APPLICATION under Article 263 TFEU 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), in which the Commission found that that State aid measure was compatible with the internal market within the meaning of Article 107(3)(c) TFEU and authorised its implementation,

THE GENERAL COURT (Fifth Chamber),

composed of D. Gratsias, President, A. Dittrich (Rapporteur) and P.G. Xuereb, Judges,

Registrar: N. Schall, Administrator,

having regard to the written part of the procedure and further to the hearing on 5 October 2017,

gives the following

Judgment

I. Background to the dispute

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

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

3 On 8 October 2014, the Commission adopted Decision (EU) 2015/658 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 contested decision').

4 The measures notified by the United Kingdom are described in Section 2 of the contested decision.

5 The first notified measure, which is described in Section 2.1 of the contested decision, is a contract for difference ('the Contract for Difference'). This is an instrument that is intended to ensure price stability for electricity sales by NNBG during the operational phase of Hinkley Point C. It is envisaged that NNBG will sell the electricity produced in that reactor on the market. However, the amount of NNBG's revenues will

be stabilised by the Contract for Difference. To that end, the strike price, which has been calculated on the basis of NNBG's projected construction and operating costs, including a reasonable profit, will be compared to the reference price, which corresponds to the weighted average of wholesale prices which the United Kingdom sets for all operators supported by a contract for difference and which reflects market prices. In the case of NNBG, the relevant reference price is the baseload market reference price, which applies to all baseload generation operators. When the reference price is lower than the strike price, NNBG will receive a difference payment corresponding to the difference between those two prices. That right to a difference payment will be limited by a maximum output cap. By contrast, when the reference price is higher than the strike price, NNBG will be obliged to pay the difference between those two prices to the other party to the Contract for Difference ('NNBG's contracting partner'). That contracting partner will be Low Carbon Contracts Company Ltd, an entity that is to be funded through a statutory obligation on all the licensed electricity suppliers collectively. There will be two 'gain-share' mechanisms, the first of which concerns the costs of production, and the second, the rate of return on equity. There will be two operating costs reopener dates, the first of which will be 15 years after, and the second, 25 years after, the date on which the first reactor is brought into service.

6 The Contract for Difference provides, under certain conditions, for compensation for NNBG for certain legislative changes. It will, moreover, under certain conditions, receive compensation in the event of the early shutdown of Hinkley Point nuclear power station on political grounds and in the event of problems related to nuclear third party liability insurance. In those circumstances, both NNBG's investors and the United Kingdom will be able to call for the transfer of NNBG to the United Kingdom ('UK') Government and compensation will be payable to those investors.

7 The second notified measure, which is described in Section 2.3 of the contested decision, is an agreement between the United Kingdom's Secretary of State for Energy and Climate Change and NNBG's investors ('the Secretary of State Agreement'). That agreement supplements the Contract for Difference. It provides that if, following an early shutdown of Hinkley Point nuclear power station on political grounds, NNBG's contracting partner were to default on compensatory payments to NNBG's investors, the Secretary of State in question will pay the agreed compensation to the investors. It also provides for gain-share mechanisms.

8 The third notified measure, which is described in Section 2.2 of the contested decision, 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, which may reach up to 17 billion pounds sterling (GBP). The level of the guarantee fee authorised by the Commission in that decision is 295 basis points.

9 In Section 7 of the contested decision, the Commission stated that the three notified measures referred to above ('the measures at issue') constituted State aid within the meaning of Article 107(1) TFEU.

10 In Sections 9 and 10 of the contested decision, the Commission considered whether the measures at issue could be declared compatible with the internal market pursuant to Article 107(3)(c) TFEU. In that context, in Section 9.1 of that decision, it stated that those measures were compatible with existing market regulation. In Section 9.2 of that decision, it found that the public interest objective which the United Kingdom was pursuing through those measures was the promotion of nuclear energy and, more specifically, the creation of new nuclear energy generating capacity. According to the considerations which the Commission set out in Section 9.3 of that decision, UK intervention was necessary in order to achieve that objective in sufficient time. In Section 9.4 of the decision in question, the Commission assessed whether the measures at issue were appropriate instruments for achieving that objective and whether they had an incentive effect. In Sections 9.5 and 9.6 of the decision, it examined the proportionality of the measures at issue and found that, subject to an adjustment of the credit guarantee fee rate to 295 basis points and amendment of the gain-share mechanism, the measures at issue had to be regarded as being necessary and that, overall, the potential for distortion of competition was limited and that the negative effects of the measures at issue were offset by their positive effects. On the basis of those considerations, the Commission concluded, in Section 10 of the contested decision, that the measures at issue were compatible with the internal market pursuant to Article 107(3)(c) TFEU.

11 The first paragraph of Article 1 of the contested decision 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].’

II. Procedure before the General Court and forms of order sought

12 The Republic of Austria brought the present action by application lodged at the General Court Registry on 6 July 2015.

13 On 18 September 2015, the Commission lodged its defence.

14 On 5 November 2015, the Republic of Austria lodged its reply.

15 On 15 January 2016, the Commission lodged its rejoinder.

16 By document lodged at the Court Registry on 9 November 2015, the Slovak Republic applied for leave to intervene in the present proceedings in support of the form of order sought by the Commission. By decision of the President of the Chamber of 9 December 2015, the Slovak Republic was granted leave to intervene in support of the form of order sought by the Commission. On 14 March 2016, it lodged its statement in intervention.

17 By document lodged at the Court Registry on 20 November 2015, the Grand Duchy of Luxembourg applied for leave to intervene in the present proceedings in support of the form of order sought by the Republic of Austria. By decision of the President of the Chamber of 18 December 2015, the Grand Duchy of Luxembourg was granted leave to intervene in support of the form of order sought by the Republic of Austria. On 24 March 2016, it lodged its statement in intervention.

18 By document lodged at the Court Registry on 25 November 2015, Hungary applied for leave to intervene in the present proceedings in support of the form of order sought by the Commission. By decision of the President of the Chamber of 6 January 2016, Hungary was granted leave to intervene in support of the form of order sought by the Commission. On 24 March 2016, it lodged its statement in intervention.

19 By document lodged at the Court Registry on 26 November 2015, the United Kingdom applied for leave to intervene in the present proceedings in support of the form of order sought by the Commission. By decision of the President of the Chamber of 6 January 2016, the United Kingdom was granted leave to intervene in support of the form of order sought by the Commission. On 23 March 2016, it lodged its statement in intervention.

20 By document lodged at the Court Registry on 30 November 2015, the French Republic applied for leave to intervene in the present proceedings in support of the form of order sought by the Commission. By decision of the President of the Chamber of 11 January 2016, the French Republic was granted leave to intervene in support of the form of order sought by the Commission. On 18 March 2016, it lodged its statement in intervention.

21 By document lodged at the Court Registry on 2 December 2015, the Czech Republic applied for leave to intervene in the present proceedings in support of the form of order sought by the Commission. By decision of the President of the Chamber of 11 January 2016, the Czech Republic was granted leave to intervene in support of the form of order sought by the Commission. On 24 March 2016, it lodged its statement in intervention.

22 By document lodged at the Court Registry on 3 December 2015, the Republic of Poland applied for leave to intervene in the present proceedings in support of the form of order sought by the Commission. By decision of the President of the Chamber of 11 January 2016, the Republic of Poland was granted leave to

intervene in support of the form of order sought by the Commission. On 24 March 2016, it lodged its statement in intervention.

23 By document lodged at the Court Registry on 3 December 2015, Romania applied for leave to intervene in the present proceedings in support of the form of order sought by the Commission. By decision of the President of the Chamber of 11 January 2016, Romania was granted leave to intervene in support of the form of order sought by the Commission. On 24 March 2016, it lodged its statement in intervention.

24 On 21 July 2016, the Republic of Austria submitted its observations on the statements in intervention of the Czech Republic, the French Republic, Hungary, the Republic of Poland, Romania, the Slovak Republic and the United Kingdom.

25 On 19 July 2016, the Commission submitted its observations on the statement in intervention of the Grand Duchy of Luxembourg.

26 On a proposal from the Judge-Rapporteur, the Court (Fifth Chamber) decided to open the oral part of the procedure and, by way of measures of organisation of procedure pursuant to Article 89 of the Rules of Procedure of the General Court, put questions to the Republic of Austria, the United Kingdom and the Commission in writing. Those parties answered the questions within the prescribed period.

27 On 14 September 2017, the Commission offered evidence and enclosed a document. That offer of evidence and that document were placed on the file and the other parties were given the opportunity to submit their observations on them.

28 By letters of 18 and 28 September 2017, the Slovak Republic and the United Kingdom lodged observations on the report for the hearing.

29 The Commission, the Czech Republic, the French Republic, the Grand Duchy of Luxembourg, Hungary, the Republic of Austria and the United Kingdom presented oral argument and replied to the questions put by the Court at the hearing on 5 October 2017.

30 The Grand Duchy of Luxembourg and the Republic of Austria claim that the Court should:

– annul the contested decision;

– order the Commission to pay the costs.

31 The Commission contends that the Court should:

– dismiss the action as unfounded;

– order the Republic of Austria to pay the costs.

32 The Czech Republic and the Slovak Republic contend that the Court should:

– dismiss the action as unfounded;

– order the Republic of Austria to pay the costs.

33 Hungary contends that the Court should:

– dismiss the action as unfounded;

– order the Republic of Austria to pay all the costs of the present proceedings, including the administrative costs and legal fees.

34 The French Republic, the Republic of Poland, Romania and the United Kingdom contend that the Court should:

– dismiss the action as unfounded.

III. Law

35 The action is based on 10 pleas in law.

36 By the first plea, the Republic of Austria claims that the Commission erred in accepting the existence of a market separate from the nuclear energy market and, moreover, in relying on a failure of that market.

37 The second plea relates to the allegedly erroneous nature of the Commission's finding that the technology used in Hinkley Point C is new.

38 The third plea alleges that the Commission erred in finding that the measures at issue constituted investment aid. According to the Republic of Austria, those measures constitute operating aid that is incompatible with the internal market.

39 By the fourth plea, the Republic of Austria claims that, contrary to the Commission's assertion, the construction of Hinkley Point C is not intended to meet an objective of 'common' interest.

40 In the context of the fifth plea, the Republic of Austria maintains that the Commission has not sufficiently determined the aid elements contained in the measures at issue.

41 The sixth plea is aimed at establishing that the Commission's conclusion that the measures at issue were consistent with the principle of proportionality was wrong.

42 In the context of the seventh plea, the Republic of Austria submits that the United Kingdom should have initiated a public procurement procedure in respect of Hinkley Point C.

43 By the eighth plea, the Republic of Austria submits that the Commission failed to comply with its Notice on the application of Articles [107] and [108] of the [FEU] Treaty to State aid in the form of guarantees (OJ 2008 C 155, p. 10; 'the Guarantee Notice').

44 The ninth plea alleges infringement of the obligation to state reasons.

45 The 10th plea covers infringement of the right to be heard.

46 In the context of the present action, the Republic of Austria queries the Commission's conclusion that the measures at issue could be declared compatible with the internal market within the meaning of Article 107(3)(c) TFEU.

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

48 As is apparent from the case-law, in order to be capable of being declared compatible with the internal market pursuant to Article 107(3)(c) TFEU, aid must be aimed at the development of an activity that constitutes a public interest objective and must be appropriate, necessary and not disproportionate (see, to that effect, judgment of 15 June 2010, *Mediaset* v *Commission*, T−177/07, EU:T:2010:233, paragraph 125).

49 In the light of Article 107(3)(c) TFEU, it is appropriate, first, to examine the fourth plea, which concerns the public interest objective established by the United Kingdom, namely the promotion of nuclear

electricity and, more specifically, the construction of new nuclear energy generating capacity, before going on to analyse the second plea, relating in particular to the allegedly erroneous nature of the Commission's finding that the technology used in Hinkley Point C was new, then the first plea, alleging that the Commission made mistakes in relation to the definition of the relevant market and wrongly found that there was a market failure, and the fifth and eighth pleas, alleging insufficient determination of the measures at issue and a failure to comply with the Guarantee Notice, and, finally, the sixth plea, concerning the principle of proportionality.

50 The third plea, alleging that the measures at issue constitute operating aid incompatible with the internal market, will be analysed taking the outcome of the examination of those pleas into account.

51 The Court will then examine the seventh plea, alleging that the United Kingdom should have initiated a public procurement procedure in respect of Hinkley Point C, and the 10th plea, alleging infringement of the right to be heard.

52 The ninth plea, which alleges infringement of the obligation to state reasons, is in six parts, covering the Commission's findings the validity of which is called in question in the context of the first to sixth pleas. Those parts will be examined in conjunction with the associated pleas.

53 Before examining the pleas put forward by the Republic of Austria, it is necessary, however, to rule on its arguments as to the inadmissibility of the statement in intervention submitted by Hungary.

A. The arguments alleging that the statement in intervention submitted by Hungary is inadmissible

54 The Republic of Austria claims that Hungary's statement in intervention must be rejected as inadmissible. In its view, a statement in intervention must be limited to supporting the form of order sought by one of the main parties. It submits that Hungary was granted leave to intervene in support of the form of order sought by the Commission, which is seeking to have the application for annulment of the contested decision dismissed, and that that decision is based on Article 107 TFEU. Yet Hungary argues in its statement in intervention that Article 107 TFEU does not apply to the field of atomic energy. According to the Republic of Austria, if those arguments were to be accepted, they would lead to the contested decision being annulled. Accordingly, Hungary is not supporting the form of order sought by the Commission.

55 In that regard, it should be borne in mind that, in accordance with the fourth paragraph of Article 40 of the Statute of the Court of Justice of the European Union and Article 142 of the Rules of Procedure, the intervention is to be limited to supporting, in whole or in part, the form of order sought by one of the main parties. Those provisions do not, however, preclude the intervener from using arguments which differ from those of the party which it supports, provided that those arguments do not alter the framework of the dispute and that the intervention is still intended to support the form of order sought by that party (see, to that effect, judgment of 8 June 1995, *Siemens* v *Commission*, T−459/93, EU:T:1995:100, paragraph 21).

56 As regards the statement in intervention submitted by Hungary, in the first place, it should be noted that the form of order sought by Hungary is in line with that sought by the Commission, since it seeks to have the Republic of Austria's application for annulment of the contested decision dismissed.

57 In the second place, it is apparent from Hungary's statement in intervention that Hungary does not dispute the fact that, in the circumstances of this case, the Commission was entitled to adopt the contested decision on the basis of Article 107 TFEU.

58 In those circumstances, even if some of the arguments advanced by Hungary concerning the Commission's power to adopt decisions based on Articles 107 and 108 TFEU in the field of nuclear energy must be regarded as altering the framework of the dispute, that would not, contrary to the Republic of Austria's contentions, justify the dismissal, for inadmissibility, of Hungary's statement in intervention in its entirety.

B. Fourth plea, alleging that the promotion of nuclear energy does not constitute an objective of 'common' interest, and fifth part of the ninth plea in law, alleging an insufficient statement of reasons for the contested decision

59 The fourth plea and the fifth part of the ninth plea concern the Commission's finding in recitals 366 to 374 of the contested decision that the objective being pursued by the United Kingdom through the measures at issue, that is, the objective of promoting nuclear energy, constitutes an objective of 'common' interest.

60 First of all, the Court will examine the arguments put forward by the Republic of Austria under the fifth part of the ninth plea and which seek to establish that the statement of reasons for the contested decision is insufficient with regard to the finding that the objective being pursued by the United Kingdom through the measures at issue constitutes an objective of 'common' interest. The Court will then go on to analyse the arguments advanced by the Grand Duchy of Luxembourg and the Republic of Austria in support of the fourth plea and which seek to challenge the merits of the Commission's considerations in recitals 366 to 374 of the contested decision.

1. Fifth part of the ninth plea, alleging that the statement of reasons for the contested decision is insufficient

61 In the context of the fifth part of the ninth plea, the Republic of Austria submits that the statement of reasons for the contested decision is not sufficient as regards the finding that the objective being pursued by the United Kingdom through the measures at issue constitutes an objective of 'common' interest in so far as, in that decision, the Commission did not sufficiently explain the relationship between the provisions of the Euratom Treaty and the rules on State aid laid down in the FEU Treaty. It claims that the Commission's considerations in that regard are incomprehensible and inadequate.

62 The Commission contests that argument.

63 In that regard, as a preliminary point, it should be borne in mind that the statement of reasons required by Article 296 TFEU must be appropriate to the measure at issue and must disclose in a clear and unequivocal fashion the reasoning followed by the institution which adopted the measure in such a way as to enable the persons concerned to ascertain the reasons for the measure and to enable the court having jurisdiction to exercise its power of review (judgment of 22 June 2006, *Belgium and Forum 187* v *Commission*, C-182/03 and C-217/03, EU:C:2006:416, paragraph 137). The requirements to be satisfied by the statement of reasons depend on the circumstances of each case, in particular the content of the measure in question, the nature of the reasons given and the interest which the addressees of the measure, or other parties to whom it is of direct and individual concern, may have in obtaining explanations. It is not necessary for the reasoning to go into all the relevant facts and points of law, since the question whether the statement of reasons meets the requirements of Article 296 TFEU 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 (judgment of 11 July 2014, *DTS Distribuidora de Televisión Digital* v *Commission*, T-533/10, EU:T:2014:629, paragraph 199).

64 It is in the light of that case-law that the Court must examine whether the statement of reasons for the contested decision, as regards the finding that the objective being pursued by the United Kingdom through the measures at issue constitutes an objective of 'common' interest, is sufficient.

65 In that regard, in the first place, it should be noted that, admittedly, in recitals 366 to 374 of the contested decision, the Commission did not expressly comment on the relationship between the provisions of the Euratom Treaty and Article 107 TFEU. However, it must be pointed out that it is apparent notably from Section 7 of that decision, entitled 'Existence of State aid', that the Commission found that Article 107 TFEU was applicable to the measures at issue. It should also be pointed out that, in Section 9.2 of that decision, entitled 'Objectives of common interest', the Commission based its finding that the promotion of nuclear energy constituted an objective of 'common' interest notably on Article 2(c) and Article 40 of the Euratom Treaty. It is therefore apparent from the latter section that the Commission found that, in the

context of the application of Article 107(3)(c) TFEU, it was appropriate to take the provisions of the Euratom Treaty into account.

66 In the second place, it must be recalled that account should be taken of the context of the contested decision, which includes the Commission's previous practice, of which the Member States are deemed to be aware. The approach taken by the Commission in that decision is consistent with its previous practice, according to which the measures of a Member State relating to the field governed by the Euratom Treaty also had to be examined in the light of Article 107 TFEU given that they were not necessary for or went beyond the objectives of the Euratom Treaty or distorted or threatened to distort competition in the internal market (see, in that regard, Commission Decision 2005/407/EC of 22 September 2004 on the State aid which the United Kingdom is planning to implement for British Energy plc (OJ 2005 L 142, p. 26, recital 239)) and according to which an objective covered by the Euratom Treaty could constitute a public interest objective for the purposes of Article 107(3)(c) TFEU (see, to that effect, Commission Decision 2006/643/EC of 4 April 2006 on the State Aid which the United Kingdom is planning to implement for the establishment of the Nuclear Decommissioning Authority (OJ 2006 L 268, p. 37, recital 162)).

67 Having regard to those points, it must be concluded that it is sufficiently clear from the grounds of the contested decision that the Commission considered that, even though the measures at issue related to nuclear energy, in so far as they constituted State aid, it was appropriate to assess their compatibility with the internal market in accordance with Article 107(3)(c) TFEU. It is also sufficiently clear from those grounds that the Commission considered that, in the context of the application of that provision, notably as regards the characterisation of the promotion of nuclear energy as a public interest objective for the purposes of that provision, it was necessary to take the provisions of the Euratom Treaty into account. Those grounds thus enabled the Republic of Austria to ascertain the reasons for that decision and enable the Court to exercise its power of review.

68 Accordingly, the fifth part of the ninth plea, alleging infringement of the obligation to state reasons, must be rejected.

2. Fourth plea, relating to the merits of the Commission's considerations

69 The Republic of Austria and the Grand Duchy of Luxembourg put forward arguments challenging the merits of the Commission's considerations in recitals 366 to 374 of the contested decision. In essence, they maintain that, contrary to the Commission's findings, the promotion of nuclear energy is not consonant with any common interest.

70 The Commission, the Czech Republic, the French Republic, Hungary, the Republic of Poland, Romania, the Slovak Republic and the United Kingdom contest those arguments.

71 Before examining the arguments of the Republic of Austria and the Grand Duchy of Luxembourg challenging the Commission's conclusion that the promotion of nuclear energy is an objective of 'common' interest, the Court must rule, as a preliminary point, on the question as to the extent to which Article 107 TFEU is applicable to measures concerning the field of nuclear energy and the extent to which it is necessary to take into account the objectives of the Euratom Treaty in the context of its application.

(a) The application of Article 107 TFEU to measures concerning the field of nuclear energy and the taking into account of the objectives of the Euratom Treaty in the context of the application of that provision

72 As regards the application of Article 107 TFEU to measures concerning the field of nuclear energy, it should be noted that, according to Article 106a(3) of the Euratom Treaty, the provisions of the EU Treaty and of the FEU Treaty are not to derogate from the provisions of the Euratom Treaty. Consequently, the provisions of the Euratom Treaty constitute special rules in relation to the provisions of the FEU Treaty and therefore derogate from the latter provisions in the event of any conflict.

73 However, the fact that the provisions of the Euratom Treaty constitute special rules in relation to the FEU Treaty does not preclude Article 107 TFEU from being applied to measures pursuing an objective covered by the Euratom Treaty. In so far as the Euratom Treaty does not lay down specific rules in that regard, the provisions of the FEU Treaty relating to a policy of the European Union may be applied to such measures (see, to that effect, judgments of 29 March 1990, *Greece* v *Council*, C−62/88, EU:C:1990:153, paragraph 17; of 12 April 2005, *Commission* v *United Kingdom*, C−61/03, EU:C:2005:210, paragraph 44; and of 4 June 2015, *Kernkraftwerke Lippe-Ems*, C−5/14, EU:C:2015:354, paragraphs 69 to 82; see also, by analogy, Opinion 1/94 (Agreements annexed to the WTO Agreement) of 15 November 1994, EU:C:1994:384, paragraph 24).

74 It must be held that the Euratom Treaty does not contain exhaustive rules on competition that could preclude the rules laid down in Chapter 1 of Title VII of the FEU Treaty being applied. In particular, the Euratom Treaty does not lay down exhaustive rules on State aid.

75 Admittedly, certain provisions of the Euratom Treaty, such as Article 2(c) and the provisions laid down in Chapter 4 of Title II concern investment in the field of nuclear energy. However, those provisions do not set out the conditions under which, notwithstanding the distortion of competition to which it gives rise, State aid concerning investment in the field of nuclear energy may be considered to be compatible with the internal market.

76 Accordingly, Article 107 TFEU is intended to be applied to the measures at issue, even though they pursue an objective covered by the Euratom Treaty.

77 That conclusion is not called in question by Article 106a(1) of the Euratom Treaty, which lists certain provisions of the EU Treaty and the FEU Treaty which are to apply to the Euratom Treaty. As is evident from the second recital of Protocol No 2 amending the Euratom Treaty annexed to the Treaty of Lisbon (OJ 2007 C 306, p. 199), that provision merely adapts that treaty to the new rules laid down by the EU Treaty and by the FEU Treaty, in particular in the institutional and financial fields. It cannot, however, be inferred from that provision that all the EU Treaty and FEU Treaty provisions not mentioned there are not intended to apply to measures that pursue objectives falling within the scope of the Euratom Treaty. To read Article 106a(1) of the Euratom Treaty in that way would not be consistent with paragraph 3 of that article, from which it may be inferred that, in principle, the provisions of the EU Treaty and of the FEU Treaty are intended to apply in the field of nuclear energy and that it is only to the extent to which the Euratom Treaty lays down special rules that the provisions of the EU Treaty and of the FEU Treaty are not to apply.

78 Consequently, Article 107 TFEU is applicable to the measures at issue. However, in the context of the application of that provision to measures concerning the field of nuclear energy, it is necessary to take into account the provisions and objectives of the Euratom Treaty.

(b) The arguments calling in question the Commission's conclusion that the promotion of nuclear energy constitutes an objective of 'common' interest

79 The Court must take into account the considerations set out in paragraphs 72 to 78 above when it examines the arguments of the Republic of Austria and the Grand Duchy of Luxembourg calling in question the Commission's conclusion in recital 374 of the contested decision that the objective of promoting nuclear energy being pursued by the United Kingdom through the measures at issue, that is, the creation of new nuclear energy generating capacity, constituted an objective of 'common' interest.

80 In the first place, the Republic of Austria and the Grand Duchy of Luxembourg submit that, if an objective does not take account of the legitimate interests of a single Member State, it cannot be described as an objective of common interest, and they also emphasise that some Member States have always rejected the notion that the construction of new nuclear reactors is a European objective of common interest.

81 The Commission, the Czech Republic, the French Republic, Hungary, the Republic of Poland, Romania, the Slovak Republic and the United Kingdom contest those arguments.

82 In that regard, first of all, it must be borne in mind that, under Article 107(3)(c) TFEU, aid to facilitate the development of certain economic activities or of certain economic areas, where such aid does not adversely affect trading conditions to an extent contrary to the common interest, may be considered to be compatible with the internal market.

83 Second, it should be noted that, in paragraph 125 of the judgment of 15 June 2010, *Mediaset* v *Commission* (T−177/07, EU:T:2010:233), the Court did indeed find that, in order to be compatible with the internal market for the purposes of Article 107(3)(c) TFEU, aid must pursue an objective in the 'common' interest and must be appropriate, necessary and not disproportionate.

84 However, the reference in the judgment of 15 June 2010, *Mediaset* v *Commission* (T−177/07, EU:T:2010:233) to the pursuit of a 'common' interest cannot be construed as a requirement that only those objectives that are in the interest of all or the majority of the Member States could be taken into account in the context of the application of Article 107(3)(c) TFEU.

85 In the context of the application of Article 107(3)(c) TFEU, it is necessary to distinguish between, on the one hand, the objective pursued by a Member State, which may consist in particular in developing an activity, and, on the other hand, the condition that State aid must not adversely affect trading conditions to an extent contrary to the common interest.

86 It cannot be concluded that Article 107(3)(c) TFEU limits the objectives capable of being pursued by Member States to those that are in the interest of all or the majority of the Member States of the European Union. In referring to a 'common' interest in paragraph 125 of the judgment of 15 June 2010, *Mediaset* v *Commission* (T−177/07, EU:T:2010:233), the Court was merely indicating that the interest had to be a public interest and not just a private interest of the beneficiary of the aid measure.

87 As regards the concept of common interest mentioned at the end of Article 107(3)(c) TFEU, it should be noted that it relates to the balance to be struck between the advantages and disadvantages arising from an aid measure, and precludes measures which adversely affect trading conditions to an extent contrary to the common interest from being authorised. It is therefore relevant to a subsequent stage of the examination carried out in the context of the application of that provision. Accordingly, it cannot be inferred from this that the public interest objectives that may be pursued by a Member State are limited to those that are common to all or to the majority of the Member States.

88 The Commission's finding, in recital 374 of the contested decision, that the measures at issue pursued an objective of 'common' interest, must be read taking those considerations into account. That recital appears in Section 9.2 of that decision, in which the Commission stated its view on the question whether the promotion of nuclear energy was an objective that could legitimately be pursued under Article 107(3)(c) TFEU. Accordingly, in that recital, it confined itself to noting that, in view of the provisions of the Euratom Treaty, the United Kingdom was entitled to decide upon the promotion of nuclear energy as a public interest objective for the purposes of that provision. However, in that recital, the Commission did not find that that objective was shared by all or by the majority of the Member States. Nor did it comment on the question whether the measures at issue adversely affected trading conditions to an extent contrary to the common interest. It is clear from the structure of that decision that the Commission examined that issue at a later stage, in Sections 9.3 to 9.6 of the decision.

89 Having regard to the foregoing considerations, the Court must reject the argument of the Republic of Austria that, in recital 374 of the contested decision, the Commission failed to take sufficient account of the fact that some Member States, including the Republic of Austria, had always rejected the idea of building new nuclear reactors.

90 In the second place, the Republic of Austria submits that, in recitals 366 to 374 of the contested decision, the Commission disregarded the fact that the need for aid and its impact on trade between Member States had to be assessed from the point of view of the European Union. In that context, it argues that the concepts of common interest mentioned in connection with Article 34 TEU and Article 142 TFEU also relate to the interest of all the Member States.

91 Those arguments must be rejected.

92 Suffice it to note in that regard that, in recitals 366 to 374 of the contested decision, the Commission did not call in question the fact that, in so far as Article 107(3)(c) TFEU provides that State aid must not adversely affect trading conditions to an extent contrary to the common interest, it is necessary to take into account the interest of the European Union and of all the Member States. As has been explained in paragraph 88 above, in those recitals, the Commission did not state its view on that weighing of interests, but only on the question whether the United Kingdom was entitled to decide upon the promotion of nuclear energy as a public interest objective.

93 In the third place, the Republic of Austria puts forward arguments that call in question the Commission's conclusion that a Member State is entitled to pursue the promotion of nuclear energy and, more specifically, the creation of new nuclear energy generating capacity, as a public interest objective for the purposes of Article 107(3)(c) TFEU. In its submission, first, Article 2(c) of the Euratom Treaty is not addressed to Member States. Second, that provision refers only to the basic installations necessary for the development of nuclear energy. Hinkley Point C does not appear to be a basic installation of that kind. Third, the objective of promoting nuclear energy has already been achieved, as numerous nuclear power stations have been built throughout Europe. Fourth, the Commission disregarded the historical context of the Euratom Treaty and the limitations that flow from it.

94 The Commission, the Czech Republic, the French Republic, Hungary, the Republic of Poland, Romania, the Slovak Republic and the United Kingdom contest those arguments.

95 In that regard, as has been noted in paragraphs 80 to 89 above, under Article 107(3)(c) TFEU, the public interest objective pursued by the measure in question does not necessarily have to be an objective that is shared by all or by the majority of the Member States.

96 It must also be recalled that, as has been set out in paragraphs 72 to 78 above, in the context of the application of Article 107 TFEU to measures pursing an objective covered by the Euratom Treaty, it is necessary to take into account the provisions and the objectives of the Euratom Treaty. It is evident from the second paragraph of Article 1 of the Euratom Treaty that the task of the Euratom Community is 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. Under Article 2(c) of the Euratom Treaty, in order to perform its task, the Euratom Community is, as provided in that treaty, 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.

97 In the light of the second paragraph of Article 1 and Article 2(c) of the Euratom Treaty, it must be held that the Commission did not err in finding that the United Kingdom was entitled to decide upon the promotion de 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. That objective is related to the Euratom Community's goal of facilitating investment in the nuclear field, and it is apparent from the first paragraph of Article 192 of the Euratom Treaty that the Member States are to facilitate the achievement of the Euratom Community's tasks. Moreover, it is apparent from the second subparagraph of Article 194(2) TFEU that each Member State has the right to choose between the different energy sources those they prefer.

98 None of the arguments put forward by the Republic of Austria is capable of calling that conclusion in question.

99 First, the Republic of Austria submits, in essence, that the Commission overlooked the historical context of the Euratom Treaty and the limitations that flow from it. The nuclear power euphoria existing at the time when the Euratom Treaty was concluded has given way, today, in numerous Member States, to a clear scepticism, shared by a large part of the population, and even to the total rejection and complete abandonment of that form of energy production. Unlike the other provisions of primary law, those of the Euratom Treaty have barely been revised and are thus rules that predate the FEU Treaty.

100 Those arguments must be rejected.

101 Contrary to what is suggested by the Republic of Austria, the provisions of the Euratom Treaty are in full force and that treaty cannot be regarded as a law that predates the FEU Treaty. It should be borne in mind that, in accordance with Article 208 of the Euratom Treaty, that treaty is applicable for an unlimited period, and it is apparent from the first recital of the preamble to Protocol No 2 amending the Euratom Treaty annexed to the Treaty of Lisbon that the provisions of the Euratom Treaty continue to have full legal effect. Moreover, it is evident from that protocol that the Treaty of Lisbon amended and confirmed not only the FEU Treaty and the EU Treaty, but also the Euratom Treaty.

102 In that context, the Court must also reject the Republic of Austria's argument that it follows from Declaration No 54 of the declarations annexed to the Final Act of the Intergovernmental Conference which adopted the Treaty of Lisbon that the Euratom Treaty is out of date. The mere fact that five Member States declared that the provisions of the Euratom Treaty had not been substantially amended since its entry into force and needed to be brought up to date is not capable of calling in question the conclusion that the provisions of the Euratom Treaty are in full force.

103 Furthermore, in so far as the Republic of Austria invokes the Joint Declaration of the Plenipotentiaries on the application of the Euratom Treaty in the context of the acts concerning the conditions of accession of the Republic of Austria, the Kingdom of Sweden, the Republic of Finland and the Kingdom of Norway to the European Union and the adjustments to the Treaties on which the European Union is founded (OJ 1994 C 241, p. 382), it is sufficient to note that it is apparent from that declaration that the Member States decide to produce or not to produce nuclear energy according to their specific policy orientations. It cannot be inferred from this that the promotion by one Member State of nuclear energy cannot constitute a public interest objective for the purposes of Article 107(3)(c) TFEU which a Member State may decide to pursue.

104 Second, the Republic of Austria maintains that Article 2(c) of the Euratom Treaty refers only to the basic installations necessary for the development of nuclear energy and that the objective of promoting nuclear energy has already been achieved.

105 It should be recalled in that regard that the contested decision is founded on Article 107(3)(c) TFEU and that that provision refers to the development of an activity. It must be 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 that provision. In accordance with the second subparagraph of Article 194(2) TFEU, the United Kingdom is entitled to choose between different energy sources. It must also be noted that, as is apparent in particular from recital 510 of the contested decision and recitals 6 and 7 of the decision to initiate the formal investigation procedure, the construction of Hinkley Point C was intended to replace ageing nuclear energy generating capacity that was scheduled for closure. Further, it is common ground that the technology to be used in that reactor is more advanced than that used in existing power stations.

106 In the light of those considerations, the Court must reject the Republic of Austria's argument that Hinkley Point C was not a basic installation necessary for the development of nuclear energy and that the objective of promoting nuclear energy had already been achieved.

107 Third, the Republic of Austria's argument that Article 2(c) of the Euratom Treaty is not addressed to the Member States must also be rejected. It should be observed in that regard that, even if that provision does not refer directly to the Member States, but to the Euratom Community, the United Kingdom was entitled to take account of it, in the light of the first paragraph of Article 192 of that treaty, according to which the Member States are to facilitate the achievement of the Euratom Community's tasks.

108 Fourth, the Republic of Austria argues that, if the promotion of nuclear energy were considered a public interest objective for the purposes of Article 107(3)(c) TFEU, it would be possible to justify any measure that pursued this goal. In that regard, it is sufficient to recall that, in recital 374 of the contested decision, the Commission confined itself to noting that the promotion of nuclear energy constituted an objective of public interest. It did not, however, in that recital, examine whether, in the light of that objective, the measures at issue were appropriate, necessary and not disproportionate. That issue was examined by the Commission in Sections 9.3 to 9.6 of that decision.

109 Consequently, the Court must reject all the arguments aimed at establishing that the provisions of the Euratom Treaty do not permit the inference that the promotion of nuclear energy and, more specifically, the creation of new nuclear energy generating capacity, constitute a public interest objective for the purposes of Article 107(3)(c) TFEU.

110 In the fourth place, the Republic of Austria and the Grand Duchy of Luxembourg claim that there is a conflict between the promotion of nuclear energy, on the one hand, and the principle of protection of the environment, the precautionary principle, the 'polluter pays' principle, and the principle of sustainability, and some of the objectives set out in Article 194(1) TFEU, such as the promotion of energy efficiency, the development of new forms of energy and the promotion of energy networks, on the other. According to those Member States, the Commission should not have given unconditional priority to the objective of promoting nuclear energy but should have taken into account the conflict between the promotion of nuclear energy and the principles mentioned above. In that context, the Grand Duchy of Luxembourg also mentions the danger arising from terrorist attacks.

111 The Commission, the Czech Republic, the French Republic, Hungary, the Republic of Poland, Romania, the Slovak Republic and the United Kingdom contest those arguments.

112 In that regard, it must be noted that, in the light of the objectives of the Euratom Treaty, it cannot be concluded that the principles invoked by the Republic of Austria and the Grand Duchy of Luxembourg preclude a Member State from deciding upon the promotion of nuclear energy as a public interest objective for the purposes of Article 107(3)(c) TFEU. As regards the principles which those Member States draw from the FEU Treaty, it should be borne in mind that, under Article 106a(3) of the Euratom Treaty, the provisions of the EU Treaty and of the FEU Treaty are not to derogate from the provisions of the Euratom Treaty.

113 Furthermore, the Court must reject the argument of the Republic of Austria and the Grand Duchy of Luxembourg that the Commission prioritised unconditionally the objective of promoting nuclear energy. In that regard, it is sufficient to recall that, in Section 9.2 of the contested decision, the Commission confined itself to noting that the promotion of nuclear energy constituted a public interest objective for the purposes of Article 107(3)(c) TFEU. However, at that stage of its analysis, it did not examine the proportionality of the measures at issue.

114 Consequently, in so far as, by their arguments, the Republic of Austria and the Grand Duchy of Luxembourg seek to demonstrate that the promotion of nuclear energy cannot constitute a public interest objective for the purposes of Article 107(3)(c) TFEU, those arguments must be rejected. However, in so far as those arguments seek to call in question the Commission's conclusions regarding the proportionality of the measures at issue, those arguments will be taken into account in the examination of the sixth plea, alleging breach of the principle of proportionality.

115 In the fifth place, the Republic of Austria submits that it is apparent from the nuclear illustrative programmes published periodically by the Commission that, in accordance with Article 40 of the Euratom Treaty, investment in nuclear energy cannot be classified as an objective of common interest.

116 The Commission, the Czech Republic, the French Republic, Hungary, the Republic of Poland, Romania, the Slovak Republic and the United Kingdom contest those arguments.

117 In that regard, first, it must be noted that, given the nature of nuclear illustrative programmes (see Article 40 of the Euratom Treaty), the considerations set out in paragraphs 79 to 115 above, which are based on the provisions of the Euratom Treaty and the FEU Treaty, cannot be called in question by the Commission's findings in those programmes.

118 Second, and in any event, it must be noted that there is nothing in the nuclear illustrative programmes mentioned by the Republic of Austria to indicate that the promotion of nuclear energy is not an activity the development of which could not be facilitated pursuant to Article 107(3)(c) TFEU.

119 On the one hand, in so far as the Republic of Austria claims that it is apparent from Section 7 of the nuclear illustrative programme of 4 October 2007, COM(2007) 565 final, that it is for Member States to decide whether to use nuclear energy or not, that confirms the United Kingdom's right to promote nuclear energy (see paragraph 97 above).

120 On the other hand, in so far as the Republic of Austria maintains that it is apparent from page 18 of the nuclear illustrative programme of 25 September 1996, COM(1996) 339 final, from Section 3.3 of that of 13 November 2008, COM(2008) 776 final, and from Section 4.2 of that of 4 October 2007, COM(2007) 565 final that, given the competitiveness of nuclear power, no State aid should be granted in that field, suffice it to note that that argument is not capable of calling in question the Commission's conclusion that the promotion of nuclear energy may constitute a public interest objective for the purposes of Article 107(3)(c) TFEU. It might only be capable of calling in question the Commission's finding as to the necessary nature of the measures at issue. Consequently, that argument is ineffective in the present context, but will be taken into account in the examination of the first plea, concerning the Commission's conclusions regarding the need for State intervention.

121 Accordingly, the arguments based on the nuclear illustrative programmes published by the Commission must be rejected.

122 In the sixth place, the Republic of Austria submits that, in the contested decision, the Commission provided no further detail regarding its thoughts on the objectives of diversification and security of supply. The Grand Duchy of Luxembourg submits that security of supply is not guaranteed, as uranium would have to be imported from countries outside the Union.

123 In that regard, suffice it to note that it is apparent from recitals 366 to 374 of the contested decision that the Commission considered the promotion of nuclear energy to be a public interest objective, which is capable in itself of justifying the measures at issue. However, in stating, in recital 374 of that decision, that the promotion of nuclear energy could also contribute to the objectives of diversification and security of supply, it did not find that those two other objectives were objectives which, by themselves and autonomously, enabled the measures at issue to be justified. In those circumstances, the Commission cannot be criticised for having failed to go into more detail with regard to the objectives of diversification and security of supply in the context of Section 9.2 of that decision.

124 Therefore, that argument must be rejected.

125 In the seventh place, the Republic of Austria also puts forward arguments relating to (i) an erroneous definition of the market; (ii) the absence of a market failure in the nuclear power station construction and operation sector; (iii) the classification of the measures at issue as investment aid; and (iv) the effect on trading conditions between Member States.

126 In that regard, suffice it to note that the arguments in question cover stages of the examination required to be carried out pursuant to Article 107(3)(c) TFEU which occur after the determination of the public interest objective pursued. Accordingly, those arguments are not capable of establishing an error by the Commission concerning the characterisation of the promotion of nuclear energy as a public interest objective for the purposes of that provision.

127 Those arguments are therefore ineffective in so far as they have been put forward in support of the present plea. However, the first argument, concerning an erroneous definition of the market, and the second argument, concerning the absence of market failure, will be taken into account in the context of the examination of the first plea, alleging that the Commission acknowledged the existence of a separate nuclear energy market and that the electricity market was not failing. The third argument, concerning the classification of the measures at issue as investment aid, will be examined in the context of the third plea, alleging that the measures at issue should have been classified as operating aid. The fourth argument, concerning the effect on trading conditions between Member States will be examined in the context of the sixth plea, aimed at demonstrating the allegedly erroneous nature of the Commission's conclusion that the measures at issue complied with the principle of proportionality.

128 Having regard to the foregoing considerations, the Court must reject the fourth plea, without prejudice to the arguments mentioned in paragraphs 114, 120 and 125 above.

C. Second plea, relating to the allegedly erroneous nature of the Commission's finding that the technology used in Hinkley Point C was new

129 The present plea concerns the Commission's findings, in recital 392 of the contested decision, that investment in new nuclear energy generating capacity was intended to achieve the public interest objective of promoting nuclear energy and that that investment would not be delivered without the United Kingdom's intervention.

130 According to the Republic of Austria, those findings are vitiated by errors.

131 In the first place, the Republic of Austria submits that the Commission was wrong to find that the technology to be used in Hinkley Point C was new. It is not new technology, but 'proven' technology, that is a variant of the pressurised water reactor used for decades, which has considerable similarities to many reactors currently in operation.

132 The Commission, the Czech Republic, the French Republic, Hungary, the Republic of Poland and the United Kingdom contest that argument.

133 As a preliminary point, it should be noted that that argument of the Republic of Austria is based on the premiss that, in recital 392 of the contested decision, the Commission found that the technology to be used in Hinkley Point C was new technology.

134 That premiss is incorrect.

135 Admittedly, the German version of recital 392 of the contested decision contains the expression 'Investitionen in neue Nukleartechnologien', a reference to investment in new nuclear technologies.

136 However, as is clear from the first page of the contested decision, only the English version is authentic. Recital 392 of that decision, in the English version, includes the expression 'new nuclear investment', a reference to investment in new nuclear energy generating capacity, and mentions that that investment aims at the objective of common interest highlighted in Section 9.2 of that decision and that the measures at issue were necessary, on the basis, inter alia, of that specific type of investment. That recital does not therefore refer to new nuclear technologies but to investment in new nuclear capacity.

137 That reading of recital 392 of the contested decision is, moreover, confirmed by recitals 375 to 391 of that decision, which precede the finding in recital 392 thereof, in which the Commission made no reference to the use of new nuclear technology.

138 Therefore, the Republic of Austria's argument is based on a misreading of recital 392 of the contested decision and must be rejected.

139 In the second place, the Court must reject the Republic of Austria's argument that the Commission failed to specify which economic activity within the meaning of Article 107(3)(c) TFEU was intended to be promoted by the measures at issue. Suffice it to note in that regard that it is sufficiently clear from recital 392 of the contested decision that the activity in question was the promotion of nuclear energy.

140 In the third place, it is necessary to examine the Republic of Austria's argument that Article 107(3)(c) TFEU and Article 2(c) of the Euratom Treaty require the development of activities and that a mere replacement measure does not fulfil that condition.In that context, it is also necessary to take account of the Republic of Austria's argument that Article 6 of Commission Regulation (EU) No 651/2014 of 17 June 2014 declaring certain categories of aid compatible with the internal market in application of Articles 107 and 108 [TFEU] (OJ 2014 L 187, p. 1), the Guidelines on State aid for environmental protection and energy 2014-2020 (OJ 2014 C 200, p. 1) and the Communication from the Commission on the Framework for State aid for research and development and innovation (OJ 2014 C 198, p. 1) preclude measures intended solely to enable an undertaking to use the latest technical advances or to comply with safety or environmental rules in force from being deemed compatible with the internal market.

141 First, as regards Regulation No 651/2014, suffice it to note that this merely provides for a standardised block exemption approach, but is not binding on the Commission in the context of an individual examination conducted directly on the basis of Article 107(3)(c) TFEU.

142 Second, as regards the Guidelines on State aid for environmental protection and energy 2014-2020 and the Communication from the Commission on the Framework for State aid for research and development and innovation, it must be noted that the Republic of Austria's arguments relate, on the one hand, to the objective of going beyond EU environmental protection standards and the objective of increasing the level of environmental protection in the absence of EU standards, which are mentioned in point 18(a) of those guidelines, and objectives relating to research, development and innovation, on the other. However, in the contested decision, the Commission did not assess the compatibility of the measures at issue in the light of those objectives. Accordingly, those arguments must be rejected.

143 Third, it must be recalled that Article 107(3)(c) TFEU merely requires that aid measures be intended to facilitate the development of certain activities. Article 2(c) of the Euratom Treaty is intended to facilitate investment and ensure the establishment of the basic installations necessary for the development of nuclear energy in the Community. Neither of those two provisions thus requires that the existence of any technological innovation be established.

144 Fourth, it must be noted that, in the circumstances of this case, the objective of promoting nuclear energy and, more specifically, that of incentivising undertakings to invest in new nuclear energy generating capacity, satisfies the requirements laid down in Article 107(3)(c) TFEU and in Article 2(c) of the Euratom Treaty. Contrary to the Republic of Austria's contention, it cannot 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. Since ageing nuclear power stations have to be closed (see recital 510 of the contested decision and recitals 6 and 7 of the decision to initiate the formal investigation procedure), nuclear power in the United Kingdom would be less developed without investment in new nuclear energy generating capacity. In any event, it must be noted that it is common ground that the technology to be used in Hinkley Point C is more advanced than that used in the nuclear power stations it is supposed to replace. Even though the Republic of Austria takes issue with the fact that the technology is fundamentally new, it acknowledges that the technology is more advanced.

145 Accordingly, those arguments must also be rejected, as, therefore, must the second plea in its entirety.

D. First plea and first and second parts of the ninth plea, relating to the definition of the market and the Commission's considerations based on the existence of a market failure

146 The first plea and the first and second parts of the ninth plea, as well as the arguments advanced in connection with the fourth plea, relating to the nuclear illustrative programmes, errors concerning the definition of the market and the absence of market failure (paragraphs 120 and 125 above), cover the considerations which the Commission set out in Section 9.3 of the contested decision, where it found that, without State intervention, new nuclear energy generating capacity would not be delivered in sufficient time.

147 The Republic of Austria and the Grand Duchy of Luxembourg take the view that the reasons given for those considerations are insufficient and erroneous. In essence, they advance three sets of arguments. In the first place, they maintain that the Commission was not entitled to conclude that intervention by the United Kingdom was necessary. It could have declared the measures at issue to be compatible with the internal market pursuant to Article 107(3)(c) TFEU only if it had found that the liberalised market for the generation and supply of electrical power was failing. In their submission, the reasons given for the Commission's considerations in that respect are insufficient and are, in any event, manifestly erroneous. In the second place, they contend that the Commission wrongly proceeded on the basis of the existence of a market for the construction and operation of nuclear power plants, and that it did not provide sufficient reasons for the contested decision in that respect. In the third place, the Republic of Austria submits that the Commission's approach was biased in favour of nuclear energy.

1. The arguments calling in question the Commission's conclusion regarding the necessity of intervention by the United Kingdom

148 The Republic of Austria and the Grand Duchy of Luxembourg submit that the Commission was not entitled to conclude that intervention by the United Kingdom was necessary. In their view, the measures at issue could have been declared to be compatible with the internal market pursuant to Article 107(3)(c) TFEU only if the Commission had found that the liberalised market for the generation and supply of electrical power was failing. However, the generation and supply of electrical power could have been secured by means of technologies other than nuclear technology. Consequently, the Commission was not entitled to find that there was a market failure.

149 The Commission, the Czech Republic, the French Republic, Hungary, the Republic of Poland, the Slovak Republic and the United Kingdom contend that those arguments must be rejected.

150 As a preliminary point, it must be recalled that Article 107(3)(c) TFEU does not expressly include a condition relating to the existence of a market failure. That provision merely requires that the aid should relate to a public interest objective, and that it be appropriate, necessary and not disproportionate (see paragraph 48 above). Accordingly, in the context of the application of that provision, the question that is relevant is whether the public interest objective pursued by the Member State would be attained without that Member State's intervention (see, to that effect, judgment of 9 June 2016, *Magic Mountain Kletterhallen and Others* v *Commission*, T−162/13, not published, EU:T:2016:341, paragraph 77).

151 While the existence of a market failure may be a relevant factor for declaring State aid compatible with the internal market, the absence of market failure does not necessarily mean that the conditions laid down in Article 107(3)(c) TFEU are not satisfied (judgments of 9 June 2016, *Magic Mountain Kletterhallen and Others* v *Commission*, T−162/13, not published, EU:T:2016:341, paragraphs 78 and 79, and of 18 January 2017, *Andersen* v *Commission*, T−92/11 RENV, not published, EU:T:2017:14, paragraph 69). For example, State intervention may be considered to be necessary for the purposes of that provision where market forces are not capable by themselves of ensuring that the public interest objective of the Member State is achieved in sufficient time, even if, as such, that market cannot be considered to be failing.

152 Those considerations must be taken into account when examining the complaints of the Republic of Austria and the Grand Duchy of Luxembourg that call in question the Commission's conclusion that intervention by the United Kingdom was necessary to achieve the public interest objective it was pursuing, that is the creation of new nuclear energy generating capacity. Those complaints are that (i) the Commission did not disclose the reasons why investment in Hinkley Point C had to be regarded as being of a specific nature and as necessitating State intervention; (ii) material and formal errors affected the Commission's findings in Section 9.3 of the contested decision; (iii) the Commission did not set out the reasons why the objectives of security of supply and decarbonisation could not be achieved without State aid; and (iv) the Commission ought to have set out in greater detail the extent to which Hinkley Point C would be using new technologies.

(a) Complaint that insufficient reasons were given as regards the specific nature of the investment in Hinkley Point C

153 The Republic of Austria submits that, in recital 392 of the contested decision, the Commission noted the specific nature of the investment in Hinkley Point C, without, however, disclosing the reasons why that investment had to be regarded as being of a specific nature.

154 The Commission contests those arguments.

155 It should be recalled in that regard that, in recital 392 of the contested decision, the Commission's conclusion was drawn from its considerations in recitals 381 to 391 of that decision. In recitals 382 and 383 of that decision, the Commission noted, in particular, that investment in nuclear energy was subject to significant risk given the combination of high upfront capital costs with long construction times and a long period of operation to recover the investment costs. According to the Commission, there were no market-based financial instruments or other types of contracts that could hedge against such substantial risk, which was a phenomenon specific to certain technologies, including nuclear energy. The instruments available on the market did not provide time horizons in excess of 10 or 15 years, either in the form of long-term contracts or as risk-hedging instruments. In that context, the Commission also referred, inter alia, to the extremely long and complex life cycles of nuclear power stations, unlike most other energy infrastructures and indeed unlike most infrastructure investments in general. In particular, it noted, first of all, that it would normally take 8 to 10 years to construct a nuclear power plant, and that the costs to be incurred before any revenues were generated and the risks were to be borne only by the investor. Next, the 60-year operational life is characterised by the generation of revenues, but these are based on an uncertain evolution of wholesale prices. Moreover, the ensuing decommissioning period could last 40 years, with funds to be set aside for the shutdown of the installation. In addition, high-level nuclear waste storage and treatment is typically carried out on-site before transfer to a repository, where waste is expected to be stored for thousands of years. Last, there is a 'hold-up' risk that may compound uncertainty for private investors, because successive governments could take different views on the desirability of nuclear technology, given its controversial nature.

156 It must be held that the Commission's considerations in recitals 382 and 383 of the contested decision disclose with sufficient clarity the reasons why, in its view, without United Kingdom intervention, given, in particular, the lack of market-based financial instruments and other types of contracts that could hedge against such substantial risk, the investment in new nuclear energy generating capacity would not be delivered in sufficient time.

157 Consequently, the complaint that insufficient reasons were given in recital 392 of the contested decision must be rejected.

(b) Complaint that material and formal errors could be shown to have affected the Commission's considerations in Section 9.3 of the contested decision

158 The Republic of Austria and the Grand Duchy of Luxembourg put forward arguments to demonstrate the erroneous nature of the Commission's considerations, in Section 9.3 of the contested decision, according to

which, given the lack of market-based financial instruments and other types of contracts that could hedge against the substantial risk to which investments in nuclear energy are subject, State intervention was necessary in order to achieve the objective of promoting nuclear energy, and, more specifically, that of creating new nuclear energy generating capacity. According to those Member States, the Commission made material and formal errors in that respect.

159 The Commission, the Czech Republic, the French Republic, Hungary, the Republic of Poland, the Slovak Republic and the United Kingdom contest those arguments. The Commission contends that some of the arguments put forward by the Republic of Austria are inadmissible because they are out of time.

160 In that context, it should be recalled that the Commission has a wide discretion when applying Article 107(3) TFEU, the exercise of which involves complex economic and social assessments. Judicial review of the manner in which that discretion is exercised is therefore confined to establishing that the rules of procedure and the rules relating to the duty to give reasons have been complied with and to verifying the accuracy of the facts and that there has been no manifest error of assessment or misuse of powers (judgments of 26 September 2002, *Spain* v *Commission*, C−351/98, EU:C:2002:530, paragraph 74, and of 29 April 2004, *Italy* v *Commission*, C−372/97, EU:C:2004:234, paragraph 83).

161 However, whilst the Commission has a margin of discretion with regard to economic matters, that does not mean that the EU judicature must refrain from reviewing the Commission's interpretation of information of an economic nature. Not only must the EU judicature establish whether the evidence relied on is factually accurate, reliable and consistent but also whether that evidence contains all the 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. However, when conducting such a review, the EU judicature must not substitute its own economic assessment for that of the Commission. Moreover, it must be noted that, where an institution has a wide discretion, the review of observance of certain procedural guarantees is of fundamental importance. According to the case-law, those guarantees include the obligation for the competent institution to examine carefully and impartially all the relevant elements of the individual case and to give an adequate statement of the reasons for its decision (see judgment of 22 November 2007, *Spain* v *Lenzing*, C−525/04 P, EU:C:2007:698, paragraphs 56 to 58 and the case-law cited).

162 The arguments put forward by the Republic of Austria and the Grand Duchy of Luxembourg must be examined taking those principles into account.

163 In the first place, the Republic of Austria submits that the mere fact that a particular undertaking cannot obtain market funding is not sufficient to establish that the public interest objective pursued by a Member State could not be attained without that State's intervention.

164 That argument must be rejected.

165 In that regard, suffice it to note that, in recitals 381 to 391 of the contested decision, the Commission does not confine itself to examining the individual situation of NNBG or of that company's investors, but comments more generally on the question whether, without United Kingdom intervention, new nuclear energy generating capacity would be built in that Member State, given the lack of market-based financial instruments and other types of contracts that could hedge against the substantial risk to which investments in nuclear energy are subject.

166 In the second place, the Republic of Austria submits that the Commission's conclusion, in recitals 382 and 383 of the contested decision, that there were no adequate financial instruments for investment in new nuclear energy generating capacity is not based on a sufficiently solid and detailed examination and is not supported by an adequate statement of reasons.

167 First, the Republic of Austria claims that the Commission failed to take into account other forms of investment, such as financing by international syndication or individual aid that would be granted by financiers able to provide sufficient means for that.

168 In that regard, it should be recalled that, in recitals 381 to 392 of the contested decision, the Commission explained in detail why investment in nuclear energy was subject to substantial risks and noted that there were no market-based financial instruments or other types of contract that could hedge against those risks. After undertaking modelling work, the Commission found, moreover, that in those circumstances there was high uncertainty as to whether private investment in new nuclear energy generating capacity would be delivered within a realistic time frame.

169 In the light of those factors, the mere reference by the Republic of Austria to the possibility of financing by international syndication or by individual aid that might be granted by financiers able to provide sufficient means in that regard is not capable of demonstrating that the Commission's considerations are vitiated by a manifest error of assessment.

170 In order to establish that the Commission made a manifest error in assessing the facts such as to justify the annulment of the contested decision, the evidence adduced by the applicant must be sufficient to make the factual assessments used in the decision implausible (judgments of 12 December 1996, *AIUFFASS and AKT* v *Commission*, T−380/94, EU:T:1996:195, paragraph 59, and of 6 October 2009, *FAB* v *Commission*, T−8/06, not published, EU:T:2009:386, paragraph 78).

171 The Republic of Austria did not explain why the substantial risks to which investment in nuclear energy is subject — owing, notably, to the combination of high upfront capital costs, long construction times and a long period of operation to recover the investment costs, as well as the extremely long and complex life cycles, uncertain evolution of wholesale prices and decommissioning costs and the 'hold-up' risk — would not also preclude financing by international syndication or individual financing.

172 Accordingly, that argument must be rejected.

173 Second, the Republic of Austria submits that the problem of the lack of long-term price signals affects other technologies also and must therefore be regarded as a normal market condition that must be taken into account in the risk assessment of the project. Contrary to the Commission's assertion, there are no stable price signals for the 10 to 15 years to come on the electricity market. In the most liquid European electricity exchanges, the products available currently have a life of up to seven years. Even for power plants using technologies with a shorter period of operation than nuclear power stations, a significant part of the life of those plants is not covered by the price signals available.

174 Suffice it to note in that regard that even on the assumption that the Republic of Austria's argument is well founded, it could not call in question the Commission's conclusion regarding the lack of adequate financial instruments for investment in new nuclear energy generating capacity. On the contrary, the argument that, even for periods of less than the 10 to 15 years taken into account by the Commission, there were no stable price signals may reinforce the Commission's findings regarding the existence of factors that preclude investment in such new capacity.

175 Third, the Republic of Austria's argument that the Commission should not have confined itself in its analysis to the financial markets in the United Kingdom must be rejected. It should be noted in that regard that, in recital 382 of the contested decision, the Commission noted the lack of market-based financial instruments and other types of contract to hedge against the substantial risks in relation to investment in nuclear energy generating capacity. It is not at all apparent from that recital that the Commission confined itself in its examination to financial instruments available in the United Kingdom.

176 Fourth, the Republic of Austria claims that, in that respect, the statement of reasons for the contested decision is insufficient.

177 First, the Republic of Austria submits that the Commission did not indicate why it was appropriate to rely exclusively on the financial markets available in the United Kingdom. That argument must be rejected. As has already been stated in paragraph 175 above, it is based on the false premiss that the Commission confined itself to those financial markets.

178 Second, the Republic of Austria submits that, in any event, in recitals 381 to 392 of the contested decision, the Commission did not explicitly mention the financial markets it took into account. It must be held in that regard that the statement of reasons in those recitals is sufficient to enable that Member State to ascertain the reasons for the measure taken, and the Court to exercise its power of review. If that Member State took the view that there were financial instruments which were not affected by the factors noted by the Commission, it could have put forward arguments in that respect during the proceedings before the Court, which would have enabled the Court to check whether that consideration on the part of the Commission was well founded.

179 In the light of the foregoing, the arguments calling in question the Commission's conclusion concerning the lack of adequate financial instruments must be rejected.

180 In the third place, the Republic of Austria advances arguments calling in question the Commission's considerations based on the risk of a political 'hold-up'.

181 As a preliminary point, it should be noted that while, in recital 384 of the contested decision, the Commission expressed reservations as to whether the 'hold-up' situation it had identified could qualify as a market failure, it found that that risk could 'be a factor in making investment in new [nuclear energy generating capacity] more difficult, in particular given the long time lines needed for constructing, operating and decommissioning nuclear power plants'. The Commission therefore found that, from the point of view of potential investors, the risk of a political 'hold-up' was a factor that precluded investment in such new capacity.

182 First, the Republic of Austria submits that a hold-up situation exists only where one of the parties to a long-term contract which is not wholly particularised when entered into enjoys considerable leeway, enabling that party to behave opportunistically when the other party has made advance payments by making, for example, substantial investments that are not transferable. The Republic of Austria argues that, contrary to the Commission's findings, that is not the case here.

183 It should be noted in that regard that it is apparent from recitals 384 and 385 of the contested decision that all technologies could in principle suffer from a political hold-up, but that nuclear projects would generally be more exposed to that risk. In that context, the Commission noted, in particular, that successive governments could take different views on the desirability of nuclear technology, which could compound uncertainty for private investors, and, moreover, that that uncertainty was greater for nuclear technology, because of its controversial nature, the longer time horizon and the greater investment size.

184 As regards the arguments put forward by the Republic of Austria, it must be noted that it confines itself, on the one hand, to explaining its understanding of a hold-up situation and, on the other, to claiming that an undertaking investing in nuclear energy generating capacity is not in such a situation.

185 It must be held that the arguments advanced by the Republic of Austria are not capable of demonstrating that the Commission's considerations in recitals 384 and 385 of the contested decision are vitiated by manifest errors of assessment (see paragraphs 160, 161 and 170 above). In particular, the Republic of Austria does not put forward any arguments that might render implausible the Commission's statement that the risk described in paragraph 183 above was a factor that precluded investment in the construction and operation of new nuclear power stations.

186 Therefore, that argument must be rejected.

187 Second, the Republic of Austria argues that the risk that the political context might change is not a risk that is peculiar to nuclear power stations but a general risk affecting all projects on which public opinion is divided, especially those requiring significant resources. Such a risk cannot therefore be a factor requiring correction by means of State aid.

188 In that regard, it should be noted that, in recitals 384 and 385 of the contested decision, the Commission did not in any way rule out the possibility of the risk of a change in political context arising also in respect of other projects and precluding investment in those projects.

189 Moreover, it must be noted that the Republic of Austria does not advance any argument that might call in question the plausibility of the Commission's assertion that the risk of a change in political context is considerable in the case of nuclear technology, notably because of its controversial nature, the likelihood of that risk, the scale of that change, which could extend as far as the total abandonment of the nuclear industry, very long repayment periods and very high amounts of investment.

190 Therefore, that argument by the Republic of Austria is also incapable of demonstrating that there is a manifest error of assessment in the Commission's reasoning.

191 Third, the Republic of Austria submits that, in the event of expropriation, financial compensation is guaranteed, in the light of the protection of investments and economic rights.

192 In so far as that argument is intended to show that the Commission did not take sufficient account of the fact that financial compensation would be guaranteed, it must be rejected. In that context, it should be noted that the Commission did examine the question to what extent compensation would be guaranteed in the event of the early closure of Hinkley Point nuclear power station. Thus, in recital 192 of the decision to initiate the formal investigation procedure, the Commission stated that damages paid by national authorities to compensate for damage caused by public authorities did not constitute State aid within the meaning of Article 107(1) TFEU. Furthermore, in recital 322 of the contested decision, it noted that the general principles underpinning UK and EU law gave rise to a right to compensation in the event of deprivation of a property right.

193 Moreover, on the assumption that the Republic of Austria's argument was intended to show that, in the light of the fact that financial compensation was guaranteed, it was manifestly wrong to find that the risk of a political hold-up was a factor that could be regarded as precluding investment in new nuclear energy generating capacity, that argument must also be rejected. The mere fact that compensation can be sought on the basis of the general principles underpinning UK and EU law does not prevent the risk of a political hold-up having a deterrent effect on potential investors. Given the investments amounts at issue in the present case, the mere prospect of obtaining, in some circumstances, after possible litigation, financial compensation of an uncertain amount in the event of expropriation is not liable to remove altogether the obstacle to investment attributable to the risk of a political hold-up. It follows from this that the Commission did not make a manifest error of assessment in finding that, notwithstanding the fact that compensation may be sought, the risk of a political hold-up was a factor precluding investment in new nuclear energy generating capacity.

194 Fourth, the Republic of Austria claims that it was wrong to 'immunise' the operators of Hinkley Point C against future, democratically taken, political decisions. The Grand Duchy of Luxembourg maintains that such political decisions cannot be regarded as market failures.

195 In so far as, by their arguments, the Republic of Austria and the Grand Duchy of Luxembourg seek to claim that future, democratically taken, political decisions could not be taken into account when examining whether there were factors precluding investment in new nuclear energy generating capacity, those arguments must be rejected. In the context of that examination, the Commission was entitled to take into account any factors capable of precluding, in the absence of State intervention, such new capacity from being created by market forces within a reasonable time. It was not, therefore, manifestly erroneous to take account in that context of the uncertainties that may arise from a risk of a political hold-up and which, for the reasons mentioned in paragraph 189 above, are particularly substantial in the field of nuclear energy.

196 In so far as, by that argument, the Republic of Austria does not merely call in question the need for intervention by the United Kingdom, as such, but also seeks to argue that there was overcompensation, because specific measures, namely the Contract for Difference, the Secretary of State Agreement and the

Credit Guarantee, went beyond what was necessary to overcome the obstacles identified, the argument is one that is aimed at the Commission's considerations concerning the necessary nature of the measures at issue and overlaps with the arguments put forward in connection with the sixth plea. That argument is therefore ineffective in the present context, but will be taken into account in the examination of the sixth plea.

197 It follows from this that all the arguments that call in question the Commission's considerations based on the possibility of there being a political hold-up must be rejected, without prejudice to the argument relating to observance of the principle of proportionality, which will be examined in the context of the sixth plea.

198 In the fourth place, the Republic of Austria submits that the construction of other nuclear power stations was financed without State aid. It refers in that context, in particular, to the construction of the nuclear power stations of Flamanville (France) and Olkiluoto (Finland).

199 As a preliminary point, it should be recalled that, in recitals 381 to 392 of the contested decision, the Commission stated that, owing to the fact that investment in nuclear energy was subject to significant risk and that there was a lack of market-based financial instruments or other types of contracts to hedge against such risks, there was high uncertainty over the question whether the market would deliver investment in new nuclear energy generating capacity within a realistic time frame. It should also be recalled that the Commission based that conclusion not only on the identification of those factors, but also on modelling work.

200 The Court must therefore examine whether the Republic of Austria's argument that nuclear power stations with the same type of reactor as that to be used at Hinkley Point C have been built at Flamanville and at Olkiluoto, without State aid, is such as to make the Commission's assessments implausible.

201 First, it should be noted that it is clear from paragraph 25 of the decision to initiate the formal investigation procedure that, before the contested decision was adopted, it was already known that the projects to build power stations at Flamanville and Olkiluoto had generated substantial cost overruns.

202 Second, it must be noted that, according to the information provided by the Commission and the French Republic, which is not disputed by the Republic of Austria or the Grand Duchy of Luxembourg, the decisions to invest in the construction projects mentioned by the Republic of Austria were taken before the accident at the Fukushima nuclear reactor (Japan).

203 Third, it must be recalled that those projects were designed in different framework conditions. As the Commission contended, without being challenged in any detail by the Republic of Austria or by the Grand Duchy of Luxembourg, the decision to invest in the construction of the Flamanville nuclear power station was taken in 2005,and thus before the global financial crisis of 2007 and 2008, whereas the contested decision was adopted after that crisis began. In the case of the Olkiluoto nuclear power station, it is evident from the nuclear illustrative programme of 4 October 2007, COM(2007) 565 final, that investment in that power station was obtained through the conclusion of a shareholder agreement ensuring a fixed energy price for the owner-investors. Furthermore, according to information provided by the Commission, which has not been disputed in any detail by the Republic of Austria or the Grand Duchy of Luxembourg, the shareholders of that power station are essentially manufacturers of paper, and the energy produced is distributed among the shareholders for the actual cost of production.

204 Fourth, the Commission claims that the wholesale price of electricity in the European Union has declined substantially since the decisions to invest in the construction of the nuclear power stations at Flamanville and Olkiluoto (by 35% to 45% between 2008 and 2012), which is not disputed by the Republic of Austria or the Grand Duchy of Luxembourg.

205 In the light of those circumstances, it must be held that, in itself, the argument that nuclear power stations with the same type of reactor as that to be used at Hinkley Point C have been built at Flamanville and at

Olkiluoto, without State aid, is not capable of making the Commission's assessments in recitals 391 to 392 of the contested decision implausible.

206 Accordingly, that argument must be rejected.

207 In the fifth place, the Republic of Austria submits that there are entirely comparable infrastructure projects (hydropower plants, tunnels, large research organisations in the field of pharmaceuticals or genetic engineering, and space projects), which require the operator to deal with high investment costs, long construction times and a long period of operation.

208 In that regard, it should be noted that, in recitals 381 to 385 of the contested decision, the Commission did not in any way rule out the possibility that there might be factors preventing investment in the case of other infrastructure projects also.

209 Moreover, a mere reference to the fact that other, unspecified, infrastructure projects also have to face high investment costs, long construction times and a long period of operation is not capable of rendering implausible the Commission's considerations in recitals 381 to 392 of the contested decision, in which it took into account, inter alia, the risks inherent in the production of nuclear energy and the lack of market-based financial instruments or other types of contracts to hedge against those risks. Furthermore, it must be noted that the risk of a political hold-up and the complete abandonment of nuclear technology, owing to its controversial nature, is inherent in investment in new nuclear energy generating capacity.

210 Consequently, that argument must also be rejected.

211 In the sixth place, the Court must examine the Republic of Austria's arguments relating to the nuclear illustrative programmes, which it put forward in the context of the fourth plea (see paragraph 120 above). The Republic of Austria argues that it is apparent from some of those programmes that nuclear energy is competitive and that projects in that field should not benefit from State aid.In essence, those arguments are intended to show that, contrary to the Commission's findings, new nuclear energy generating capacity could have been built within a reasonable time without the United Kingdom's intervention.

212 In that context, it is appropriate to examine the content of the nuclear illustrative programmes to which the Republic of Austria refers.

213 As regards the nuclear illustrative programme of 4 October 2007, COM(2007) 565 final, it must be noted that, admittedly, in Section 4.2 of the document concerned, the Commission identified a trend in certain Member States whereby new nuclear plants were generally being built without subsidies, which was said to be an indication that nuclear energy was increasingly perceived as being competitive. However, it must also be noted that, in Section 4.3 of that document, the Commission found that there was uncertainty about future electricity prices, market structure and conditions and about future energy and climate change policies, which posed a major risk to long-term investment in the energy sector and was particularly important for nuclear technology, due to the high capital investment required for the construction of a new power plant and the relatively long period before any such investment starts to show a profit. There is also mention of the fact that investors prefer investments with shorter construction times and shorter payback periods. Furthermore, in Sections 4.2 and 4.3 of that document, the Commission noted that it did not have proven cost data for the construction of new nuclear power plants, as no new power plant had been built for more than a decade, which made it difficult to estimate the precise costs for the latest generation of reactors.

214 In the case of the nuclear illustrative programme of 13 November 2008, COM(2008) 776 final, it should be pointed out that, in Section 3.3 of that programme, the Commission did find that it was necessary to ensure that, in the European Union, nuclear energy projects do not benefit from any State subsidy. However, it must be held that, in Sections 3.3, 3.3.1 and 3.3.2 of that programme, the Commission stated that a nuclear power plant had significantly higher construction costs than an equivalent coal or gas-fired plant, that the size of the initial investment and the time needed to pay it back implied a high risk for

private companies and that the recent volatility in global credit markets was likely to put pressure on large-scale investment projects. It concluded that, while financing new nuclear power plant construction belonged to private operators and the capital markets, some measures could be justified to facilitate financing, especially since the general investment climate for large-scale borrowers had become more difficult.

215 It follows from this that, contrary to what is suggested by the Republic of Austria, there is no contradiction between the Commission's considerations in the nuclear illustrative programmes mentioned in paragraphs 213 and 214 above, on the one hand, and the Commission's considerations as set out in Section 9.3 of the contested decision, on the other.

216 In any event, it should be borne in mind that the nuclear illustrative programmes in question reflect the situation as it is at the time when they are drawn up. They do not, therefore, take account of circumstances that arise after they have been drawn up, such as, for example, the consequences of the accident at the Fukushima nuclear reactor.

217 Consequently, contrary to what is claimed by the Republic of Austria, the content of the nuclear illustrative programmes in question is not capable of demonstrating that the Commission made a manifest error of assessment.

218 In the seventh place, the Republic of Austria argues, in essence, that the Commission erred in taking into account the size of the project as a factor that precluded investment in new nuclear energy generating capacity. That criterion should have been taken into account in the context of the application of Article 107(3)(b) TFEU, pursuant to the Communication from the Commission on the criteria for the analysis of the compatibility with the internal market of State aid to promote the execution of important projects of common European interest (OJ 2014 C 188, p. 4).

219 That argument must also be rejected.

220 Contrary to the Republic of Austria's contention, there is nothing, in the context of the application of Article 107(3)(c) TFEU and, more specifically in the context of the examination as to whether State intervention is necessary, to preclude the Commission from taking into account the size of the project notified.

221 Consequently, without prejudice to the argument relating to possible overcompensation (see paragraph 196 above), which will be taken into account in the examination of the sixth plea, the Court must reject all the arguments by which the Republic of Austria and the Grand Duchy of Luxembourg seek to call in question the Commission's conclusion that, without the United Kingdom's intervention, the objective pursued by that Member State, namely the creation of new nuclear energy generating capacity, would not be achieved within a reasonable time, and there is no need to rule on the Commission's argument that some of the arguments put forward by the Republic of Austria are inadmissible because they are out of time.

(c) Complaint that the objectives of security of supply and decarbonisation could be achieved without State aid

222 The Republic of Austria and the Grand Duchy of Luxembourg claim that, contrary to the Commission's contentions, it was possible for the objectives of security of supply and decarbonisation to be achieved without the measures at issue.

223 The Commission, the Czech Republic, the French Republic, Hungary, the Republic of Poland, the Slovak Republic and the United Kingdom contest those arguments. The Commission also contends that some of the arguments put forward by the Republic of Austria are inadmissible because they are out of time.

224 In that regard, in the first place, it should be noted that the present complaint is based on a false premiss. The Commission's conclusion regarding the need for intervention by the United Kingdom is not based on the consideration that it was not possible for the objectives of security of supply and decarbonisation to be achieved without State aid. On the contrary, as is apparent from recitals 378 to 380 of the contested decision, the Commission found that the achievement of those objectives did not appear to justify investment specifically in nuclear energy generation, but more broadly investment in low-carbon generation and remedies to internalise the positive externality of electricity availability.

225 In the second place, it must be recalled that the Commission's considerations concerning the need for United Kingdom intervention as set out in Section 9.3 of the contested decision are based on the objective of promoting nuclear energy, and, more specifically, on the objective of creating new nuclear energy generating capacity. As has been stated in paragraphs 153 to 221 above, the arguments put forward by the Republic of Austria and the Grand Duchy of Luxembourg are not capable of demonstrating that the reasons given for those considerations are insufficient or that they are vitiated by material errors.

226 Consequently, the complaint that the objectives of security of supply and of decarbonisation could be achieved without State aid must be rejected, and there is no need to rule on the Commission's argument that some of the arguments put forward by the Republic of Austria are out of time.

(d) Complaint that the Commission did not make sufficiently clear the extent to which Hinkley Point C would be using new technologies

227 As regards the argument that the Commission should have set out in greater detail the extent to which Hinkley Point C would be using new technologies, suffice it to recall that that argument is based on a misreading of recital 392 of the contested decision (see paragraphs 131 to 138 above). Accordingly, that argument must also be rejected.

228 Consequently, all the complaints challenging the Commission's conclusion that intervention by the United Kingdom was necessary in order to achieve the public interest objective it was pursuing must be rejected.

2. The arguments relating to the Commission's market definition

229 The Republic of Austria claims that the Commission made errors in relation to market definition. In its view, contrary to the approach taken in the decision to initiate the formal investigation procedure, the Commission did not proceed, in the contested decision, on the basis of the liberalised market for the generation and supply of electrical power, but on the basis of the market for the construction and operation of nuclear power stations. Thus, the Commission had not applied the rules on market definition and had departed from its own practice in relation to market definition.

230 The Commission, the Czech Republic, the French Republic, Hungary, the Republic of Poland, the Slovak Republic and the United Kingdom contend that those arguments must be rejected.

231 In that regard, in the first place, it should be noted that, in the contested decision, the Commission identified the liberalised market for the generation and supply of electrical power as being the market affected by the measures at issue. In recital 340 of that decision, the Commission found that those measures could distort competition and affect trade, referring to their effects on the liberalised market for the generation and supply of electrical power. It is also apparent from Section 9.6 of that decision that, in weighing up the advantages and disadvantages arising from those measures, the Commission took account of the distortions of competition and trade on that market.

232 Accordingly, the Court must reject the Republic of Austria's argument that, in the contested decision, the Commission proceeded on the basis of the market for the construction and operation of nuclear power stations.

233 In the second place, in so far as the arguments of the Republic of Austria are intended to suggest that the Commission failed to examine to what extent the construction and operation of nuclear power stations could be considered to be a relevant market, suffice it to note that, in the context of its examination as to whether intervention by the United Kingdom was necessary in order to achieve the objective pursued by the United Kingdom — of creating new nuclear energy generating capacity — the Commission was not obliged to comment on that issue. Those arguments must therefore also be rejected.

234 In the third place, as regards the other arguments of the Republic of Austria relating to the Commission's market definition, suffice it to note that they are based on the false premisses that, in the contested decision, the Commission had proceeded on the basis of the market for the construction and operation of nuclear power stations or could have declared the measures at issue to be compatible with the internal market pursuant to Article 107(3)(c) TFEU only if it had identified a failure of that market. It follows that those arguments must also be rejected, as, therefore, must all the arguments concerning market definition.

3. The argument as to bias in favour of nuclear energy

235 The Republic of Austria also submits that the Commission's approach was biased in favour of nuclear energy.

236 The Commission, the Czech Republic, the French Republic, Hungary, the Republic of Poland, the Slovak Republic and the United Kingdom contend that those arguments must be rejected.

237 In that regard, in the first place, it should be recalled that Article 107(3)(c) TFEU enables aid to be declared compatible with the internal market if that aid is aimed at the development of an activity that constitutes a public interest objective, is appropriate, necessary and not disproportionate, and that, under Article 2(c) of the Euratom Treaty and the second subparagraph of Article 194(2) TFEU, a Member State is entitled to regard the promotion of nuclear energy as constituting such an objective (see paragraph 97 above).

238 In the second place, in so far as the Republic of Austria seeks, by its argument, to establish that, in the light of their effects on investment in energy sources other than nuclear energy, the measures at issue could not be regarded as proportionate, suffice it to note that that argument seeks to challenge the not disproportionate nature of the measures at issue. Yet, in Section 9.3 of the contested decision, the Commission merely examined whether intervention by the United Kingdom was necessary. It follows that, in the present context, that argument must be rejected as being ineffective. Nevertheless, it will be taken into account in the context of the sixth plea, by which the Republic of Austria seeks to challenge, in particular, the Commission's findings to the effect that those measures are not disproportionate.

239 Consequently, inasmuch as the Republic of Austria's arguments seek to call in question the Commission's conclusion that intervention by the United Kingdom was necessary, they must be rejected.

240 Last, the Court must reject the arguments of the Republic of Austria and the Grand Duchy of Luxembourg to the effect that the Commission was not entitled to find that there was a market failure. It should be borne in mind in that regard that Article 107(3)(c) TFEU does not contain an express condition in relation to market failure and that the Commission's considerations in the context of Section 9.3 of the contested decision, the plausibility of which is not called in question by the arguments put forward by those Member States, support the conclusion that, without UK intervention, investment in new nuclear energy generating capacity would not have been delivered within a reasonable time. In those circumstances, even on the assumption that the Commission was not entitled to find that there was a market failure, that could not call in question its conclusion that the United Kingdom's intervention was necessary in order for the public interest objective pursued by that Member State to be achieved.

241 Consequently, without prejudice to the examination of the arguments relating to alleged immunisation against the risk of a political hold-up and the allegedly disproportionate nature of the measures at issue due to their effects on investment in energy sources other than nuclear energy (see paragraphs 196 and 238

above), which will be taken into account in the context of the examination of the sixth plea, the Court must reject the first plea, the first and second parts of the ninth plea, based on the existence of a market failure and the arguments put forward in the context of the fourth plea, which are derived from nuclear illustrative programmes and are aimed at the Commission's considerations concerning market definition as well as its considerations concerning the existence of a market failure.

E. Fifth and eighth pleas, alleging insufficient determination of the aid elements and infringement of the Guarantee Notice, and fourth part of the ninth plea, alleging infringement of the obligation to state reasons in that respect

242 In the context of the fifth plea, the Republic of Austria submits that, in the contested decision, the Commission did not sufficiently determine the aid elements contained in the measures at issue. Having failed to determine them sufficiently, the Commission was not in a position to comment on whether they could be authorised pursuant to Article 107(3)(c) TFEU.

243 In support of the eighth plea, the Republic of Austria and the Grand Duchy of Luxembourg submit that the Commission failed to comply with the Guarantee Notice. In essence, they maintain that, contrary to the requirements of that notice, the Commission did not sufficiently determine, in the contested decision, the aid element contained in the Credit Guarantee, and that it did not take all the relevant elements into account in that context.

244 In the context of the fourth part of the ninth plea, the Republic of Austria claims that the reasons given in the contested decision were not sufficient in that regard.

245 The Commission, the French Republic, Hungary, the Republic of Poland and Romania maintain that those arguments must be rejected.

246 In the first place, it is necessary to answer the question as to whether, and to what extent, the Commission is obliged to determine the precise amount of the grant equivalent of an aid measure before assessing its compatibility with the internal market pursuant to Article 107(3)(c) TFEU. In the second place, the Court will analyse the arguments aimed at establishing that the Commission did not sufficiently determine the aid elements contained in the measures at issue. In the third place, the Court will examine the arguments alleging infringement of the obligation to state reasons.

1. The question as to whether, and to what extent, the Commission is obliged to quantify the grant equivalent of an aid measure

247 The Republic of Austria maintains, in essence, that it is 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.

248 In that regard, it should be recalled that, in order to be able to declare an aid measure to be compatible with the internal market under Article 107(3)(c) TFEU, the Commission must establish that it is aimed at a public interest objective set by the Member State and that, in the light of that objective, it is appropriate and necessary and that it does not adversely affect trading conditions or competition conditions disproportionately in the light of the advantages arising therefrom (see paragraph 48 above).

249 Article 107(3)(c) TFEU does not, however, expressly require the Commission to quantify the precise amount of the grant equivalent arising from an aid measure. Accordingly, if the Commission is in a position to conclude that an aid measure is appropriate, necessary and not disproportionate without that amount being made explicit, it cannot be criticised for failing to quantify it.

250 The arguments put forward by the Republic of Austria are not capable of calling that reading of Article 107(3)(c) TFEU in question. Neither the legislation nor the case-law relied on by that Member State is such as to establish a principle according to which the Commission is obliged to quantify the

precise amount of the grant equivalent arising from an aid measure before it may examine the proportionality of that measure in the light of that provision.

251 First, the Republic of Austria mentions Articles 7 and 8 of Regulation No 651/2014 declaring certain categories of aid compatible with the internal market in application of Articles 107 and 108 TFEU, and recitals 23 and 25 of that regulation. It must be pointed out in that regard that Article 7 of that regulation lays down the rules for calculating aid intensity and eligible costs. Article 8 of that regulation lays down a cumulation rule that must be adhered to when examining whether the notification thresholds in Article 4 of the regulation in question and the maximum aid intensities in Chapter III of that regulation are respected. Recitals 23 and 25 of the regulation in question concern those two provisions. Contrary to what is argued by the Republic of Austria, it cannot be inferred from those articles or from those recitals that only an aid measure the grant equivalent of which has been quantified pursuant to those rules may be declared compatible with the internal market under Article 107(3)(c) TFEU. The regulation concerned merely provides for a standardised block exemption approach, but is not binding on the Commission in the context of an individual examination carried out directly on the basis of Article 107(3)(c) TFEU. Therefore, that argument must be rejected.

252 Second, the Republic of Austria invokes paragraph 69 of the Guidelines on State aid for environmental protection and energy 2014-2020. Suffice it to note in that regard that that paragraph merely states that environmental and energy aid is considered to be proportionate if the aid amount per beneficiary is limited to the minimum needed to achieve the environmental protection or energy objective aimed for. It cannot therefore be inferred from that paragraph that, when examining an aid measure in the light of Article 107(3)(c) TFEU, the Commission is obliged to quantify the precise amount of the grant equivalent of the measure concerned before examining its proportionality. In any event, it must be noted that, in the contested decision, the Commission took account of the objective of promoting nuclear energy, which is not among the objectives covered by those guidelines.

253 Third, as regards Part I of Annex I to 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), it should be noted that this contains the standard form for notification of State aid and that, according to point 5 of that form, the overall amount of the aid must be indicated there. Contrary to the Republic of Austria's contention, it cannot be inferred from this that the Commission is not entitled to declare an aid measure compatible with Article 107(3)(c) TFEU if it has not quantified precisely the grant equivalent arising from that measure. Therefore, that argument must be rejected.

254 Fourth, the Republic of Austria invokes Article 26 of Council Regulation (EU) 2015/1589 of 13 July 2015 laying down detailed rules for the application of Article 108 [TFEU] (OJ 2015 L 248, p. 9). In that regard, it is sufficient to note that that provision merely imposes an obligation on the Member States to submit annual reports on all existing aid schemes to the Commission. It cannot, however, be inferred from this that the Commission is not entitled to determine whether an aid measure is compatible with the internal market pursuant to Article 107(3)(c) TFEU if it has not quantified the precise amount of the grant equivalent contained in that measure. Therefore, that argument must be rejected.

255 Fifth, in support of its argument that the Commission is obliged to quantify the precise amount of the grant equivalent of the measures at issue, the Republic of Austria claims that it is apparent from the Communication from the Commission amending the Communications from the Commission on EU Guidelines for the application of State aid rules in relation to the rapid deployment of broadband networks, on Guidelines on regional State aid for 2014-2020, on State aid for films and other audiovisual works, on Guidelines on State aid to promote risk finance investments and on Guidelines on State aid to airports and airlines (OJ 2014 C 198, p. 30) that, to ensure transparency, where aid exceeds EUR 500 000, the Member States are obliged to publish the name of the recipient and the amount and the objective of the aid. Suffice it to note in that regard that it cannot be inferred from such an obligation on the Member States that the Commission was required to quantify the precise amount of the grant equivalent of the measures at issue. Therefore, that argument must be rejected.

256 Sixth, in so far as the Republic of Austria claims that an obligation for the Commission to determine the actual amount of an aid measure stems from paragraph 25 of the judgment of 12 October 2000, *Spain* v *Commission* (C−480/98, EU:C:2000:559), it is sufficient to find that no such conclusion can be drawn from that paragraph. In that paragraph, the Court did no more than observe that no provision of EU law requires the Commission, when ordering the recovery of aid declared incompatible with the internal market, to fix the exact amount of the aid to be recovered, and that it is sufficient for the Commission's decision to include information enabling the recipient to work out himself, without overmuch difficulty, that amount. Therefore, that argument must be rejected.

257 The Court must take into account the considerations set out in paragraphs 247 to 249 above when examining the arguments of the Republic of Austria aimed at establishing that the Commission did not sufficiently determine the aid elements contained in the measures at issue.

2. The arguments aimed at establishing that the aid elements contained in the measures at issue were not sufficiently determined

258 First, the Republic of Austria submits that, when the contested decision was adopted, the detailed terms of the measures at issue had not all been determined. Second, in common with the Grand Duchy of Luxembourg, it maintains that the Commission did not sufficiently determine the aid elements contained in the various measures at issue. Third, it claims that the Commission did not sufficiently take into account the costs related to the management and disposal of nuclear waste. Fourth, it argues that the Commission did not take into account any possible future State aid.

(a) The argument that the detailed terms of the measures at issue had not all been determined when the contested decision was adopted

259 In the context of the fifth plea, the Republic of Austria submits that, when the contested decision was adopted, the detailed terms of the measures at issue had not all been determined and that they subsequently continued to be the subject of further negotiations and amendment.

260 The Commission contests those arguments. It contends, in particular, that that argument is inadmissible, the Republic of Austria having failed to specify the information that was missing.

261 The Commission's reasoning in relation to the inadmissibility of the Republic of Austria's argument must be rejected.

262 It must be noted that the argument put forward by the Republic of Austria relates in particular to the fact that, when the contested decision was adopted, the Commission had received only the financing heads of terms for the Hinkley Point C project, as already agreed by the parties, and that it had not had the opportunity to examine the other parameters of the project (see recitals 73 and 551 of the contested decision).

263 As to whether the Republic of Austria's argument is well founded, it must be recalled that, under Article 108(3) TFEU, the Commission is to be informed, in sufficient time, of any plans to grant or alter aid. The aid measures must therefore be notified to it while they are still at the draft stage, that is to say, before they are implemented and while they are still capable of being adjusted in the light of any observations the Commission may have.

264 In that context, it should also be noted that, since Article 108(3) TFEU does not contain any formal criterion, it is for each Member State to determine at what stage of the legislative or administrative procedure it decides to submit the aid plan for examination by the Commission, provided always that the plan is not implemented before the Commission has declared the aid compatible with the internal market (see, to that effect, judgment of 16 September 1998, *Waterleiding Maatschappij* v *Commission*, T−188/95, EU:T:1998:217, paragraph 118).

265 In the present case, the Commission examined the Hinkley Point C project as notified by the United Kingdom. In that context, it is apparent from recitals 73 and 551 of the contested decision that the Commission examined the measures at issue while taking into account the statement by the UK authorities that the rest of the terms and conditions as well as the final financing documents would contain standard clauses that any investor would seek for a similar project. It follows from this that the authorisation given by the Commission covered only the aid elements falling within that project as notified to it.

266 As to the risk invoked by the Republic of Austria that the content of the measures at issue might be amended subsequently, it is sufficient to recall that the Commission's authorisation covered only the project as notified to it. Therefore, any subsequent amendment liable to affect the assessment of the compatibility of the aid measure with the common market will have to be notified anew to the Commission. Thus, in recitals 73 and 551 of the contested decision, the Commission was careful to invite the UK authorities to notify the final documents if they included an amendment of the measures as compared with those submitted to it.

267 In the light of those considerations, the Court must reject the Republic of Austria's arguments that, in essence, it was still possible that the detailed terms of the measures at issue might be amended.

(b) The arguments alleging insufficient determination of the aid elements contained in the measures at issue

268 In the context of the fifth and eighth pleas, the Republic of Austria submits arguments aimed at establishing that the Commission did not sufficiently determine the aid elements contained in the measures at issue. It claims, moreover, that the Commission failed to take into account the cumulation of those measures.

(1) The Contract for Difference

269 In the context of the fifth plea, the Republic of Austria puts forward arguments by which it seeks to establish that the terms of the Contract for Difference had not been sufficiently determined in the contested decision.

270 In that regard, in the first place, it should be borne in mind that the mere fact that the Commission did not quantify in the contested decision the precise amount of the grant equivalent arising from the Contract for Difference is not capable of establishing that the Commission made an error (see paragraphs 247 to 256 above). In that context, it must be noted that, in the light of the way in which the Contract for Difference operates (see paragraphs 5 and 6 above), precise quantification of the amount of the grant equivalent arising from it was not possible in any event. That amount depends on changes in the reference price, which corresponds to the market price. The price in question is thus one that is uncertain and difficult to determine in advance.

271 In the second place, the Court must examine which factors the Commission took into account when it examined the proportionality of the aid element contained in the Contract for Difference. In that context, it should be borne in mind that, in Section 9.3 of the contested decision, the Commission found that there were factors in the market for the generation and supply of electrical power which precluded the timely construction of new nuclear energy generating capacity. In Section 2.1 of that decision, it describes how the Contract for Difference functions, the effect of that contract being to stabilise prices. It goes on, in Sections 9.5.2 and 9.5.3.2 of that decision, to consider whether the strike price was adequate, taking into account, in particular, the rates of return used to determine that price. As a result of its analysis, it required adjustments to be made to the gain-share mechanism.

272 In the third place, with regard to the arguments of the Republic of Austria, it must be held that, save for the argument that the Commission did not quantify the precise amount of the grant equivalent arising from the Contract for Difference, which has already been examined in paragraphs 247 to 256 above, the Republic of Austria has not put forward any detailed argument capable of demonstrating that, on the basis

of the matters set out in paragraph 271 above, the Commission was not in a position to verify the proportionality of the aid element contained in the Contract for Difference.

273 In the fourth place, in so far as the Republic of Austria submits that the Commission should have examined the effect of foreclosure of the internal market in electricity and the effects of the measures at issue on prices in that market, it must be noted that the Republic of Austria has not put forward any argument capable of demonstrating that, on the basis of the information available to the Commission, it was not in a position to assess those effects. Moreover, in so far as that argument seeks to call in question the Commission's conclusion regarding the not disproportionate nature of the measures at issue, it will be taken into account in the examination of the sixth plea, concerning compliance with the principle of proportionality.

274 In the light of those considerations, the arguments aimed at establishing that the terms of the Contract for Difference were not sufficiently determined must also be rejected.

(2) Advantages granted in the event of an early shutdown

275 In the context of the fifth plea, the Republic of Austria maintains that, in the contested decision, the Commission failed to determine the advantages that had to be granted in the event of the early shutdown of Hinkley Point nuclear power station.

276 In that context, it should be borne in mind that, as is apparent from paragraph 6 above, the Contract for Difference provides that NNBG will be protected against certain legislative changes and that compensation will be payable in the event of the early shutdown of Hinkley Point nuclear power station on political grounds and in the event of problems related to nuclear third party liability insurance. In the event of an early shutdown, both NNBG's investors and the United Kingdom will be able to call for the transfer of NNBG to the UK Government and compensation will be payable to those investors. As is apparent from paragraph 7 above, the Secretary of State Agreement provides that if, following an early shutdown on political grounds, NNBG's contracting partner defaults on compensatory payments to NNBG's investors, the Secretary of State in question will pay the agreed compensation to them.

277 It should also be noted that, as is evident from recitals 317 to 322 of the contested decision, that indemnification consists of compensation where there has been deprivation of a property right, based on the general principles underpinning UK and EU law. In that decision, the Commission found that, as such, the payment of damages on that basis and with a view to guaranteeing to NNBG's investors that their situation would not be altered in the event of the early shutdown of Hinkley Point nuclear power station on political grounds did not constitute State aid. Consequently, as an aid element, it identified only the existence of a special agreement, 'relieving' NNBG or its investors of any spent fees and time lost in the enforcement of their rights deriving from those general principles in court or out of court. In other words, the advantage identified by the Commission is limited to a special contractual right enabling them to obtain prompt and certain payment.

278 In the first place, contrary to what is claimed by the Republic of Austria, the Commission cannot be criticised for having failed to quantify the grant equivalent arising from that special agreement. In that context, it should be noted that the grant equivalent arising from such an agreement is difficult to quantify. It must also be borne in mind that although the Commission did not quantify the advantage derived from the Secretary of State Agreement, it did take it into account. As is apparent from recitals 337 and 479 of the contested decision, the Commission took account of the compensation mechanism for changes in law giving rise to a right to compensation when it determined the rates of return and the adequate strike price envisaged for the Contract for Difference.

279 In the second place, it is true that the Commission was not aware of the precise details of the compensation mechanism when the contested decision was adopted. However, in that context, it should be recalled that, in the contested decision, the Commission merely authorises the project notified by the United Kingdom, and that, according to the information provided by the United Kingdom, that mechanism

was intended to guarantee to NNBG's investors that their situation would not be altered in the event of the early shutdown of Hinkley Point nuclear power station on political grounds. Accordingly, if, after the adoption of the contested decision, the United Kingdom were to decide to pay compensation in excess of the amount that would be necessary to compensate for deprivation of property, that would be an advantage that would not be covered by the contested decision and which would therefore have to be notified to the Commission.

280 In the third place, the Republic of Austria argues that the Commission did not determine sufficiently the aid element arising from the compensation, because it did not examine whether the compensation envisaged in connection with aid in the event of the early shutdown of Hinkley Point nuclear power station was intended to compensate for decommissioning and monitoring costs and other similar costs and did not evaluate the advantages arising from the right of transfer.

281 In that regard, it should again be recalled that, according to the project which the United Kingdom notified to the Commission, the compensation was intended to guarantee to NNBG's investors that, in the event of the early shutdown of Hinkley Point nuclear power station on political grounds, they would receive compensation if deprived of their property. It follows that, should Hinkley Point nuclear power station be closed and NNBG transferred to the United Kingdom, which would then become responsible for decommissioning and monitoring costs and other similar costs, it would be appropriate for that to be taken into account in terms of compensation. If those costs were not sufficiently reflected in the calculation of compensation, that would be aid which the United Kingdom would be required to notify to the Commission.

282 Therefore, that argument must be rejected.

283 In the fourth place, the Court must reject the Republic of Austria's argument that, in its examination of the compatibility with the internal market of the Secretary of State Agreement, the Commission lost sight of the fact that that agreement will not benefit NNBG, but its investors, and that the transfer right will not benefit NNBG, but its owners. In that context, suffice it to note that the measures at issue are supposed to create an incentive effect for investment and were therefore aimed principally at NNBG's investors, even if, in legal terms, certain rights were granted to NNBG. Therefore, contrary to the Republic of Austria's contention, the Commission did not make an error in that regard.

284 In the light of those considerations, the Court must reject the arguments of the Republic of Austria to the effect that, in the contested decision, the Commission did not sufficiently determine the advantages that would have to be granted in the event of the early shutdown of Hinkley Point nuclear power station.

(3) The Credit Guarantee

285 In the context of the fifth and eighth pleas, the Republic of Austria claims that the aid element contained in the Credit Guarantee was not sufficiently determined by the Commission. In the absence of a sufficient determination of that measure, the Commission was not in a position adequately to examine the proportionality of that guarantee.

286 As a preliminary point, it is necessary to bear in mind the approach taken by the Commission in the contested decision with regard to the Credit Guarantee.

287 As is evident from Section 7.8 of the contested decision, the Commission considered the Contract for Difference, the Secretary of State Agreement and the Credit Guarantee to be linked, as all those measures were necessary for the construction of Hinkley Point C. It also found that, as the Credit Guarantee had been notified by the United Kingdom, that measure constituted State aid.

288 In that context, it is appropriate also to take into account the considerations which the Commission set out in Section 9.5.1 of the contested decision. In that section, it stated that the Credit Guarantee fee rate

initially notified by the United Kingdom remained below the market rate which NNBG would have had to pay if such a guarantee had been offered on the market.

289 In the contested decision, the Commission did not, however, authorise the Credit Guarantee as initially notified to it by the United Kingdom. As is evident from Section 9.5.3.1 of that decision and the description of the Credit Guarantee which the Commission declared compatible with the internal market in Section 2.2 of that decision, the authorisation relates to a credit guarantee with an adjusted fee rate. According to recitals 475 and 476 of that decision, that adjustment was intended to limit the aid element contained in the Credit Guarantee to the minimum.

290 In the context of Section 9.5.3.1 of the contested decision, the Commission explained that the risk category BB+ or Ba1 which the United Kingdom considered appropriate did not adequately reflect the risk to which the Credit Guarantee was exposed. According to the Commission, it was appropriate to give it a score of BB or Ba and, for that score, the guarantee fee rate of 250 basis points, proposed by the United Kingdom, had to be adjusted to a higher level, consistent with that score, that is, to a level of 295 basis points. It compared that adjusted fee rate to the fee rate of 291 basis points, which corresponds to the average of 102 European corporate credit default swaps in the BB risk category. Furthermore, it compared the fee rate of 295 basis points with the median value of 286 basis points for the BB risk category and considered that, in the light of the latter rate, the fee rate for such a guarantee had to be adjusted upwards because of the maturity effect it had identified.

291 In response to the Commission's concerns, the United Kingdom increased the fee rate for the Credit Guarantee from 250 to 295 basis points, so that it would correspond to the fee rate which NNBG would have had to pay on the private market, if such a guarantee had been offered on that market. As is apparent from recital 476 of the contested decision, the Commission considered that that adjustment enabled the aid element contained in that guarantee to be limited to the minimum.

292 The Republic of Austria and the Grand Duchy of Luxembourg maintain that those considerations are erroneous. First, the Republic of Austria submits that the Commission should not have found that the project to build and operate Hinkley Point C was a sound project with a relatively low likelihood of failure. Second, it maintains that the Commission should have determined the risk category of the Credit Guarantee without taking the other measures at issue into account. Third, like the Grand Duchy of Luxembourg, it puts forward arguments relating to the fact that, when it evaluated the Credit Guarantee, the Commission did not sufficiently take into account the criteria laid down in the Guarantee Notice.

(i) The argument that the Commission should not have found that the project to build and operate Hinkley Point C was a sound project with a relatively low likelihood of failure

293 The Republic of Austria argues that the Commission should not have found that the project to build and operate Hinkley Point C was a sound project with a relatively low likelihood of failure. That approach contradicts the considerations of the Commission that are based on the existence of market failures.

294 The Commission contends that those arguments must be rejected.

295 In that regard, it is sufficient to note that the score BB or Ba, which was considered appropriate by the Commission (see recital 465 of the contested decision), corresponds to high-risk projects for which a positive overall outcome nevertheless appears likely.

296 Contrary to what is suggested by the Republic of Austria, the Commission did not, therefore, proceed on the basis that the project entailed a relatively low likelihood of failure.

297 Consequently, that argument of the Republic of Austria must be rejected.

(ii) The argument that the Commission should have evaluated the risk category of the Credit Guarantee without taking the other measures at issue into account

298 The Republic of Austria maintains that, when evaluating the Credit Guarantee, the Commission should not have taken into account the effects of the other measures at issue, but should have proceeded on the basis of its finding in recital 390 of the contested decision, that purely commercial investment in new nuclear energy generating capacity would not come forward in the absence of State aid.

299 The Commission contends that those arguments must be rejected.

300 It should be noted in that regard that there was nothing to preclude the Commission from taking into account the effects of the Contract for Difference and the Secretary of State Agreement in the context of its assessment of the likelihood of the project's failure, which it carried out in order to determine the fee rate for the Credit Guarantee that was consistent with the rate that would be offered on the market. The three measures at issue form one unit, and the Contract for Difference and that agreement are intended precisely to overcome the obstacles to investment in new nuclear energy generating capacity identified by the Commission. The effects of those measures, notably the revenue stream guaranteed by the Contract for Difference, were the elements that were relevant for the purpose of analysing the likelihood of the risk that the project would fail. By contrast, the approach envisaged by the Republic of Austria, according to which those elements would not be taken into account in that analysis, would increase disproportionately the risk to be taken into consideration in the evaluation of the Credit Guarantee.

301 It follows that the Commission did not make a manifest error of assessment by taking into account the effects of the Contract for Difference when assessing the likelihood of the project's failure, which it did in the context of the evaluation of the Credit Guarantee. Accordingly, the Court must reject the Republic of Austria's argument that the Commission should not have taken into account the effects of the other measures at issue when assessing the risk of the project's failure with a view to setting an appropriate guarantee rate.

(iii) The arguments that the Commission did not take sufficient account of the criteria laid down by the Guarantee Notice

302 The Republic of Austria and the Grand Duchy of Luxembourg put forward arguments alleging, in essence, that, when it evaluated the Credit Guarantee, the Commission did not take sufficient account of certain criteria laid down in the Guarantee Notice. In that context, they submit arguments alleging insufficient determination of the duration of the guarantee, insufficient determination of the extent of the limitation of the loan, that the fee rate for the Credit Guarantee was not sufficiently high and that EDF had encountered financial difficulties.

303 The Commission, the French Republic, Hungary, the Republic of Poland and Romania maintain that those arguments must be rejected. In that context, the Commission contends in particular that the Guarantee Notice was not relevant in the present case.

304 As a preliminary point, it should be recalled that, in recitals 336 to 339 of the contested decision, the Commission found that the Credit Guarantee constituted State aid. It stated, in particular, that, given the unprecedented nature of the project, of the financing and of the guarantee for which there were no precisely comparable benchmarks, even if the adjusted Credit Guarantee fee rate was deemed to have reduced the aid to the minimum, the price paid by NNBG for that guarantee could not be considered a market price, since the market did not and would not provide a similar facility. None of the parties has called in question that conclusion.

305 It should also be borne in mind that, as is apparent from recitals 463 to 477 of the contested decision, in order to accommodate the Commission's concerns of under-pricing of the risk relating to the Credit Guarantee, the United Kingdom adjusted the guarantee fee rate to 295 basis points and the Commission considered that that adjusted fee rate was an approximation of a hypothetical market rate for a facility which was not offered by the market.

306 It must be held that, by their arguments concerning the failure to adhere to the criteria laid down in the Guarantee Notice, the Republic of Austria and the Grand Duchy of Luxembourg seek to show that the Commission's reasoning that the adjusted fee rate for the Credit Guarantee of 295 basis points was an approximation of the hypothetical market rate for a facility which was not offered by the market is vitiated by errors. In essence, they submit that, when assessing whether that fee rate constituted such an approximation, the Commission failed to take into account criteria which a market economy investor would have taken into consideration, namely the unspecified duration of that guarantee, the excessive extent of the limitation of the loan, and EDF's financial difficulties. Furthermore, they submit that that fee rate was not sufficiently high.

307 It must also be noted, first, that the Commission's conclusion that an adjusted fee rate for the Credit Guarantee of 295 basis points was an approximation of a hypothetical market rate is based on the consideration that a hypothetical market economy investor would have demanded such a fee rate and, second, that the arguments put forward by the Grand Duchy of Luxembourg and the Republic of Austria are intended to establish that such an investor would have taken into account matters which the Commission failed to take into consideration and that he would have required a higher fee rate.

308 In those circumstances, even on the assumption that the Guarantee Notice was not applicable in the present case, as the Commission claims, the arguments of those Member States, alleging insufficient determination of the duration of the guarantee, insufficient determination of the extent of the limitation of the loan, that the fee rate for the Credit Guarantee was not sufficiently high and that EDF had encountered financial difficulties, cannot be considered to be entirely irrelevant solely because those States rely on criteria laid down in the Guarantee Notice to support their arguments.

309 However, 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.

– *The duration of the guarantee*

310 The Republic of Austria argues that the Commission did not take into account the fact that the duration of the Credit Guarantee had not been determined. In that context, the Republic of Austria mentions the criterion referred to in point (b) of the third paragraph of point 4.1 of the Guarantee Notice.

311 The Commission contends that that argument must be rejected.

312 As a preliminary point, it should be noted that, as is apparent from point 3.2(b) of the Guarantee Notice, one of the conditions required by point 3 of that notice in order for a State to be able to rule out any advantage pursuant to that notice is that the extent of the guarantee should be limited in time. Further, it is apparent from point 4.1(b) of that notice that, in order to calculate the grant equivalent in a guarantee pursuant to that notice, the duration of the guarantee must be taken into account. It is also apparent from that point that, in principle, the Commission considers that guarantees which are unlimited are incompatible with Article 107 TFEU.

313 As regards the arguments advanced by the Republic of Austria, in the first place, the Court must reject its assertion that the Credit Guarantee was not limited in time. Suffice it to note in that regard that it is evident from recital 49 of the contested decision that that guarantee is not unlimited, but covers the timely payment of principal and interest of qualifying debt. It must also be noted that, according to recital 432 of that decision, the tenor of the guaranteed debt is anticipated to have a weighted average life of 27.4 years, with bond tenors ranging from 8 to 41 years.

314 In the second place, in so far as, by its arguments, the Republic of Austria claims that, when setting the adjusted fee rate for the Credit Guarantee at 295 basis points, the Commission did not sufficiently take into account the duration of that guarantee, first, it must be noted that, in recital 472 of the contested decision, the Commission stated that that fee rate took into account its concerns about the exceptionally long

maturity of the bonds to be issued. Second, it must be noted that the Republic of Austria has not put forward any other detailed arguments that might render implausible the Commission's conclusion that, having regard to the maturity of the bonds, that fee rate was fixed in such a way as to reflect the price that would have been paid in the case of a market economy guarantor.

315 In the light of these considerations, the Court must reject the Republic of Austria's argument concerning the duration of the guarantee.

– *The amount covered by the loan*

316 The Republic of Austria claims that the Commission failed to determine the extent of the limitation of the loan. In that context, it refers to point 4.1(c) of the Guarantee Notice.

317 The Commission contests those arguments.

318 As a preliminary point, it should be noted that, according to point 3.2(c) of the Guarantee Notice, in order for a Member State to be able to rule out the existence of an advantage pursuant to point 3 of that notice, in principle, a guarantee must not cover more than 80% of the outstanding loan or other financial obligation. It is thus evident from point 3.2(c) of that notice that the Commission considers that, if a financial obligation is wholly covered by a guarantee, the lender has less incentive to properly assess, secure and minimise the risks arising from the lending operation, and in particular to properly assess the borrower's creditworthiness, and that such risk assessment might, due to lack of means, not always be taken over by the State guarantor. Furthermore, point 4.1(c) of that notice provides that that criterion must be taken into account when calculating the aid element contained in a guarantee.

319 However, it must also be noted that, according to point 3.2(c) of the Guarantee Notice, that threshold is not applicable to guarantees covering debt securities within the meaning of Article 2(1)(b) of Directive 2004/109/EC of the European Parliament and of the Council of 15 December 2004 on the harmonisation of transparency requirements in relation to information about issuers whose securities are admitted to trading on a regulated market and amending Directive 2001/34/EC (OJ 2004 L 390, p. 38), as amended by Directive 2008/22/EC of the European Parliament and of the Council of 11 March 2008 amending Directive 2004/109 (OJ 2008 L 76, p. 50). According to the latter provision, debt securities are bonds or other forms of transferable securitised debts, with the exception of securities which are equivalent to shares in companies or which, if converted or if the rights conferred by them are exercised, give rise to a right to acquire shares or securities equivalent to shares.

320 In the first place, it must be noted that the Credit Guarantee relates to bonds issued pursuant to the terms of a European medium-term note programme, and thus to debt securities within the meaning of Article 2(1)(b) of Directive 2004/109. Accordingly, the Court must reject the Republic of Austria's argument that the Credit Guarantee does not comply with the criterion concerning the extent of the limitation of the loan, which is laid down in point 3.2(c) and in point 4.1(c) of the Guarantee Notice.

321 In the second place and in any event, point 3.2(c) of the Guarantee Notice does not, in the event of the 80% threshold being exceeded, preclude the existence of an advantage from being ruled out. It is apparent from that point that, where that threshold is not observed, the Member State is supposed to notify the measure and substantiate its claim that the measure in question does not constitute State aid. Consequently, even if that threshold had been exceeded, that would not be sufficient for a finding that the Commission's conclusion, that an adjusted Credit Guarantee fee rate of 295 basis points was consistent with a fee rate which a market economy guarantor would have required, was manifestly erroneous.

322 In the light of those considerations, the Court must reject the argument regarding the threshold mentioned in points 3.2(c) and point (c) of the third paragraph of point 4.1of the Guarantee Notice having been exceeded.

– *The existence of EDF's financial difficulties*

323 The Republic of Austria and the Grand Duchy of Luxembourg submit that the Commission should have taken account of the fact that EDF, the parent company of NNBG, was experiencing financial difficulties. In their view, the evidence they submitted during the proceedings before the Court serves to establish that fact. According to them, in exceptional circumstances, the aid element may turn out to be as high as the amount effectively covered by the Credit Guarantee. Even though that evidence was not submitted during the administrative procedure, the Commission should have taken into account the facts to which those documents refer. In that context, the Republic of Austria and the Grand Duchy of Luxembourg refer to points 3.2(a) and 4.1(a) of the Guarantee Notice.

324 The Commission and the French Republic contend that those arguments must be rejected. In that context, the Commission contends that the documents on which the Republic of Austria and the Grand Duchy of Luxembourg rely were not submitted to it during the administrative procedure and that, therefore, it was not required to take into account the circumstance they invoke.

325 As a preliminary point, it should be noted that, according to point 3.2(a) of the Guarantee Notice, one of the conditions enabling a Member State to rule out the existence of an advantage pursuant to that notice is the absence of financial difficulty on the part of the borrower and, according to point 4.1(a) of that notice, that aspect must be taken into account when calculating the aid element. As is evident from the second paragraph of point 4.1(a), the Commission considers that for companies in difficulty, a market economy guarantor, if any, would, at the time the guarantee is granted charge a high premium given the expected risk of default and, if the likelihood that the borrower will not be able to repay the loan became particularly high, this market rate might not exist and in exceptional circumstances the aid element of the guarantee might turn out to be as high as the amount effectively covered by that guarantee.

326 In the first place, it is appropriate to examine the argument of the Republic of Austria and the Grand Duchy of Luxembourg 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.

327 In that context, it must be noted that, according to point 9 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’), to which the Guarantee Notice refers, a firm is in financial difficulty if it is unable, whether through its own resources or with the funds which its owners, its shareholders or its creditors are prepared to provide, to stem losses which, without outside intervention by the public authorities, will almost certainly condemn it to going out of business in the short or medium term.

328 In support of their claim that EDF was in financial difficulty, the Republic of Austria and the Grand Duchy of Luxembourg submit the following evidence:

– reference documents published by another company partly taken over by EDF (‘the company in question’) in the first quarters of the years 2012, 2013 and 2014;

– an article that appeared on a website on 27 February 2011;

– an article that appeared in a French newspaper on 1 March 2012;

– an article that appeared in a UK newspaper on 8 April 2013;

– an article that appeared in a German business newspaper on 26 February 2014;

– an article that appeared in a German business newspaper on 6 October 2014;

– an article that appeared in a French newspaper on 5 June 2015;

– an article that appeared in a French newspaper on 17 February 2016;

– an article that appeared in a French newspaper on 18 February 2016;

– two articles that appeared in a UK economic and financial newspaper on 12 March 2016;

– a special report from November 2015 of the French Court of Auditors on EDF's international strategy;

– an article by an independent organisation which appeared on 13 December 2012.

329 First, as regards the article which appeared on a website on 27 February 2011, it should be noted that it relates to EDF's financial situation and that it refers to the company's indebtedness. However, given that it mentions that that company had been given an AA score by a credit rating agency, it cannot be inferred from this that the company's indebtedness had reached the point where it was foreseeable that EDF would be going out of business in the short or medium term. That score represents a high quality and what is, in principle, a safe investment.

330 Second, as regards the article that appeared in a UK newspaper on 8 April 2013, all that can be inferred from this is that EDF's original partner for the Hinkley Point C project had abandoned nuclear power and that, because of EDF's debt of EUR 39 billion, it was not certain that EDF would be able to complete the project by itself. However, it cannot be inferred from this that EDF was a firm in financial difficulty within the meaning of point 9 of the Guidelines on firms in difficulty.

331 Third, as regards the article that appeared in a French newspaper on 1 March 2012 and those which appeared in a German business newspaper on 26 February and 6 October 2014, it should be pointed out that they concern the company in question, not EDF. At the time of the adoption of the contested decision, the company in question and EDF were separate undertakings, and neither the Republic of Austria nor the Grand Duchy of Luxembourg has submitted evidence from which it might be established that, at the time of the adoption of the contested decision, the Commission knew or ought to have known that the company mentioned in those articles would be partly taken over by EDF in the future. On the contrary, in that context, it should be noted that, according to the Commission's statements, which have not been called in question by the Republic of Austria or the Grand Duchy of Luxembourg, the memorandum of understanding on the partial takeover of the company in question by EDF was not signed until 29 July 2015, and thus some time after 8 October 2014, the date on which the contested decision was adopted. Accordingly, those articles are not capable of establishing that EDF had encountered financial difficulties at the time of the adoption of the contested decision. Those considerations apply equally to the reference documents published by the company in question in the first quarters of 2012, 2013 and 2014, as well as to the article that appeared on the website, in so far as they contain information concerning that company.

332 Fourth, as regards the articles that appeared in a French newspaper on 5 June 2015, and 17 and 18 February 2016, and the article which appeared in a UK economic and financial newspaper on 12 March 2016, it must be noted that these were published after the adoption of the contested decision.

333 In that context, it should be borne in mind that the legality of a Commission decision on State aid is to be assessed in the light of the information available to the Commission when that decision was adopted (judgment of 10 July 1986, *Belgium* v *Commission*, 234/84, EU:C:1986:302, paragraph 16). In the present case, that information was not available to the Commission, since the articles mentioned in paragraph 332 above were published after the adoption of the contested decision and there is nothing in the file to indicate that the information they contained was available to the Commission prior to its adoption of the decision.

334 In any event, even if the Republic of Austria and the Grand Duchy of Luxembourg had submitted the articles mentioned in paragraph 328 above in order to establish the existence of circumstances that arose before the adoption of the contested decision, they would not be capable of establishing that, prior to that adoption, EDF was a firm in financial difficulty within the meaning of point 9 of the Guidelines on firms in financial difficulty. In so far as reference is made in those articles to the break-up of the company in question and EDF's takeover of part of that company, it should be noted that those events occurred after the

adoption of the contested decision (see paragraph 331 above). It must also be held that it cannot be inferred from those articles that, before the adoption of the contested decision, EDF's indebtedness had grown to such an extent that, without outside intervention, it was almost certainly condemned to go out of business in the short or medium term.

335 Fifth, the Republic of Austria submits that it is apparent from page 5 of the special report of November 2015 of the French Court of Auditors on EDF's international strategy that that company found itself, at the end of 2009, in a 'weak financial situation', and from page 7 of that report that the 'financial situation [of that company was] weak and even at the cost of greater indebtedness'.

336 In that regard, suffice it to note that it cannot be inferred from the special report of November 2015 of the French Court of Auditors on EDF's international strategy that, at the time when the contested decision was adopted, EDF was a firm experiencing financial difficulty within the meaning of point 9 of the Guidelines on firms in difficulty. First, on page 5 of that report it is stated that, 'at the end of 2009, [EDF] found itself in a weak financial situation', but it is subsequently stated that, 'a new cycle, corresponding to the period [of] the audit [by the Court of Auditors, had] started, dominated by disposals of a total amount of almost [EUR] 13 [billion]'. Second, it must be noted that the wording used on page 7 of that report, according to which 'the main concern of the State shareholder [had] been that the group continue to issue a substantial dividend, despite a financial situation that [was] weak and even at the cost of greater indebtedness', does not show that EDF's indebtedness would almost certainly have condemned it to go out of business in the short or medium term.

337 Sixth, as regards the article by an independent organisation of 13 December 2012, it is apparent from this that the construction costs for the nuclear power stations at Flamanville and Olkiluoto have increased. First of all, it is clear from the contested decision that the Commission took those circumstances into account. Next, it must be held that it cannot be inferred from that article that EDF or the company in question were in financial difficulty. Last, as regards the information from that article concerning the latter company, it is sufficient to refer to the considerations set out in paragraph 331 above. That article is, therefore, also incapable of demonstrating that the Commission made a manifest error of assessment.

338 The evidence submitted by the Republic of Austria and the Grand Duchy of Luxembourg is not therefore capable of demonstrating that EDF was experiencing financial difficulty within the meaning of point 9 of the Guidelines on firms in difficulty. Accordingly, the Court must 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.

339 In the second place, in so far as the arguments put forward by the Republic of Austria and the Grand Duchy of Luxembourg are aimed at establishing that, in the light of the financial situation in which EDF found itself, a market economy investor would not have accepted a fee rate for the Credit Guarantee of 295 basis points, suffice it to note that those Member States did not put forward any detailed arguments that might establish that the considerations which the Commission set out in Section 9.5.3.1 of the contested decision were implausible. In particular, those Member States have not advanced any argument that might show that it was manifestly erroneous to rely on the BB or Ba score, or any argument to show that (i) the comparison made by the Commission between the average of 102 European corporate credit default swaps in the BB risk category, on the one hand, and the median value of 286 basis points for that risk category, on the other, or (ii) the adjustment of the fee rate for that credit guarantee to 295 basis points in response to the Commission's concerns (see paragraph 290 above) were implausible.

340 Consequently, the Court must also reject the arguments of the Republic of Austria and of the Grand Duchy of Luxembourg to the effect that the Commission failed to take into account the criteria laid down in points 3.2(a) and 4.1(a) of the Guarantee Notice, and there is no need to rule on the Commission's argument that the documents submitted by those Member States had not been submitted during the administrative procedure.

– *The argument that the fee rate should have been at least 400 basis points*

341 In the reply, the Republic of Austria maintains that, in accordance with the sixth subparagraph of point 3.4(f) of the Guarantee Notice, the minimum risk premium is 400 basis points. The Commission had failed to explain why the Credit Guarantee, for which an adjusted fee rate of 295 basis points had been set, was less risky.

342 The Commission and the United Kingdom contest those arguments.

343 In that regard, in the first place, it must be noted that the criterion mentioned in the sixth subparagraph of point 3.4(f) of the Guarantee Notice and to which reference is made in point 4.2 of that notice applies only to guarantee schemes and not to individual guarantees. The Credit Guarantee does not, however, constitute a guarantee scheme within the meaning of point 1.3(a) of that notice.

344 In the second place and in any event, it must be noted that, contrary to what is suggested by the Republic of Austria, the amount of 400 basis points provided for in the sixth subparagraph of point 3.4(f) of the Guarantee Notice does not relate directly to the guarantee fee rate. As is apparent from point 3.4(f) of that notice, the premiums charged have to cover the normal risks associated with granting the guarantee, the administrative costs of the scheme and a yearly remuneration of an adequate capital. The yearly remuneration of an adequate capital is made up of a risk premium, possibly increased by the risk-free interest rate. The amount of 400 basis points mentioned in the sixth subparagraph of point 3.4(f) of that notice concerns only the normal risk premium for equity, which should be included in the guarantee premium charged to the beneficiaries. It follows from this that, contrary to what is suggested by the Republic of Austria, the fee rate cannot be compared directly to the rate of 400 basis points provided for in that paragraph.

345 In the third place and for the sake of completeness, it must be noted that the sixth subparagraph of point 3.4(f) of the Guarantee Notice merely specifies one element of a methodology that enables a Member State to establish a fee rate corresponding to that which a market economy guarantor would require. That point does not in any way preclude the Commission from taking a different approach to determine that rate, instead of following that methodology, by taking into account as a point of reference the fee rates required by market economy guarantors for comparable projects and by adjusting those rates on the basis of the specific features of the project concerned. Consequently, that point does not preclude the approach which the Commission took in the present case (see paragraph 290 above).

346 In the light of those considerations, the Court must also reject the argument that the Commission did not take into account the method of calculation mentioned in the sixth subparagraph of point 3.4(f) and in point 4.2 of the Guarantee Notice.

347 The arguments put forward by the Republic of Austria and the Grand Duchy of Luxembourg alleging a failure to comply with the criteria laid down in the Guarantee Notice are not, therefore, capable of establishing a manifest error affecting the Commission's considerations in recitals 475 and 476 of the contested decision, according to which the adjusted fee rate for the Credit Guarantee of 295 basis points corresponded to a rate which NNBG would have had to pay if such a guarantee had been offered on the market.

348 Accordingly, the Court must reject those arguments, without it being necessary to rule on whether the Commission was, in this instance, required to take into account the criteria laid down in the Guarantee Notice.

349 Consequently, all the arguments concerning the Credit Guarantee must be rejected.

(4) Aggregation of the measures at issue

350 In the context of the fifth plea, the Republic of Austria submits that the Commission failed to take account of the principle of aggregation, which requires that all the measures at issue be determinable in their entirety.

351 In the first place, in so far as, by that argument, the Republic of Austria is again claiming that the Commission was obliged to calculate the precise amount of the grant equivalent of the measures at issue, or that it did not sufficiently determine the aid element contained in the various measures at issue, that argument must be rejected, and reference made to paragraphs 247 to 349 above.

352 In the second place, in so far as, by that argument, the Republic of Austria seeks to claim that the Commission did not take sufficient account of the cumulative effect of the three measures at issue, it must be noted that that argument concerns the existence of overcompensation. It will therefore be taken into consideration in the examination of the sixth plea, relating to the proportionality of the measures at issue.

353 Consequently, that argument must also be rejected, as must, therefore, all the arguments aimed at establishing that the aid elements contained in the measures at issue were not sufficiently determined.

(c) The costs related to the management and disposal of nuclear waste

354 In the context of the fifth plea, the Republic of Austria submits that, in the contested decision, the Commission did not sufficiently determine the costs related to the management and disposal of nuclear waste.

355 In that regard, in the first place, it must be recalled that the aid measure which the Commission declared compatible relates only to the Contract for Difference, the Secretary of State Agreement and the Credit Guarantee. By contrast, the contested decision does not cover any State aid that may have been granted by the United Kingdom to cover expenditure related to the management and disposal of nuclear waste.

356 In the second place, it must be noted that, as is evident from recital 461 of the contested decision, in its assessment of the measures at issue, the Commission took account of information concerning expenditure related to management and disposal of nuclear waste that was included in the financial model for Hinkley Point C. As the Commission correctly argues, as these were costs that had to be borne by the plant operator, they had to be taken into account when calculating the level of return necessary in order to create a sufficient incentive effect.

357 In the third place, it must be noted that, in recitals 460 and 461 of the contested decision, the Commission expressly recalled that any element of further aid, concerning expenditure related to management and disposal of nuclear waste which was not included in the measures at issue, was required to be notified separately.

358 Having regard to those points, it must be concluded that the Commission acted in accordance with the principles recalled in paragraphs 263 to 266 above. Accordingly, the Republic of Austria's argument alleging that the Commission did not sufficiently determine the costs related to the management and disposal of waste must be rejected.

359 That conclusion is not capable of being called in question by the fact that, on 20 July 2015, thus after the adoption of the contested decision, the United Kingdom notified the pricing methodology for nuclear waste transfer contracts, and that, by decision of 9 October 2015 in Case SA.34962, Waste Contract for New Nuclear Power Stations (OJ 2016 C 161, p. 1), the Commission categorised that methodology as State aid and declared it compatible with the internal market in accordance with Article 107(3)(c) TFEU. Those facts postdate the adoption of the contested decision, and are not, therefore, capable of affecting its legality (see, to that effect, judgment of 11 July 2014, *DTS Distribuidora de Televisión Digital* v *Commission*, T−533/10, EU:T:2014:629, paragraph 75). Furthermore, if the Republic of Austria was of the view that the aid measure authorised by the decision of 9 October 2015 ought not to have been declared compatible with the internal market, it was for the Republic of Austria to put those arguments forward in the context of an action against that decision. However, those arguments are not relevant in the context of the present action, the object of which is an application for annulment of the contested decision, which does not concern that pricing methodology.

(d) The possible grant of future State aid

360 In the context of the fifth plea, the Republic of Austria maintains that, in the future, further aid in favour of Hinkley Point C might be granted in the form of a State guarantee.

361 Suffice it to note that that argument refers to matters that might occur after the date on which the contested decision was adopted and which are not, therefore, capable of affecting the legality of that decision (see paragraph 359 above). In any event, in so far as the Republic of Austria considers that any further aid would not be compatible with the internal market, those arguments cannot be taken into consideration in the context of the present action, which concerns only an application for annulment of the contested decision, relating to the measures at issue.

362 Consequently, the Court must reject all the arguments aimed at establishing that the aid elements contained in the measures at issue were not sufficiently determined.

3. The arguments relating to infringement of the obligation to state reasons

363 As regards the arguments alleging infringement of the obligation to state reasons, which the Republic of Austria puts forward in the fourth part of the ninth plea, suffice it to note that they are based on the false premiss that the Commission was obliged to determine the measures at issue in greater detail. Accordingly, those arguments must be rejected.

364 The Republic of Austria's argument alleging that the methodology used by the Commission to define the aid element contained in the Credit Guarantee is incomprehensible must also be rejected. As has already been set out in paragraphs 285 to 349 above, it is sufficiently clear from the contested decision that the Commission adjusted the terms of the Credit Guarantee notified by the United Kingdom in such a way as to reduce the aid element contained in that guarantee to the minimum.

365 Accordingly, the arguments relating to infringement of the obligation to state reasons must also be rejected.

366 Consequently, the Court must reject the fifth and eighth pleas, and the fourth part of the ninth plea, without prejudice to the examination of the argument related to the effect of foreclosure of the internal market in electricity and the effects of the measures at issue on prices in that market (see paragraph 273 above) and the argument that the Commission did not take sufficient account of the cumulative effect of the three measures at issue (see paragraph 352 above), which will be taken into consideration when examining the sixth plea.

F. Sixth plea, second complaint in the third part of the ninth plea and sixth part of the ninth plea, concerning the review of the proportionality of the measures at issue

367 The sixth plea, the second complaint in the third part of the ninth plea and the sixth part of the ninth plea concern the Commission's considerations in Sections 9.5 and 9.6 of the contested decision, according to which the measures at issue complied with the principle of proportionality. In recital 548 of that decision, the Commission stated that, subject to an adjustment of Credit Guarantee fee rate to 295 basis points and amendment of the gain-sharing arrangements, competition distortions resulting from the commissioning of Hinkley Point C were kept to the minimum necessary and were offset by the positive effects of the measures.

368 It is appropriate, first, to examine the sixth plea, which aims to establish that there were errors in relation to the review of the proportionality of the measures at issue. The Court will then go on to examine the second complaint in the third part of the ninth plea and the sixth part of that plea, alleging, in particular, an insufficient statement of reasons.

1. Sixth plea, concerning the review of the proportionality of the measures at issue

369 In support of the sixth plea, the Republic of Austria and the Grand Duchy of Luxembourg claim that the Commission's considerations in Sections 9.5 and 9.6 of the contested decision are vitiated by manifest errors.

370 In that context, as a preliminary point, it must be recalled that, in order to be compatible with the internal market for the purposes of Article 107(3)(c) TFEU, an aid measure must be appropriate and necessary in order to attain the public interest objective pursued. Moreover, the adverse effect on trading conditions and distortion of competition caused by the measure must not be disproportionate in relation to the positive effects resulting from it (see, to that effect, judgments of 25 June 1998, *British Airways and Others* v *Commission*, T−371/94 and T−394/94, EU:T:1998:140, paragraphs 282 and 283, and of 26 February 2015, *France* v *Commission*, T−135/12, not published, EU:T:2015:116, paragraph 60).

371 It should also be noted that, as has already been stated in paragraphs 79 to 128 above, not only was the United Kingdom entitled to choose nuclear technology as an energy source forming part of its energy mix, but, in the light of Article 2(c) and the first paragraph of Article 192 of the Euratom Treaty, it was also entitled to decide on the construction of new nuclear energy generating capacity as a public interest objective for the purposes of Article 107(3)(c) TFEU.

372 As regards the scope of the review which the Court must carry out in the present context, it must be stated that the Commission has a wide discretion under Article 107(3)(c) TFEU. Accordingly, the Court's review is limited (see paragraphs 160 and 161 above).

373 It is in the light of those considerations that the Court must examine the arguments put forward by the Republic of Austria and the Grand Duchy of Luxembourg in support of the sixth plea, which may be broken down into three parts, the first of which covers the appropriateness of the measures at issue, the second, their necessity, and the third, the weighing up of the positive and negative effects of those measures.

(a) Whether the measures at issue are appropriate

374 The Republic of Austria and the Grand Duchy of Luxembourg argue that, contrary to what was found by the Commission, the measures at issue were not appropriate for the purpose of attaining the objective of improving security of supply, nor to those of diversifying electricity suppliers or decarbonisation.

375 In the first place, the Republic of Austria submits that the measures at issue are not appropriate for the purpose of improving security of supply and achieving diversification in respect of electricity suppliers.

376 On the one hand, the Republic of Austria maintains, as regards security of supply, that nuclear energy offers no advantage over other, more ecological and less onerous sources of energy. First of all, the Member States are dependent on imports of the mineral uranium. Next, nuclear power stations are very sensitive to increases in temperature because of their great need for cooling water. Moreover, small, decentralised power plants are less costly and can quickly be switched on and off, which ensures a far greater ability to react to rapidly changing demand for electricity.In addition, an outage in a small power station is much more manageable than it is in a nuclear power station. Furthermore, in the various scenarios it envisaged, the Commission failed to take the interconnection plan into account, which aims, inter alia, to integrate renewable energy sources and future technical developments. Also, according to the Republic of Austria, there will in the future be a considerable increase in energy generating capacity in the United Kingdom.Last, it maintains that the Commission failed sufficiently to consider the possibility that any shortages in supply might be resolved by the use of various energy efficiency measures.

377 On the other hand, the Republic of Austria argues that the measures at issue do not contribute to the diversification of electricity suppliers, but that they have the opposite effect. The extension of Hinkley Point nuclear power station would restrict public funds, substantially reduce the budget for renewable energy and prevent projects to develop and expand renewable energy sources from being pursued. Those measures thus contribute to nuclear energy being perpetuated at the expense of renewable energy, and,

therefore, to the maintenance of the current supply structure, of which nuclear energy is a substantial element. Accordingly, those measures are contrary to the objective allegedly being pursued of the diversification of electricity suppliers.

378 In the second place, the Republic of Austria submits that the measures at issue are not appropriate for the purpose of achieving the objective of decarbonisation. Nuclear energy has proved to be substantially more expensive than, for example, wind energy or water power. According to the Republic of Austria, if the measures at issue were applied to those means of producing electricity, carbon dioxide emissions could be further reduced.

379 The Commission, the Czech Republic, Hungary, the Republic of Poland, Romania, the Slovak Republic and the United Kingdom contest those arguments.

380 In that regard, it should be noted that, in Section 9.2 of the contested decision, the Commission identified the promotion of nuclear energy and, more specifically, the creation of new nuclear energy generating capacity, as the public interest objective pursued by the measures at issue. As has been stated in the context of the examination of the fourth plea, the Republic of Austria and the Grand Duchy of Luxembourg have not put forward any arguments that might call that conclusion in question.

381 It must be held that the arguments put forward by the Republic of Austria merely call in question the appropriateness of the measures at issue with regard to the pursuit of other objectives, such as improving security of supply, diversification of suppliers and decarbonisation. They do not, however, seek to call in question the appropriateness of those measures as regards the common interest objective decided upon by the United Kingdom, that is, the creation of new nuclear energy generating capacity, which the Commission took into account. It follows that those arguments put forward by the Republic of Austria are not capable of calling in question the merits of the Commission's considerations in relation to the appropriateness of those measures. They must therefore be rejected as being ineffective in this context.

382 Nevertheless, it must be held that some of the arguments put forward by the Republic of Austria are aimed, in essence, at the Commission's weighing up in the contested decision of the positive and negative effects of the measures at issue. Those arguments will be taken into account in the examination of the third part of the sixth plea, concerning that balancing exercise.

(b) Whether the measures at issue are necessary

383 The Republic of Austria and the Grand Duchy of Luxembourg submit that the measures at issue go beyond what is necessary to achieve the objectives of improving security of supply, diversifying suppliers and decarbonisation, and therefore cause excessive distortion of competition. The aid mechanism of the Contract for Difference, which enables investment to be made, thanks to the guaranteed baseload price, in nuclear energy generating capacity, is capable of influencing the conditions for competition on the United Kingdom energy market. Notably, they claim, Hinkley Point C would have an incentive to generate electricity even when electricity prices are negative. That would have negative effects on that market, in the form of dysfunction, and would disadvantage the alternative electricity suppliers. Renewable energy producers would be driven out of the market, in the absence of clauses comparable to those contained in the Contract for Difference.

384 In that context, in the first place, the Republic of Austria submits that an increase in electricity produced by nuclear power stations as a result of their being subsidised will influence their supply merit curve, cause disruption on the energy market and could result in technologies capable of stabilising the networks efficiently being driven out, notably gas power stations. In its view, that will compromise the development of an efficient combination of generating capacities based on the flexible gas power stations associated with volatile wind energy, by making the operation and maintenance of a growing number of gas power stations uneconomical. It claims that gas power stations will encounter significant difficulty in remaining on the market in 2030, while subsidised nuclear power stations, like Hinkley Point C, will generate high coverage rates because of the aid that will have been granted to them and will have an incentive to supply

the network without any consideration during phases in which the network is already receiving substantial injections of electricity from renewable energies. That would compromise security of supply because of the foreseeable decline in flexible generating capacity.

385 In the second place, the Republic of Austria claims that, contrary to the Commission's finding, the measures at issue do not have an incentive effect appropriate for the realisation of investments. In view of the impact of those measures, the incentive effect which the Commission assumed existed in favour of the beneficiary is not suitable for achieving the desired aim. Those measures create false incentive structures for the generation of electrical energy, which, under certain market conditions, may even compromise security of supply, instead of guaranteeing it. In addition, market distortions and disruption could occur and have a knock-on effect on the national market as well as on the European market for electricity. First of all, the promotion of nuclear energy would lead to a potential overcapacity of inflexible generation. Because of the subsidy mechanism, in a negative price situation, NNBG, as the operator of Hinkley Point C, would have an economic incentive not to reduce the amount of electricity generated in the event of oversupply but, on the contrary, to continue to generate electricity to supply the network, without taking any account of the network situation. The effect of this would be to require renewable energy producers, in particular the wind turbines which the United Kingdom aims to develop, artificially to reduce their input, in order not to jeopardise network stability. According to the Republic of Austria, the latter will withdraw from the market, will have to pay negative prices for what they generate and will lose their subsidies or the opportunity to be granted possible subsidies. Next, Hinkley Point C is contributing directly to making the negative prices scenario even more likely. Since, with or without State aid, a nuclear power station in any event has only a limited ability to react to market prices, to peaks in demand and to anything that might jeopardise network stability, a power station that is subsidised by means of a Contract for Difference thus contributes specifically to market conditions for competing technologies being influenced negatively and, while benefiting from substantial subsidies, it could drive technologies with lower marginal costs from the market. Last, the Republic of Austria adds that the price of electricity per megawatt hour (MWh) generated by Hinkley Point C will be twice as high as the current market price.

386 In the third place, the Republic of Austria maintains that the measures at issue disadvantage other technologies excessively. Contrary to the view taken by the Commission, other technologies could not be similarly supported by contracts for difference. Aid for the production of energy from renewable energy sources is subject to defined and very strict criteria laid down by Regulation No 651/2014 and the Guidelines on State aid for environmental protection and energy 2014-2020. Those measures and, in particular, the Contract for Difference do not, however, fulfil any of those conditions. On the contrary, those measures would even cause renewable energy producers to be driven out of the market, in so far as they are unable to obtain aid comparable to that received by nuclear power station operators. In addition, such measures would enable NNBG to benefit from subsidies without taking any account of the network situation, whereas, for example, in the case of wind turbines, network stability has to be given precedence over their electricity input and, therefore, on their ability to benefit from any subsidies.

387 The Commission, the Czech Republic, Hungary, the Republic of Poland, Romania, the Slovak Republic and the United Kingdom contest those arguments.

388 As a preliminary point, it must be noted that the arguments put forward by the Republic of Austria may be broken down, in essence, into three complaints, the first of which alleges that the measures at issue were not necessary in order to attain the objectives of improving security of supply, diversification of suppliers and decarbonisation, the second, that more moderately sized power stations would have been sufficient, and the third, that the Commission did not examine sufficiently the risk of overcompensation.

389 In the first place, it is appropriate to examine the arguments of the Republic of Austria alleging that the measures at issue were not necessary in order to attain the objectives of security of supply, diversification of suppliers and decarbonisation.

390 Suffice it to note in this regard that, in the contested decision, the Commission took into account the public interest objective relating to the creation of new nuclear energy generating capacity (see paragraph 380

above). Consequently, the arguments of the Republic of Austria and of the Grand Duchy of Luxembourg to the effect that the measures at issue were not necessary in order to attain the objectives of improving security of supply, diversification of suppliers and decarbonisation are not capable of calling in question the merits of the Commission's considerations. They must, therefore, be rejected.

391 In the second place, the Court must reject the Republic of Austria's argument that smaller, potentially modular, power stations would be sufficient, as they could be switched on more quickly and an outage at such a power station would be more manageable than an outage at Hinkley Point. In so far as that argument concerns non-nuclear power stations, it is sufficient to recall that such power stations are not appropriate for the purpose of achieving the objective of promoting nuclear energy pursued by the measures at issue. As to the remainder, suffice it to note that the Republic of Austria does not state why the construction of several smaller nuclear power stations designed to create the same nuclear energy baseload as that of Hinkley Point C would be capable of having a more limited effect on trading conditions and on competition than the construction of Hinkley Point C.

392 In the third place, the Republic of Austria submits that the Commission did not sufficiently take into account the fact that the United Kingdom envisaged three measures, the individual amounts of which are already exceptionally high. In the contested decision, the Commission, it argues, confined itself to justifying each element separately, without, however, taking into account their cumulative effect.That argument overlaps with the argument put forward in connection with the fifth plea, according to which the Commission failed to take account of the cumulative effect of the measures at issue (see paragraph 352 above). In that context, account must also be taken of the argument put forward in connection with the first plea, that it was not necessary to 'immunise' the operators of Hinkley Point C (see paragraph 196 above).

393 First, the Court must reject the argument of the Republic of Austria that the Commission confined itself to justifying each element separately, but failed to take into account their cumulative effect. It is evident from recital 337 of the contested decision that the Commission considered those measures to be interlinked. Moreover, it is apparent from recitals 407 and 479 of that decision that, when examining whether those measures were proportionate, the Commission took that link into account. In those recitals, the Commission found that the rates of return on the basis of which the strike price for the Contract for Difference had been calculated were consistent with the set of measures framing it. The Secretary of State Agreement and the Credit Guarantee are part of that set of measures. It follows that, when assessing whether the aid element contained in the Contract for Difference was necessary, the Commission took account of the aid elements contained in the other two measures at issue.

394 Second, it must be held that the Republic of Austria has not put forward any detailed argument that might establish that the aid elements contained in the various measures at issue were excessive in the light of the objective of triggering a decision to invest in new nuclear energy generating capacity.

395 First of all, as regards the Credit Guarantee, it should be borne in mind that the Commission required the amount of its fee to be amended in order to reduce to the minimum the aid element contained within it. In that context, it should also be recalled that the examination of the eighth plea did not disclose any manifest errors by the Commission in that respect (see paragraphs 285 to 349 above).

396 Next, with regard to the Secretary of State Agreement, it must be noted that the aid element contained in that agreement is limited to a contractual right which, in the event of the early closure of Hinkley Point nuclear power station on political grounds, exempts NNBG's investors from fees or time lost in the enforcement of their rights deriving from the general principles governing compensation where there has been deprivation of a property right (see paragraph 277 above).

397 As regards the argument of the Republic of Austria that it was not necessary to 'immunise' NNBG and its investors against any legal risk, it must be stated that the measures at issue do not protect NNBG from all risk, but that it is exposed to, inter alia, a risk associated with delays in construction or incomplete construction of Hinkley Point C, to a risk of poor performance and to a risk of a poor outcome. Moreover, in the light of the objective of those measures, to create an incentive effect for investment in new nuclear

energy generating capacity, it cannot be considered manifestly wrong to have used an instrument such as the Secretary of State Agreement to contain the risks to which such investments would be exposed, in order to lower the amount of the strike price guaranteed by the Contract for Difference.

398 Last, with regard to the Contract for Difference, it must be noted that the Republic of Austria has not put forward any detailed argument that might establish that the Commission's reasoning that the strike price did not exceed the amount necessary in order to trigger a decision to invest in Hinkley Point C was manifestly erroneous. In that context, it should be recalled that the strike price had been fixed taking into account the rates of return and that, in Sections 9.5.3.2 and 9.5.3.3 of the contested decision, the Commission found that, subject to amendment of the gain-share mechanisms, those rates were consistent with the rates of return that a project of a size comparable to that of building Hinkley Point C, and characterised by a similar level of uncertainty, would have to be able to achieve. The Republic of Austria, however, has not put forward any argument that might establish that those considerations were vitiated by manifest errors of assessment.

399 It follows that all of the arguments aimed at calling in question the necessary nature of the measures at issue must be rejected.

400 However, in the present context, the Republic of Austria also puts forward arguments aimed at the Commission's weighing up of the positive and negative effects of the measures at issue. Those arguments will be taken into account in the context of the third part of the present plea, concerning that balancing exercise.

(c) Weighing up the positive and negative effects of the measures at issue

401 The third part relates to the Commission's conclusion in recitals 547 and 548 of the contested decision that, taking into account the adjustment of the Credit Guarantee fee rate and the commitments offered by EDF, the potential for competition distortion caused by the measures at issue was limited and was offset by the positive effects of those measures.

402 The Republic of Austria and the Grand Duchy of Luxembourg take issue with that conclusion. In the view of those Member States, the disadvantages resulting from the measures at issue are disproportionate to the advantages they confer. The Republic of Austria submits that, contrary to the Commission's assertion, any advantages resulting from those measures are out of proportion to the disadvantages resulting from them, such as, in particular, the distortion of competition at the expense of other electricity producers and the creation of substantial inefficiencies on the market for electricity. It claims that, in the first place, the Commission failed to take account of the negative effects of those measures for other electricity producers, in particular the substantial negative effects for renewable energy producers. Furthermore, such measures create incentive effects that lead to inefficiencies. In the second place, in carrying out the balancing exercise, the Commission omitted certain essential aspects which also militated against those measures being authorised. First, the effects on the electricity market had not been sufficiently analysed. Second, the contested decision has the value of serving as a precedent for a number of nuclear installations that are planned but not yet implemented because they are not viable without State aid. Third, the considerable consequences for consumers had not sufficiently been taken into consideration. The mere fact that the other possible solutions for covering the United Kingdom's future electricity needs had barely been considered in the contested decision showed that insufficient account had been taken of the welfare of consumers. A liberalised sector like the electricity sector should in principle be able to function without substantial public support. Consequently, the amount of the measures that will have to be borne by United Kingdom taxpayers is all the more surprising. Fourth, the environmental effects, as regards in particular the disposal of waste, and which also concern consumers or taxpayers, had not been sufficiently taken into consideration.

403 The Commission, the Czech Republic, Hungary, the Republic of Poland, Romania, the Slovak Republic and the United Kingdom contest those arguments.

404 The arguments put forward by the Republic of Austria may be divided into four groups. A first group of arguments seeks to call in question the positive effects of the measures at issue which the Commission took into account. A second group of arguments concerns the Commission's conclusion that the distortions of competition caused by those measures were limited. A third group of arguments relates to the Commission's weighing up of the positive and negative effects of those measures. A fourth group of arguments alleges that the Commission failed to take into account information that was relevant.

(1) The positive effects of the measures at issue identified by the Commission

405 In the first place, as regards the positive effects of the measures at issue identified by the Commission, it must be noted that it is apparent from recitals 2 to 11 of the decision to initiate the formal investigation procedure that those measures are part of a set of energy policy measures taken by the United Kingdom in the context of the reform of the electricity market. That strategy seeks to ensure security of supply, diversification of sources and decarbonisation. As is apparent from recitals 199, 404 and 508 to 511 of the contested decision, between 2021 and 2030, the United Kingdom will need new nuclear energy generating capacity capable of supplying approximately 60 gigawatts. In the light of the scheduled closure of existing nuclear power stations and coal-fired power stations, the construction of Hinkley Point C is intended to limit the decline in the contribution of nuclear energy to total electricity needs. According to the Commission's findings, it is not 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 solely by relying on renewable energies. In that context, the Commission took account of the fact that nuclear energy represents a baseload method of electricity supply, that is to say, a form of continuous energy generation that is not intermittent, unlike numerous technologies for generating energy from renewable sources. The Commission also stated that the equivalent of the power that should be supplied by Hinkley Point C corresponds to 14 gigawatts of onshore wind or 11 gigawatts of offshore wind energy capacity, and considered that it would be unrealistic to expect that capacity to be provided in the same time frame.

406 In the second place, it must be noted that, while the appropriateness and necessity of the measures at issue must be assessed in the light of the public interest objective of creating new nuclear energy generating capacity, in the context of the weighing up of the advantages and disadvantages of those measures, it is necessary to take account of all the positive effects to which that new capacity gives rise.

407 In the third place, as regards the arguments put forward by the Republic of Austria and the Grand Duchy of Luxembourg, including those advanced in support of the first and second parts of the sixth plea (see paragraphs 382 and 398 above), it must be stated that, in essence, those Member States have put forward seven complaints calling in question the Commission's considerations regarding the positive effects of the measures at issue. First, the Republic of Austria puts forward arguments calling in question the existence of a future energy generation capacity deficit in the United Kingdom. Second, it maintains that the concept of a broad 'baseload' is an anachronism. Third, like the Grand Duchy of Luxembourg, it claims that, so far as nuclear energy is concerned, security of supply of uranium is not guaranteed. Fourth, it submits that nuclear power stations are sensitive to temperature rises. Fifth, it invokes the consequences of an outage at Hinkley Point nuclear power station. Sixth, the Grand Duchy of Luxembourg calls in question the Commission's finding that nuclear energy is a form of energy that has low carbon dioxide emissions. Seventh, the Republic of Austria and the Grand Duchy of Luxembourg claim that the construction of Hinkley Point C will not be completed on time.

(i) The arguments calling in question the existence of a future energy generation capacity deficit

408 The Republic of Austria submits that the Commission's finding concerning the existence of a future energy generation capacity deficit is manifestly erroneous. In that context, it claims that, in the various scenarios examined by the Commission, the Commission failed to take account of changes in the electricity market resulting from measures such as smart meters, smart grids, intelligent houses and storage capacity. In its view, the Commission also did not sufficiently take into account the possibility of importing

electricity from other Member States and the prospect of a substantial increase in electricity generation capacity in the United Kingdom.

409 In that regard, in the first place, it should be noted that, with regard to the existence of a future energy generation capacity deficit, the Commission took the United Kingdom's forecasts into account. As is evident from recitals 250 to 258 of the decision to initiate the formal investigation procedure, in the context of those forecasts, the United Kingdom took account of the increase in generation capacity other than nuclear energy generating capacity, energy efficiency measures and the possibility of importing energy from other Member States through interconnection. Admittedly, as recitals 259 to 263 of the decision to initiate the formal investigation procedure show, at the time when that decision was adopted, the Commission had doubts about the United Kingdom's analysis. Nevertheless, it is apparent in particular from recital 510 of the contested decision that, after an in-depth examination, the Commission recognised the need identified by the United Kingdom for new energy generating capacity capable of supplying 60 gigawatts between 2021 and 2030. It follows that the Court must reject the Republic of Austria's argument that the Commission failed to take account of the future development of the electricity market.

410 In the second place, as regards the argument of the Republic of Austria that it is apparent from the Commission's report entitled 'Investment perspectives in the electricity market' of July 2015 that energy generation capacity in the United Kingdom will increase, it should be recalled that the legality of a Commission decision on State aid is to be assessed in the light of the information available to the Commission at the time when that decision was adopted (judgment of 10 July 1986, *Belgium* v *Commission*, 234/84, EU:C:1986:302, paragraph 16). Yet, in the present case, the report on which the Republic of Austria relies was published after the contested decision had been adopted, and there is nothing in the case file to indicate that the information contained in that report was available to the Commission before it adopted that decision. In any event, the mere argument that energy generation capacity from renewable sources and thus intermittent capacity has increased in the United Kingdom is not capable of rendering implausible the Commission's reasoning to the effect that, because of an increase in demand and the closure of existing nuclear power stations and coal-fired power stations, the United Kingdom will have to face a deficit in energy generation capacity.

411 Consequently, the Court must reject all of the arguments of the Republic of Austria calling in question the Commission's finding concerning the existence of a future energy generation capacity deficit.

(ii) The arguments alleging that the concept of a large baseload capacity is anachronistic

412 The Republic of Austria argues that the concept of a large baseload capacity is outdated. Preference, it submits, should be given to small, flexible power plants.

413 In that regard, in the first place, it should be borne in mind that, in recital 404 of the contested decision, the Commission 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 required 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.

414 In the second place, it is necessary to examine whether the arguments put forward by the Republic of Austria are likely to render those considerations implausible.

415 First, the Republic of Austria submits an interview from 11 September 2015 with the Chief Executive Officer (CEO) of the undertaking that operates, inter alia, the United Kingdom's power transmission networks. It argues that it is apparent from that interview that the idea of using large nuclear power stations is outdated.

416 In that regard, first, it should be noted that the interview in question was published after the adoption of the contested decision and that it is not, therefore, capable of calling in question the legality of that

decision (see paragraph 410 above). That applies a fortiorisince some of what the CEO of the undertaking foresees takes account of new aspects that arose in 2015, and thus after the adoption of the contested decision.

417 Second, and in any event, it must be held that the usefulness of nuclear energy as a reliable source of electricity generation is not called in question in that interview. Moreover, although, in that interview, the usefulness of the baseload for consumers is called in question on the basis that it is envisaged that consumers will produce electricity themselves, it is also stated that the pace of that development is uncertain. In addition, the fact that the baseload will remain important for business customers is not called in question. It should also be noted that demand for electricity is forecast in that interview to rise in the 2020s. In the light of those considerations and taking into account the United Kingdom's right to choose from various energy sources and the general structure of its energy supply and the broad discretion it has in that regard (see paragraph 372 above), it must be concluded that the interview in question is not capable of showing that the Commission's considerations mentioned in paragraph 413 above are vitiated by a manifest error.

418 Second, the Republic of Austria submits that, in the future, the need for flexible resources will increase as against the need for a baseload, relying in that respect on the Commission's report entitled 'Investment perspectives in the electricity market'. Suffice it to note in this regard that, for the reasons mentioned in paragraph 410 above, that report is not capable of calling in question the legality of the contested decision. In any event, that argument is not capable of rendering implausible the Commission's findings that it was unrealistic to expect that sufficient flexible and low-carbon energy production capacity can be created in the same time frame as that envisaged for the construction of Hinkley Point C.

419 Third, the Republic of Austria claims that it is apparent from an article entitled 'Will the U. S. Ever Need to Build Another Coal or Nuclear Power Plant?' published on 22 April 2009 in an American journal that the Chairman of the US Federal Energy Regulatory Commission considered that the concept of baseload capacity could become an anachronism.

420 It is sufficient to note in this regard that, even though it is apparent from that article that the Chairman of the US Federal Energy Regulatory Commission took the view that, in the future, the concept of baseload capacity could become an anachronism, it must be noted that it is also evident from that article that that opinion is certainly not shared unanimously and that other experts expressed the view that nuclear energy would continue to play a major role in the future. In view of the broad discretion enjoyed by the United Kingdom in determining its energy mix, that article is therefore also not capable of showing that the Commission's considerations, summarised in paragraph 413 above, are manifestly erroneous.

421 Consequently, the arguments of the Republic of Austria alleging that the concept of a large baseload capacity is outdated must also be rejected.

(iii) The arguments relating to uranium supply

422 The Republic of Austria and the Grand Duchy of Luxembourg submit that known uranium resources are not unlimited. Furthermore, nuclear fuels have to be imported largely from countries in which the political situation is not stable.

423 In the first place, the Court must examine whether the argument relating to the limited nature of known uranium resources is capable of calling in question the plausibility of the Commission's considerations regarding the advantages resulting from the measures at issue.

424 In that regard, it must be noted, first, that it is apparent from recital 383 of the contested decision that Hinkley Point C is expected to have an operational life of 60 years. Second, according to the summary of the 'Red Book' published by the International Atomic Energy Agency (IAEA) and by the Organisation for Economic Cooperation and Development (OECD) submitted by the Commission, uranium resources are

sufficient for the next 150 years. It follows that the argument relating to the limited nature of the resources is not capable of rendering the Commission's considerations implausible.

425 That conclusion is not affected by the Republic of Austria's argument that it is apparent from page 10 of the Commission's nuclear illustrative programme of 4 October 2007, COM(2007) 565 final, that reasonably assured and recoverable known uranium resources at competitive prices can sustain the requirements of the nuclear industry for at least 85 years at current levels of consumption.

426 First, it must be pointed out that that illustrative programme refers to a forecast contained in an earlier version of the 'Red Book' mentioned in paragraph 423 above, whereas the forecast of 150 years comes from a more recent version of that book.

427 Second and in any event, even on the assumption that reasonably assured and recoverable known uranium resources at competitive prices can sustain the requirements of the nuclear industry for only 85 years at current levels of consumption, that period would exceed the expected operational life of Hinkley Point C and the Republic of Austria has not put forward any detailed evidence capable of demonstrating that the development of nuclear energy is such that known uranium resources would be exhausted before the end of that period.

428 Third, in that context, it is also necessary to take account of the possibility of using fuels that have already been used or that come from the dismantling of nuclear weapons. As regards that possibility, the Republic of Austria merely argues that it is apparent from page 18 of the 2014 annual report of the Euratom Supply Agency that the Member States provide only 21% of conversion capacity, which is not enough to meet the European Union's needs. Suffice it to note in this regard that it is apparent from pages 18 and 33 of that document that there is, worldwide, conversion overcapacity, and that the needs of EU electricity producers are well covered in the short and medium term.

429 Accordingly, the argument relating to the limited nature of uranium resources is not capable of establishing that the Commission's considerations have been affected by a manifest error of assessment.

430 In the second place, as regards the argument alleging that the European Union is highly dependent on imports of nuclear fuels from third countries, the Court notes the possibility referred to above of converting fuels that have already been used or that come from the dismantling of nuclear weapons and the existence of uranium mines within the territory of the European Union, albeit on a very limited scale.

431 Moreover, the fact that a very large proportion of uranium is imported from third countries is not capable in itself of establishing that Hinkley Point C will not be able to achieve the electricity production planned.

432 The Republic of Austria nevertheless submits that those imports are largely derived from countries in which the political situation is not stable.

433 In that regard, first, it should be noted that part of the supply comes from Canada and Australia and that the Republic of Austria has not put forward any arguments calling in question the stability of the political situation in those countries.

434 Second, according to the information provided by the Commission, which refers to page 2 of the nuclear illustrative programme of 13 November 2008, COM(2008) 776 final, uranium sources are widely distributed, in geopolitically stable areas, which may reduce the risk of any unrest in one or more of those areas leading to a shortage of uranium for the Member States. The Republic of Austria has not put forward any detailed arguments capable of calling that information in question.

435 Third, in that context, account must also be taken of the Commission's statements, which are confirmed by pages 4 and 11 of the Communication from the Commission on the Nuclear Illustrative Programme of 4 October 2007, that European undertakings are co-owners of mines in third countries and that

international agreements facilitating trade in nuclear materials and technology have been concluded with Australia, Canada, the United States, Japan and the Republic of Kazakhstan.

436 Fourth, it must be borne in mind that dependence on fuels imported from third countries is not a specific feature of nuclear energy but applies equally to other technologies, such as gas-fired power stations.

437 Accordingly, the argument of the Republic of Austria, that a very large proportion of uranium has to be imported from third countries is also not capable of rendering implausible the Commission's considerations concerning the positive effects of the measures at issue.

438 Consequently, all of the arguments concerning uranium resources must be rejected.

439 Last, as regards the argument that the Commission ought not to have favoured the importation of uranium ore from third countries over the importation of electricity from other Member States, it should be noted that this concerns the weighing up of the advantages and disadvantages of the measures at issue. It will therefore be taken into consideration in the examination of that balancing exercise.

(iv) The argument relating to the sensitivity of nuclear power plants to temperature rises

440 The Republic of Austria submits that nuclear power plants are very sensitive to rises in temperature owing to their great need for cooling water. Nuclear power plants should therefore be switched off during heatwaves.

441 In the first place, it must be noted that the Republic of Austria has not put forward any evidence that might establish that, in normal climatic conditions, nuclear power plants are particularly sensitive to meteorological conditions, unlike renewable energy sources such as wind or solar power.

442 In the second place, the Court must examine whether the Republic of Austria's argument that heatwaves might affect the functioning of nuclear power plants is capable of rendering implausible the Commission's considerations, summarised in paragraph 405 above.

443 The Republic of Austria claims that the sensitivity of nuclear power plants to heatwaves is made clear in a document entitled 'Nuclear Free Local Authorities briefing' of 9 December 2014.

444 It must be noted in this regard that, according to that document, the unreliability of certain nuclear reactors is principally linked to the fact that these are ageing reactors which are 'past their sell-by date'. The construction of Hinkley Point C is intended precisely to replace ageing nuclear power plants. Moreover, it must be noted that the Republic of Austria has not put forward any argument capable of establishing that Hinkley Point C, which is to be located in Somerset on the coast of the United Kingdom, might be particularly likely to be exposed to heatwaves and would suffer cooling problems.

445 In any event, it must be held that, even if, in exceptional circumstances, Hinkley Point C's operation were to be affected by a heatwave, that would not be capable of calling in question, as such, the energy generating capacity resulting from the construction of that plant which the Commission took into account in its considerations, summarised in paragraph 405 above. In that context, account should also be taken of the Commission's argument that heatwaves result in increased solar energy performance, and that there is therefore a certain compensatory effect, which could counterbalance any consequences of overly high temperatures for the generation of nuclear energy.

446 In the light of those considerations, it must be concluded that the argument relating to the effects of heatwaves is not capable of establishing that the Commission's considerations regarding the positive effects of the measures at issue are vitiated by manifest errors.

(v) The argument relating to the possible consequences of outages

447 The Republic of Austria invokes the complications that may be caused by an outage in a nuclear power plant and, more specifically, an outage in a power plant of the size of the future nuclear power station at Hinkley Point.

448 In that regard, in the first place, it should be noted that, on the one hand, according to the information provided by the Commission, production at Hinkley Point nuclear power station will be assured by several nuclear power plant blocks using a variety of technologies, which will enable maintenance works to be scheduled in such a way that baseload production is maintained, and, on the other hand, that the Republic of Austria has not put forward any arguments that might call that information in question.

449 In the second place, it must be noted that the mere fact that Hinkley Point C's operation might be affected by occasional outages is not capable of calling in question, as such, the energy generating capacity resulting from that plant which the Commission took into account in the context of its considerations, summarised in paragraph 405 above.

450 It follows that the argument relating to the possible consequences of outages is not capable of rendering implausible the Commission's considerations concerning the advantages arising from the measures at issue.

(vi) The classification of nuclear energy as energy producing low carbon dioxide emissions

451 The Grand Duchy of Luxembourg submits that the Commission's finding that nuclear energy is a form of technology that has low carbon dioxide emissions is manifestly erroneous. It claims that nuclear technology causes substantial carbon dioxide emissions, because of the carbon produced during the extraction and processing of uranium, and during the construction and decommissioning of nuclear power plants.

452 As a preliminary point, it should be borne in mind that, in the contested decision, the Commission did not identify decarbonisation as a public interest objective capable of independently justifying the measures at issue. However, as has already been stated in paragraph 405 above, in weighing up the advantages and disadvantages of the measures at issue, it took account of the fact that those measures were part of an overall strategy by the United Kingdom to reform its electricity market, with the aim, in particular, of achieving decarbonisation. In those circumstances, the Court must examine whether the arguments put forward by the Grand Duchy of Luxembourg are capable of establishing that the consideration, to the effect that the measures at issue are part of that overall strategy, is vitiated by a manifest error of assessment.

453 In essence, the Grand Duchy of Luxembourg bases its arguments, to the effect that nuclear technology is not a low carbon dioxide emitting technology, on a study published in 2008, entitled 'Valuing the greenhouse gas emissions from nuclear power'.

454 In the first place, as regards the content of the study in question, it must be held that it is not apparent from this that nuclear energy is a high-carbon form of energy. On the contrary, as the Commission correctly points out, it is apparent from that study that the mean value of carbon dioxide emissions from nuclear power generating capacity is 66 g of carbon dioxide equivalent, as compared with emissions for solar power and biomass technologies, which are between 13 g and 41 g of carbon dioxide equivalent, whereas fossil fuels such as natural gas, oil, diesel and coal are between 443 g and 1 050 g of carbon dioxide equivalent.

455 In the second place, it must be noted that the Commission argues that, in the future, mean carbon dioxide emissions from nuclear power generating capacity will diminish. The carbon intensity from the electricity consumption needed for the extraction of raw materials, the construction and decommissioning of a nuclear power plant may diminish, because that electricity is at least partly replaced by electricity that does not emit carbon dioxide or emits less of it. Those arguments have not been contested by the Republic of Austria or the Grand Duchy of Luxembourg.

456 In the third place, it must be noted that the Commission, for its part, submitted another study, dating from 2012, in which the results of various studies comparable to that submitted by the Grand Duchy of Luxembourg are analysed. It must be noted that it is apparent from page 90 of that other study, which is more recent by four years than that submitted by that Member State, that, according to the scientific literature, carbon dioxide emissions from nuclear energy are just a fraction of those caused by the use of fossil fuels to generate energy, and that they are comparable to those caused by renewables technologies.

457 In the light of those factors, it must be concluded that the arguments put forward by the Grand Duchy of Luxembourg are not capable of establishing that the Commission made a manifest error of assessment in finding that the construction of Hinkley Point C was part of an overall strategy by the United Kingdom to reform its electricity market, with the aim, in particular, of achieving decarbonisation.

(vii) The argument that completion of Hinkley Point C will be delayed

458 The Republic of Austria and the Grand Duchy of Luxembourg also submit that Hinkley Point C will be completed and operational only after the supply shortage predicted by the United Kingdom.

459 In that regard, in the first place, it should be borne in mind that, if NNBG fails to comply with the timetable laid down, it risks losing the advantages conferred by the Contract for Difference and that it thus has an incentive to comply with that timetable.

460 In the second place and in any event, it must be noted that it is envisaged that Hinkley Point C will become operational in 2023. Even if it were to become operational after that date, it cannot be ruled out that it may help to meet the needs for new energy generating capacity capable of supplying 60 gigawatts identified by the United Kingdom for the period from 2021 to 2030.

461 In the light of those considerations, the argument relating to delay in completing the construction Hinkley Point C must also be rejected.

462 Consequently, it must be concluded that none of the arguments put forward by the Republic of Austria is capable of calling in question the Commission's considerations concerning the positive effects of the measures at issue.

(2) The negative effects taken into account by the Commission

463 The Republic of Austria and the Grand Duchy of Luxembourg raise arguments aimed at establishing that the Commission's conclusion that the distortions of competition caused by the measures at issue were limited is vitiated by manifest errors of assessment. In that context, account should also be taken of the arguments put forward in the context of the first and second parts of the sixth plea (see paragraphs 382 and 398 above), the argument relating to the effect on trading conditions between Member States (see paragraph 125 above), and the argument alleging an effect of foreclosure of the internal market and the effects of the measures at issue on prices on that market, which were advanced in connection with the fifth plea (see paragraph 273 above).

464 First, the Republic of Austria submits that the Commission disregarded the fact that the measures at issue had negative effects on the internal market and on the energy market in particular.

465 It should be noted in that regard that, in Section 7.9 of the contested decision, the Commission stated that the measures at issue had the potential to distort competition as regards the generation and supply of electrical power and to affect trade between Member States. It also considered that those measures could potentially distort investment decisions and displace other possible investments. Furthermore, in the context of its examination in Section 9.6 of that decision, it identified certain negative effects of those measures in terms of distortion of competition and impact on trade between Member States. However, in recital 548 of that decision, the Commission concluded that competition distortions resulting from the commissioning of Hinkley Point C would be kept to the minimum necessary and be offset by the positive

effects of those measures. That conclusion is based in particular on the Commission's examination in the context of Sections 9.6.1 to 9.6.5 of that decision.

466 In that context, it should also be noted that, in Section 9.6.1 of the contested decision, the Commission examined distortions of investment that will be caused by the measures at issue and their impact on trade flows. In recital 511 of that decision, it concluded that those measures would have an insignificant impact on trade flows, on prices and on investment. That conclusion is based on three considerations set out in that section, and on a consideration that is included in recital 403 of that decision.

467 First, in recitals 503 to 505 of the contested decision, the Commission noted that a widespread use of contracts for difference could substantially interfere with, or altogether remove, the role of prices as investment signals, and to effectively lead to price regulation of electricity generation at government-chosen levels. Contracts for difference required generators to sell on the market, thereby preserving some of the incentives which apply to unsupported market operators. The Commission noted, however, that such incentives were mainly preserved at the operational level, and not at the level of investment decisions, which were likely to be determined by the revenue stability and certainty provided by the contract for difference. In any event, market distortions deriving from the Contract for Difference at the operational level were very limited for nuclear energy generators, which had low marginal operating costs and were therefore likely to sell on the market regardless of price levels and occupied the initial positions in the supply merit curve.

468 Second, in recitals 506 to 508 of the contested decision, in terms of interconnector build and the direction and intensity of trade flows, the Commission found that the construction of Hinkley Point C was estimated to have a minimal impact on wholesale prices in the United Kingdom. In that context, it explained that the modelling work carried out suggested that prices in Great Britain would decrease by less than 0.5% as a result of the operation of that nuclear power plant, which in turn would translate into a cumulative and overall decrease in interconnector revenues of less than 1.7% up to 2030. This result stems from the fact that, even though the marginal cost of the electricity produced by that plant was lower than the price of existing plants, its overall capacity would be a small fraction of overall capacity in Great Britain, and from the fact that a decrease in wholesale prices and in interconnector revenues could be expected to take place also if that plant were not to be built. According to the Commission, that result was based on a worst-case scenario, since, in the absence of that plant, the United Kingdom could be expected to pursue other types of low-carbon production, up to the extent which would be feasible (and not up to the overall capacity provided by Hinkley Point C, which would be too large to replace through low-carbon sources only). Therefore, in its view, a decrease in wholesale prices and in interconnector revenues could be expected to take place also in the absence of Hinkley Point C.

469 Third, as regards trade distortions, in recitals 509 and 510 of the contested decision, the Commission found that Hinkley Point C had a negligible impact on prices other than those of Great Britain, which was quantified as 0.1% at most. That would translate into a decrease in cross-border flows of less than 1%. In that context, the Commission also stated that, according to the results of the modelling of alternative scenarios in which the Hinkley Point nuclear power plant project did not take place, the displacement of alternative investments would be limited. In particular, the forecasts of shrinking supply would leave ample room for other generators to enter and for other generation technologies to expand capacity regardless of investment in Hinkley Point C, in particular given the timing of the closure of existing nuclear and coal plants. The United Kingdom would need new nuclear energy generating capacity capable of producing about 60 gigawatts to come on line between 2021 and 2030, of which Hinkley Point C would provide 3.2 gigawatts. It would be impossible for low-carbon sources alone to make up this future deficit in energy generation capacity.

470 Fourth, in recital 403 of the contested decision, the Commission indicated that the Contract for Difference did not discriminate excessively against other technologies, as they could be supported sufficiently with the same type of instrument being used, in the context of the capacity market created by the United Kingdom, except for adaptations considered necessary for the differences in technologies.

471 It follows that the arguments put forward by the Republic of Austria to the effect that the Commission failed to take account of the negative effects of the measures at issue on the internal market must be rejected.

472 Second, it must be noted that some of the arguments put forward by the Republic of Austria are intended to establish that the Commission's conclusion as to the limited nature of competition distortions caused by the measures at issue is vitiated by manifest errors. In the first place, the Republic of Austria submits that the Contract for Difference alters the supply merit curve to the disadvantage of gas power stations. In the second place, it argues that that contract creates incentive effects that are inadequate. In the third place, the contract increases significantly the frequency of negative prices. In the fourth place, contrary to the Commission's considerations, those measures confer an inappropriate advantage on nuclear technology. In the fifth place, it submits, the Commission failed to take sufficient account of the importance of the interconnection of the energy networks.

473 The Commission, the Czech Republic, the French Republic, Hungary, the Republic of Poland, Romania, the Slovak Republic and the United Kingdom contest those arguments.

474 In the first place, the Republic of Austria submits that the Contract for Difference alters the supply merit curve to the disadvantage of gas power stations, which have high marginal costs and would have difficulty in remaining on the market in 2030. In its view, were gas power stations to leave the market, that would jeopardise the development of an efficient combination of generation capacities based on flexible gas power stations associated with volatile wind power.

475 As a preliminary point, it should be borne in mind in this regard that, in its examination, the Commission did not rule out the Contract for Difference having effects on the energy market. However, as is apparent in particular from recital 510 of the contested decision, it considered that the displacement of alternative investments remained limited because, on the one hand, of the United Kingdom's need for new electricity generation capacities to come on-line between 2021 and 2030 and to be capable of supplying about 60 gigawatts, of which only 3.2 gigawatts would be provided by Hinkley Point C, and, on the other, that the construction of Hinkley Point C would not translate into an increased share of the baseload capacity, but would constitute a substitute investment compensating for part of the power generated by the oldest nuclear power stations and baseload-generating coal-fired power stations. In recital 403 of that decision, it also took account of the fact that the likelihood of foreclosure of gas plants was limited by the United Kingdom's creation of a capacity market, which would seek to attract investment in new gas plants.

476 It is necessary to examine whether the arguments put forward by the Republic of Austria are likely to render those considerations by the Commission implausible.

477 According to the Republic of Austria, the adverse effects of the Contract for Difference on operators of gas plants and, indirectly, on wind power producers are demonstrated by a May 2012 study entitled 'Assessment of the dispatch distortions under the Feed-in Tariff with Contract for Differences policy' ('the May 2012 study').

478 It must be noted, however, that the content of the May 2012 study is not capable of demonstrating that the Commission's findings as regards the limited effects of the displacement of alternative investments are manifestly erroneous. On the contrary, on pages 12 and 13 of that study, it is made clear that the modelling and analysis undertaken did not find any significant distortions because of contracts for difference for baseload. As regards pages 6, 7 and 36 et seq. of that study, on which the Republic of Austria bases its argument, it is true that it is apparent from these that the combination of an inflexible technology like nuclear technology and an intermittent technology such as wind power could create scenarios in which energy generation exceeds demand, which would have the effect of limiting gas plant production. However, contrary to the Republic of Austria's contention, it cannot be inferred from that study that the construction of Hinkley Point C will result in a major foreclosure effect for gas plants. On the contrary, it should be noted that it is evident from page 30 of the study that nuclear energy will, until 2030, see only a moderate increase in existing generation capacity, whereas wind power generation will increase markedly,

and that the addition of wind capacity will also modify the supply merit curve to the disadvantage of gas plants.

479 It should, moreover, be noted that the Republic of Austria has not put forward any argument that might call in question the Commission's considerations based on the future capacity deficit, on the fact that the construction of Hinkley Point C is merely a substitute investment and on the existence of a market created by the United Kingdom, which seeks to attract investment in new gas plants.

480 In the light of those considerations, it must be concluded that the arguments of the Republic of Austria relating to the alteration of the supply merit curve are not capable of establishing that the Commission's findings concerning the negative effects of the measures at issue are vitiated by a manifest error of assessment.

481 In the second place, the Republic of Austria submits that the mechanism of the Contract for Difference creates an inappropriate incentive effect for NNBG. The latter has an incentive, owing to the Contract for Difference, to maintain its feed-ins at a high level, without regard for the stability of the network. Accordingly, the promotion of nuclear energy could lead to a potential overcapacity of non-flexible electricity generation, which would result in producers of renewable energies being obliged to reduce their feed-ins into the network, in order not to compromise its security. As a result they would lose their subsidies. In those circumstances, it would be difficult for the other electricity producers to prevail on the market or to enter it.

482 First, in so far as the Republic of Austria maintains that the Commission made an error as regards the incentive effect of the measures at issue on the creation of new nuclear energy generating capacity, its arguments must be rejected. Those arguments are not capable of calling in question the Commission's considerations, in recitals 393 to 406 of the contested decision, according to which those measures would make it possible to overcome the main obstacles to investment in such new capacity.

483 Second, in so far as the Republic of Austria maintains that the Commission's consideration that the Contract for Difference has only an insignificant impact on investment is manifestly wrong, the Court must also reject its arguments.

484 First of all, it should be pointed out that the phenomenon of wind energy generation increasing and possibly exceeding demand on certain high wind days may be directly related to the intermittent nature of that technology, and that the risk of such a phenomenon increases with the share of that source of energy in the energy mix. In that context, it should be noted that, as is apparent from pages 30 and 36 of the May 2012 study, as wind deployment increases from now until 2030, the system operator will need to take action to curtail wind generation in periods of high wind.

485 Next, it must be noted that the reason why Hinkley Point C will generate electricity without regard to wind-generated power plants lies in the very nature of nuclear technology, which is an inflexible energy source. Contrary to what is suggested by the Republic of Austria, it is not, therefore, the Contract for Difference that might incentivise NNBG to maintain its level of generation during high wind periods, but technical reasons peculiar to that technology.

486 Furthermore, as is apparent from recital 14 of the contested decision, NNBG will be able to receive difference payments based on its output only up to a cap that has to be set in the Contract for Difference. Consequently, that contract will not be an incentive to generate energy above that cap.

487 In addition, it must be noted that the Republic of Austria has not put forward any argument that might call in question the Commission's reasoning that the measures at issue have only an insignificant impact on investment. As is apparent from recitals 510 and 511 of the contested decision, that reasoning is based on forecasts that, because of shrinking supply, other generators and generation technologies will be able to find their place on the market, and on the finding that the construction of Hinkley Point C will not result in an expansion of the share of baseload capacity, but will constitute replacement investment partly

compensating for the closure of the oldest nuclear and coal plants. In that context, account should also be taken of the fact that, in the event that capacity to generate energy from wind farms is curtailed by the system operator, there is a right to compensation on the basis of the balancing mechanism, if prices are not negative.

488 In the light of those considerations, it must be concluded that those arguments of the Republic of Austria are not capable of rendering implausible the Commission's conclusion regarding the limited effects of the measures at issue on investment in wind generated power plants.

489 In the third place, the Republic of Austria argues that the Contract for Difference will increase the frequency of negative prices. In its view, Hinkley Point C will have a particular incentive to generate energy when prices are negative and will negatively influence market conditions for competing technologies.

490 In that context, first, it should be noted that, as is apparent from recital 497 of the contested decision, the Commission took account of the risk that EDF might alter that reference price, by bidding in capacity under a very low, even negative, price. Having examined that issue in Section 9.6.2 of that decision, it nevertheless considered that that risk was negligible. Moreover, according to the information provided by the Commission in recitals 506 to 508 of that decision, the construction of Hinkley Point C should have a minimal impact on United Kingdom wholesale prices. In that context, the Commission explained that the modelling work carried out suggested that prices in Great Britain would decrease by less than 0.5% as a result of the operation of Hinkley Point C. It also stated that that result stemmed from the fact that the marginal cost of electricity produced by Hinkley Point C would be lower than the price of existing plants, but that its overall capacity would be a small fraction of overall capacity in Great Britain and that a decrease in wholesale prices would take place also in the absence of Hinkley Point C.

491 It is necessary to examine whether the arguments put forward by the Republic of Austria are likely to render those considerations by the Commission implausible.

492 It should be noted in this regard that the only argument which the Republic of Austria put forward in that context is that, according to page 53 of the May 2012 study, if 3 gigawatts of nuclear capacity were added to the inflexible supply of electricity, that would double the probability of negative prices whereas, if nuclear capacity were 3 gigawatts lower, this would reduce the probability of negative prices by two thirds.

493 So far as that argument is concerned, it should be noted that the Republic of Austria has failed to establish that the project to build Hinkley Point C could be treated in the same way as the scenario, envisaged on page 53 of the May 2012 study, involving an additional 3 gigawatts of nuclear capacity. Admittedly, according to the Commission's statements, Hinkley Point C is supposed to generate 3.2 gigawatts. However, according to the Commission's statements, the construction of Hinkley Point C is no more than a replacement investment, designed to compensate partly for the output of the oldest nuclear power plants and coal-fired power plants generating the baseload.

494 In any event, in a situation such as that in the present case, in which the Commission states that it has carried out modelling work and concluded, on the basis of that work, that United Kingdom prices would decrease by less than 0.5% as a result of the operation of Hinkley Point C, even if the argument that the probability of negative prices will increase was well founded, that would not be sufficient to establish a manifest error of assessment on the part of the Commission. It cannot be inferred from the fact that the probability that negative prices will increase that the Commission's conclusion to the effect, that prices in Great Britain would decrease by less than 0.5% as a result of the operation of Hinkley Point C, is vitiated by a manifest error.

495 Consequently, the argument of the Republic of Austria relating to the increase in the probability of negative prices must also be rejected.

496 In the fourth place, the Republic of Austria and the Grand Duchy of Luxembourg submit that the Commission's consideration, in recital 403 of the contested decision, that the use of the Contract for Difference does not lead to an inappropriate advantage over other technologies because other technologies can be similarly supported by contracts for difference is not sufficiently substantiated and is erroneous. In that context, those Member States refer to Regulation No 651/2014 declaring certain categories of aid compatible with the internal market in application of Articles 107 and 108 TFEU, and to the Guidelines on State aid for environmental protection and energy 2014-2020.

497 First, as regards the argument of the Republic of Austria and of the Grand Duchy of Luxembourg in relation to Regulation No 651/2014 declaring certain categories of aid compatible with the internal market in application of Articles 107 and 108 TFEU, it is sufficient to note that that regulation merely provides for a standardised block exemption approach, but is not binding on the Commission in the context of an individual examination carried out directly on the basis of Article 107(3)(c) TFEU (see paragraph 251 above). The mere fact that the measures at issue do not satisfy the requirements laid down in that regulation is not, therefore, capable of establishing that the Commission's consideration in recital 403 of the contested decision is manifestly erroneous.

498 Second, as regards the argument of the Republic of Austria and of the Grand Duchy of Luxembourg in relation to the Guidelines on State aid for environmental protection and energy 2014-2020, it should be noted as a preliminary point that those Member States are not claiming that the Commission erred in failing to apply those guidelines to the measures at issue. They merely claim that the Commission found, in recital 403 of the contested decision, that technologies other than nuclear technology and nuclear technology itself could be supported similarly, whereas the conditions under which aid could be granted to technologies other than nuclear technology were more stringent than those applied by the Commission, in that decision, to nuclear technology.

499 Suffice it to note in this regard that, contrary to what is suggested by the Republic of Austria and the Grand Duchy of Luxembourg, in recital 403 of the contested decision, the Commission did not find that other technologies could be supported by contracts for difference containing the same terms as those laid down for Hinkley Point C. In that context, the Commission did no more than state that the use of the instrument of the contract for difference did not discriminate excessively against other technologies because that type of instrument could also be used to support other technologies. However, in that recital, it expressly acknowledged that adaptations may be necessary to take account of the differences in technologies.

500 Consequently, the arguments on the basis of which the Republic of Austria and the Grand Duchy of Luxembourg submit that the Commission's consideration, in recital 403 of the contested decision, that the use of the Contract for Difference does not lead to an inappropriate advantage over other technologies because other technologies can be similarly supported by contracts for difference is not sufficiently substantiated and erroneous, must be rejected.

501 In the fifth place, the Republic of Austria and the Grand Duchy of Luxembourg submit that the Commission did not take sufficient account of the effects of the construction of Hinkley Point C on the interconnection of energy networks.

502 In that regard, first, it should be borne in mind that, in recitals 506 to 509 of the contested decision, the Commission found that the construction and operation of Hinkley Point C should have a minimal impact on United Kingdom wholesale prices. In that context, it explained that the modelling work carried out suggested that prices in Great Britain would decrease by less than 0.5% as a result of the operation of that nuclear power plant, which in turn would translate into a cumulative and overall decrease in interconnector revenues of less than 1.7% up to 2030. Accordingly, the Commission took account of the effects of the construction and operation of Hinkley Point C on interconnection.

503 Second, although the Republic of Austria and the Grand Duchy of Luxembourg claim that the Commission failed to take sufficient account of those effects, it must be noted that those Member States

have not put forward any evidence that might render implausible the Commission's considerations with respect to the interconnection of energy networks.

504 Consequently, the arguments on the basis of which the Republic of Austria and the Grand Duchy of Luxembourg submit that the Commission did not take sufficient account of the effects of the construction and operation of Hinkley Point C on the interconnection of energy networks must be rejected, as, therefore, must all the arguments of the Republic of Austria and the Grand Duchy of Luxembourg aimed at establishing that the Commission overlooked the negative effects that the measures at issue would have on the energy market or the scale of those effects.

(3) The balancing exercise carried out

505 The Republic of Austria and the Grand Duchy of Luxembourg put forward various arguments calling in question the Commission's weighing up of the positive and negative effects of the measures at issue. They claim, in essence, that the positive effects of those measures are outweighed by their negative effects. In addition to the negative effects already mentioned in paragraphs 382, 384 and 400 above, that is to say, the effect of other producers being driven out of the market, the limitation of input from wind generated power plants in high wind periods, the effects on prices and the less advantageous terms of the contracts for difference available to other producers, the Republic of Austria claims that another negative effect of those measures is to perpetuate the current supply structure, of which nuclear energy is a substantial element. Furthermore, it submits that the Commission did not attach sufficient weight to the objectives of promoting energy efficiency and energy savings, developing new forms of energy and promoting the interconnection of energy networks laid down in Article 194(1) TFEU. In that context, it is also necessary to take account of the arguments relating to the balancing exercise mentioned in paragraphs 238 and 439 above, alleging that the Commission was biased in favour of nuclear energy and that it should not have favoured the importation of uranium ore from third countries over the importation of electricity from other Member States.

506 In that regard, in the first place, it should be noted that, in recitals 502 to 511 and 547 of the contested decision, the Commission found that the risk of distortion of competition was limited, notably as regards the effects of the measures at issue on alternative investments and on prices. The Republic of Austria and the Grand Duchy of Luxembourg have not put forward any arguments that might call that conclusion in question.

507 In the second place, as regards the arguments of the Republic of Austria alleging that the current supply structure is being perpetuated, it should be noted that, according to the information provided by the Commission, the project to build Hinkley Point C is intended solely to prevent a drastic fall in the contribution of nuclear energy to overall electricity needs. 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 cannot be considered to be manifestly disproportionate as compared with the positive effects of the measures at issue.

508 In the third place, as regards the fact, invoked by the Republic of Austria and the Grand Duchy of Luxembourg, that, in high wind periods, wind generated power plants are obliged to limit their production in order not to jeopardise network stability, first, it should be noted that that phenomenon is a result of the intermittent nature of wind technology. Second, the fact that the inflexible baseload produced by nuclear power plants may reinforce that effect is not sufficient in itself to establish that the negative effects of the measures at issue are disproportionate as compared with their positive effects. First, 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, the United Kingdom cannot be criticised for adopting the measures necessary to maintain nuclear energy in its energy mix, even if that may have negative effects on producers of intermittent energy. Second, and in any event, according to the Commission's findings, which have not been called in question by the arguments of the Republic of Austria and the Grand Duchy of Luxembourg, it would not be possible

to address the future low levels of energy generation capacity capable of supplying 60 gigawatts identified by the United Kingdom by resorting solely to other low-carbon sources.

509 In the fourth place, the Republic of Austria argues that, in the weighing up of the effects of the measures at issue, the Commission did not give sufficient weight to the objective of favouring electricity imports from other Member States and to the goal of efficiency. In that regard, suffice it to note that, according to the findings of the Commission, summarised in paragraphs 405 and 466 to 470 above, the impact of the measures at issue on interconnectors remains limited and there is a future gap in energy generation capacity to supply 60 gigawatts to the United Kingdom, of which only 3.2 gigawatts would be provided by Hinkley Point C, and, moreover, that the plausibility of those findings has not been properly called in question by the arguments put forward by the Republic of Austria and the Grand Duchy of Luxembourg. In those circumstances, the argument that the Commission did not attach sufficient weight to the objective of favouring electricity imports from other Member States and to the goal of efficiency is not capable of establishing that the negative effects of the measures at issue are disproportionate as compared with their positive effects.

510 In the fifth place, it must be borne in mind that the United Kingdom is entitled to determine the composition of its own energy mix and to maintain nuclear energy as a source in that mix. In view of that entitlement, the mere fact that, in order to create an incentive for the construction of new nuclear energy generating capacity so as to overcome the obstacles to it, the United Kingdom provided for a Contract for Difference for the construction and operation of Hinkley Point C which contains terms that are more favourable than contracts for difference available for other technologies is not sufficient in itself to establish that the negative effects of the measures at issue are disproportionate as compared with their positive effects.

511 It follows that all of the arguments put forward by the Republic of Austria and the Grand Duchy of Luxembourg to establish that the Commission made a manifest error of assessment in relation to the weighing up of the measures at issue must be rejected.

(4) The argument that the Commission failed to take into account information that was relevant

512 The Republic of Austria and the Grand Duchy of Luxembourg argue that, in the weighing up of the effects of the measures at issue, the Commission failed to take into account matters which would have been relevant, such as the effects of those measures on the environment, the terrorist threat and the costs of storing nuclear waste, as well as the consequences of their financing. In that context, account must also be taken of the arguments which the Republic of Austria put forward in connection with the fourth plea, to the effect that, by unconditionally prioritising Article 2(c) of the Euratom Treaty, the Commission acted in breach of the principle of protection of the environment, the precautionary principle, the ‘polluter pays’ principle and the principle of sustainability (see paragraph 114 above).

513 The Commission, the Czech Republic, the French Republic, Hungary, the Republic of Poland, Romania, the Slovak Republic and the United Kingdom contest those arguments.

514 In the first place, the Court must examine the arguments of the Republic of Austria to the effect 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.

515 In that regard, first, it must be noted that the United Kingdom did not specifically intend, through the measures at issue, to give effect to the principles relied on by the Republic of Austria and the Grand Duchy of Luxembourg. Accordingly, the Commission was not obliged to take into account those principles when identifying the advantages that flow from the measures at issue.

516 Second, with regard to the disadvantages of the measures at issue, it must be 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. 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. Consequently, when identifying the negative effects of the measures at issue, the Commission was not obliged to take into account the extent to which the measures at issue are detrimental to the implementation of that principle (see, to that effect, judgment of 3 December 2014, *Castelnou Energía* v *Commission*, T−57/11, EU:T:2014:1021, paragraphs 189 to 191). That applies equally to the precautionary principle, the 'polluter pays' principle and the sustainability principle relied on by the Republic of Austria.

517 Third, in so far as, by their arguments, the Republic of Austria and the Grand Duchy of Luxembourg seek to establish that measures that are contrary to EU law may not be authorised by the Commission, it should be noted that, apart from the principle of protection of the environment, the precautionary principle, the 'polluter pays' principle and the principle of sustainability, those Member States do not invoke any EU environmental legislation that may not have been complied with. Moreover, if those Member States are claiming that those principles preclude State aid from being granted for the construction or operation of a nuclear power plant, that argument must also be rejected, since such an interpretation would be inconsistent with Article 106a(3) of the Euratom Treaty.

518 It follows that all of the arguments of the Republic of Austria and the Grand Duchy of Luxembourg to the effect 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 must be rejected.

519 In the second place, the argument of the Grand Duchy of Luxembourg that the Commission did not sufficiently take into account the danger arising from terrorism must be rejected for similar reasons. The measures at issue were not measures intended specifically to guard against terrorism, and protection against terrorism does not constitute, per se, one of the components of the internal market, defined as an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured. Furthermore, it must be noted that the Republic of Austria and the Grand Duchy of Luxembourg do not invoke any legislation on the security of nuclear power plants that may not have been complied with.

520 In the third place, as regards the argument of the Republic of Austria that the Commission failed to take the costs of storing nuclear waste into consideration, suffice it to refer to the review carried out in paragraphs 354 to 358 above.

521 In the fourth place, the Republic of Austria claims that the Commission did not sufficiently take into account the negative consequences of the measures at issue for consumers, who must bear the cost of those measures, notably in their capacity as taxpayers.

522 In that context, first, it should be stated that, in so far as payments are required to be made on the basis of the Contract for Difference, consumers will not be affected in their capacity as taxpayers, since those payments are funded through a levy on suppliers (see recital 329 of the contested decision). Furthermore, contrary to what is argued by the Republic of Austria, it cannot be inferred from the contested decision that the Commission failed to take the interests of consumers of electricity into account in its review of proportionality. Not only did it examine the effects of the measures at issue on electricity prices and find that no significant effects were to be expected, but it also ensured that those measures would not result in overcompensation. Thus, it adjusted the Credit Guarantee fee rate and, in recital 491 of that decision, expressly stated that the changes to the gain-share mechanism were likely to translate into lower levels of support to be provided by suppliers and, ultimately, by those consumers.

523 Second, as regards the Credit Guarantee, it is apparent from recital 339 of the contested decision that it entails the resources of the United Kingdom. Therefore, in that context, consumers may be affected in their capacity as taxpayers. However, in that regard, it should be borne in mind that it is necessary to distinguish

the measures at issue from their funding. Taxes which serve to finance aid do not fall within the scope of the provisions of the Treaty concerning State aid unless they constitute the method of financing an aid measure, so that they form an integral part of that measure. For a tax, or part of a tax, to be regarded as forming an integral part of an aid measure, it must be hypothecated to the aid measure under the relevant national rules, in the sense that the revenue from the tax is necessarily allocated for the financing of the aid. In the event of such hypothecation, the revenue from the tax has a direct impact on the amount of the aid and, consequently, on the assessment of the compatibility of the aid with the internal market (judgment of 13 January 2005, *Streekgewest*, C−174/02, EU:C:2005:10, paragraphs 25 and 26). It must be noted, first, that the contested decision does not contain anything that might establish that the Credit Guarantee is similarly hypothecated to its financing and, second, that the Republic of Austria has not put forward any argument capable of demonstrating the existence of such hypothecation.

524 Consequently, the Court must reject the argument of the Republic of Austria that the Commission did not sufficiently take into account the effects of the measures on consumers, notably in their capacity as taxpayers.

525 In the fifth place, the Republic of Austria submits that the Commission did not sufficiently take into account the fact that the Hinkley Point C project restricted public funds for projects to develop and expand renewable energy sources and prevented such projects from being pursued.

526 In that regard, it should be recalled that, in accordance with the second subparagraph of Article 194(2) TFEU, Member States are entitled to choose between different energy sources. Accordingly, in itself, the choice made by the United Kingdom to grant aid for the promotion of nuclear energy cannot be called in question, notwithstanding the fact that the public resources used for that project are, as a result, unavailable for other projects.

527 Second, it must be stated that the Republic of Austria has not put forward anything to demonstrate that, as a result of the measures at issue being granted in respect of Hinkley Point C, the United Kingdom is unable to meet its obligations under EU law in relation to the protection of the environment.

528 Third, it must be borne in mind that, in recital 510 of the contested decision, the Commission stated that, regardless of investment in Hinkley Point C, there was still ample room on the market for other generators and other generation technologies to enter and to expand their capacity, and that, in recital 403 of that decision, it took account of the fact that the Contract for Difference did not discriminate excessively against other technologies, as these could be supported sufficiently using the same type of instrument, in the context of the capacity market created by the United Kingdom, except for the adaptations necessary to take account of the differences in technologies. It should also be borne in mind that the arguments of the Republic of Austria and the Grand Duchy of Luxembourg considered in paragraphs 463 to 511 above are not capable of establishing that the Commission made a manifest error of assessment in that respect.

529 In the light of the above, the Court must reject the argument of the Republic of Austria that the Commission did not sufficiently take into account the fact that the Hinkley Point C project restricted public funds for projects to develop and expand renewable energy sources and prevented such projects from being pursued, as well, therefore, as all of the arguments alleging that the Commission failed to take relevant factors into account.

530 Consequently, the Court must reject all of the arguments relating to the weighing up of the positive and negative effects of the measures at issue and, therefore, the sixth plea in its entirety, as well as the arguments relating to the necessary nature of those measures put forward in connection with the first plea (see paragraph 196 above) and the fifth plea (see paragraphs 273 and 352 above), and the arguments relating to that weighing up exercise put forward in connection with the fourth plea (see paragraphs 114 and 125 above) and the first plea (see paragraph 238 above).

2. Second complaint in the third part of the ninth plea, and sixth part of that plea, alleging, in particular, an insufficient statement of reasons

531 In the second complaint in the third part of the ninth plea, and the sixth part of that plea, the Republic of Austria puts forward arguments claiming, in essence, that the statement of reasons for the contested decision as regards the review of the proportionality of the measures at issue is insufficient.

532 In the first complaint in the sixth part of the ninth plea, the Republic of Austria submits that the statement of reasons for the contested decision is insufficient as regards the possible alternatives to subsidising Hinkley Point C. The contested decision did not, it claims, present the tenders of alternative energy producers. Moreover, that decision was 'silent' as regards the energy saving and energy efficiency measures.

533 The Commission contests those arguments.

534 It should be noted in that regard that it is apparent from Section 9.2 of the contested decision that the Commission considered that the public interest objective pursued by the measures at issue was the promotion of nuclear energy and, specifically, the creation of new nuclear energy generating capacity. The reason why the tenders of alternative energy suppliers did not represent an alternative to the subsidisation of Hinkley Point C is therefore clearly evident from that section.

535 In addition, as regards energy saving and energy efficiency measures, it is sufficient to point out that it is apparent from recitals 250 to 254 of the decision to initiate the formal investigation procedure that the United Kingdom had identified a future deficit in electricity generating capacity and that, in determining the scale of that future deficit, it had taken energy saving and energy efficiency measures into account. Since the Commission relied on that future deficit in the contested decision, and the statement of reasons in the decision to initiate the formal investigation procedure is part of the context to the contested decision, the statement of reasons for the latter cannot be considered to be insufficient in that respect (see paragraph 63 above).

536 Furthermore, if, by the present complaint, the Republic of Austria is seeking to cast doubt on whether the statement of reasons referred to above is well founded, suffice it to note that that complaint has already been examined and rejected in the context of the examination of the sixth plea.

537 Consequently, the first complaint in the sixth part of the ninth plea must be rejected.

538 By the second complaint in the sixth part of the ninth plea, the Republic of Austria maintains that the Commission failed to set out the scenarios to which it refers in recital 416 of the contested decision.

539 The Commission contests that argument.

540 As a preliminary point, it must be noted that recital 416 of the contested decision is in Section 9.5.1 of that decision, in which the Commission described the Credit Guarantee notified by the United Kingdom and, in particular, the fee rate for that guarantee originally envisaged by the United Kingdom. In that context, the Commission stated that, in the circumstances of the case, two methods could be used to establish a fee rate for that guarantee corresponding to market terms. One of those methods would be the so-called expected loss approach, which links the company's business plan to its capital structure under different scenarios resulting in a likelihood of default.

541 According to the Republic of Austria, the Commission failed to set out those scenarios.

542 In that regard, it should be noted that, in recitals 424 to 427 of the contested decision, the Commission explained, in more detail, the expected loss approach and one of the scenarios which had been envisaged by the United Kingdom in that context. It should also be noted that the Commission found that the fee rate for the Credit Guarantee notified by the United Kingdom did not reflect the rate corresponding to market terms. For that reason, in recitals 463 to 477 of that decision, the Commission stated to what extent it was appropriate to amend the fee rate for that guarantee in order to limit the aid element in the Credit Guarantee to the minimum. In that context, it set out the criteria used and the scenarios which it envisaged.

543 In the light of those factors, the complaint that the statement of reasons in respect of recital 416 of the contested decision was insufficient must be rejected.

544 In the third complaint in the sixth part of the ninth plea, the Republic of Austria submits that, in Section 9.5.2 of the contested decision, the Commission relied on the TESLA 4 report, but did not set out the data relating thereto. Consequently, it is argued, its considerations regarding the financial risk were not comprehensible.

545 The Commission contests that argument.

546 In the first place, the Court must reject the argument of the Republic of Austria alleging infringement of the obligation to state reasons. It should be noted in that regard that, in recitals 434 to 458 of the contested decision, the Commission examined in some detail the level of the strike price and the rates of return, on the basis of various sources of data. In recitals 446 and 447 of that decision, it took account of the TESLA 4 report, drawn up internally by NNBG. It must be pointed out that it is sufficiently clear from the public version of that decision that the Commission did not disclose the data from that report in order to protect business secrets.

547 In the second place, if, by its argument, the Republic of Austria is seeking to call in question the confidentiality of those data or the Commission's decision to redact them, it is sufficient to note that it has not put forward any detailed argument in that regard.

548 Accordingly, the complaint relating to the TESLA 4 report must be rejected.

549 In the fourth complaint in the sixth part of the ninth plea, the Republic of Austria argues that it is incomprehensible that, in Section 9.5.3.3 of the contested decision, the gain-share mechanism was published but not the construction gain-share thresholds.

550 The Commission contests those arguments.

551 In that context, it should be noted that it is clear from recital 487 of the contested decision that the Commission considered that the construction gain-share thresholds constituted business secrets. Furthermore, it must be noted that the Republic of Austria has not put forward any argument that might cast any doubt on the confidential nature of that information or as to whether the Commission's decision not to reveal them was well founded.

552 Consequently, the argument of the Republic of Austria relating to the construction gain-share thresholds must also be rejected.

553 In the fifth complaint in the sixth part of the ninth plea, the Republic of Austria claims that the statement of reasons for the contested decision is not sufficient as regards the subsidies linked to the additional costs in relation to the decommissioning of installations and the processing and disposal of nuclear waste.

554 The Commission contests those arguments.

555 In that regard, it is sufficient to note that, as is apparent from recitals 460 and 461 of the contested decision, the Commission only took into account cost items for expenditures related to management and disposal of waste, liability fees, and decommissioning which were included in the financial model for Hinkley Point C. The decision does not, however, cover additional aid elements in relation to that type of expenditure. Consequently, the Commission was not required to give reasons for its decision in that regard.

556 In the sixth complaint in the sixth part of the ninth plea, the Republic of Austria maintains that the Commission should have given further reasons as to why, contrary to its practice in taking decisions, it had not considered that the lack of a tendering procedure exacerbated the effects of the measures at issue on competition.

557 The Commission contests those arguments.

558 In this regard, it should be noted, first, that, in Section 9.1 of the contested decision, the Commission set out the reasons why, in its view, Directive 2004/17/EC of the European Parliament and of the Council of 31 March 2004 coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors (OJ 2004 L 134, p. 1) and Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts (OJ 2004 L 134, p. 114), as amended, were not applicable to the measures at issue.

559 Second, in recitals 359 to 364 of the contested decision, the Commission stated that the selection procedure used by the United Kingdom was based on a clear, transparent and non-discriminatory framework, which could be considered equivalent to a tendering procedure in terms of transparency and non-discrimination. In that context, in recital 363 of that decision, it expressly stated that the United Kingdom had held discussions with new nuclear developers other than NNBG.

560 Third, it must be held that the reasons for the Commission's view that the measures at issue did not lead to overcompensation are sufficiently apparent from Section 9.5 of the contested decision.

561 In the light of those factors, the present complaint must be rejected.

562 In the seventh complaint in the sixth part of the ninth plea, the Republic of Austria submits that, in recital 389 of the contested decision, the Commission identified a considerable improvement in general welfare and in the welfare of all consumers. However, in that context, the Commission had not stated to what extent the external costs generated, for example, by the processing and disposal of nuclear waste or the risk of accidents had been taken into account. Furthermore, the reasons given in Section 9.4 of that decision, regarding the appropriateness of the instruments, were not comprehensible. In that context, the Commission had not determined sufficiently the effects of the measures at issue on the electricity market.

563 The Commission contests those arguments.

564 It should be noted in this regard that, in Section 9.3 of the contested decision, the Commission commented on whether intervention by the United Kingdom was necessary in order to achieve the public interest objective it was pursuing, namely the creation of new nuclear energy generating capacity, and, in Section 9.4 of that decision, on whether the measures at issue, notably the Contract for Difference, could be considered appropriate instruments for achieving that goal. In that context, the Commission took account, in particular, of the fact that other technologies could be similarly supported by contracts for difference and of the intermittent nature of many renewable energy technologies. However, contrary to what is suggested by the Republic of Austria, it did not, in those sections, carry out a comprehensive balancing exercise in respect of all the relevant positive and negative effects of those measures. It did so at a later stage, after its examination, in the context of Section 9.6 of that decision.

565 It follows that, in Sections 9.3 and 9.4 of the contested decision, the Commission was not obliged to determine all of the positive and negative effects of the measures at issue, nor was it obliged to weigh them up. Furthermore, in so far as, in recital 389 of that decision, it mentioned the improvement in the welfare of society as a whole and of all consumers, that is not a conclusion that arose from such a balancing exercise. In that recital, it did no more than find that the creation of new nuclear energy generating capacity constituted a positive effect of those measures.

566 In the light of those considerations, the complaint that the statement of reasons in respect of Sections 9.3 and 9.4 of the contested decision was insufficient must also be rejected.

567 In the second complaint in the third part of the ninth plea, the Republic of Austria submits that, in Section 8.1.7 of the decision to initiate the formal investigation procedure, the Commission based serious doubts as to the compatibility of the measures at issue with the internal market on a report which concluded that they

could result in serious distortions of competition. Yet in the contested decision, the Commission had failed to explain why those doubts had been dispelled.

568 The Commission contests those arguments.

569 In that regard, first, it should be borne in mind that, as is apparent from Article 6(1) of Regulation No 659/1999, the Commission's considerations in Section 8.1.7 of the decision to initiate the formal investigation procedure were preliminary assessments (see, to that effect, judgment of 1 July 2009, *ISD Polska and Others* v *Commission*, T−273/06 and T−297/06, EU:T:2009:233, paragraph 126 and the case-law cited). Consequently, the reasons given for the contested decision cannot be considered insufficient merely because they are not completely identical to those given in the decision to initiate the formal investigation procedure. In a decision adopted at the end of a formal investigation procedure, the Commission is not obliged to present an analysis covering all the considerations contained in the decision to initiate the formal investigation procedure.

570 Second, account must be taken of the fact that, in the contested decision, the Commission set out the reasons why, after having examined in depth the effects of the measures at issue on competition and on trade between Member States, it considered that those measures were compatible with the internal market. In that context, it should also be noted that the Commission's doubts related to the measures as notified by the United Kingdom. However, the authorisation in the contested decision concerned the measures as amended in order to take those doubts into account.

571 Third, in so far as the Republic of Austria argues that the changes to the notified measures were not capable of removing the doubts originally raised, it must be noted that it does not put forward any detailed argument in that respect.

572 Fourth, and in any event, it must be pointed out that the Commission expressly stated in recital 402 of the decision to initiate the formal investigation procedure that the report referred to in Section 8.1.7 of that decision did not necessarily reflect its views.

573 In the light of those considerations, it must be concluded that, contrary to what is argued by the Republic of Austria, the mere fact that the Commission did not explain in detail why it did not share the doubts expressed in the report mentioned in Section 8.1.7 of the decision to initiate the formal investigation procedure does not mean that the statement of reasons for the contested decision is insufficient.

574 Consequently, the second complaint in the third part of the ninth plea and the sixth part of the ninth plea must be rejected.

G. Third plea and first complaint in the third part of the ninth plea, concerning the characterisation of the measures at issue

575 The third plea and the first complaint in the third part of the ninth plea concern recitals 344 to 347 of the contested decision. In those recitals, 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. In that context, it found, in particular, 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.

576 The Republic of Austria and the Grand Duchy of Luxembourg maintain that those considerations are erroneous. First, they claim that the Commission should have characterised the measures at issue as operating aid that is incompatible with the internal market. Second, the Republic of Austria argues that the reasons given for the contested decision are insufficient.

1. The arguments relating to the characterisation of the measures at issue

577 The Republic of Austria and the Grand Duchy of Luxembourg submit that the measures at issue constitute operating aid, which is not compatible with the internal market. In that context, account must also be taken of the argument put forward in connection with the fourth plea, concerning the characterisation of the measures at issue as investment aid, mentioned in paragraph 125 above.

578 The Commission, the Czech Republic, Hungary, the Republic of Poland and the United Kingdom contest those arguments.

579 In the first place, it should be borne in mind that, according to settled case-law, operating 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 (see, to that effect, judgments of 5 October 2000, *Germany* v *Commission*, C−288/96, EU:C:2000:537, paragraphs 88 to 91; of 19 September 2000, *Germany* v *Commission*, C−156/98, EU:C:2000:467, paragraph 30; 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).

580 Such aid cannot meet the requirements of Article 107(3)(c) TFEU. Thus, operating aid which is limited to maintaining the status quo does not facilitate development within the meaning of that provision. Aid which 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 cannot be considered to be pursuing a public interest objective for the purposes of that provision. Furthermore, aid by which advantages are conferred on undertakings without being intended to achieve a public interest objective pursued by the Member State conferring them and which may then be used by those undertakings to meet existing and ongoing operating costs cannot be declared compatible with the internal market under that provision. Such aid would give those undertakings an advantage over their competitors, without this being justified by the attainment of a public interest objective.

581 It must be noted that, in the contested decision, the Commission did not call in question the case-law cited in paragraph 579 above. On the contrary, in recital 344 of that decision, it referred to the first paragraph of Section 8.1 of the decision to initiate the formal investigation procedure, in which it had cited that case-law.

582 By contrast, as is apparent from recitals 344 to 347 of the contested decision, the Commission found that the case-law cited in paragraph 579 above did not apply to the measures at issue because of the peculiarity 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.

583 Contrary to what is argued by the Republic of Austria and the Grand Duchy of Luxembourg, that approach is not incorrect. There is nothing to preclude an aid measure which pursues a public interest objective, which is appropriate to and necessary for the attainment of that goal, which does not adversely affect trading conditions to an extent contrary to the common interest and which therefore satisfies the requirements of Article 107(3)(c) TFEU from being declared compatible with the internal market under that provision, irrespective of whether it must be characterised as investment aid or operating aid. It should, moreover, be recalled that even operating aid may be declared compatible with the internal market if those conditions are satisfied (see, to that effect, judgment of 9 June 2016, *Magic Mountain Kletterhallen and Others* v *Commission*, T−162/13, not published, EU:T:2016:341, paragraphs 116 and 117).

584 As regards the measures at issue, first, it should be noted that, in the contested decision, the Commission found that those measures pursued a public interest objective, namely, the creation of new nuclear energy generating capacity, which could not be achieved within a reasonable time without State intervention and, moreover, that the Republic of Austria and the Grand Duchy of Luxembourg had not put forward any arguments that might cast doubt on that finding. Accordingly, those measures cannot be regarded as aid that is limited to maintaining the status quo. On the contrary, according to the Commission's findings, without them, no investment in new nuclear energy generating capacity would be made within a reasonable time.

585 Second, it must be recalled that, according to the Commission's conclusions, which have not been impugned by the arguments put forward by the Republic of Austria and the Grand Duchy of Luxembourg, the measures at issue are appropriate to and necessary for the attainment of that goal and do not adversely affect trading conditions to an extent contrary to the common interest. In those circumstances, the measures at issue cannot be regarded 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. On the contrary, the objective of those measures was to create an incentive to construct new nuclear energy generating capacity by reducing the risks associated with investment, with a view to ensuring that the investment would be profitable.

586 The arguments put forward by the Republic of Austria and the Grand Duchy of Luxembourg must be examined taking those considerations into account. First of all, those Member States put forward arguments relating to the Contract for Difference. Second, they put forward arguments relating to the Secretary of State Agreement. Third, they put forward arguments concerning the compensation provided for. Fourth, they maintain that, in the contested decision, the Commission should have made a clear distinction between operating aid and investment aid.

(a) The arguments relating to the Contract for Difference

587 In the first place, the Republic of Austria and the Grand Duchy of Luxembourg put forward arguments by which they seek to establish that that contract is inextricably linked to the operation of Hinkley Point C. In that context, they claim that it covers the ongoing expenditure of NNBG and is not limited, therefore, to subsidising only unit C of that power station but also relates to the ongoing operation, and that the amount of the aid should depend directly on the energy generated.

588 In that regard, as a preliminary point, it should be recalled that an aid measure may be declared compatible with the internal market if it satisfies the requirements laid down in Article 107(3)(c) TFEU, regardless of whether it is characterised as operating aid or investment aid (see paragraph 583 above).

589 As regards the argument of the Republic of Austria and the Grand Duchy of Luxembourg that it is impossible to establish a link between payments made under the Contract for Difference and investment in new nuclear energy generating capacity, it is sufficient to note that that contract seeks to guarantee stable revenues for a sufficiently long period of time to encourage the undertaking concerned to invest the funds necessary to build that new capacity. In essence, it is, therefore, a risk-hedging instrument in the form of a price stabiliser, offering revenue stability and certainty. However, unlike a non-repayable subsidy, which is granted in full at the outset or on the basis of the progress of construction, a contract for difference has an incentive effect for investments, guaranteeing as it does a specific and stable price.

590 In that context, first, it must be recalled that, under the Contract for Difference, NNBG will receive payment only when the reference price is lower than the strike price. By contrast, when the reference price is higher than the strike price, NNBG will be obliged to pay the difference between the two prices (see paragraph 5 above). Therefore, although the grant and the amount of the aid depend on the circumstances surrounding the operation of Hinkley Point C and its generation of electricity, there is a clear link between that amount and the public interest objective pursued. Those arrangements are intended to ensure that the amount of the payment due under the Contract for Difference corresponds to the level that has to be reached in order to trigger investment in new nuclear energy generating capacity.

591 Second, contrary to what is claimed by the Republic of Austria, the fact that, if Hinkley Point C were not to be completed, NNBG would not receive aid under the Contract for Difference is not capable of calling in question the link between the measures at issue and the public interest objective pursued, namely the creation of new nuclear energy generating capacity. It must be stated that, in that situation, the public interest objective pursued would not be achieved. Article 107(3)(c) TFEU does not preclude arrangements for spreading the risk which allocate the technical risk of implementation to the beneficiary undertaking.

592 Third, the Republic of Austria submits that the Contract for Difference allows the strike price to be reopened and that, in that context, account will be taken not only of investment costs but also of operating costs.

593 It should be noted in that regard that the strike price authorised by the Commission in the contested decision takes account not only of the price of the cost of building Hinkley Point C but also of its operating costs. 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.

594 It follows that the fact that, after 15 and 25 years, the strike price may be reopened and that, in the context of that reopener (see paragraph 5 above), account is taken of matters relating to the operating costs, is not capable of calling in question the link between the measures at issue and the public interest objective pursued, that is, the creation of new nuclear energy generating capacity. 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 reopeners 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.

595 It follows that, although the payments which will be made pursuant to the Contract for Difference will concern the operation of Hinkley Point C and its generation and sale of nuclear energy, that is not capable of calling in question the link between those payments and the initial investment decision.

596 Therefore, even if NNBG were to use part of the payments it will receive because of the Contract for Difference to cover the ongoing operating costs of Hinkley Point C, that could not break the link that exists between the measures at issue and the public interest objective pursued, that is to say, the creation of new nuclear energy generating capacity.

597 Accordingly, the arguments of the Republic of Austria and the Grand Duchy of Luxembourg aimed at establishing that that contract is inextricably linked to the operation of Hinkley Point C cannot be accepted.

598 In the second place, the Republic of Austria submits that the costs linked to the outage of a nuclear power plant and disposal of waste or the liability or follow-up costs of such a plant constitute expenditure that usually flows from the ongoing operation of a nuclear power plant. Taking responsibility for the costs of disposing of radioactive waste should, in particular, be regarded not as investment aid but as operating aid.

599 That argument, too, must be rejected. As has been stated in paragraphs 593 and 594 above, the costs linked to the outage of a nuclear power plant, disposal of waste or the liability or follow-up costs of such a plant that were taken into account by the Commission in the contested decision (see paragraphs 354 to 359 above) have had an influence on the rates of return, on which the decision to invest in the construction of Hinkley Point C depends. Therefore, taking those costs into account in determining the strike price is not capable of calling in question the link between payments made under the Contract for Difference, on the one hand, and the public interest objective pursued by the United Kingdom, namely the creation of new nuclear energy generating capacity, on the other.

600 In the third place, the Court must reject the argument of the Republic of Austria that, in recital 358 of the contested decision, the Commission itself acknowledged that the Contract for Difference constituted operating aid. It must be noted in this regard that, in recital 358 of the contested decision, which appears in Section 9.1 of that decision, the Commission examined whether the measures at issue were compatible with existing market regulation and stated that the Contract for Difference for Hinkley Point C did not qualify as a public contract or as a procurement activity, because it merely established the conditions for the exercise of the activity of electricity generation through use of nuclear technology. As has been explained in paragraphs 577 to 600 above, the mere fact that the Contract for Difference will have an influence on the conditions in which Hinkley Point C will generate nuclear electricity is not capable of calling in question its compatibility with the internal market.

601 In the fourth place, in so far as the Republic of Austria argues that the Contract for Difference will incentivise NNBG to generate electricity even when prices are lower than marginal costs or are negative, suffice it to recall that that argument has already been examined and rejected in the assessment of the sixth plea (see paragraphs 481 to 488 above) and that it is not capable of calling in question the compatibility of the Contract for Difference with Article 107(3)(c) TFEU.

602 Consequently, the Court must reject all of the arguments of the Grand Duchy of Luxembourg and of the Republic of Austria concerning the Contract for Difference.

(b) The arguments relating to the Secretary of State Agreement

603 As regards the Secretary of State Agreement, the Republic of Austria merely claims that, in the event of the early closure of Hinkley Point nuclear power station, the transfer of NNBG would also involve the public authorities taking overall responsibility for the management of irradiated materials. In that regard, it is sufficient to refer to paragraphs 280 to 282 and 354 to 359 above, from which it is apparent that, in the contested decision, the Commission did not authorise State aid for overall responsibility to be taken by the public authorities for the management of irradiated materials in that situation. Consequently, that argument must also be rejected.

(c) The arguments relating to the compensation provided for in the measures at issue

604 In support of the third plea, the Republic of Austria and the Grand Duchy of Luxembourg submit arguments relating to the compensation provided for.

605 In the first place, the Grand Duchy of Luxembourg claims that the operating aid will, in all likelihood, reach an exorbitant amount. It is, it claims, highly likely that market prices for electricity will continue to fall and that the aid paid pursuant to the Contract for Difference will constitute a very high subsidy over the 35 years of energy generation, much higher than envisaged and assessed when the aid mechanism was being established.

606 In that regard, it should be noted that, in support of its argument that the amount of the aid paid on the basis of the Contract for Difference is exorbitant, the Grand Duchy of Luxembourg merely claims that, most probably, market prices for electricity will continue to fall. That circumstance, however, is not capable of demonstrating by itself that the payments are exorbitant. In the light of the public interest objective pursued by the United Kingdom, that is, the creation of new nuclear energy generating capacity, the amount of the aid could be regarded as exorbitant only if it were demonstrated that a lower amount would have been sufficient to trigger a decision to invest in such new capacity. By contrast, the mere fact that the price paid on the basis of the Contract for Difference could potentially be lower than the future market price does not in itself demonstrate the existence of overcompensation. In any event, in that context, it should be recalled that there are to be two dates on which the operating expenditure is to be revised ('opex reopener' dates), the first of which will be 15 years, and the second, 25 years after the date on which the first reactor becomes operational. The opex reopeners would allow for an increase or decrease of the strike price, on the basis of known actual costs and revised predictions of those costs, for certain cost line items determined in the Contract for Difference (see recital 31 of the contested decision). Therefore, that argument must be rejected.

607 In the second place, the Republic of Austria maintains that the investment costs are permissible only up to the amount necessary for the purpose of implementing the common interest and that it may be concluded from the coexistence of several separate aids that the measures at issue relate to the actual operation of Hinkley Point C rather than to its construction.

608 In that regard, it is sufficient to note that the arguments concerning the existence of overcompensation have been examined and rejected in paragraphs 392 to 398 above and that, in this context, the Republic of Austria has not put forward any additional arguments that might demonstrate that such overcompensation exists. In particular, it has not put forward any detailed argument that might demonstrate that the payments

which will be made under the Contract for Difference will exceed the level necessary to encourage investment in new nuclear energy generating capacity. In that context, it should also be pointed out that, when the reference price is higher than the strike price, NNBG will be obliged to pay the difference between those two prices to its contracting partner.

609 Accordingly, the arguments relating to the compensation provided for in the measures at issue must also be rejected.

(d) The argument that the Commission should have made a clear distinction between operating aid and investment aid

610 The Republic of Austria submits that it is apparent from paragraph 77 of the judgment of 26 September 2002, *Spain* v *Commission* (C−351/98, EU:C:2002:530), that the Commission should have made a clear distinction between operating aid and investment aid.

611 That argument must also be rejected.

612 As is clear from paragraphs 76 and 77 of the judgment of 26 September 2002, *Spain* v *Commission* (C−351/98, EU:C:2002:530), in the case giving rise to that judgment, the Community guidelines on State aid for environmental protection (OJ 1994 C 72, p. 3) were applicable and those guidelines explicitly distinguished between investment aid, on the one hand, and operating aid, on the other. In that case, 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 those guidelines.

613 It cannot, however, be inferred from the judgment of 26 September 2002, *Spain* v *Commission* (C−351/98, EU:C:2002:530), that the Commission is required to refer to those categories outwith the scope of the Community guidelines on State aid for environmental protection.

614 Consequently, that argument must also be rejected, as, therefore, must all the arguments aimed at demonstrating that the measures at issue are incompatible with the internal market because they constitute operating aid.

2. The obligation to state reasons

615 In the context of the third plea and the first complaint in the third part of the ninth plea, the Republic of Austria argues that the reasons given for the contested decision are not sufficient as regards the characterisation of the measures at issue. The fact that the Commission abruptly departed from its own practice in taking decisions without any comprehensive justification represents an infringement of the obligation to state reasons. According to the Republic of Austria, if the Commission intended to exercise its discretion in a radically different way, it should have given detailed reasons for doing so. In that context, it also submits that the Commission did not sufficiently explain why, after having characterised those measures as operating aid in the decision to initiate the formal investigation procedure, it subsequently characterised them as investment aid in the contested decision.

616 The Commission, the Czech Republic, Hungary, the Republic of Poland and the United Kingdom contest those arguments.

617 In the first place, it should be borne in mind that, in recitals 344 to 347 of the contested decision, the Commission did, admittedly, find that, in principle, operating aid did not satisfy the requirements of Article 107(3)(c) TFEU. In that context, it referred to the first paragraph of Section 8.1 of the decision to initiate the formal investigation procedure, in which it mentioned the case-law cited in paragraph 579 above. It cannot, therefore, be inferred from that consideration that the Commission concluded that aid which pursues a public interest objective, which is appropriate to and necessary for the attainment of that goal and which does not adversely affect trading conditions to an extent contrary to the common interest, and which therefore satisfies the requirements laid down by that provision, cannot be declared compatible

with the internal market under that provision. Furthermore, in those recitals, the Commission stated that the measures at issue had to allow NNBG to commit to invest in the construction of Hinkley Point C, taking into account the characteristics and risk profile of the project and minimising the amount of aid necessary and the additional measures essential to incentivise the investment. It also stated 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.

618 In the second place, it must be noted that the statement of reasons for the contested decision as regards the characterisation of the measures at issue is not limited to recitals 344 to 347 of that decision and that, in Section 9 of that decision, the Commission explained why the conditions of Article 107(3)(c) TFEU were met, setting out in detail the objective of the measures at issue, namely the creation of new nuclear energy generating capacity (see Section 9.2 of that decision), the circumstances that made State intervention necessary (see Section 9.3 of the decision) and the proportionate nature of those measures (see Sections 9.5 and 9.6 of the decision in question).

619 Therefore, the Commission did not infringe its obligation to state reasons as regards the characterisation of the measures at issue.

620 None of the arguments put forward by the Republic of Austria is capable of calling that conclusion in question.

621 In the first place, the Republic of Austria submits that, given that, in the Guidelines on State aid for environmental protection and energy 2014-2020 and in its earlier practice in taking decisions, the Commission laid down the principle that operating aid was not compatible with the internal market, the Commission should have set out in greater detail the reasons for its departure from that principle.

622 In that regard, first, it should be recalled that it cannot be inferred from the case-law that aid which satisfies the requirements of Article 107(3)(c) TFEU cannot be considered to be compatible with the internal market, irrespective of its classification as operating aid or investment aid (see paragraphs 577 to 586 above).

623 Second, the arguments raised by the Republic of Austria in relation to the earlier practice of the Commission must be rejected.

624 On the one hand, contrary to what is claimed by the Republic of Austria, no support for its argument is to be found in recitals 396 and 397 of the Commission's decision of 4 June 2008 on the State aid C 41/05 awarded by Hungary through Power Purchase Agreements (OJ 2009 L 225, p. 53), which, moreover, concerned the application of Article 107(3)(a) TFEU, not the application of Article 107(3)(c) TFEU. It is true that, in recital 396 of that decision, the Commission found that some of the subsidies at issue in that case, which were paid only after the nuclear power station had been brought into operation, and which covered current expenses, were operating aid that was incompatible with the internal market. However, as is apparent from recital 397 of that decision, it was aid in respect of which the Hungarian authorities and the interested parties had neither demonstrated that there were regional handicaps relating to specific regions, nor established that the principle of proportionality had been complied with.

625 On the other hand, in so far as the Republic of Austria submits that the Commission laid down in the Guidelines on State aid for environmental protection and energy 2014-2020 the principle that operating aid was not compatible with the internal market, suffice it to note that, contrary to what is argued by that Member State, those guidelines do not show that aid linked to operational matters cannot be considered to be compatible with the internal market. On the contrary, it is apparent from Section 3.3.2.1 of those guidelines that the Commission considers that, under certain conditions, aid which is linked to operational matters may be consistent with Article 107(3)(c) TFEU. In any event, it must be recalled that, in the contested decision, the Commission took account of the objective of promoting nuclear energy, which is not among the objectives covered by those guidelines.

626 In the second place, the Republic of Austria argues that, in Section 8.1 of its decision to initiate the formal investigation procedure, the Commission found that the measures at issue were operating aid which could be incompatible with the internal market. The Commission should, moreover, have set out the reasons why it no longer had those doubts in the context of the contested decision.

627 In that regard, as a preliminary point, it should be borne in mind that, as is apparent from Article 6(1) of Regulation No 659/1999, the findings made by the Commission in Section 8.1 of the decision to initiate the formal investigation procedure are preliminary assessments. The reasons given for the contested decision cannot, therefore, be considered insufficient on the ground that they are not identical to those given in a decision to initiate the formal investigation procedure. Accordingly, in the contested decision, which was adopted at the end of the formal investigation procedure, the Commission was not obliged to present an analysis covering all the considerations contained in the decision to initiate the formal investigation procedure, to which the Republic of Austria refers (see paragraph 569 above).

628 Furthermore, it should be noted that, as has been stated in paragraph 617 above and in Section 8.1 of the decision to initiate the formal investigation procedure, the Commission merely referred to the case-law mentioned in paragraph 579 above, which relates to operating aid which, for the reasons set out in paragraph 580 above, does not satisfy the requirements of Article 107(3)(c) TFEU. At the time when the Commission adopted the decision to initiate the formal investigation procedure, it had doubts as to whether the measures at issue were compatible with the internal market under that provision. Following an in-depth examination and changes to the measures at issue (adjustment of the Credit Guarantee fee rate and of the gain-share mechanism), the Commission's doubts were dispelled.

629 Consequently, the argument relating to Section 8.1 of the decision to initiate the formal investigation procedure must also be rejected as, therefore, must all the arguments alleging infringement of the obligation to state reasons with regard to the characterisation of the measures at issue.

630 It follows that the third plea must be rejected in its entirety, as must the argument put forward in connection with the fourth plea, alleging that the measures at issue constitute operating aid that is incompatible with the internal market (see paragraph 125 above), and the first complaint in the third part of the ninth plea.

H. Seventh plea, relating in particular to the Commission's considerations concerning the compatibility of the measures at issue with existing market regulation

631 The present plea relates to the Commission's considerations in recitals 348 to 365 of the contested decision, in which it examined whether the measures at issue were compatible with existing market regulation.

632 In recitals 350 to 358 of the contested decision, the Commission stated, in particular, that the public procurement rules enshrined in Directive 2004/17 coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors, and in Directive 2004/18 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts were not applicable to the measures at issue, as these did not involve any procurement of supply, works or services. On the basis of the available information it would not have been possible to conclude that the Contract for Difference concerned the acquisition of any works, services or supplies and that it thus qualified as a public contract or concession. According to the Commission, that contract did not establish any specific requirements on the supply, to the contracting authority or to third parties, of any type of services, goods or works. The measures at issue did not cater for mutually binding obligations which could be enforceable before a court. In addition there was no selectivity on the number of contracts for difference that could be entered into by nuclear electricity generators other than those resulting from the limited number of sites available for the construction of nuclear power stations.

633 In recitals 359 to 364 of the contested decision, the Commission stated that Article 8 of Directive 2009/72/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for

the internal market in electricity and repealing Directive 2003/54/EC (OJ 2009 L 211, p. 55) had not been infringed. That article did not prescribe the use of a tendering procedure, but established that equivalent procedures in terms of transparency and non-discrimination, and on the basis of published criteria, could be followed. The selection procedure used by the United Kingdom to identify a contractor prepared to invest in new nuclear energy generating capacity and to enter into a contract for difference was based on a clear, transparent and non-discriminatory framework, which could be considered equivalent to a tendering procedure in terms of transparency and non-discrimination.

634 The Republic of Austria contends that those considerations are erroneous.

635 It is appropriate, first, for the Court to examine the arguments of the Republic of Austria to the effect that the United Kingdom did not launch a tendering procedure in respect of the Hinkley Point C project. Second, it will examine the argument of the Republic of Austria that the procedure followed by the United Kingdom was discriminatory.

1. The arguments aimed at establishing that the United Kingdom should have launched a tendering procedure for the Hinkley Point C project

636 The Republic of Austria maintains that, under Directives 2004/17 and 2004/18, Article 8 of Directive 2009/72 and the principles of transparency, equal treatment and non-discrimination inherent in the FEU Treaty, the United Kingdom should have launched a public procurement procedure for the Hinkley Point C project. Those rules are, it claims, inextricably linked to the object of the measures at issue and their infringement means that the Court is obliged to annul the contested decision.

637 The Commission, Hungary and the United Kingdom contest those arguments. In that context, the Commission argues, in particular, that the legality of the measures at issue does not depend on compliance with public procurement legislation.

638 The Court will begin by examining the arguments alleging infringement of Directives 2004/17 and 2004/18. It will then go on to examine the arguments alleging infringement of Article 8 of Directive 2009/72 and breach of the principles of transparency, equal treatment and non-discrimination inherent in the FEU Treaty.

(a) The arguments alleging infringement of Directives 2004/17 and 2004/18

639 The Republic of Austria submits that, in the circumstances of the present case, in accordance with Directives 2004/17 and 2004/18, the United Kingdom was obliged to launch a call for tenders for the Hinkley Point C project. The project in question constituted a public contract or, at the very least, a concession within the meaning of those directives. That project should have been assessed as a whole, taking into account all the stages envisaged and the purpose of the project. Such an examination would have revealed that the measures at issue constituted a mutually binding obligation in relation to the supply of a service. The construction of Hinkley Point C and the resulting feed-in of electricity into the public network would serve to cover a specific need of the United Kingdom as contracting authority. The consideration offered by the United Kingdom would be the agreed aid. The Republic of Austria maintains that it does not have sufficient information to assess whether the measures at issue should be characterised as a contract or a concession.

640 The Commission, Hungary and the United Kingdom contest those arguments. In that context, the Commission submits, in particular, that, in accordance with its Decision 2006/211/EC of 8 March 2006 establishing that Article 30(1) of Directive 2004/17 applies to electricity generation in England, Scotland and Wales (OJ 2006 L 76, p. 6), that directive is not applicable to the measures at issue.

641 It is appropriate, first, to examine the arguments aimed at establishing the existence of a contract within the meaning of Directive 2004/17 or of a public contract within the meaning of Directive 2004/18.

642 As a preliminary point, it should be noted that, under Article 1(2)(a) of Directive 2004/17, supply, works and service contracts are contracts for pecuniary interest concluded in writing between one or more contracting entities and one or more contractors, suppliers, or service providers. According to Article 1(2)(a) of Directive 2004/18, public contracts are contracts for pecuniary interest concluded in writing between one or more economic operators and one or more contracting authorities and having as their object the execution of works, the supply of products or the provision of services.

643 Article 1(2)(b) of Directive 2004/17 and Article 1(2)(b) of Directive 2004/18 state that works contracts (Directive 2004/17) and public works contracts (Directive 2004/18) are contracts having as their object either the execution, or both the design and execution, of works related to certain defined activities or a work, or the realisation, by whatever means, of a work corresponding to the requirements specified by the contracting entity (Directive 2004/17) and the contracting authority (Directive 2004/18).

644 According to the first subparagraph of Article 1(2)(c) of Directive 2004/17 and the first subparagraph of Article 1(2)(c) of Directive 2004/18, supply contracts (Directive 2004/17) and public supply contracts (Directive 2004/18) have as their object the purchase, lease, rental or hire purchase, with or without option to buy, of products.

645 The first subparagraph of Article 1(2)(d) of Directive 2004/17 and the first subparagraph of Article 1(2)(d) of Directive 2004/18 state that service contracts (Directive 2004/17) and public service contracts (Directive 2004/18) are contracts other than works or supply contracts (Directive 2004/17) and public works or supply contracts (Directive 2004/18).

646 The Court must examine in the light of those provisions the arguments of the Republic of Austria aimed at establishing that the measures at issue should have been characterised as a contract within the meaning of Directive 2004/17 or as a public contract within the meaning of Directive 2004/18.

647 In that context, in the first place, it should be noted that the Credit Guarantee and the Secretary of State Agreement constitute neither a contract within the meaning of Article 1(2)(a) of Directive 2004/17 nor a public contract within the meaning of Article 1(2)(a) of Directive 2004/18.

648 In the second place, the Court must examine whether the Commission should have characterised the Contract for Difference as a contract within the meaning of Article 1(2)(a) of Directive 2004/17 or as a public contract within the meaning of Article 1(2)(a) of Directive 2004/18.

649 In that regard, it should be noted that, as is apparent in particular from recitals 219, 312, 313 and 356 of the contested decision, the Contract for Difference does not enable the United Kingdom to require NNBG either to build Hinkley Point C or to supply electricity. The Contract for Difference does not lay down any specific requirement either as regards the works to be carried out by NNBG, or as regards the electricity to be supplied. Nor, if NNBG were to fail to complete the construction of that reactor or to generate electricity, would the United Kingdom be entitled to payment of compensation by NNBG. The United Kingdom can, however, terminate the Contract for Difference unilaterally, if construction is not completed by the longstop date.

650 In the light of those features of the Contract for Difference, contrary to what is claimed by the Republic of Austria, it cannot be held that it aims to cover a specific need of the United Kingdom as contracting authority. On the contrary, the object of the Contract for Difference is the award of a subsidy and, by that subsidy, the United Kingdom merely incentivises NNBG and its investors to achieve the public interest objective of that Member State, namely the creation of new nuclear energy generating capacity.

651 It follows that the Contract for Difference does not impose a binding obligation on NNBG in relation to the execution of works, the supply of products or the provision of services within the meaning of Directive 2004/17 or Directive 2004/18. Therefore, the Court must reject the argument of the Republic of Austria that the measures at issue constitute a contract within the meaning of Article 1(2)(a) of Directive 2004/17 or a public contract within the meaning of Article 1(2)(a) of Directive 2004/18.

652 Next, it is appropriate to examine the argument of the Republic of Austria that the Commission disregarded the fact that the measures at issue constituted a works concession within the meaning of Directive 2004/17 or a public works concession within the meaning of Directive 2004/18.

653 In that regard, it should be noted that, under Article 1(3)(a) of Directive 2004/17 and Article 1(3) of Directive 2004/18, a works concession (Directive 2004/17) and a public works concession (Directive 2004/18) are contracts of the same type as a works contract (Directive 2004/17) or a public works contract (Directive 2004/18) except for the fact that the consideration for the works to be carried out consists either solely in the right to exploit the work or in that right together with payment.

654 Under Article 1(3)(b) of Directive 2004/17 and Article 1(4) of Directive 2004/18, a service concession is a contract of the same type as a service contract (Directive 2004/17) or a public service contract (Directive 2004/18) except for the fact that the consideration for the provision of services consists either solely in the right to exploit the service or in that right together with payment.

655 The Court must examine in the light of those provisions the arguments of the Republic of Austria aimed at establishing that the measures at issue should have been characterised as a works concession within the meaning of Directive 2004/17 or as a public works concession within the meaning of Directive 2004/18.

656 In that context, in the first place, it should be noted that the Credit Guarantee and the Secretary of State Agreement constitute neither a works concession within the meaning of Article 1(3)(a) of Directive 2004/17 nor a public works concession within the meaning of Article 1(3) of Directive 2004/18.

657 In the second place, the Court must examine whether the Commission should have characterised the Contract for Difference as a works concession within the meaning of Directive 2004/17 or as a public works concession within the meaning of Directive 2004/18.

658 Under Article 1(3)(b) of Directive 2004/17 and Article 1(4) of Directive 2004/18, contracts and public contracts, on the one hand, and concessions, on the other, are distinguished only as regards the consideration owed to the tenderer. As is apparent from the considerations set out in paragraphs 648 to 650 above, it is notably on account of the fact that the Contract for Difference does not lay down any obligation for NNBG to execute works, supply products or provide services that that contract cannot be characterised as a contract or as a public contract. It follows that that contract cannot be characterised as a works concession within the meaning of Directive 2004/17 or as a public works concession within the meaning of Directive 2004/18 either.

659 That interpretation is, moreover, confirmed by recital 12 of Directive 2014/23/EU of the European Parliament and of the Council of 26 February 2014 on the award of concession contracts (OJ 2014 L 94, p. 1), from which it is clear that the mere financing of an activity, in particular through grants, does not constitute a concession within the meaning of that directive.

660 Consequently, it must be concluded that the Commission did not err in finding that the measures at issue did not constitute a works contract or concession within the meaning of Directive 2004/17 or a public works contract or concession within the meaning of Directive 2004/18.

661 None of the arguments put forward by the Republic of Austria is capable of calling that conclusion in question.

662 In the first place, the Republic of Austria submits that, in recital 312 of the contested decision, the Commission noted the existence of contractual obligations on the part of NNBG and the fact that these were typical obligations for a public contract.

663 It should be noted in this regard that, admittedly, in recital 312 of the contested decision, the Commission stated that the '[Contract for Difference] seem[ed] to provide a series of such stringent clauses incentivising NNBG to perform its obligations according to the contract'. However, in that recital and in

recital 313 of that decision, the Commission also found that NNBG was not obliged to build Hinkley Point C or to supply electricity. Consequently, the contractual obligations to which the Commission referred in recital 312 of that decision do not justify the characterisation of the Contract for Difference as a works contract or concession within the meaning of Directive 2004/17 or as a public works contract or concession within the meaning of Directive 2004/18.

664 Nor, contrary to what is argued by the Republic of Austria, can it be inferred from the Commission's consideration in recital 312 of the contested decision, according to which the contractual obligations laid down in the Contract for Difference are 'typical contractual obligations that any contractual parties would try to include in a similar deal', that these are obligations which might justify characterising the Contract for Difference as a contract, a works contract or concession within the meaning of Directive 2004/17 or as a public works contract or concession within the meaning of Directive 2004/18. It is clear from that recital and its context that, in referring to a 'similar deal', the Commission was not referring to the conclusion of an agreement concerning a contract, a public contract or a concession, but to the conclusion of an agreement providing for an incentive, in the form of a subsidy, to achieve a public interest objective. The obligations in question are, therefore, obligations normally contained in subsidy agreements.

665 Consequently, the Republic of Austria's argument in relation to recital 312 of the contested decision must be rejected.

666 In the second place, the Republic of Austria submits that the Commission did not take sufficient account of the fact that it would be de facto impossible for NNBG to withdraw from the contracts because of the potential amount of the investment costs that would be lost. The theoretical possibility of the unilateral termination of the contract cannot, it argues, entirely rule out the application of Directives 2004/17 and 2004/18.

667 In that regard, it should be noted that that argument is not capable of calling in question the point mentioned in paragraph 649 above, that the Contract for Difference does not lay down any specific requirement either as regards the works to be carried out by NNBG, or as regards the electricity required to be produced or supplied by NNBG. In that context, the Court must reject the argument of the Republic of Austria that it may be inferred from recital 13 of the contested decision that NNBG will be obliged to maintain a predetermined minimum level of performance, and that, even if a failure to achieve that minimum level would not necessarily result in loss of the aid, it would be equivalent, in view of the substantial sums invested, to an obligation to build and to operate Hinkley Point C. It is clear from that recital and from recital 313 of that decision that NNBG is not obliged to guarantee a predetermined level of production, since those recitals merely state that, if it does not achieve a load factor of 91%, it will not achieve the revenues which it is expecting to receive from the project. NNBG does not therefore have a contractual obligation to achieve that load factor.

668 In the absence of specific contractual requirements concerning works to be carried out by NNBG or electricity to be produced or supplied by NNBG, there was no reason to apply the provisions of Directive 2004/17 and Directive 2004/18.

669 In any event, in the absence of a contractual obligation to execute works, supply products or provide services within the meaning of Directive 2004/17 or Directive 2004/18, the possibility cannot be ruled out that, notwithstanding the economic incentives designed to ensure that NNBG would build and operate Hinkley Point C, NNBG would decide not to complete it or not to operate it, on economic grounds.

670 In the light of those considerations, the argument of the Republic of Austria, that, de facto, NNBG was committed to producing a certain output level, must be rejected.

671 In the third place, the Republic of Austria submits that it cannot be the case that the public procurement rules are not applied merely because the project to build and operate Hinkley Point C was substantially conceived and defined by EDF.

672 That argument must be rejected.

673 Suffice it to recall in this regard that the Commission did not rule out the application of Directives 2004/17 and 2004/18 because the project to build and operate Hinkley Point C had been substantially defined by EDF, but because of the fact that the Contract for Difference did not lay down a contractual obligation to execute works, supply products or provide services within the meaning of those directives.

674 In the fourth place, as regards the assertion by the Republic of Austria that it does not have sufficient information to determine whether the measures at issue must be characterised as a contract, public contract or concession, suffice it to note that the Republic of Austria has sufficient information to comment on whether the Contract for Difference lays down an obligation for NNBG to execute works, supply products or provide services and that, given that there is no such obligation, in any event, for the reasons set out in paragraphs 639 to 660 above, the measures at issue cannot be characterised either as a works contract or concession within the meaning of Directive 2004/17 or as a public works contract or concession within the meaning of Directive 2004/18.

675 In the fifth place, the Republic of Austria submits that the Commission should have examined the project as a whole, taking into account the complexity of the contractual provisions encompassing the building and operation of Hinkley Point C. That argument must be rejected. In the absence of an obligation for NNBG to execute works, supply products or provide services, even an overview of the measures at issue as a whole would not have permitted the inference that they should have been characterised as a contract, public contract or concession within the meaning of Directive 2004/17 or Directive 2004/18.

676 In the light of the foregoing considerations, it is necessary to reject all the arguments put forward by the Republic of Austria to establish that the Commission should have treated the measures at issue as a works contract or concession within the meaning of Directive 2004/17 or as a public works contract or concession within the meaning of Directive 2004/18, and there is no need to rule on the Commission's argument that Directive 2004/17 is not applicable to those measures, in accordance with Decision 2006/211.

(b) The arguments alleging infringement of Article 8 of Directive 2009/72 and breach of the principles of equal treatment, non-discrimination and transparency inherent in the FEU Treaty

677 The Republic of Austria maintains that the object of the service was the building and operation of Hinkley Point C, with, by way of consideration, the financial support of the United Kingdom. Therefore, under Article 8 of Directive 2009/72 concerning common rules for the internal market in electricity, and the principles of equal treatment, non-discrimination and transparency inherent in the FEU Treaty, the United Kingdom should, it argues, have launched a call for tenders in relation to the project for the construction and operation of Hinkley Point C, expressed in clear, precise and unequivocal terms, containing all the specific details of the conduct of the entire procedure and guaranteeing all tenderers the same opportunity. Such a procedure should have been launched, since there was a cross-border interest, even if authorisation to carry out an activity did not oblige the recipient to carry out the activity assigned. The Commission's consideration, set out in recital 357 of the contested decision, that the contract for difference system is open to all potential interested parties and is not, therefore, selective, is not convincing. The choice of NNBG had resulted in other operators being excluded from the construction and operation of Hinkley Point C.

678 The Commission, Hungary and the United Kingdom contest those arguments.

679 As a preliminary point, it should be noted that, by those arguments, the Republic of Austria does not dispute the fact that a selection procedure took place. It merely contends that the procedure organised by the United Kingdom (see paragraph 633 above) was not sufficient, as there was no call for tenders in relation to the construction and operation of Hinkley Point C.

680 In the first place, the Court must examine the argument of the Republic of Austria alleging infringement of Article 8 of Directive 2009/72.

681 It should be recalled that, according to the first sentence of Article 8(1) of Directive 2009/72, Member States must ensure the possibility, in the interests of security of supply, of providing for new energy production capacity or energy efficiency or demand-side management measures through a tendering procedure or any procedure equivalent in terms of transparency and non-discrimination, on the basis of published criteria.

682 It must be noted that the first sentence of Article 8(1) of Directive 2009/72 does not necessarily require a Member State to launch a tendering procedure but also allows it to adopt a different procedure, if it is conducted on the basis of published criteria and if it is equivalent to a tendering procedure in terms of transparency and non-discrimination. That article does not, therefore, preclude a Member State from opting for an instrument which constitutes a subsidy to incentivise undertakings to achieve a particular public interest objective, instead of launching a tendering procedure.

683 Accordingly, contrary to the Republic of Austria's contention, the first sentence of Article 8(1) of Directive 2009/72 did not require the construction and operation of Hinkley Point C necessarily to be the subject of a tendering procedure.

684 Consequently, the argument of the Republic of Austria alleging infringement of Article 8 of Directive 2009/72 must be rejected.

685 In the second place, the Court must examine the argument of the Republic of Austria alleging breach of the principles of equal treatment, non-discrimination and transparency inherent in the FEU Treaty.

686 In that context, it should be borne in mind that the principles of equal treatment, non-discrimination and transparency are applicable to public contracts, to concessions, to exclusive authorisations and to exclusive licences granted by a public authority and for which the EU legislature has not laid down special rules. Where such contracts or such rights are awarded, the principles of equal treatment, transparency and non-discrimination require that the Member States ensure a degree of advertising sufficient to enable the competition selection procedure to be open and the impartiality of the award procedures to be reviewed (see, to that effect, judgments of 7 December 2000, *Telaustria and Telefonadress*, C−324/98, EU:C:2000:669, paragraph 62; of 3 June 2010, *Sporting Exchange*, C−203/08, EU:C:2010:307, paragraph 41; and of 14 November 2013, *Belgacom*, C−221/12, EU:C:2013:736, paragraph 28).

687 However, in that context, it should be noted that the principles of equal treatment, non-discrimination and transparency do not necessarily require a tendering procedure in order for a particular project to be launched (see, to that effect, judgment of 3 June 2010, *Sporting Exchange*, C−203/08, EU:C:2010:307, paragraph 41). They do not therefore limit the right of a Member State to choose between a public contract and the grant of a subsidy to encourage undertakings to achieve a particular public interest objective.

688 The Court must therefore reject the argument of the Republic of Austria alleging breach of the principles of equal treatment, non-discrimination and transparency, without there being any need to determine whether the measures at issue may be treated in the same way as an exclusive authorisation or licence as referred to in the case-law mentioned in paragraph 687 above.

689 Consequently, the Court must reject all the arguments of the Republic of Austria aimed at establishing that the United Kingdom should have launched a tendering procedure for the Hinkley Point C project, without there being any need to determine whether an infringement of Directives 2004/17 and 2004/18, Article 8 of Directive 2009/72 or breach of the principles of transparency, equal treatment, and non-discrimination inherent in the FEU Treaty would have been capable of calling in question the legality of the contested decision.

2. The argument that the Contract for Difference is discriminatory

690 In connection with the seventh plea, the Republic of Austria puts forward an argument relating to recital 549 of the contested decision. In that recital, the Commission stated, with regard to the compliance of the

measures at issue with Articles 30 and 110 TFEU, that, for so long as the Contract for Difference was not open to electricity generators located outside Great Britain, the United Kingdom had committed itself to adjusting the way in which electricity suppliers' liabilities for Contract for Difference payments were calculated so that eligible nuclear electricity generated in the European Union but outside Great Britain and supplied to customers in Great Britain would not be counted towards suppliers' markets shares. In that context, the Commission noted that the United Kingdom would remove that exemption once generators from other Member States were eligible to apply for contracts for difference.

691 The Republic of Austria submits that it is apparent from recital 549 of the contested decision that the system of contracts for difference was discriminatory, since it was not open to electricity generators located outside the United Kingdom.

692 The Commission contests that argument.

693 In that regard, in the first place, it should be noted that, as is apparent from recitals 359 to 364 of the contested decision, the selection procedure used by the United Kingdom to identify the contractor ready to invest in new nuclear capacity in the United Kingdom was open to developers, generators and investors from other Member States. There was, therefore, no discrimination on grounds of nationality in that respect.

694 In the second place, in so far as the Republic of Austria seeks to claim that the instrument of the Contract for Difference was not yet open to electricity generators located outside Great Britain, that argument too must be rejected. In that regard, it must be pointed out that the construction and operation of a nuclear power station covers the generation of baseload energy with a view to ensuring security of supply. In those circumstances, the United Kingdom cannot be criticised for requiring such a power station to be built in Great Britain, in order to ensure that it is not limited by the physical capacity of the interconnections.

695 Accordingly, all the arguments put forward in connection with the seventh plea must be rejected.

I. Tenth plea, alleging infringement of the right to submit observations pursuant to Article 108(2) TFEU and Article 6(1) of Regulation No 659/1999

696 The Republic of Austria claims that the Commission infringed Article 108(2) TFEU and Article 6(1) of Regulation No 659/1999, which require the Commission to give interested parties the opportunity to submit comments. The Member States thus have a subjective right to be heard in the formal investigation procedure. They have the right to be involved in the administrative procedure to the extent appropriate in the light of the circumstances of the case. A decision to initiate the procedure should give interested parties the opportunity effectively to participate in the formal investigation procedure, during which they would have the opportunity to put forward their arguments.

697 The Republic of Austria submits that, given that, when it was able to submit comments, the amount of the aid and the specific terms thereof had not yet been determined, it was not in a position to comment sufficiently and adequately on the various measures specifically envisaged. In its view, if it had had further, accurate information regarding the scope and modalities of the measures envisaged, it would have been able to put forward additional, cogent arguments concerning the reservations which it had about those measures.

698 The Commission and Hungary claim that those arguments must be rejected. The Commission submits in particular that the Republic of Austria merely refers to the contested decision, and not to the decision to initiate the formal investigation procedure.

699 In that regard, it should be noted that, in accordance with the first subparagraph of Article 108(2) TFEU, if the Commission decides to initiate a formal investigation procedure, it is obliged to give notice to the parties concerned to submit their comments.

700 As is apparent from the case-law, the purpose of the first subparagraph of Article 108(2) TFEU is to oblige the Commission to take steps to ensure that all persons who may be concerned are notified and given an opportunity to put forward their arguments and to allow the Commission to be fully informed of all the facts of the case before taking its decision (judgment of 25 June 1998, *British Airways and Others* v *Commission*, T−371/94 and T−394/94, EU:T:1998:140, paragraph 58).

701 In that context, it should be recalled that the case-law confers on the parties concerned essentially the role of information sources for the Commission in the administrative procedure instituted under Article 108(2) TFEU. It follows that, far from enjoying the same rights of defence as those which individuals against whom a procedure has been instituted are recognised as having, interested parties have only the right to be involved in the administrative procedure to the extent appropriate in the light of the circumstances of the case (judgments of 25 June 1998, *British Airways and Others* v *Commission*, T−371/94 and T−394/94, EU:T:1998:140, paragraphs 59 and 60, and of 30 November 2009, *France and France Télécom* v *Commission*, T−427/04 and T−17/05, EU:T:2009:474, paragraph 147).

702 In the procedure for reviewing State aid, interested parties have only the opportunity to send to the Commission all information intended for the guidance of the latter with regard to its future action and they cannot themselves seek to engage in an adversarial debate with the Commission in the same way as is offered to the Member State concerned (judgment of 15 November 2011, *Commission and Spain* v *Government of Gibraltar and United Kingdom*, C−106/09 P and C−107/09 P, EU:C:2011:732, paragraph 181).

703 In addition, it has been held that the Commission cannot be required to present a complete analysis of the aid at issue in its notice of intention to initiate the formal investigation procedure. It must, however, define sufficiently the framework of its investigation so as not to render meaningless the right of interested parties to submit their comments (judgment of 30 November 2009, *France and France Télécom* v *Commission*, T−427/04 and T−17/05, EU:T:2009:474, paragraph 148).

704 As regards paragraph 1 of Article 6 of Regulation No 659/1999, entitled ‘Formal investigation procedure’, this provides that the decision to initiate the formal investigation procedure is to summarise the relevant issues of fact and law, include a preliminary assessment of the Commission as to the aid character of the proposed measure, set out the doubts as to its compatibility with the internal market and call upon the Member State concerned and upon other interested parties to submit comments within a prescribed period.

705 Thus, a decision to initiate the formal investigation procedure must give interested parties the opportunity effectively to participate in that procedure during which they will have the opportunity to put forward their arguments. For that purpose, it is sufficient for the parties concerned to be aware of the reasoning which has led the Commission to conclude provisionally that the measure in issue might constitute new aid incompatible with the internal market (judgment of 12 May 2011, *Région Nord-Pas-de-Calais and Communauté d’agglomération du Douaisis* v *Commission*, T−267/08 and T−279/08, EU:T:2011:209, paragraph 81).

706 For that reason, the right of the interested parties to information does not go beyond the right to be heard by the Commission. In particular, it cannot extend to the general right to comment on all the potentially key points raised during the formal investigation procedure (judgment of 30 November 2009, *France and France Télécom* v *Commission*, T−427/04 and T−17/05, EU:T:2009:474, paragraph 149).

707 It is in the light of the foregoing that the Court must examine the arguments put forward by the Republic of Austria, alleging that the Commission did not respect its right to submit comments because, in the decision to initiate the formal investigation procedure, the Commission had not sufficiently specified the measures at issue.

708 As a preliminary point, it should be noted that, in support of the present plea, the Republic of Austria refers to recitals 16, 73 and 551 of the contested decision. In itself, a reference to the considerations in the contested decision is not capable of demonstrating that the Commission failed to respect the right of the

Republic of Austria to submit comments. Article 108(2) TFEU and Article 6(1) of Regulation No 659/1999 cover the right of interested parties to submit comments during the administrative procedure, and the decisive question in this context is thus whether the decision to initiate the formal investigation procedure contained sufficient information. By contrast, the question whether the contested decision, which was adopted after the administrative procedure, contains sufficient information is not directly relevant in this context.

709 However, it is sufficiently clear from the arguments of the Republic of Austria that that Member State claims, in essence, that the decision to initiate the formal investigation procedure did not contain sufficient information to enable it to exercise its right to submit comments in an appropriate manner, and that that lack of information is also reflected in the contested decision.

710 In the first place, the Republic of Austria puts forward arguments to establish that the decision to initiate the formal investigation procedure did not contain sufficient information to enable it to submit comments effectively.

711 First, the Republic of Austria claims that certain questions regarding the Contract for Difference remained open. Thus, the nature of the Contract for Difference mechanism and, in particular, the terms on the basis of which the difference would be calculated, notably a reference for the strike price, had not yet been set.

712 In that regard, it should be pointed out at the outset that the Commission described the Contract for Difference in recitals 43 to 49 and 53 to 89 of the decision to initiate the formal investigation procedure. As is apparent from recital 67 of that decision, prior to the notification of the measures at issue, the United Kingdom and EDF had reached an agreement on the key terms of that contract, including the strike price, the duration of the contract and the rate of return. Those particulars were communicated to the interested parties. It is apparent from recital 70 of that decision that the strike price envisaged by the United Kingdom would be set at 92.50 pounds sterling (GBP) per MWh, and from recital 78 of that decision that it was envisaged that payments would be made for a period of 35 years. It is stated in recital 71 of the decision in question that the post-tax rate of return, on the basis of which the funding gap was calculated, corresponded to a margin of between 9.75% and 10.15% and, in the notice of the relevant decision in the Official Journal, it was stated to be 9.87%. In recital 72 of that decision, it is stated that the difference between the strike price and the reference price had been calculated to vary between GBP 3.5 and GBP 9 billion, depending on the carbon price in the United Kingdom. In that context, account should also be taken of recital 361 of that decision, from which it is apparent that the overall amount of the aid depended on assumptions as to future wholesale prices and the discount rate, and, according to different scenarios, came to GBP 4.78 billion, GBP 11.17 billion or GBP 17.62 billion. In that regard it should be borne in mind that the total amount of the aid depended on the reference price, which is a market price, the future amount of which is difficult to predict.

713 Next, account must be taken in particular of recitals 126 to 145, and 163 to 178 of the decision to initiate the formal investigation procedure, concerning the characterisation of the Contract for Difference as State aid. In that context, the Commission described in detail how that contract would operate.

714 Last, it should be noted that, in recitals 349 to 362 of the decision to initiate the formal investigation procedure, the Commission explained that, on the basis of the information available to it, it could not conclude that the Contract for Difference was a proportionate aid measure. In that context, it set out in detail the factors that made it difficult to determine the adequate strike price and profitability of the Hinkley Point C project.

715 In the light of those factors, it must be concluded that, contrary to what is argued by the Republic of Austria, the information contained in the decision to initiate the formal investigation procedure concerning the amount of the aid element in the Contract for Difference, the terms thereof and the doubts of the Commission were sufficient to enable the Republic of Austria to exercise its right to submit comments.

716 Second, as regards the Credit Guarantee, the Republic of Austria submits that that guarantee was described in extremely vague and uncertain terms, as the Commission merely indicated that that guarantee was linked to the credit that NNBG would actually obtain and that the overall amount could be GBP 17.6 billion.

717 In this regard, it should be noted that it is indeed the case that, in the description of the Credit Guarantee in recitals 50 to 52 of the decision to initiate the formal investigation procedure, the Commission merely indicated that the details of that guarantee had not yet been set but that it seemed that that guarantee would be linked to the level of credit actually obtained by NNBG.

718 However, in that context, account should also be taken of recitals 146 and 147 and 179 to 187 of the decision to initiate the formal investigation procedure, in which the Commission commented on the status of that measure as State aid. In that context, the Commission explained that, according to the information provided by the United Kingdom, the Credit Guarantee did not constitute State aid because the guarantee would be provided on commercial terms and would comply with the Guarantee Notice, in particular in relation to its pricing terms. It also indicated that it was not convinced that the methodology proposed by the United Kingdom to determine the price of that guarantee could ensure that that price would be consistent with the price which a market investor would offer. In that regard, it stated that certain elements of the methodology proposed did not correspond to the approach which a market investor would have taken. Furthermore, in recitals 342 to 348 of that decision, it stated that, on the basis of that information, it could not exclude the possibility that the grant of the guarantee in question might lead to overcompensation.

719 In the light of those factors, it must be concluded that, contrary to what is argued by the Republic of Austria, the information concerning the Credit Guarantee, which was contained in the decision to initiate the formal investigation procedure, was sufficiently precise to enable the Republic of Austria to exercise its right to submit comments.

720 Third, as regards the compensation for the early shutdown of Hinkley Point nuclear power station, the Republic of Austria submits that the information in the decision to initiate the formal investigation procedure was limited to the information that the owners were entitled to compensation, but that the level and exact circumstances of that compensation were still being negotiated and were not yet fully known.

721 In that regard, it is necessary to take into account recitals 47 and 48 of the decision to initiate the formal investigation procedure, from which it is apparent that the Secretary of State Agreement dealt with the eventuality of the nuclear power plant being shut down as a result of a political decision. It is stated there that, in those circumstances, NNBG's investors would, on the one hand, be entitled to compensation, the level and scope of which were not yet known and, on the other, be entitled to transfer NNBG to the United Kingdom, which in turn would have the right to require NNBG to be transferred to it.

722 Account should, moreover, be taken of recitals 192 to 195 of the decision to initiate the formal investigation procedure, concerning the characterisation of such indemnification as State aid. In that context, the Commission stated that damages paid to compensate for damage caused by public authorities did not constitute State aid. It mentioned, however, that before a definitive conclusion could be reached, it needed further information on whether the compensation provided for resulted from a general principle and whether it would also be available to other market operators in a similar situation.

723 In the light of those factors, it must be stated that the decision to initiate the formal investigation procedure contained sufficient information to enable the Republic of Austria to exercise its right to submit comments. In that context, it must be noted that, as is apparent from paragraphs 275 to 282 above, the only aid element which the Commission identified in the contested decision in relation to the Secretary of State Agreement was the right to prompt and certain payment. The Commission does not, however, in that decision, authorise aid elements that might result from the method of calculating compensation.

724 Fourth, it must be recalled that, as has been explained in paragraphs 247 to 362 above, the Commission was entitled to adopt the contested decision even though it did not have knowledge at the time of all of the clauses concerning the financing of Hinkley Point C, since those clauses had not yet been agreed by the parties. It follows that, contrary to what is argued by the Republic of Austria, the fact that the particular clauses were not known at the stage of the decision to initiate the formal investigation procedure either cannot have rendered meaningless the right of the Republic of Austria to submit comments.

725 In the light of the foregoing considerations, the Court must reject the arguments of the Republic of Austria alleging that the decision to initiate the formal investigation procedure did not contain sufficient information to enable it to exercise effectively its right to be involved in that procedure.

726 In the second place, the Court must reject the argument of the Republic of Austria that, in certain situations, the Commission is obliged to inform the interested parties again.

727 In that context, it should be borne in mind that the formal investigation procedure must enable a more in-depth examination and clarification of the questions raised in the decision to initiate that procedure and must enable the Member State that notified the project to adapt that project on the basis of any comments by the Commission. Accordingly, any difference between that decision and the final decision cannot be regarded in itself as constituting a defect rendering the final decision unlawful (judgment of 4 September 2009, *Italy* v *Commission*, T−211/05, EU:T:2009:304, paragraph 55). Only an amendment affecting the nature of the measures at issue would therefore be capable of triggering an obligation on the Commission to inform the interested parties again.

728 It must be noted, however, that the Republic of Austria does not invoke any amendment or indeed any detail that may have come to light during the formal investigation procedure and that would have been capable of triggering such an obligation.

729 In the third place and in any event, even if the Commission had failed to respect the right of the Republic of Austria to submit comments, the present plea could not succeed. An infringement of that right could result in an annulment only if, had it not been for that irregularity, the outcome of the procedure might have been different (judgment of 12 May 2011, *Région Nord-Pas-de-Calais and Communauté d'agglomération du Douaisis* v *Commission*, T−267/08 and T−279/08, EU:T:2011:209, paragraph 85). However, it must be noted that the Republic of Austria has not put forward anything which, had it been taken into account by the Commission, could have changed the conclusion that it reached in the contested decision.

730 Having regard to the foregoing considerations, the 10th plea must be rejected in its entirety.

J. Ninth plea, alleging an insufficient statement of reasons

731 The ninth plea alleges infringement of the obligation to state reasons.

732 In that context, it should be noted that the ninth plea may be broken down into six parts, which cover elements of the contested decision that are also covered by other pleas and that have already been examined in conjunction with those pleas (see above, for the first part, paragraph 234; for the second part, paragraphs 153 to 157; for the first and second complaints in the third part, paragraphs 626 to 629 and paragraphs 567 to 574; for the fourth part, paragraphs 363 to 366; for the fifth part, paragraphs 61 to 68; for the sixth part, paragraphs 532 to 566).

733 It follows that the ninth plea must also be rejected in its entirety.

734 Having regard to all the foregoing considerations, the action must be dismissed.

Costs

735 Under Article 134(1) of the Rules of Procedure, 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 Republic of Austria has been unsuccessful, it must be ordered to pay the Commission's costs, in accordance with the form of order sought by the Commission.

736 Under Article 138(1) of the Rules of Procedure, Member States which have intervened in the proceedings are to bear their own costs. Accordingly, on the one hand, the Grand Duchy of Luxembourg and, on the other, the Czech Republic, the French Republic, Hungary, the Republic of Poland, Romania, the Slovak Republic and the United Kingdom shall bear their own costs.

On those grounds,

THE GENERAL COURT (Fifth Chamber)

hereby:

1. Dismisses the action;

2. Orders the Republic of Austria to bear its own costs 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, Romania, the Slovak Republic and the United Kingdom of Great Britain and Northern Ireland to bear their own costs.

Gratsias Dittrich Xuereb

Delivered in open court in Luxembourg on 12 July 2018.

[Signatures]

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* Language of the case: German.