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The Gordian Knot of State Aid: When State Aid Is Inextricably Linked[2]

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When State aid decisions are contested before the Court of Justice of the European Union, the beneficiary may face the risk of having to reimburse the aid to the State. Legal certainty in the area of State aid is crucial – not only for the recipient, but also for the broader EU economy, particularly given the increasingly competitive and complex global environment. This article analyses the CJEU's approach to interpreting Article 108 TFEU, especially in light of its obligation to avoid outcomes that conflict with the specific provisions of the Treaty. The analysis is prompted by the landmark judgment in Case C-594/18 P, Republic of Austria v European Commission, in which the Court appeared to dismiss the need for an inextricable link when assessing State aid in relation to environmental matters. This raises the question of whether similar reasoning could apply to other areas of EU law. While the Hinkley Point C case introduces further ambiguity, the principal aim of this article is to examine various dimensions of the issue of inextricable links between State aid and different provisions of EU law.

Keywords: EU law, State aid, inextricable link, indissoluble link.

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Węzeł gordyjski pomocy publicznej: Kiedy pomoc państwa jest nierozerwalnie związana[3]

Streszczenie

W przypadku zakwestionowania decyzji w sprawie pomocy publicznej przed Trybunałem Sprawiedliwości Unii Europejskiej beneficjent może stanąć w obliczu ryzyka konieczności zwrotu pomocy państwu. Dlatego pewność prawna w obszarze pomocy publicznej ma kluczowe znaczenie – nie tylko dla beneficjenta, lecz także dla szerszego gospodarczego kontekstu w UE, zwłaszcza biorąc pod uwagę coraz bardziej konkurencyjne i złożone środowisko rynkowe. Niniejszy artykuł analizuje podejście TSUE do interpretacji art. 108 TFUE, zwłaszcza w świetle obowiązku unikania wyników niezgodnych z konkretnymi postanowieniami Traktatu. Analiza ta ma swoją genezę w przełomowym wyroku w sprawie C-594/18 P, Republika Austrii przeciwko Komisji Europejskiej, w którym Trybunał zdawał się odrzucać doktrynę nierozerwalnego związku przy ocenie pomocy państwa w odniesieniu do kwestii środowiskowych. Kwestia ta zrodziła pytanie, czy analogiczne rozumowanie można przenieść również względem innych obszarów prawa UE. Podczas gdy sprawa Hinkley Point C ciągle wymaga interpretacji, głównym celem niniejszego artykułu jest zbadanie różnych wymiarów doktryny nierozerwalnego związku między pomocą państwa a innymi przepisami prawa UE.

Słowa kluczowe: prawo UE, pomoc państwa, nierozerwalny związek, energetyka jądrowa.

[3] Badania wykorzystane w artykule nie zostały sfinansowane przez żadną instytucję.

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Introduction

In the current global landscape, Member States are grappling with intense competition among major powers. While seeking to boost their economies, they must also contend with the aftermath of the energy crisis triggered by Russia's reinvasion of Ukraine. At the same time, China's heavily subsidised industry and the USA's Inflation Reduction Act are exerting considerable pressure on both the European Union and its Member States. A significant risk looms: a potential influx of cheap products flooding the EU market[4] and the relocation of European companies to the USA.[5] To address these challenges, alongside the protectionist measures already introduced on the EU level,[6] the European Commission must reconsider and refine its State aid rules, making them more precise and user-friendly. One issue that is gaining prominence amid the increasing economic interventionism is the interaction between State aid rules and sectoral legislation. Despite the EU having issued numerous guidelines[7] and notices,[8] there remains a significant risk that decisions may be contested before the Court of Justice of the European Union. A particular point of concern lies in the EC's verification process regarding the compatibility of aid with other EU law provisions.

According to well-established jurisprudence, the procedure under article 108 TFEU must never produce a result that is contrary to the specific provisions of the

4 M.G. Jones, *EU ready to make 'full use' of trade defence tools against China, von der Leyen warns Xi*. Available from: https://www.euronews.com/my-europe/2024/05/06/eu-ready-to-make-full-use-of-trade-defence-tools-against-china-von-der-leyen-warns-xi (accessed: 30.09.2024).

5 K. Urlich, *Is Germany industry migrating to the USA*. Available from: https://www.dw.com/en/is-german-industry-migrating-to-the-us/a-65031130 (accessed: 30.09.2024).

6 Examples: introduction on 12 July 2023 2022/2560 Regulation of the European Parliament and of the Council of 14 December 2022 on foreign subsidies distorting the internal market or conducting first proceeding under Regulation (EU) 2022/1031 of the European Parliament and of the Council of 23 June 2022 on the access of third-country economic operators, goods and services to the Union's public procurement and concession markets and procedures supporting negotiations on access of Union economic operators, goods and services to the public procurement and concession markets of third countries (International Procurement Instrument – IPI).

7 E.g. Communication from the Commission – Guidelines on State aid for climate, environmental protection and energy 2022, C/2022/481, OJ C 80, 18.2.2022, p. 1–89.

8 Commission Notice on the notion of State aid as referred to in Article 107(1) of the Treaty on the Functioning of the European Union, OJ C 262, 19.7.2016, pp. 1–50.

Treaty.[9] However, not all provisions of EU law are relevant in this context – only those that are intrinsically linked to State aid. While recent CJEU judgments have clarified the nature of this link to some extent, case law remains rather casuistic and certain unresolved issues persist.[10]

To fully comprehend the problem addressed in this article, it is first necessary to establish whether the compatibility assessment of State aid remains confined solely to provisions inextricably linked to the aid, or whether this scope has been broadened. This question is pivotal to understanding the current legal landscape. Second, it is necessary to use existing jurisprudence to determine when and under what circumstances State aid must align with other EU legal norms. In other words, it is necessary to establish when State aid must be compatible with other EU laws. Certainty in this area is essential – not only from the perspective of the EC, but also for aid beneficiaries, as the consequences are more severe for them. Ultimately, they may be required to reimburse the aid if the Commission's decision is found incompatible with the internal market.

In the following section, the article will examine specific areas of EU law to determine whether there exist any peculiarities deviating from the general rules – with a particular focus on environmental protection, public procurement law, and the financing of aid measures. One might argue that such a scope is too narrow; however, it is not feasible to comprehensively address all relevant issues within a single article. Therefore, this contribution will highlight the following key questions:

1. What are the consequences of an incompatibility between State aid and other EU law provisions? What should the European Commission do in such a case, and how should the CJEU respond when State aid is incompatible with other EU legal norms?
2. How broadly should the analysis of such incompatibilities be framed? To what extent must the wider legal context be considered?

Hence, the aim of this article is to synthesise the relevant judicial cases and crystallise the main issues emerging from CJEU jurisprudence regarding the compatibility of State aid as part of the overarching obligation not to produce results contrary to the specific Treaty provisions.

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9 Consolidated version of the Treaty on the Functioning of the European Union, OJ C 326, 26.10.2012, pp. 47–39, 'TFEU' or 'Treaty'.

10 Case T-484/10 R *Gas Natural Fenosa v Commission* [2011] ECLI:EU:T:2011:53 [66].

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Is inextricable link still an issue?

According to the established line of jurisprudence, the EC may not authorise State aid that infringes other provisions of EU law,[11] both primary and secondary.[12] However, not all EU law provisions should be applicable in every case. Jurisprudence reveals a crucial distinction: only those provisions that are inextricably linked to the object of the aid – such that they cannot be assessed separately – are relevant. In such instances, their impact on the compatibility or incompatibility of the aid must necessarily be determined in the light of the procedure prescribed in article 108 TFEU.[13]

The first issue is to examine whether it remains valid that compatibility must be ensured only when such an inextricable link exists. To explore this, it is necessary to recall the landmark Hinkley Point C[14] case. Austria, supported by Luxembourg, challenged a decision granting State aid for the development of a new nuclear power plant.[15] Among several pleas, Austria argued that when Article 107 TFEU applies to nuclear energy, other EU law principles – such as environmental protection requirements – must also be taken into account.[16] In response, the General Court stated as follows:

> "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."

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11 Case 73/79 *Commission v Italy* [1980] ECLI:EU:C:1980:129, [11]; Case C-225/91 *Matra v Commission* [1993] EU:C:1993:239 [41-42].

12 Ph. Nicolaides, *The Link between State Aid and Environmental Provisions of EU Law*. Available from: https://www.lexxion.eu/Stateaidpost/the-link-between-State-aid-and-environmental-provisions-of-eu-law/ (accessed: 30.09.2024).

13 Case 74/76 *Iannelli & Volpi* [1997] EU:C:1977:51 [14] – it is the first case where the Court stipulated that requirement.

14 Case T-356/15 *Republic of Austria v European Commission* [2018] ECLI:EU:T:2018:439; Case C-594/18 P *Republic of Austria v European Commission* [2020] ECLI:EU:C:2020:742 ('HPC Judgment').

15 The full text of the Commission decision SA.34947 can be accessed here: https://competition-cases.ec.europa.eu/search?search=hinkley%20poit%20c&sortField=relevance&sortOrder=DESC (accessed: 30.09.2024).

16 For additional comments on this judgment see Ph. Nicolaides, *Must the Commission Prohibit State Aid That Harms the Environment?*, "European State Aid Law Quarterly" 2023, 23(1), pp. 4–1; L. Hancher, A. Bouchagiar, *Hinkley Point C: Trimming the SAM, While Extending the Reach of Wider EU Law Infringements?*, "European State Aid Law Quarterly" 2021, 20(4), pp. 529–545.

Thus, the General Court rejected the necessity to comply with EU environmental law, but did not look into the existence of an inextricable link in this context. Later on, Advocate General Hogan attempted to connect the General Court's conclusions to the inextricable link doctrine,[17] but his efforts appeared to be insufficient.[18] As Nicolaides noticed, the CJEU, surprisingly, did not refer to the inextricable link between the aid and the contravention of environmental law either,[19] and explained that:

> "since Article 107(3)(c) TFEU applies to State aid in the nuclear energy sector covered by the Euratom Treaty, State aid for an economic activity falling within that sector that is shown upon examination to contravene rules of EU law on the environment cannot be declared compatible with the internal market pursuant to that provision."[20]

Although the CJEU acknowledged Austria's argumentation, it still dismissed the application. The CJEU reasoned that if the grounds of a General Court judgement disclose an infringement of EU law but the operative part is well-founded on other legal grounds, the appeal must be dismissed.

The above development raises questions as to whether the CJEU has indeed broadened the EC's obligations to verify the compatibility of State aid with other EU law provisions, potentially extending beyond environmental issues. As Leigh Hancher noted:

> "The Court took the case law a substantial step forward in recognizing that State aid that breaches the Treaty rules, but also breaches the secondary law, is automatically incompatible. Interestingly, it cited case law that did not fully support its conclusion."[21]

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17 Case C-594/18 P *Opinion of Advocate General Hogan* [2020] ECLI:EU:C:2020:352 [90] – when the Commission applies the State aid procedure, it is required, in accordance with the general scheme of the Treaty, to ensure that provisions governing State aid are applied consistently with specific provisions other than those relating to State aid and, therefore, to assess the compatibility of the aid in question with those specific provisions, where the aspects of aid are so inextricably linked to the object of the aid that it is impossible to evaluate them separately. In the present case, the existence of such an inextricable link was, as the Commission points out, not raised by the Republic of Austria; nor does it exist. The principles raised by the Republic of Austria, namely, the protection of the environment, the precautionary principle, the 'polluter pays' principle and the principle of sustainability, can be assessed separately and, should it prove necessary, in other proceedings.

18 Case C-594/18 P *Opinion of Advocate General Hogan* [2020] ECLI:EU:C:2020:352.

19 For additional comments on this judgment see Ph. Nicolaides, *Shedding Light into the 'Black Box' of State Aid?*, "European State Aid Law Quarterly" 2021, 21(1), pp. 17–28.

20 HPC Judgment [45].

21 L. Hancher, *Euratom, State aid and environmental protection: Hinkley Point*, "Common Market Law Review" 2021, 58, pp. 1491–1522.

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Austria further tested this interpretation in its second challenge to nuclear energy State aid, the Paks II Judgment,[22] where it contested the EC's decision authorising aid to the Paks II nuclear power plant.[23] One of Austria's pleas, concerning the absence of a public procurement procedure, argued that in light of the HPC Judgement:

> "it is of little importance, in the case of the aid at issue, whether the question concerns an "inextricable aspect" or even an "aspect" of the aid, since, in general, State aid which contravenes provisions or general principles of EU law cannot be declared compatible with the internal market."[24]

This suggests that the HPC Judgment could have broader implications, potentially extending to other EU law provisions as public procurement law.

The General Court attempted to navigate this complex legal terrain, claiming that no conclusions could be drawn from the fact that the CJEU did not examine the existence of an inextricable link[25], however, the CJEU's earlier statement in HPC Judgement could nevertheless significantly influence the Commission's obligations. Requiring the Commission to verify compatibility with every potentially relevant EU law provision would be an overwhelming burden.

The Paks II Judgement of the General Court, after the unfavourable opinion of the Advocate General Medina, awaits CJEU verification.[26]

Meanwhile, from the perspective of this article, it is useful to consider other relevant cases addressing similar issues. One such recent case is Braesch,[27] in which the CJEU dismissed as inadmissible the action brought at first instance seeking annulment of a Commission decision concerning State aid for Banca Monte dei Paschi di Siena.[28] The CJEU found that the General Court had erred in law recognising

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22 Case T-101/18 Austria v Commission [2022] ECLI:EU:T:2022:728 („Paks II judgment').

23 The full text of the Commission decision SA.38454 can be accessed here: https://competition-cases.ec.europa.eu/search?search=paks%20ii&sortField=relevance&sortOrder=DESC (accessed: 30.09.2024).

24 Paks II Judgment [20].

25 Paks II Judgment [28] – no conclusions can be drawn from the fact that the Court of Justice did not examine the existence of an inextricable link in its judgment of 22 September 2020, Austria v Commission. That is explained by the fact that in the case which gave rise to that judgment the alleged infringement of principles of EU law derived from the actual object of the aid, namely the development of a power plant producing electricity from nuclear power. Accordingly, the question of the existence of a link with an aspect of the aid, separate from its object, did not arise.

26 Case C-59/23 *Opinion of Advocate General Medina* [2025] ECLI:EU:C:2025:125.

27 Case C-284/21 P *Antony Braesch and Others v Commission* [2023] ECLI:EU:C:2023:58.

28 The full text of the Commission decision SA.47677 can be accessed here: https://ec.europa.eu/competition/state_aid/cases/270037/270037_1951496_149_2.pdf (accessed: 30.09.2024).

Braesch and others as interested parties under Article 1(h) of Regulation 2015/1589.[29] While the issue of locus standi lies beyond the scope of this article, it is worth noting that the inextricable link doctrine was also raised in this context.

The CJEU stated as follows:

> "indeed, where the modalities of an aid measure are so indissolubly linked to the object of the aid that it is impossible to evaluate them separately, their effect on the compatibility or incompatibility of the aid viewed as a whole must therefore of necessity be determined in the light of the procedure prescribed in Article 108 TFEU."[30]

A similar formulation was later reiterated by the CJEU in several Ryanair cases.[31] Moreover, in Paks II Judgement, the General Court suggested that it was not the CJEU's intention to depart from its earlier case law requiring a distinction between elements inextricably linked to the object of the aid and those that are not. This interpretation rests on the CJEU's reference in the HPC judgment to point 50 of Nuova Agricast, which reflects well-established case law – albeit without expressly referring to the inextricable link.[32] One could argue that if this interpretation is correct, the HPC judgment may be considered imprecise. Nonetheless, subsequent judgments appear to confirm that the requirement of an inextricable link was never truly abandoned.

General remarks on inextricable link

Having confirmed that the assessment of the compatibility of State aid under EU law is limited to provisions that are inextricably linked to the aid, the next issue must be addressed: when are other provisions of EU law in fact so inextricably linked to State aid that the European Commission is required to conduct a separate analysis of their compatibility within proceedings under Article 108 TFEU?

First, it is important to recall the earlier statement that aspects of the aid may be regarded as inextricably linked where they are so indissolubly tied to the object of the aid that they cannot be evaluated separately. Conversely, an aspect of the

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29 Council Regulation (EU) 2015/1589 of 13 July 2015 laying down detailed rules for the application of Article 108 of the Treaty on the Functioning of the European Union ('Regulation 2015/1589').

30 Case C-284/21 P *Antony Braesch and Others v Commission* [2023] ECLI:EU:C:2023:58 [97].

31 Case C-321/21 P *Ryanair vs Commission* [2023] ECLI:EU:C:2023:713 [121] and T-268/21 *Ryanair v Commission* [2021] ECLI:EU:T:2023:279.

32 Similar observation was made by L. Hancher, *Euratom, State aid and environmental protection…*

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aid should not be deemed inextricably linked where the conditions or elements of an aid scheme – although formally part of the aid – are not necessary for achieving its objective or ensuring its proper functioning.[33] Moreover, if the aspect of the aid can be separated from the object of the aid, then there is no requirement to assess its compatibility with EU law provisions other than those concerning State aid within the framework of Article 108 TFEU.[34]

In practice, when the Commission identifies aid-related aspects that are inherent to the aid, it is obliged to assess their compatibility with other relevant EU law provisions. This leads to another important question.

First, where is the delineation of a clear boundary between a specific legal issue and the core concept of State aid? The important voice in regard to understanding this topic was raised by the of the Advocate General Saugmandsgaard Øe who said that:

> "an aspect of aid is necessary for the attainment of the object or for the functioning of aid where it is a constituent or essential element of the aid, so that its inapplicability leads to a change in the scope or the principal characteristics of the aid".[35]

Therefore, the Advocate General suggests that this will apply to any element that can influence or change the aid itself, whether in terms of the amount of aid or the measures involved.

On the other hand there is also a more formal approach. Such a boundary exists where a separate procedure could be initiated for the issue in question, distinct from the State aid procedure. The General Court has emphasised that the Commission's powers under Articles 106, 107, and 108 TFEU, and the procedures for assessing aid compatibility, cannot replace infringement proceedings, which remain essential for ensuring compliance with all EU law provisions by Member States.[36] Similarly, in case Thermenhotel Stoiser Franz and Others v Commission General Court stated that "the possible infringement of the directive […] could give rise, where appropriate, to proceedings for a declaration of failure to fulfil obligations but could not constitute a serious difficulty and therefore affect the Commission's assessment of the compatibility of the aid with the internal market."[37]

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33 Case T-57/11 *Castelnou Energía v Commission* [2014] ECLI:EU:T:2014:1021 [182].

34 *Ibidem* [184].

35 Case C-598/17 *Opinion of Advocate General Saugmandsgaard Øe* [2018] ECLI:EU:C:2018:1037, [81].

36 Case T-57/11 *Castelnou Energía v Commission* [2014] ECLI:EU:T:2014:1021 [190].

37 Case T-158/99 *Thermenhotel Stoiser Franz and Others v Commission* [2004] ECLI:EU:T:2004:2, [159]

This was further illustrated in the Paks II case, where Austria claimed that the Commission's decision was null and void due to a breach of fundamental public procurement rules, which – according to Austria – were inextricably linked to the aid. The General Court held that the Commission had not erred in law, as it was not required to examine public procurement compliance under Article 108 TFEU. The selection of the contractor for the Paks II nuclear power plant had already been examined in a separate infringement procedure. The Court upheld the Commission's position that awarding the construction contract was not an aspect inextricably linked to the aid. However Advocate General Medina, refused to share the view of the General Court, finding that there was an inextricable link and that the Austrian complaint was, in fact, well founded.[38]

Second, a key question arises in the context of parallel infringement procedures: should a State aid proceeding be suspended if a potentially related – though not inextricably linked to the aid – infringement procedure is ongoing? For example, consider a situation where the Commission initiates a formal investigation into State aid granted to a beneficiary involved in an infrastructure project (e.g., a highway or bridge), while simultaneously launching an EU Pilot procedure to examine whether Directive 2003/4/EC on public access to environmental information has been properly implemented. Should the State aid investigation be suspended pending the outcome of the infringement procedure? Again the answer to this question can be found in jurisprudence. In *Matra v Commission*, the CJEU argued as follows:

> "when taking a decision on the compatibility of State aid with the common market, the Commission is not obliged to await the outcome of a parallel procedure […], once it has reached the conclusion, based on an economic analysis of the situation and without any manifest error in the assessment of the facts, that the recipient of the aid is not in breach of Articles 107 and 108 of the Treaty."[39]

This statement appears reasonable, as issues that are not inherent to the aid itself should not determine the outcome of the State aid decision. Accordingly, the CJEU's approach deserves full support. Matters that can be resolved via separate procedures should not unduly affect the compatibility assessment under State aid rules. This brings us to the main conclusion: when the incompatibility of aid with other EU law provisions that are inextricably linked to the aid is established, the

38 Case C-59/23 *Opinion of Advocate General Medina* [2025] ECLI:EU:C:2025:125, [97].

39 Case C-225/91 *Matra v Commission* [1993] EU:C:1993:239 [45].

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Commission must attempt to address the issue within the State aid procedure. If it cannot, it may conclude that the aid is incompatible with the internal market. Conversely, if an aspect of the aid is separable from its objective, the Commission is not required to assess its compatibility with other EU law provisions within the Article 108 TFEU procedure.[40]

No decision should be issued with defects concerning other EU law provisions that are inextricably linked to the aid, as such decisions could distort the internal market and create legal uncertainty for the beneficiaries if later effectively challenged and annulled by the CJEU.

Third, it is important to clarify whether all EU law provisions that are inextricably linked to State aid require compatibility analysis. This issue was addressed by the General Court in a Ryanair case.[41] Italy introduced a measure with four eligibility conditions for selecting aid beneficiaries, one of which required beneficiaries to pay a minimum remuneration to employees based in Italy. The Commission considered these conditions to be indissolubly linked to the aid and assessed the remuneration requirement under Article 8 of the Rome I Regulation.[42] The applicant argued that the Commission had failed to explain why it limited its analysis to Article 8 of Rome I, omitting other relevant provisions, claiming that the EC:

> "has failed to explain why, in its view, the only relevant provision, other than Articles 107 and 108 TFEU, in the light of which it had to examine the compatibility of the minimum remuneration requirement with EU law was Article 8 of the Rome I Regulation, to the exclusion of 'other provisions of Union law' and, in particular, Article 56 TFEU establishing the freedom to provide services."[43]

The General Court agreed, finding that the Commission's failure to consider Article 56 – especially in light of the complaint submitted by AICALF (the Italian Low Fares Airline Association) – constituted a failure to state reasons. AICALF had claimed that the Italian measure indirectly discriminated against service providers from other Member States. As the Commission was aware of this argument, it should have addressed the compatibility of the aid with Article 56 TFEU. Its failure to do so led to the annulment of the compensation scheme for Italian-licensed airlines.

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40 Case T -282/16 *Inpost v Commission* [2019] ECLI:EU:T:2019:168 [66].

41 Case T-268/*21 Ryanair v Commission* [2021] ECLI:EU:T:2023:279.

42 Regulation (EC) No 593/2008 of The European Parliament And of The Council of 17 June 2008 on the law applicable to contractual obligations.

43 Case T-268/21 *Ryanair v Commission* [2021] ECLI:EU:T:2023:279 [34].

The conclusions and significance of this case was well captured by Phedon Nicolaides, who raised a very good point in that regard:

> "[w]hether it is incumbent on the Commission to examine the vast body of EU law for possible infringement. Given its volume, such an obligation would create a Herculean task for the Commission. However, the General Court appeared to limit the extent of that obligation to the "context" of the case and in particular to the law cited by the complainant. But, in the absence of a complaint, it seems that the Commission must necessarily examine possible infringement of any other provision of EU law that appears to be relevant to any inherent component of an aid measure."[44]

Indeed, the General Court emphasised the relevance of 'context', which includes but is not limited to the complaints received. Therefore, this reasoning should also be applied to Article 6 of Regulation 2015/1589, which governs formal investigation procedures. Under Article 6, the Commission must invite Member States and interested parties to submit comments. Thus, following the logic in the Ryanair case, the context of the case is shaped in part by the submissions received during this consultation. The Commission must examine all relevant issues raised; failure to do so may be considered a breach of its duty to state reasons. However, the Commission is not required to assess issues not raised during the formal investigation, unless the omission amounts to a manifest error of assessment.[45] This limitation applies mainly to cases that have entered the formal phase. Cases concluded under Article 4 of Regulation 2015/1589 in the preliminary phase should be assessed based on their specific circumstances. In simpler terms, the context of a case is limited to (i) provisions of EU law that are clearly applicable and (ii) those raised during the State aid procedure.

To summarise, an inextricable link between State aid and other provisions of EU law exists only where the latter are so closely connected to the aid that they cannot be assessed separately. This is the case when an aspect of the aid is necessary for achieving its objective or for its proper functioning, to the extent that its

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44 Ph. Nicolaides, *How the Infringement of Non-State aid Rules Can Affect the Compatibility of State aid.* Available from: https://www.lexxion.eu/en/Stateaidpost/how-the-infringement-of-non-State-aid-rules-can-affect-the-compatibility-of-State-aid/ (accessed: 30.09.2024).

45 Just to offer a potential example of such manifest error of assessment: if the support scheme for renewable energy sources as wind turbines was not assessed in light of Article 19d of Regulation (EU) 2024/1747 of the European Parliament and of the Council of 13 June 2024 amending Regulations (EU) 2019/942 and (EU) 2019/943 as regards improving the Union's electricity market design, hence the decision could be considered defective, as issued with the manifest error of assessment due to the absence of an assessment of the measure with the requirements of specific regulation related inextricably to the aid.

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inapplicability would lead to a change in the scope or principal characteristics of the aid. Where the issue can be evaluated by the Commission in a separate procedure, compatibility should be assessed through that procedure.

However, once an inextricable link is established, the Commission must examine all relevant EU law provisions – especially those raised in consultations under Article 6 of Regulation 2015/1589. A failure to do so may be seen by the CJEU as ignoring the context of the case, leading to annulment of the State aid decision for insufficient reasoning. By contrast, such consequences should not apply to issues not raised during the procedure, unless their omission constitutes a manifest error of assessment.

Bearing these rules in mind, the following section will serve to assess how this framework applies to specific EU law provisions in practice.

Depicting the practice of the inextricable link between State aid and specific provisions of EU law

This part of the article discusses issues related to State aid and the specific provisions of EU law, focusing in particular on aid's compatibility with EU's environmental law, public procurement law, and measures to finance the aid in question.

EU Environmental Law

In the Spanish coal case – Castelnou Energía v Commission – which is a valuable source of statements concerning the inextricable link between State aid and other provisions of EU law, the General Court found that the obligation to purchase indigenous coal, the preferential dispatch mechanism, and the financial compensation constituted elements that were inextricably linked to the purpose of the aid. As a result, the EC was required to assess the compatibility of the aid measures with the rules on the free movement of goods,[46] the freedom of establishment, and Directive 2005/89.[47] However, the General Court held that environmental issues were not relevant in this case, as the aid in question did not pursue environmental protection objectives.[48] The Court emphasised that:

46 Case 74/76 *Iannelli & Volpi* [1997] EU:C:1977:51.

47 Case C-156/98 *Germany v Commission* [2000] ECLI:EU:C:2000:467 [78-79].

48 Other issues that may be deemed as inextricable linked are: free competition – Weyl Beef Products and Others v Commission, joined cases T-197/97 and T-198/97 and prohibition of internal taxation which adversely affects the internal market in case Portugal v Commission, C-204/97.

> "when assessing an aid measure which does not pursue an environmental objective, the Commission is not required to take account of environmental rules in its assessment of the aid and of the aspects which are inextricably linked to it."[49]

The Court also clarified that the assessment of compatibility must be limited to the internal market, understood as an area without internal frontiers in which the free movement of goods, persons, services, and capital is ensured. Environmental protection does not, per se, constitute a component of the internal market. Therefore, the mere fact that an aid measure has harmful environmental effects does not, by that fact alone, undermine the functioning of the internal market.[50]

Hence, "the Commission is required to make an assessment by reference to the relevant provisions which are not, strictly speaking, covered by the law on aid only where certain aspects of the aid in issue are so closely linked to its object that any failure on their part to comply with those provisions would necessarily affect the compatibility of the aid with the internal market."[51]

It is noteworthy that the Castelnou Energía judgment, delivered six years prior to the HPC Judgment, arrives at different conclusions despite being based on the same jurisprudence. Both cases concerned environmental aspects of State aid. However, according to the General Court in Castelnou Energía, environmental considerations not inextricably linked to the aid should not be included in the compatibility assessment. Consequently, the Commission may not prohibit State aid on the grounds that it harms the environment if such harm does not impede the internal market.[52]

On the other hand, environmental issues should not be entirely excluded from compatibility tests. If an aid measure intrinsically involves environmental matters that may affect compatibility with the internal market, the assessment must take into account relevant provisions of EU environmental law.

Public Procurement Law

Returning to the Paks II Judgment, this section will explore the issue of compatibility of the State aid with public procurement law, which was central to the case in question. In this case, Austria argued that the contested decision was unlawful because no public procurement procedure had been initiated for the construction

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49 Case T-57/11 *Castelnou Energía v Commission* [2014] ECLI:EU:T:2014:1021 [188-189].

50 *Ibidem* [188-189].

51 Case T-289/03 *BUPA and Others v Commission* [2008] EU:T:2008:29 [314].

52 Ph. Nicolaides, *Must the Commission Prohibit…*

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of new nuclear reactors for the Paks II company. Specifically, it claimed that awarding the contract for the development and construction of the two new reactors directly to JSC NIAEP without a public procurement procedure constituted an infringement of Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC and Directive 2014/25/EU of the European Parliament and of the Council of 26 February 2014 on procurement by entities operating in the water, energy, transport and postal services sectors and repealing Directive 2004/17/EC. Accordingly, the contested decision was considered null and void owing to an infringement of fundamental provisions of public procurement law, compliance with which is inextricably linked to the object of the aid.[53] In response to that plea, the General Court, however concluded that the Commission had not erred in law in limiting its review, under Article 108 TFEU, to the aid measure itself and to aspects inextricably linked to it.

Two main arguments underpinned this conclusion. First, a separate procedure had been conducted by the Commission to assess compliance with public procurement law and the selection of JSC NIAEP. Second, Austria incorrectly argued that awarding the contract to JSC NIAEP without a tender constituted an inextricable link to the aid measure. Austria suggested that a different procurement procedure could have led to an entirely different aid measure in terms of amount and structure.[54] Moreover, the General Court observed that:

> "[…] Commission, Hungary and the French Republic are right to argue that it has not been demonstrated that other tenderers could have supplied the two reactors with VVER 1200 technology on better terms or at a lower price […] the carrying out of a public procurement procedure and the possible use of another undertaking for the construction of the reactors would alter neither the object of the aid, namely the provision free of charge of two new reactors for the purpose of their operation, nor the beneficiary of the aid, which is the Paks II company. In addition, an infringement of the rules on public procurement would produce effects solely on the market for the construction of nuclear power stations and would have no consequences for the market covered by the object of the aid measure at issue."[55]

This issue was particularly raised by Advocate General Medina in her opinion. She concluded that: 'the General Court was wrong to uphold the Commission's

53 Paks II Judgment [15].
54 *Ibidem* [55].
55 *Ibidem* [37].

conclusion that the direct award to JSC NIAEP of the contract for the construction of the new reactors did not constitute an 'inextricable aspect' of the object of the aid at issue.'[56] Advocate General Medina, based her opinion on a number of assumptions, inter alia on the argument that 'the award of the contract for the construction of the new reactors is not a simple 'design aspect', nor a secondary aspect of the notified measure. The object of the aid at issue is in fact the development of those reactors, which constitute the asset intended to be made available to the beneficiary.'[57] Presented by Advocate General's logic might mean that the European Commission would be obliged to automatically assess the compatibility of any State aid for the investment project with public procurement law, since the design of the project, that benefit from the State aid would not be a 'secondary aspect' for any investment. In fact this might lead to the extension of the Commission's remit in the exercise of the powers conferred on it by Articles 106 TFEU, 107 TFEU and 108 TFEU. Therefore, one might ask the valid question: what are the other EU law provisions that should be considered as a secondary aspect important in every State aid case? In the event of the involvement of companies from third countries, perhaps foreign subsidy regulation[58] should be considered, even though there is a special, separate procedure for this case.

Bearing this in mind, it is worth emphasising that this case undermines a conflict of values. This conflict is between, on the one hand, the certainty of the compatibility of State aid with EU law and on the other the efficiency of State aid proceedings. Expanding the notion of an inextricable link to encompass all aspects other than secondary ones may be counterproductive. Jurisprudence should acknowledge that there are distinct legal forums for evaluating such issues.

Moreover, Advocate General argued that that award of the construction contract to JSC NIAEP was necessary both for the attainment of the object of the aid at issue and for its proper functioning as JSC NIAEP was the only undertaking capable of providing the technology necessary for the construction of the new reactors from a technical point of view and that the award of the construction contract to that undertaking was a necessary choice in order to ensure the viability and success of the project financed by the aid at issue.[59]

It will be interesting to see how the Court of Justice of European Union addresses this issue, given that in the nuclear sector, technology is often exclusive to a single supplier due to intellectual property rights. When an investor selects a specific

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56 Case C-59/23 *Opinion of Advocate General Medina* [2025] ECLI:EU:C:2025:125, [58].

57 *Ibidem* [53].

58 Regulation (EU) 2022/2560 of the European Parliament and of the Council of 14 December 2022 on foreign subsidies distorting the internal market.

59 *Ibidem* [55].

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technology – in this case, Russian technology – any procurement procedure becomes moot if only one supplier is capable of delivering it. The competition might take place on lower level of the supply chain.

One particular issue that has aroused interest is the fact that the Advocate General has not delved into the matter that public procurement issues were already examined in a separate infringement proceeding, apart from noticing that the European Commission did not provide any reasoning for its assessment of the compatibility of the public procurement law. One can argue, that the existence of a concurrent infringement procedure examining the compatibility of the procurement process for JSC NIAEP should have sufficed to reject Austria's plea. This is in accordance with reasoning provided in the Thermenhotel Stoiser Franz and Others v Commission and Castelnou Energía cases, as both issues can be assessed separately, hence no inextricable link exist.

In other words, the current judicial practice indicates that the notion of an inextricable link should be interpreted strictly, and that the absence of such a link is sufficient to confirm the compatibility of the aid measure. However, following the Advocate General's opinion in the Paks II case, there may be a shift in the inextricable link doctrine in relation to the compatibility of any aid with public procurement law. It will be interesting to see the final CJEU judgement and how this doctrine further develops.

Measures to finance the aid

Finally, the question of how State aid is financed remains relevant. States often choose to fund aid schemes through taxes or parafiscal levies, which may seem inextricably linked to the aid measure. However, the devil is in the details. In case C-206/06 Essent Network Noord,[60] in the course of proceedings between Essent Netwerk Noord BV, an electricity network operator, and Aluminium Delfzijl BV, a purchaser of electricity and transport services, there was a dispute over a surcharge on electricity transmission prices. The CJEU reiterated that taxes fall outside the scope of State aid rules unless they constitute the method of financing an aid measure – in other words, when they form an integral part of it.

In a different case, the CJEU added that:

> "for a tax to be regarded as forming an integral part of an aid measure, it must be hypothecated to the aid under the relevant national rules, in the sense that the revenue from the charge is necessarily allocated for the financing of the

[60] Case C-206/06 *Essent Network Noord* [2008] ECLI:EU:C:2008:413 [89].

> aid and has a direct impact on the amount of the aid and, consequently, on the assessment of the compatibility of that aid with the common market."[61]

This logic was affirmed in subsequent cases and resulting decisions. For instance, the CJEU confirmed that the Commission did not err in law by finding that in order for its method of financing to form an integral part of an aid measure, the charge in question must be hypothecated to the aid – in the sense that the revenue generated by the charge is necessarily allocated to the financing of the aid and has a direct impact on the amount of the aid.[62] The case of Streekgewest might be one interesting example, where the CJEU stated:

> "the aid measure takes the form of an exemption from tax on waste. Even if, for the purposes of the budget estimates of the Member State in question, the tax advantage was compensated for by the increase in the amount of the tax on waste from NLG 28.50 to NLG 29.20 per 1 000 kg of waste, that fact is not sufficient in itself to show that the tax was hypothecated to the tax exemption."[63]

Thus, a mathematical correlation between a levy and the aid does not, in itself, establish an inextricable link. However, if an aid measure is wholly financed by a levy and the aid amount is derived from the revenue generated, the link becomes indissoluble. In such cases, the compatibility of the levy with the internal market – particularly under Articles 30 and 110 TFEU – must be assessed.[64]

In practice, the Commission refers to these provisions in its decisions when an inextricable link is found. For example, in the opening decision concerning the Dukovany nuclear power plant, the Commission noted:

> "as regards the financing of the measure, the Czech authorities have explained that while a levy may contribute to the financing of the measures, the financing would not depend on such a levy and the State budget would cover costs where required. Benefits of the project would also flow to the State budget. Based on the currently available information, the levy, if any, would thus not be hypothecated to the measure."[65]

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61 Case C-333/07 *Société Régie Networks* [2008] ECLI:EU:C:2008:764 [99],C-510/16 *Carrefour* [2018] ECLI:EU:C:2018:751 [19] and Case C-174/02 Streekgewest [2005] ECLI:EU:C:2005:10 [25-26].

62 Case T-533/10 *DTS v Commission* [2014] ECLI:EU:T:2014:629 [58].

63 Case C-174/02 *Streekgewest* [2005] ECLI:EU:C:2005:10 [27].

64 Case C-206/06 *Essent Network Noord* [2008] ECLI:EU:C:2008:413 [40-59].

65 The full text of the Commission decision SA.58207 can be accessed here: https://ec.europa.eu/competition/state_aid/cases1/202249/SA_58207_0010CD84-0000-C7E0-A425-6311047577E0_272_1.pdf (accessed: 30.09.2024).

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This illustrates that the issue of an inextricable link between financing mechanisms and aid remains significant in the Commission's practice. Nonetheless, the CJEU has provided relatively clear guidance for Member States and the Commission on how to determine whether such a link exists. As a result, there is no need to determine the compatibility of the aid with Article 110 TFEU and 30 TFEU, when there is no direct correlation between the amount of the aid and the levy itself.

Conclusions

Undoubtedly, the issue of the inextricable link between EU law provisions and State aid will take centre stage in forthcoming cases – not only those concerning the nuclear sector. The eagerly awaited final judgment in the Paks II nuclear power plant case is expected to shed light on this matter. Moreover, the issuance of the European Commission's decision granting aid for the nuclear power plant in Dukovany[66] will be probably challenged before the CJEU as all decisions in State aid cases concerning nuclear power – by the Republic of Austria, which opposes nuclear energy as a matter of principle.

While awaiting, especially after the opinion of Advocate General Medina, the final judgment in the Paks II case, the inextricable link doctrine can be summed up as follows. The assessment of compatibility with other EU law provision is limited to issues that are inextricably linked to the State aid in question. The significance of the revolutionary statements in the HPC Judgment – or perhaps their simplification, as suggested by the General Court in Paks IIJudgement – appears to be diminishing in the light of post-HPC jurisprudence and EC's evolving practice.[67]

From the perspective of legal certainty and the beneficiaries of aid, it would be desirable for future judgments to confirm that an inextricable link exists only where the EU law provisions are so closely intertwined with the aid that they cannot be assessed separately, and where any incompatibility may affect the internal market. A clear distinction between issues that should be addressed in other proceedings (e.g. infringement procedures or national-level proceedings[68]) and

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66 Commission approves State aid to support construction of nuclear power plant in Czechia https://ec.europa.eu/commission/presscorner/detail/en/ip_24_2366 (accessed: 30.09.2024).

67 In the case of Belgium's lifetime extension of two nuclear reactors (Doel 4 and Tihange 3) SA.106107, EC reflects on its obligation in relation to the issues that are not inextricably linked accordingly to the Paks II judgment, see point 242 of that decision.

68 According to the case C-598/17 *A-Fonds* [2019] ECLI:EU:C:2019:352, [46]: "Whilst the assessment of the compatibility of aid measures with the internal market falls within the exclusive competence of the Commission, subject to review by the European Union Courts, it is for the national courts to ensure that the rights of individuals are safeguarded where the obligation to give prior notification of State aid to

those that fall within the Commission's remit under Article 108 TFEU would be highly welcome. This would undoubtedly bring greater clarity and predictability to the complex field of State aid law.

Once an inextricable link is established, the Commission is obliged to verify compliance with all relevant EU law provisions – particularly those raised during the context-shaping phase of the case, such as consultations held within the formal investigation procedure under Article 6 of Regulation 2015/1589. A failure to address issues raised during these consultations may lead the CJEU to find an error of insufficient reasoning, potentially resulting in a declaration of incompatibility of the State aid decision. However, similar consequences should not arise in relation to issues not raised during the consultation phase – unless their omission in the Commission's decision amounts to a manifest error of assessment.

Finally, it is reasonable to highlight that a significant change regarding environmental issues in the context of State aid may be introduced through regulatory measures by the Commission. At present, work is ongoing to establish a new procedure ensuring access to justice in environmental matters in relation to EU State aid decisions – in response to the findings of the Aarhus Convention Compliance Committee. The Commission aims to address these findings by adapting access-to-justice mechanisms to the specific characteristics of State aid law. The final outcome of these consultations will be worth following closely, as the solution proposed by the Commission could not only enable environmental NGOs to more effectively challenge State aid decisions before the CJEU, but also influence the future development of the inextricable link doctrine in cases involving environmental considerations.

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the Commission pursuant to Article 108(3) EC has been infringed Such disregard, if relied on by individuals and confirmed by the national courts, must lead those courts to draw from it all the consequences in accordance with their national law, without their decisions, however, implying an assessment of the compatibility of the aid with the internal market, which is a matter within the exclusive competence of the Commission, subject to review by the Court."

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