Reports of Cases

JUDGMENT OF THE GENERAL COURT (First Chamber)

15 December 2016*

[Text rectified by order of 10 July 2017]

(Competition — Abuse of dominant position — Greek markets for the supply of lignite and of wholesale electricity — Decision finding an infringement of Article 86(1) EC in conjunction with Article 82 EC — Granting or maintaining in favour of a public undertaking of rights to exploit public deposits of lignite — Definition of the relevant markets — Existence of inequality of opportunity — Obligation to state reasons — Legitimate expectations — Misuse of powers — Proportionality)

In Case T-169/08 RENV,

Dimosia Epicheirisi Ilektrismou AE (DEI), established in Athens (Greece), represented by P. Anestis, lawyer,

applicant,

supported by

Hellenic Republic, represented by P. Mylonopoulos and K. Boskovits, acting as Agents,

intervener,

v

European Commission, represented by T. Christoforou, acting as Agent, and by A. Oikonomou, lawyer,

defendant,

supported by

Elpedison Paragogi Ilektrikis Energeias AE (Elpedison Energeiaki), formerly Energeiaki Thessalonikis AE, established in Marousi (Greece),

and

Elliniki Energeia kai Anaptyxi AE (HE & D SA), established in Kifissia (Greece),

represented by P. Skouris and E. Trova, lawyers,

and by

* Language of the case: Greek.

Mytilinaios AE, established in Athens,

Protergia AE, established in Athens,

and

Alouminion tis Ellados VEAE, formerly Alouminion AE, established in Athens,

represented by N. Korogiannakis, I. Zarzoura, D. Diakopoulos and E. Chrisafis, lawyers,

interveners,

APPLICATION under Article 263 TFEU for annulment of Commission Decision C(2008) 824 final of 5 March 2008 on the granting or maintaining in force by the Hellenic Republic of rights in favour of DEI for extraction of lignite,

THE GENERAL COURT (First Chamber),

composed of H. Kanninen (Rapporteur), President, I. Pelikánová and E. Buttigieg, Judges,

Registrar: S. Spyropoulos, Administrator,

having regard to the written procedure and further to the hearing on 8 March 2016,

gives the following

Judgment

Background to the dispute

1. The applicant

1 The applicant, Dimosia Epicheirisi Ilektrismou AE (DEI), was established by Greek Law No 1468 of 2 and 7 August 1950 (FEK A' 169), as a public undertaking wholly owned by the Hellenic Republic. It was transformed into a joint stock company by Greek Law No 2414/1996 on the modernisation of public undertakings (FEK A' 135), although the Hellenic Republic continued to be the only shareholder.

2 The applicant enjoyed the exclusive right to produce, transmit and supply electricity in Greece until the first measures were adopted to liberalise the Greek electricity market, under Greek Law No 2773/1999 on the liberalisation of the market for electricity (FEK A' 286), which in particular transposed Directive 96/92/EC of the European Parliament and of the Council of 19 December 1996 concerning common rules for the internal market in electricity (OJ 1997 L 27, p. 20). In accordance with that law and with Greek Presidential Decree No 333/2000 (FEK A' 278), the applicant was transformed into a joint stock company from 1 January 2001, in which, pursuant to Article 43(3) of Law No 2773/1999, the Hellenic Republic's shareholding could not be less than 51% of the voting shares. That shareholding was 51.12% at the time of the adoption of the Decision of the European Commission forming the subject matter of the present action.

2. The market for lignite in Greece

3 Lignite is a carbon mineral, essentially used as a fuel for the production of electricity. Greece, with its known reserves of around 4 500 million tonnes on 1 January 2005, was, at the time of adoption of the Commission decision forming the subject matter of the present action, the fifth largest producer in the world and the second largest producer in the European Union.

4 Exploration and exploitation rights were granted in Greece to entities other than the applicant before the Second World War for small and medium-sized lignite mines, known as Achlada, Vevi and Amynteon/Vegora, which on 1 January 2007 represented total reserves of 210.5 million tonnes.

5 Under Article 22 of Greek Legislative Decree No 4029/1959 of 12 and 13 November 1959 (FEK A' 250), the applicant owns exclusive exploitation rights for lignite in the Arcadia Region, whose reserves are around 250 million tonnes. Those rights, which were renewed in 1976, will expire on 5 March 2026 and could be renewed for a period of 25 years.

6 A Mining Code was introduced in Greece by Greek Legislative Decree No 210/1973 (FEK A' 277), and then amended by Greek Law No 274/1976 (FEK A' 50) ('the Mining Code'). Articles 143 and 144 of that code provide that exploration and exploitation rights in public deposits are to be granted simultaneously, either following a tendering procedure or by direct award in urgent cases and for reasons of general interest.

7 Article 3(3) of Law No 134/1975 of 23 and 29 August 1975 (FEK A' 180) provides that, 'by virtue of a decision of the [Greek] Minister for Industry … it is possible to determine … areas … in which [the applicant] shall have the exclusive right to search, research and exploit solid combustible mineral materials'. By virtue of a number of ministerial decisions adopted on the basis of that provision, the applicant was granted exploration and exploitation rights for lignite deposits in the Amynteon, Prosilion-Trigonikon and Komnina regions, until 2018, corresponding to 378 million tonnes of reserves, and in the Flórina region, until 2024, representing around 140 million tonnes of reserves.

8 By Law No 134/1975, which permitted the merger of the undertaking Liptol AE with the applicant, the applicant also acquired Liptol's entire lignite exploration and exploitation rights in the Ptolemaïs region. Those rights, covering reserves of around 1 500 million tonnes, were renewed in 1976 until 5 March 2026 and could be renewed for a further period of 25 years.

9 By ministerial decisions of 1985 and 1994, adopted pursuant to Law No 134/1975, exploration rights only were granted to the applicant for the Dráma and Elassona lignite deposits, which represent around 1 000 million tonnes of reserves. These rights expired in 2005.

10 After 1985, exploration and exploitation rights were also granted to undertakings other than the applicant for seven small lignite deposits.

11 Thus, at the material time, of around 4 500 million tonnes of lignite reserves in Greece, the applicant's exploration and exploitation rights came to around 2 200 million tonnes; 85 million tonnes belonged to third parties and around 220 million tonnes were in public deposits explored and exploited by third parties, but supplying in part the applicant's power stations. No exploitation rights had yet been allocated in respect of about 2 000 million tonnes of lignite reserves in Greece.

3. The electricity market in Greece

Licences for the production of electricity and the construction of power stations

12 The Greek market for electricity was partly opened to competition under Law No 2773/1999 (see paragraph 2 above), which introduced prior authorisation for the construction of power stations and the generation of electricity, granted by decision of the Greek Minister for Development after an opinion of the Rythimistiki Archi Energias (RAE, the energy regulatory authority, Greece), and, moreover, an electricity transmission network management body, called the Hellenic Transmission System Operator SA (HTSO).

13 Article 15(4) of Law No 2773/1999, amended by Article 23(9) of Law No 3175/2003, authorised HTSO to hold tendering procedures — in some of which the applicant was not allowed to participate — for the construction and operation, in return for a subsidy, of power stations with the aim of ensuring that sufficient electricity production capacity would be maintained.

14 Pursuant to Article 42 of Law No 2773/1999, the applicant was granted a single licence for all the electricity power stations belonging to it which had been completed or were under construction on the date on which that law entered into force. Under the combined provisions of Article 8(5) of Greek Law No 2941/2001 (FEK A' 201) and Article 24 of Greek Law No 3377/2005 (FEK A' 202), the validity of that licence was extended until 31 December 2008.

15 Furthermore, in accordance with Article 23(12) of Law No 3175/2003, the applicant obtained a licence to replace old power stations, without the technologies to be used being specified, for a total of 1 600 megawatts (MW). The Hellenic Republic indicates that the power stations to be replaced accounted for 1 200 MW produced by gas-fired power stations and only 400 MW from lignite-fired power stations. In November 2007, the applicant announced that it would seek licences for two 450 MW lignite-fired power stations, called Florina II and Ptolemaida V.

16 As regards the lignite-fired power stations, all such power stations in existence belong to the applicants. Three applications by third undertakings to construct such power stations were rejected, as RAE considered that the applicants' financial capacity was inadequate and that the quantities of lignite envisaged were inadequate or not supported by adequate evidence. At the material time, a fourth application, by EFT Hellas AE, was still pending. Last, a fifth application, for a 460 MW power station, had been submitted by Heron AE on 26 March 2007.

17 As regards the electricity power stations other than those using lignite, the applicant obtained, on 16 July 2003, an electricity generation licence for a gas-fired combined cycle power station with a 400 MW capacity at Lavrion and, on 4 November 2003, a licence for a 120 MW gas turbine power station to be employed pending the commissioning of the abovementioned power station at Lavrion.

18 Eleven competitors of the applicant obtained licences for gas-fired power stations, with a total capacity of 4 114 MW, following a call for tenders launched by RAE which excluded, in particular, lignite-fired power stations. Other licences have also been issued since 2001 for combined cycle gas fired power stations and for one open cycle gas turbine. Overall, in March 2006, 21 licences, representing a total capacity of 5 930 MW, had been issued to undertakings other than the applicant for non-lignite-fired power stations. However, only one power station had actually been built.

19 As regards the combined heat and power stations and the renewable energy sources power stations, under Law No 2773/1999 they had priority for distribution if their capacity was below 50 MW, a regulated electricity selling price and an exemption, for small projects, of the obligation to obtain a

licence. Next, in order to facilitate the development of those power stations, Greek Law No 3468/2006 (FEK A' 129) removed the 50 MW cap, made the selling price more attractive, rationalised the licensing process and raised the thresholds below which a licence is not required.

Imports of electricity

20 The Greek interconnected electricity transmission system ('the ITS'), which covers the Greek continental territory and certain islands connected with that territory, was at the material time connected with the Italian electrical system, with a maximum interconnection capacity of 500 MW, and that of the countries to the north of Greece, namely Albania, Bulgaria and the former Yugoslav Republic of Macedonia ('the countries to the north'), with an interconnection of 600 MW. The total interconnection capacity with other networks therefore came to 1 100 MW. A new interconnector to link the ITS with the Turkish network, with a capacity of around 200 MW, was expected to become operational in 2008.

21 Since a substantial part of the interconnection capacity with the countries to the north was reserved for the applicant until 1 July 2007, and since a part of the interconnection capacity with Italy was administered by the Italian electricity network management body, a maximum of 500 MW (200 MW from the countries to the north and 300 MW from Italy) could in theory be imported at the material time by the applicant's competitors, which were expected to have access to 900 MW in the near future, representing 7.5% of total domestic installed capacity and 6.9% of total domestic capacity plus import capacity.

Mandatory day market

22 Law No 3175/2003 provided for the implementation, from May 2005, of a mandatory day market for all sellers and buyers of electricity in the ITS. On this market, producers and importers of electricity submit offers (indicating a price and a quantity of electricity) on the evening of every day, while suppliers and customers submit demand forecasts to cover their customers' needs. On the basis of those factors, HTSO prepares the power stations' hourly load programme for the following day. In that regard, it first takes into account estimates of the injection of electricity produced from renewable energies, combined heat and power stations and certain hydroelectricity power stations, which have priority. It then takes into consideration electricity offered by thermal power stations, including those running on lignite, gas and oil. For the latter power stations, the hourly rates offered by producers must be at least equal to the variable cost of the power station. The offers of electricity power stations with the lowest variable cost are therefore the first to be accepted. The price offered by the most expensive power station which is eventually included in the distribution programme in order to satisfy demand, called the 'System Ceiling Price' ('the SCP'), is the price finally paid to all producers and importers whose offers have been accepted.

Administrative procedure

23 In 2003, the Commission received a complaint alleging that the Hellenic Republic had granted the applicant an exclusive licence to explore and exploit lignite in Greece, contrary to Article 86(1) EC in conjunction with Article 82 EC.

24 On 1 April 2004, the Commission sent a letter of formal notice to the Hellenic Republic concerning, in particular, the grant to the applicant of exclusive rights to exploit lignite deposits, which enabled it to maintain or extend its dominant position on the wholesale electricity market. That thus constituted, according to that letter, an infringement of Article 86 EC, in conjunction with Article 82 EC. On 3 May 2004, the Commission sent a copy of that letter to the applicant, inviting it to submit observations. The Hellenic Republic and the applicant replied by letters of 5 July 2004.

25 By letter of 21 September 2005, the Commission requested clarification on a number of points from the Hellenic Republic, which replied by letters of 22 and 28 November 2005 and 19 June 2006.

26 On 18 October 2006, the Commission sent a supplementary letter of formal notice to the Hellenic Republic, in which it stated that the new facts communicated by the Hellenic Republic did not alter the objections set out in the first letter of formal notice.

27 The applicant and the Hellenic Republic submitted their observations on the supplementary letter of formal notice on 19 and 24 January 2007 respectively.

28 On 8 February 2008, the applicant submitted to the Commission data on the Greek electricity market updated for the period 2006-2007.

29 On 5 March 2008, the Commission adopted Decision C(2008) 824 final on the granting or maintaining by the Hellenic Republic of rights in favour of the applicant for the extraction of lignite ('the contested decision').

Contested decision

30 In the contested decision, the Commission examined the impact of certain measures adopted by the Hellenic Republic on two distinct markets, namely the market for the supply of lignite in Greece ('the upstream market') and the wholesale electricity market in the ITS ('the downstream market'). The Commission pointed out that the latter market had been liberalised, in accordance with Directive 96/92, from 19 February 2001 and included the supply to eligible customers of domestically produced and imported electricity (recitals 60, 150 and 158 to 172 of the contested decision).

31 The Commission considered that the applicant held a dominant position on the upstream market, where its market share had been above 97% since 2000. The applicant also held a dominant position on the downstream market, since, first, its market share was above 85%; second, there was no prospect of a significant new entry by a competitor; and, third, imports, which accounted for 7% of total consumption, did not represent an effective competitive constraint. In addition, the downstream market, which represented more than 90% of total consumption of electricity in Greece, was a substantial part of the internal market (recitals 177 and 179 of the contested decision).

32 As for the measures adopted by the Hellenic Republic, the Commission found that, pursuant to Legislative Decree No 4029/1959 and Law No 134/1975, the Hellenic Republic had granted the applicant exploitation rights for 91% of the public lignite deposits for which the rights had been granted and, in spite of the possibilities offered by the Mining Code, had never granted a right in a significant deposit to any of the applicant's competitors. The Commission stated that, because quasi-monopolistic rights to exploit lignite had been maintained in favour of the applicant, the Hellenic Republic had maintained or reinforced the applicant's dominant position on the downstream market, in so far as the lignite-fired power stations were the cheapest on that market and therefore the most used (recitals 185 to 188 and 238 of the contested decision).

33 Last, the Commission found that the Hellenic Republic had not relied on Article 86(2) EC to justify the adoption of the measures in question and considered that those measures affected interstate trade (recitals 239 of 244 of the contested decision).

34 Article 1 of the contested decision is worded as follows:

'Article 1 and Article 22(1) of Legislative Decree No 4029/1959, Article 3(1) of Law No 134/1975 and the Decisions of the Greek Minister for Industry, Energy and Technology of 1976 (FEK B' 282), 1988 (FEK B' 596) and 1994 (FEK B' 633) are contrary to Article 86(1) EC, read in conjunction with

Article 82 EC, to the extent that they grant and maintain in force privileged rights to [the applicant] for the exploitation of lignite in Greece, thereby creating inequality of opportunity between economic operators as regards access to primary fuels for the production of electricity and enabling [the applicant] to maintain or reinforce its dominant position on the Greek wholesale electricity market by excluding or hindering market entry by newcomers.'

35 It should be pointed out that Article 1 of the contested decision contains a material error, in that it refers to Article 3(1) of Law No 134/1975, whereas it is clear from the file that the reference should in reality be to Article 3(3) of that law.

36 Article 2 of the contested decision states that the Hellenic Republic is to inform the Commission, within two months, of the measures it intends to take in order to correct the anticompetitive effects of the State measures referred to in Article 1 of that decision and also that those measures must be adopted and implemented within eight months from the notification of that decision.

Procedure before the General Court and the Court of Justice

37 By application lodged at the Court Registry on 13 May 2008, the applicant requested the Court to annul the contested decision and to order the Commission to pay the costs.

38 By document lodged at the Court Registry on 5 September 2008, the Hellenic Republic sought leave to intervene in support of the form of order sought by the applicant.

39 By letters lodged at the Court Registry on 9 September 2008, Elpedison Paragogi Ilektrikis Energeias AE ((Elpedison Energeiaki), formerly Energeiaki Thessalonikis AE) and Elliniki Energeia kai Anaptyxi AE (HE & D SA), undertakings active in electricity generation in Greece ('the interveners'), sought leave to intervene in support of the form of order sought by the Commission. In accordance with Article 116(1) of the Rules of Procedure of the General Court of 2 May 1991, those applications were notified to the parties.

40 The Commission lodged its defence at the Court Registry on 11 September 2008, requesting the Court to dismiss the action and to order the applicant to pay the costs.

41 The Commission then lodged its observations on the interveners' applications for leave to intervene, on 23 October 2008. By documents lodged at the Court Registry on 7 and 10 November 2008 respectively, the applicant raised objections against each of those applications for leave to intervene.

42 By order of 3 December 2008, the President of the Seventh Chamber of the General Court granted the Hellenic Republic's application for leave to intervene.

43 By document lodged at the Court Registry on 19 December 2008, the applicant, in the context of the measures of organisation of procedure provided for by Article 64 of the Rules of Procedure of 2 May 1991, requested the General Court to order, in the event that the Commission did not agree to modify the defence of its own initiative, that a certain formulation appearing in that document be replaced.

44 In its observations, lodged at the Court Registry on 23 January 2009, on the applicant's request for measures of organisation of procedure, the Commission agreed, as proposed by the applicant, to modify a certain formulation in the defence.

45 The Hellenic Republic lodged its statement in intervention at the Court Registry on 18 February 2009.

46 By orders of 18 September 2009, the President of the Seventh Chamber of the General Court allowed the interveners' intervention. The interveners lodged their statement in intervention at the Court Registry on 13 November 2009.

47 The Commission, by letters of 23 October 2008 and 19 February and 16 March 2009, and the applicant, by letters of 7 and 10 November 2008, 8 January and 23 June 2009 and 28 January 2010, requested that certain confidential material contained in the application, the defence, the reply, the rejoinder, the observations on the statements in intervention of the Hellenic Republic and the observations on the interveners' statement in intervention not be notified to the interveners. Notification of those procedural documents to the interveners was limited to the non-confidential version, a decision which they did not challenge.

48 By judgment of 20 September 2012, *DEI* v *Commission* (T-169/08, EU:T:2012:448), the General Court annulled the contested decision and ordered the Commission to bear its own costs and to pay the costs incurred by the applicant. The Hellenic Republic and the interveners were ordered to bear their own costs.

49 By application lodged at the Registry of the Court of Justice on 30 November 2012, the Commission brought an appeal against the judgment of the General Court, pursuant to Article 56 of the Statute of the Court of Justice of the European Union.

50 By documents lodged at the Registry of the Court of Justice on 25 March 2013, Mytilinaios AE, Protergia AE and Alouminion AE, undertakings operating in the Greek electrical sector ('the interveners in the appeal'), applied for leave to intervene in the proceedings on appeal referred to in paragraph 49 above in support of the form of order sought by the Commission. By order of 11 July 2013 the Vice-President of the Court granted their application.

51 By judgment of 17 July 2014, *Commission* v *DEI* (C-553/12 P, 'the judgment on appeal', EU:C:2014:2083), the Court of Justice set aside the judgment of the General Court, rejected the second and fourth parts of the first plea, referred the case back to the General Court for adjudication on the matters which it had not resolved and reserved the costs.

Procedure and forms of order sort after referral

52 Following the judgment on appeal, and in accordance with Article 118(1) of the Rules of Procedure of 2 May 1991, the case was assigned to the First Chamber by decision of the President of the General Court of 3 September 2014. In accordance with Article 119(1) of the Rules of Procedure of 2 May 1991, the applicant, the Commission, the Hellenic Republic, Elpedison Energeiaki and the interveners in the appeal lodged written observations at the Court Registry on 3 October 2014, 27 November 2014, 30 March 2015, 2 April 2015 and 17 April 2015 respectively.

53 On a proposal from the Judge-Rapporteur, the Court (First Chamber) decided to open the oral procedure and on 26 January 2016, by way of measures of organisation of procedure pursuant to Article 89 of the Rules of Procedure of the General Court, invited the parties to answer certain questions, which they did within the prescribed period.

54 The parties presented oral argument and answered the Court's oral questions at the hearing on 8 March 2016.

55 The applicant, supported by the Hellenic Republic, claims that the Court should:

— annul the contested decision;

— order the Commission to pay the costs.

56 The Commission, supported by the interveners and the interveners in the appeal, contends that the Court should:

— dismiss the action;

— order the applicant to pay the costs.

Law

57 The applicant puts forward four pleas in law in support of the action, alleging, first, an error of law in the application of the combined provisions of Article 86(1) EC and Article 82 EC and a manifest error of assessment; second, breach of the obligation to state reasons; third, breach of the principles of legal certainty, the protection of legitimate expectations and the protection of private property, and misuse of powers; and, fourth, breach of the principle of proportionality.

1. First plea, alleging an error of law in the application of the combined provisions of Article 86(1) EC and Article 82 EC and a manifest error of assessment

58 This plea consists of five parts, alleging:

— first, a manifest error of assessment in the definition of the relevant markets;

— second, absence of extension of the dominant position on the upstream market to the downstream market, as concerns the interpretation of the condition relating to the existence of exclusive or special rights in order for there to be an infringement of Article 86(1) EC in conjunction with Article 82 EC;

— third, absence of inequality of opportunity to the disadvantage of the applicant's competitors;

— fourth, absence of extension of the dominant position on the upstream market to the downstream market, as regards the alleged privileged access to a primary fuel; and

— fifth, a manifest error of assessment in that the Commission failed to take developments on the downstream market into account.

59 As the Court of Justice rejected the second and fourth parts in the judgment on appeal, only the first, third and fifth parts need to be examined.

First part, alleging a manifest error of assessment in the definition of the relevant markets

Preliminary observations

60 Before it is possible to assess whether an undertaking such as the applicant has a dominant position within the meaning of Article 82 EC, it is necessary to define the relevant market, both from the point of view of the goods or services concerned and from the geographic point of view (judgment of 14 February 1978, *United Brands and United Brands Continentaal* v *Commission*, 27/76, EU:C:1978:22, paragraph 10). The purpose of that market definition is to define the perimeter within which it must be assessed whether an undertaking is in a position to behave to an appreciable extent

independently of its competitors, its customers and consumers (see, to that effect, judgment of 9 November 1983, *Nederlandsche Banden-Industrie-Michelin* v *Commission*, 322/81, EU:C:1983:313, paragraph 37).

61 For the purposes of defining the relevant market in order to apply Article 82 EC, the possibilities of competition must be assessed in the context of the market comprising the totality of the products which, with respect to their characteristics, are particularly suitable for satisfying constant needs and are only to a limited extent interchangeable with other goods or services; these possibilities of competition must also be assessed in the light of competitive conditions and the structure of supply and demand (judgments of 9 November 1983, *Nederlandsche Banden-Industrie-Michelin* v *Commission*, 322/81, EU:C:1983:313, paragraph 37, and of 17 December 2003, *British Airways* v *Commission*, T-219/99, EU:T:2003:343, paragraph 91). As stated, in particular, in paragraph 7 of the Commission Notice on the definition of the relevant market for the purposes of Community competition law (OJ 1997 C 372, p. 5), the relevant product market therefore comprises all the products or services which are regarded as substitutable by the consumer, by reason of the products' characteristics, their prices and their intended use.

62 The geographic market can thus be defined as the territory in which all traders operate under the same conditions of competition in so far as concerns the relevant goods or services. From that point of view, it is not necessary for the objective conditions of competition between traders to be perfectly homogeneous. It is sufficient if they are similar or sufficiently homogeneous (see, to that effect, judgment of 14 February 1978, *United Brands and United Brands Continentaal* v *Commission*, 27/76, EU:C:1978:22, paragraphs 44 and 53). In addition, that market may be limited to a single Member State (see, to that effect, judgments of 9 November 1983, *Nederlandsche Banden-Industrie-Michelin* v *Commission*, 322/81, EU:C:1983:313, paragraph 28, and of 1 July 2008, *MOTOE*, C-49/07, EU:C:2008:376, paragraph 34).

63 In the present case, it should be borne in mind that, in recital 158 of the contested decision, the Commission stated that the measures referred to in Article 1 of that decision ('the measures at issue') concerned two separate markets, the upstream market and the downstream market. According to the Commission, by granting lignite exploitation rights virtually exclusively to the applicant and excluding or impeding any new entry to the upstream market by competitors, those measures enabled the applicant to maintain or strengthen its dominant position on the downstream market. The applicant, supported by the Hellenic Republic, essentially disputes the Commission's definition of the markets. It divides its arguments into two subsidiary parts.

First subsidiary part, relating to the definition of the upstream market

64 The Commission stated, in recitals 161, 168 and 169 of the contested decision, that the upstream market was a separate product market, the geographic dimension of which was national.

65 The applicant and the Hellenic Republic submit that that definition of the upstream market is wrong, as the Commission has not applied the criteria which it itself set out in the Notice on market definition (see paragraph 61 above), namely (i) demand substitutability and (ii) supply substitutability, and also potential competition. They put forward four complaints — which the Commission disputes — to challenge that definition.

– *First complaint*

66 The applicant and the Hellenic Republic claim that, as the downstream market, on which the alleged infringement of Article 82 EC took place, is the wholesale market for the supply of electricity in the ITS, the upstream market cannot be confined to the supply of lignite, but must consist of all fuels used to produce electricity. If the upstream market were defined as the Commission claims, the

downstream market would then also have to be divided according to the fuel used to produce the energy supplied. They further submit that electricity producers choose from among the competing fuels the one to be used in a particular power station, taking into account, inter alia, first, the 'under-capacity' on the ITS, where supply is below demand; second, the operating cost of a power station, which includes the cost of fuel, operating and maintenance costs and the environmental costs; and, third, investments and necessary construction periods, which are shorter for a gas-fired power station than for one using lignite. The Commission therefore ought to have included coal, nuclear fuel and gas in the definition of the upstream market. Gas-fired power stations are used on a continuous basis, moreover, and represent a significant installed capacity.

67 The Commission disputes the arguments put forward by the applicant and the Hellenic Republic.

68 In that regard, it should be observed that it is indeed correct that an electricity producer who decides to embark on the construction of a power station is free to design it in such a way that it will be fired by the fuel of his choice, that decision being taken on the basis of several economic parameters, including, possibly, those to which the applicant refers in paragraph 66 above.

69 However, the applicant does not dispute the Commission's assertion, in recital 13 of the contested decision, that lignite-fired power stations are specifically designed to operate on that fuel alone and that it is very expensive to convert them to coal-fired power stations. Therefore, if an electricity producer decides to construct a lignite-fired power station, he will subsequently be restricted to obtaining only that fuel in order to produce electricity in that power station during the whole of its working life.

70 Lignite suppliers therefore do not compete with suppliers of the other fuels used to produce electricity so far as sales to lignite-fired electricity power stations are concerned, as such power stations constitute a captive market. It is apparent from recital 12 of the contested decision, and is not contradicted by the applicant, that virtually all lignite exploited in Greece is used in the production of electricity. Lignite-fired power stations therefore do not represent a negligible part of lignite producers' customers, but are their main, indeed their exclusive, market. That market is a market of considerable size, moreover, since it is clear from tables 11 and 14 of the contested decision that 43% of installed capacity electricity production within the ITS and 59.7% of total production, respectively, corresponded to such power stations in 2006.

71 Furthermore, as the investments required in order to build a lignite-fired power station are, according to the applicant itself, very high, it is reasonable to consider that the operation of such a power station, once it is in service, would be difficult to abandon for reasons connected with even a significant increase in the price of lignite, which reinforces the market power of lignite suppliers and their ability to act relatively independently of changes in the price of other fuels used to produce electricity.

72 The argument put forward by the applicant and the Hellenic Republic that all of those other fuels should also be included in the upstream market cannot therefore call the Commission's definition of the market in question. The competition which electricity produced from any other fuel represents for electricity produced from lignite is seen, rather, on the downstream market. That definition therefore raises questions relating to that market, as will be examined below.

73 The present complaint must therefore be rejected.

– *Second complaint*

74 The applicant claims that, in its definition of the upstream market, the Commission ought to have taken into account the competitive pressure applied by imported electricity.

75 The Commission disputes the applicant's argument.

76 In that regard, it is sufficient to observe that, notwithstanding the possibility of importing electricity from Italy or the countries to the north, the operators of lignite-fired power stations are still, in practice, required to obtain the fuel required to run those power stations from the lignite suppliers.

77 Accordingly, the fact that imports of electricity are possible does not mean that the Commission's definition of the upstream market can be considered incorrect, independently of whether the possibility of such imports may result in significant competitive pressure on the downstream market.

78 The present complaint must thus be rejected.

– *Third complaint*

79 The applicant and the Hellenic Republic submit that the Commission erred in defining lignite as a 'primary fuel', which in their submission had an impact on the definition of the upstream market. If that concept referred to a fuel used for the production of electricity in 'base-load power stations', which permanently feed electricity into the network, the upstream market ought to include coal and gas, which may also be used as fuels for 'base-load power stations'.

80 The Commission disputes the arguments put forward by the applicant and the Hellenic Republic.

81 On this point, it should be borne in mind that, in recital 189 and Article 1 of the contested decision, the Commission stated that the maintenance of rights to exploit lignite in favour of the applicant would create inequality of opportunity between economic operators with as regards access to 'primary fuels' for the production of electricity (see paragraph 34 above). By using the expression 'primary fuels', which has no technical meaning in the context of the contested decision, the Commission sought only to refer to the importance and the essential role of lignite in the downstream market, and not to define the upstream market.

82 The same applies to the use in the contested decision of the expression 'base-load power stations'. If, as the applicant asserts, these are the power stations that permanently feed electricity into the network, it is apparent from the contested decision that the Commission analysed all the sources of electricity production, and all the types of technology used, and concluded that access to lignite continued to be essential in Greece in order to allow actual or potential competition on the downstream market, and that it did not consider that the upstream market was the market for lignite solely because only lignite could be used to fire the power stations that permanently feed electricity into the network.

83 The present complaint must therefore be rejected.

– *Fourth complaint*

84 The applicant claims that the definition of the upstream market is incorrect in that, in geographic terms, that market should not be limited to lignite produced in Greece, but should also include lignite from deposits in certain neighbouring countries and territories. The Hellenic Republic adds that the Commission's view that imports of lignite are unlikely is incorrect, since in early 2009 it issued a licence for the production of electricity from lignite to a competitor of the applicant, which could guarantee a long-term supply of imported lignite.

85 The Commission disputes the applicant's arguments.

86 It should be observed that the Commission stated, in recital 13 of the contested decision, that, owing to the fact that lignite is the least calorific of all categories of coal, it cannot be transported over long distances, and that trade in lignite is virtually non-existent outside direct supplies between deposits close to lignite-fired power stations and those power stations. The Commission also stated, without being contradicted by the applicant or the Hellenic Republic, that all lignite-fired power stations in the European Union are close to lignite deposits and that consumption of imported lignite was 0.1% in Member States as a whole and non-existent in Greece.

87 Furthermore, as regards lignite from territories adjoining Greece, the Commission observed, in recital 16 of the contested decision, that deposits in those territories were more than 100 km from the Greek border and therefore too far away to be able to represent a potential source of supply for the lignite-fired power stations in the ITS and, moreover, were already exploited by local undertakings to produce electricity on the local electricity networks. Thus, although the Commission acknowledges, in recital 161 of the contested decision, that it is possible in theory that lignite might be supplied, in order to fuel power stations on the ITS, from deposits in those territories, in recital 169 of the contested decision it concluded that that possibility could not constitute a realistic alternative to Greek lignite.

88 The applicant claims, however, that the problems and the cost associated with transporting lignite are considerably reduced in the case of supplies of lignite from certain territories adjoining Greece because of the high calorific value of the product and its price. In order to substantiate that assertion, the applicant refers to an email sent to the Commission on 8 February 2008. However, that email contains no analysis relating to the economic profitability of imports of lignite from those territories. In fact, in that email, the applicant merely asserts that the upstream market is larger than that defined by the Commission in the contested decision and, as proof of that assertion, submits three offers which it had received from three undertakings concerning the supply of lignite from the former Yugoslav Republic of Macedonia and Kosovo.

89 First, as regards the first two offers, relating to the supply of 300 000 tonnes of lignite per annum from Kosovo, with a calorific power of 1 800 kcal/kg, and of 600 000 tonnes per annum from the former Yugoslav Republic of Macedonia, with a calorific power of between 2 800 and 3 000 kcal/kg, and, moreover, of 1 000 000 tonnes from Kosovo, the calorific power of which is not specified, to be supplied in 2007, it should be observed that the price to be paid for those quantities of lignite is not apparent from the file. The existence of those offers therefore does not suffice to prove that imports of lignite would be economically profitable.

90 As regards the third offer, relating to a quantity of xylite from the former Yugoslav Republic of Macedonia of 300 000 tonnes per annum, to be supplied to two power stations close to the border with that country, with a calorific power of 2 700 kcal/kg, it states the price to be paid by the applicant, namely EUR 37.5 per tonne, which could vary according to the quality of the product finally supplied, according to a predetermined rule. However, the applicant does not explain whether, taking that price into account, the import of xylite, on the assumption that it could be used in lignite-fired power stations, would actually be profitable. Furthermore, it should be pointed out that the letter containing that third offer mentions the problems that imports of those quantities would cause at the border, since, as it would require traffic of 60 trucks per day, it would use up the clearance capacity of the customs post closest to the power stations served.

91 Second, it should be noted that the undertakings making the offers received by the applicant did not commit themselves, in those offers, to delivering fuel in the long term. However, the applicant does not dispute the Commission's observation in recital 203 of the contested decision that the quantity of lignite required by a lignite-fired power station over its lifespan (40 to 45 years) is several millions of tonnes. The Commission pointed out, for example, that the Vevi deposit, which has reserves of 90 million tonnes, was supposed to fuel a 400 MW power station during its lifespan, at a rate or around 2 000 000 tonnes per annum.

92 It is therefore unrealistic to consider that an averagely prudent investor would commit to the heavy costs which, according to the applicant itself, are associated with the construction of a lignite-fired power station to produce electricity on the ITS without being guaranteed supplies in the long term.

93 Third, it should be observed that the applicant does not state that it accepted any of the offers received, which indicates rather that they had not been considered to be sufficiently competitive at the material time. A further strong indication in that sense is the absence of imports of lignite into Greece (see paragraph 86 above). As lignite is the fuel most used to generate electricity on the ITS, it would be difficult to explain the absence of imports if, as the applicant claims in essence, the transport of lignite from territories adjoining Greece was economically profitable.

94 Therefore, while it cannot be precluded that imports of lignite from certain territories adjoining Greece for power stations close to the border between Greece and the countries to the north may have occasionally taken place, it must be considered that the applicant has not succeeded in showing that such imports were real alternative source of supply to lignite deposits on the ITS.

95 That conclusion cannot be called in question by the Hellenic Republic's argument that on 7 January 2009 Heron was granted the licence to build a lignite-fired power station for which it had applied on 26 March 2007 (see paragraph 16 above), when it had mentioned, as sources of fuel, deposits outside Greece.

96 [As rectified by order of 10 July 2017] In fact, as the Commission correctly claims, the licence granted to Heron on 7 January 2009 does not explain in detail how that undertaking was to obtain supplies of lignite. As the Commission notes, a more detailed explanation is set out in the opinion issued by RAE in the procedure culminating in the grant of that licence. However, it is apparent from that opinion that Heron had put forward as the main source of lignite for the proposed power station two deposits within the ITS, one of which, the Vevi deposit, was 20 km from the proposed site of the power station. RAE mentioned the construction of a railway line between that deposit and the new power station. The import of a quantity of 3 000 000 tonnes from the territory of Kosovo is indeed mentioned as an alternative source of lignite for the proposed power station, but that does not support the conclusion that Heron would have applied for and obtained a licence to build a lignite-fired power station had it not expected to obtain supplies from a nearby deposit, such as the Vevi deposit.

97 Furthermore, in its response to the questions put by the Court in the context of the measures of organisation of procedure of 26 January 2016 and at the hearing, the Hellenic Republic confirmed that Heron was not under a legal obligation to build the proposed power station. The only possible consequence if Heron should decide to cancel its project was that its licence to build would be withdrawn. Therefore the mere fact that Heron obtained that licence does not show that it considered that the construction of the proposed power station was possible in the event that it did not obtain rights to exploit the Vevi deposit.

98 [As rectified by order of 10 July 2017] The existence of the licence granted to Heron does not therefore suffice to establish that the construction of a lignite-fired power station on the ITS would be economically successful without access to the lignite deposits currently existing on that territory. The fact that the only case in the file in which an undertaking mentioned imported lignite as a possible source of supply for a proposed power station is the one in which that undertaking had applied for the rights to exploit a deposit 20 km from that power station indicates, rather, the economic need for deposits close to lignite-fired power stations. A further indication is the fact that, as the Commission stated at the hearing, without being contradicted by the applicant or the Hellenic Republic, Heron, which was ultimately not granted rights to exploit the Vevi deposits, has thus far not commenced construction of the proposed power station.

99 Last, as the Commission observes, nothing in the licence granted to Heron or in the RAE opinion relating to that licence indicates that the quantities of lignite that could be imported would be guaranteed throughout the lifespan of the proposed power station; nor has the Hellenic Republic supplied any information relating to the price of the lignite to be imported by Heron that would permit a comparison of its profitability, for the purposes of electricity production in the ITS, with lignite in the Greek deposits.

100 In the light of all of the foregoing considerations, the present complaint must be rejected.

101 It must therefore be concluded that the applicant has not succeeded in establishing that the Commission erred in defining the upstream market in the contested decision. Accordingly, the first subsidiary part is unfounded.

Second subsidiary part, relating to the definition of the downstream market

102 It should be borne in mind that, in recital 162 of the contested decision, the Commission defined the downstream market as the market for the production of electricity in power stations of the ITS and the import of electricity through interconnectors for the purpose of resale.

103 In order to challenge that definition of the downstream market, the applicant relies in essence on two complaints, which the Commission disputes.

– *First complaint*

104 The applicant asserts that, in order to define the downstream market, the Commission wrongly relied on data that preceded the creation of the mandatory day system and that it failed to take into account the degree to which that market had been liberalised.

105 The Commission disputes the applicant's assertion.

106 It should be observed at the outset that, even on the assumption that that assertion were true, that would not permit the conclusion that the Commission's definition of the downstream market was incorrect. The applicant itself does not state that the Commission would have arrived at a different definition of that market if it had relied on more relevant data.

107 In any event, it follows from the contested decision, read as a whole, that the Commission based its analysis of the downstream market on all the material which had been submitted to it before it adopted that decision. It does not follow from that decision, as confirmed by paragraphs 201 to 203 below, that the Commission confined its assessment to material which had reached it before 18 October 2006. On the contrary, in recitals 103 to 106 of the contested decision the Commission described the rules governing that market, which it also examined in recitals 164 to 166 of that decision, and, in recital 222 of that decision, it took certain particular features of the relevant market into account and on that basis established that lignite was the most advantageous fuel for the production of electricity in the ITS.

108 The present complaint must therefore be rejected.

– *Second complaint*

109 The applicant claims that the Commission wrongly failed to distinguish, in the contested decision, the competitive pressure brought to bear by imported electricity according to the different types of fuel. By way of example, imported electricity from hydroelectric and nuclear power stations is significantly less expensive than electricity produced in Greece and enters the system before Greek electricity, thus ousting other power stations, including lignite-fired power stations.

110 That argument, which the Commission disputes, is factually incorrect. The Commission included imported electricity in the downstream market, as is apparent from the definition of that market set out in recital 162 of the contested decision and referred to in paragraph 102 above. The Commission found that the real import capacity represented, at the material time, only around 7% of installed capacity on the downstream market, which the applicant has not disputed. The Commission therefore did not fail to take the competitive pressure of imported electricity into account, but, in the light of the relatively small quantity of imported electricity by comparison with total production capacity installed in the ITS and consumption, it considered that at the material time lignite continued to be a particularly attractive fuel for the production of electricity in that market.

111 The second complaint must therefore be rejected.

112 It must therefore be concluded that the applicant has not succeeded in establishing that the Commission erred in its definition of the downstream market in the contested decision. Accordingly, the second subsidiary part is unfounded.

113 As no error has been found in the definition of the markets referred to in the contested decision, the first part of the first plea must be rejected.

Third part of the first plea, alleging absence of inequality of opportunity to the disadvantage of new competitors

114 According to the case-law of the Court of Justice, a system of undistorted competition can be guaranteed only if equality of opportunity is secured as between the various economic operators. It follows that if inequality of opportunity between economic operators, and thus distorted competition, is the result of a State measure, such a measure constitutes an infringement of Article 86(1) EC read with Article 82 EC (see the judgment on appeal, paragraphs 43 and 44 and the case-law cited).

115 It should be borne in mind that, in the contested decision, the Commission considered that the measures at issue were capable of creating inequality of opportunity in favour of the applicant on the ground that they granted the applicant virtually exclusive access to lignite suitable for electricity production in the ITS, when it was the most advantageous fuel for that purpose.

116 In order to rebut that finding, the applicant relies, in essence, on five complaints.

117 Those complaints are disputed by the Commission.

First complaint

118 The applicant observes that the rights to exploit around 2 000 million tonnes of lignite reserves, including 1 230 million tonnes of reserves that could be used for the production of electricity, had not yet been granted at the material time. Its competitors could therefore obtain lignite by applying for those rights. The rules applicable in that regard have been de facto the same for all undertakings since 1994, when the applicant was last granted rights. Thus, a tendering procedure has been launched and almost completed for the Vevi deposit.

119 The Commission disputes the applicant's arguments.

120 First, it should be observed that it is apparent from paragraphs 5 to 12 above that the applicant was granted exploration and exploitation rights for virtually all public lignite deposits for which such rights had been granted in Greece at the material time. Specifically, the rights granted to the applicant corresponded to around 2 200 million tonnes on 1 January 2007 and represented 91% of the reserves of the public deposits for which such rights had been granted.

121 It is also apparent from paragraph 11 above that, of around 4 500 million tonnes of lignite reserves in Greece, the exploration and exploitation rights granted to third parties and capable of being used for the production of electricity in lignite-fired power stations not belonging to the applicant came to around 85 million tonnes.

122 Most of the grants of exploitation rights from which the applicant benefited were made either under Ministerial Decisions adopted in accordance with Article 36(3) of Law No 3734/2009, or under a specific legislative instrument, liked Law No 134/1975, from which the applicant's competitors could not benefit.

123 It is admittedly the case that Article 36(3) of Law No 3734/2009 repealed Article 3(3) of Law No 134/1975, which was called in question in Article 1 of the contested decision. However, that provision was repealed after the contested decision had been adopted and is merely a measure adopted in order to comply with that decision. It cannot therefore show that the Commission's analysis in the contested decision was incorrect.

124 Furthermore, and in any event, as the applicant and the Hellenic Republic acknowledge, it was in 1994 that, on the basis of Law No 134/1975, the last exploitation rights for public deposits of lignite in Greece were granted, and granted directly to the applicant, by Ministerial Decision. Thus, although the Mining Code does not formally preclude the possibility of granting to interested undertakings, other than the applicant, rights over public deposits of lignite which have not yet been allocated, no significant deposit had been the subject of a concession granted to those undertakings, notwithstanding the interest which they had shown, when the contested decision was adopted. The applicant was de facto the only undertaking able to exploit a significant quantity of lignite on the upstream market.

125 Accordingly, the mere fact that Law No 134/1975 was repealed does not suffice to correct the inequality of opportunity on the wholesale market for electricity caused by the fact that the applicant's privileged access to the rights to exploit lignite was maintained.

126 In that regard, it should be added that the Hellenic Republic has not put forward, either during the administrative procedure or before the Court, any argument capable of justifying the failure to grant rights to exploit unallocated deposits and, in particular, significant deposits such as those at Dráma and Elassona.

127 Nor does the Mining Code prevent the applicant from applying for and being granted rights to exploit deposits which have not yet been allocated. Thus, even if the Hellenic Republic decided to grant rights to exploit such deposits, according to the procedure laid down in the Mining Code, that could not in itself ensure that the applicant's competitors on the downstream market would be guaranteed sufficient access to lignite as a fuel for the production of electricity. In fact, following that procedure, the applicant could acquire those rights and thus increase its portfolio.

128 Second, it must be observed that the Hellenic Republic has adopted no alternative measure to the grant of exploitation rights that would be capable of guaranteeing the applicant's competitors sufficient access to lignite as a fuel for the production of electricity or of eliminating any advantages that the applicant derives from its virtually exclusive access to that fuel.

129 Third, it is apparent from recital 80 of the contested decision that the Hellenic Republic adopted certain asymmetrical measures to the applicant's disadvantage following the liberalisation of the downstream market. However, because they consist, in essence, in holding competitive tendering procedures, from which the applicant is excluded, for the construction of power stations using fuels other than lignite, those measures are not capable of guaranteeing the applicant's competitors sufficient access to lignite as a fuel for the production of electricity.

130 It follows from the foregoing that when the contested decision was adopted the applicant de facto benefited from privileged access to lignite as a fuel for the production of electricity, notwithstanding that, strictly speaking, rights to exploit the as yet unallocated deposits might be granted to its competitors.

131 The present complaint must therefore be rejected.

Second complaint

132 The applicant, supported by the Hellenic Republic, observes that the Commission itself acknowledges that, in the downstream market, any undertaking may apply for and obtain a licence to produce electricity and that a significant number of undertakings had already obtained such licences when the contested decision was adopted. The fact that, on the date of adoption of that decision, such licences had not yet been obtained for the construction of lignite-fired power stations is not the consequence of inequality of opportunity, but of objective reasons, such as the inability to guarantee either a sufficient supply of fuel or the requisite financial capacity. The arrival in Greece of large European undertakings, particularly after the adoption of the contested decision, shows that the downstream market has been opened to new producers, which no longer justifies the existence of the subsidised tendering procedures.

133 The Commission disputes the applicant's arguments.

134 First, it should be observed that the fact that the applicant's competitors, including large undertakings, have been able to obtain licences to produce electricity in the ITS does not demonstrate the absence of inequality of opportunity on that market to their disadvantage. It shows only that the barriers to entry are not such that all competition is excluded.

135 Furthermore, it is apparent from tables 12 and 14 of the contested decision that in 2006, and therefore five years after the partial liberalisation of the downstream market, the applicant had 90% of installed production capacity on the ITS and also produced 93.6% of the total electricity distributed. The extent to which the applicant's competitors had penetrated that market at the material time therefore tended rather to show that inequality between the applicant and its competitors persisted, a fortiori because, according to the applicant itself, the ITS was in a situation of under-capacity which, in principle, ought to have been corrected, in particular, by the arrival of new competitors.

136 Second, it is apparent from recitals 77 and 211 of the contested decision, and it has not been disputed by the applicant or the Hellenic Republic, that all applications for the construction of lignite-fired power stations submitted by the applicant's competitors before the adoption of the contested decision were rejected. The applicant itself acknowledges that one of the main reasons for rejecting those applications was that it was impossible for the applicants to be guaranteed a sufficient supply of lignite, which the Commission also noted in recital 211 of the contested decision. That shows, rather than disproves, the difficulties encountered by the other operators in constructing lignite-fired power stations, since they did not have access to the large deposits.

137 The present complaint must therefore be rejected.

Third complaint

138 The applicant claims that its competitors are able to secure sufficient access to lignite as a fuel for the production of electricity by purchasing it or working with undertakings which already have rights to exploit lignite in Greece. However, no undertaking has ever asked the applicant to supply it with lignite.

139 The Commission disputes the applicant's arguments.

140 As regards the deposits exploited by undertakings other than the applicant, it should be pointed out that the Commission stated, in recital 203 of the contested decision — and it has not been disputed by the applicant or by the Hellenic Republic — that very small deposits, scattered over Greek territory, cannot constitute a realistic source of fuel for electricity power stations. The Commission observed, in that regard, that the logistical costs associated with supplying a lignite-fired power station, whose consumption over its lifespan of 40 to 45 years amounts to tens of millions of tonnes, from a multitude of scattered deposits would be excessive.

141 It is apparent from recital 51 of the contested decision that the private lignite deposits owned by undertakings other than the applicant are small, having an average of 9 million tonnes of reserves, and that, with only one exception, were no longer exploited in 2003.

142 As for the public lignite deposits owned by undertakings other than the applicant, it is apparent from recital 52 of the contested decision that, of the 10 public deposits on Greek territory, only three contained non-negligible reserves and were still exploited in 2001; furthermore, the applicant had entered into contracts for the supply of the lignite used by one of its power stations from two of those deposits. It is also apparent from recital 52 of the contested decision that the licensees of two of the deposits exploited in 2001 lost their exploitation rights in 2003.

143 Therefore, having regard to the small quantity of reserves held by undertakings other than the applicant and available for use by its competitors as a source of fuel on the downstream market, the theoretical possibility of obtaining lignite from those undertakings was not capable of eliminating the inequality of opportunity which the Commission found to exist between the applicant and its competitors.

144 As regards the possibility of purchasing lignite from the applicant, it is apparent from the Hellenic Republic's letter of 5 July 2004 to the Commission that the applicant's entire lignite production was at the material time used for its own electricity power stations and it was neither actually nor potentially active as a seller on the upstream market. Consequently, no averagely prudent businessman would assume the cost of long-term investments to construct a power station in the expectation of obtaining the necessary lignite from the applicant's deposits.

145 Furthermore, if the applicant's competitors were required to obtain from it the fuel necessary to operate their power stations, the applicant would not necessarily have an economic interest in supplying them with the requested lignite at a competitive price, or in appropriate conditions, since that would expose it to stronger competition in the downstream market.

146 The possibility of buying lignite from the applicant is therefore also incapable of eliminating the inequality of opportunity between the applicant and its competitors, as established by the Commission.

147 The present complaint must therefore be rejected.

Fourth complaint

148 The applicant observes that the Commission was wrong to infer the existence of a barrier to new entry to the downstream market solely from its dominant position on the upstream market, which is attributable to purely historical reasons. The applicant and the Hellenic Republic add that the Commission had to be aware that the liberalisation of the market would be gradual and could not use the contested decision to speed up the rate at which competitors accessed that market.

149 Those arguments, which the Commission disputes, are factually incorrect. In the contested decision, the Commission did not find that there was any barrier to entry to the downstream market based on the mere fact that the applicant had a dominant position on the upstream market. As stated in paragraph 34 above, the Commission found the existence of inequality of opportunity between the applicant and its competitors on account of the applicant's privileged access to lignite as a fuel for the production of electricity. The fact that that inequality of opportunity might be explained by historical reasons, on the assumption that it is correct, does not mean that that inequality does not exist.

150 In addition, the sole objective pursued by the Commission in the contested decision is to eliminate the inequality of opportunity found in that decision and not to ensure that the applicant's competitors will be able to enter the downstream market at a particular rate or that they will be able to acquire a share of that market. The contested decision sets no threshold of market penetration that would be deemed acceptable. The applicant cannot therefore criticise that decision on the ground that it was improperly used to speed up its competitors' access to that market.

151 The present complaint must therefore be rejected.

Fifth complaint

152 The applicant asserts that the Commission erred in finding, in the contested decision, that lignite was at the material time the most advantageous fuel for producing electricity in the ITS and that the applicant was the only one to have access to it, which the Commission disputes. However, the applicant develops no argument in the context of this part of the plea in support of that assertion, but merely refers to various passages in the application which in its submission confirm its assertion.

153 Thus, first of all, the applicant refers to a passage in the application in which it states that since the liberalisation of the downstream market the Hellenic Republic had announced that the rights to exploit the lignite deposits would in future be allocated on the basis of an open tendering procedure. However, it has already been explained, in essence, in paragraphs 120 to 129 above, that in spite of that theoretical possibility the applicant enjoys privileged access to the public lignite deposits.

154 In addition, the applicant states that the Hellenic Republic avoided granting it new exploitation rights, even for deposits which it had already explored. That in itself is true. However, the fact that the applicant has not been allocated additional exploitation rights is not capable of allowing its competitors to obtain the lignite necessary to operate power stations and does not limit the privileged access to lignite for which such rights had previously been granted to the applicant.

155 Next, the applicant refers to a passage in the application in which it states that the Greek legislation does not prohibit electricity producers from building new lignite-fired power stations and claims that its competitors prefer to build power stations that use other fuels because, although lignite is not expensive as a fuel, the investments required in order to build a lignite-fired power station are twice as much as those necessary to build a gas-fired power station.

156 First, it should be observed that the fact that lignite-fired electricity power stations have a relatively low variable cost, but a higher fixed cost and amortisation than the costs associated with the construction of a gas-fired power station, was expressly acknowledged by the Commission in recital 222 of the contested decision and also in the pleadings which it has submitted to the Court.

157 However, in view of the regulatory features of the downstream market, that does not alter the fact that lignite was at the material time the most advantageous fuel for the production of electricity in the ITS.

158 As is apparent from paragraph 22 above and from the parties' answers to the measures of organisation of procedure, on the mandatory day market the electricity produced by power stations with a low variable cost, including those running on lignite, is integrated, in the programme drawn up by HTSO, before that produced by power stations running on fuels with higher variable costs, such as gas, fuel oil and diesel oil.

159 In practice, lignite-fired power stations, which almost always offer their electricity at a price below the SCP, inject electricity on the mandatory day market at a very high percentage of their capacity and are profitable at all hours of the day and night. During the night, when demand for electricity is lower, the electricity sold comes from lignite, which shows that it can be sold on the market without competition from electricity produced using other fuels. It is only during the day, when demand is higher, that, in addition to electricity produced from lignite, other power stations using other fuels are in a position to dispose of their production on the Greek market, as during those periods the SCP is generally higher than the variable costs of those power stations.

160 Therefore, as the Commission points out in recital 222 of the contested decision, the mandatory day market is designed in such a way that the SCP allows power stations with low variable costs which submit prices below the SCP to sell electricity in the programme drawn up by HTSO at a profit and thus to cover their fixed costs.

161 Second, it follows from the parties' answers to the questions put by the Court in the context of the measures of organisation of procedure of 26 January 2016 that the costs mentioned in table 15 of the contested decision for the various electricity generation technologies included both variable costs and fixed costs. The average cost of generating electricity of the lignite-fired power stations shown in that table is the lowest among the different types of thermal power stations.

162 It must therefore be considered that the argument which the applicant derives from the fact that lignite-fired power stations have high fixed costs does not undermine the Commission's finding that lignite was the most attractive fuel in Greece for the production of electricity at the time when the contested decision was adopted.

163 Last, the applicant refers to certain passages in the application where it is alleged that the high fixed costs of lignite-fired power stations and the large number of projects for the construction of coal and gas-fired power stations show that those fuels were as competitive as lignite.

164 First, it should be pointed out that the arguments which the applicant derives from the less advantageous nature of lignite as a fuel for the production of electricity because of the high fixed costs of lignite-fired power stations were examined and rejected in paragraphs 156 to 160 above.

165 Second, the existence of certain projects and applications for the construction of gas-fired power stations must be put in perspective with the fact that, although the applicant's competitors have also shown an interest in setting up lignite-fired power stations and have applied for licences, in spite of the liberalisation of the downstream market since 2001, they have not obtained rights to exploit lignite deposits sufficiently large to supply an electricity power station over its average lifespan, which, in practice, forces them to have recourse to other fuels, even less competitive fuels, if they wish to be present on the downstream market.

166 Furthermore, if fuels other than lignite were sufficiently competitive by comparison with lignite, it would be difficult to explain the situation of under-capacity on the downstream market, the existence of which was underlined by the applicant itself, which forced the Hellenic Republic to have recourse to subsidised tendering to encourage the construction of new power stations in order to guarantee security of supply.

167 It would also be difficult to explain why, for lignite-fired power stations, the percentage of actual generation was, between 2004 and 2006, much higher on the ITS than the percentage of installed capacity, as is apparent from a comparison of tables 11 and 14 of the contested decision, which the Commission correctly established in recital 86 of that decision.

168 Likewise, the applicant has adduced no convincing evidence that could explain why it had not taken the opportunity to diversify its sources of supply of fuel by replacing the lignite-fired power stations, at the end of their useful life, by power stations running on other fuels, which would be wise if those fuels were really competitive by comparison with lignite, instead, as the Commission stated in recital 79 of the contested decision, of applying for and obtaining licences to replace its lignite-fired power stations by other power stations still running on lignite.

169 Third, as regards, more particularly, coal, the Commission stated in the written pleadings which it submitted to the Court, without being challenged on that point, that no authorisation for coal-fired power stations had been granted in Greece up to the date of adoption of the contested decision.

170 Fourth, as regards the fact that Heron was granted the licence to build a lignite-fired power station for which it had applied on 26 March 2007 (see paragraph 16 above), it should be observed that the very fact that only one licence was granted in spite of the advantages of lignite as a fuel for the production of electricity in Greece shows rather that the applicant's competitors are faced with real difficulties because of the limited access to lignite. Those difficulties seem all the more plausible if account is taken of the fact that, as the main parties claimed at the hearing, Heron's proposed power station has not been built.

171 It follows from all of the foregoing that the applicant has not shown that the Commission had erred in taking the view that lignite was the most attractive fuel for the production of electricity on the ITS.

172 The present complaint must therefore be rejected.

173 Since none of the arguments put forward in support of the third part of the first plea is well founded, this part of the plea must also be rejected.

Fifth part of the first plea, alleging a manifest error of assessment in that the Commission failed to take developments in the downstream market into account

174 The applicant claims that in the contested decision the Commission relied on the situation prevailing at the beginning of its investigation, when the downstream market had just been partly opened to competition. Between that time and the date of adoption of the contested decision, the downstream market had experienced fundamental developments, which the Commission wrongly failed to take into consideration. That, in the applicant's submission, constitutes a manifest error of assessment that should lead to the annulment of the contested decision.

175 In support of this part of the plea, which the Commission disputes, the applicant relies on two complaints.

First complaint

176 The applicant claims that the Commission frequently refers in the contested decision to outdated data and assessments, which no longer reflect the downstream market, in spite of the fact that it had received significant information concerning the development of that market at both the legislative and the competitive levels. In particular, it disregarded, first, the increasing importance of gas, which enabled an undertaking to compete with the applicant during the hours of low demand, and also the fact that new power stations had been brought into service; second, the fact that the peak hours, during which the applicant faces competition from all power stations, occupy the main part of the day, having regard to the under-capacity existing on the downstream market; third, the increasing importance of coal; and, fourth, the costs borne by lignite-firing power stations because of their polluting emissions, which make that fuel increasingly unattractive.

177 The Commission disputes the applicant's arguments.

178 In the first place, it should be observed that, in so far as it takes issue with the Commission for having relied in the contested decision on outdated data and assessments, the applicant does not identify any factual element found in that decision that had become obsolete on the date of its adoption.

179 In the second place, as regards the importance of gas and the fact that new power stations had been brought into service on the downstream market, it should be observed that, in recital 67 of the contested decision, the Commission found that, at the end of 2006, 90% of installed electricity production capacity in the ITS belonged to the applicant, a point which has not been disputed by the applicant, as its competitors had only two gas-fired power stations and a number of small combined heat and power stations and power stations using renewable energy sources.

180 In recital 68 of the contested decision, the Commission also found, without being contradicted by the Hellenic Republic or the applicant, that the applicant had decided in November 2007 to apply for licences to build new power stations, including two lignite-fired power stations, and that it estimated that it could continue to have more than 75% of installed capacity in the interconnected system in 2011.

181 The Commission also found, in recital 76 of the contested decision, that, on the basis of the legislative provisions applicable to the procedure for obtaining a licence to produce electricity following the liberalisation of the market, the applicant and 11 operators had applied for and obtained such licences to build new gas-fired power stations, following a call for submissions made by RAE in 2001 which excluded, in particular, power stations using lignite. The Commission also pointed out that other licences had been issued since 2001 to build combined-cycle power stations.

182 The Commission likewise stated, in recital 77 of the contested decision, that competitors of the applicant had submitted three applications to build lignite-fired power stations, which had all been rejected. In that recital the Commission stated that in 2007 Heron had applied for a licence for a lignite and biomass-fired power station and for rights to exploit the Vevi deposit, although no decision had yet been taken at the time of the adoption of the contested decision. The Commission considered that this showed that the applicant's competitors were interested in building lignite-fired power stations and also that, owing to the technical characteristics of those power stations, their lifespan and the extent of the investments, their construction would be authorised only when significant deposits were made available to those competitors, who were therefore forced to use mainly gas in order to be able to operate on the downstream market.

183 Accordingly, it must be considered that the Commission examined the downstream market in the light of (i) the events that took place on that market during the period immediately preceding the adoption of the contested decision, including, in particular, the existence of certain gas-fired power stations whose production could compete with the applicant's production, and (ii) plans to open new power

stations using different technologies. The fact that the Commission considered in the contested decision that lignite was the most attractive fuel for the production of electricity on the downstream market and that the applicant's virtually exclusive access to that fuel was capable of reinforcing its dominant position on that market is therefore the result not of a failure to have sufficient regard to the role of certain power stations currently in service or that could be built, but of an assessment of the various elements of fact established in the contested decision which differs from that proposed by the applicant. However, that does not explain how the assessment set out in the contested decision would be incorrect.

184 In the third place, as regards the alleged fact that peak hours occupy the main part of the day, it should be observed at the outset that that assertion is wholly unsubstantiated. The applicant accompanies its assertion by a reference to documents in the file which indicate that demand for electricity increased at an average annual rate of 5.4% between 1997 and 2000, but do not show that the peak hours are in the majority. Even on the assumption that that assertion were true, it would not suffice to support the conclusion that during the period immediately preceding the adoption of the contested decision lignite was not the most advantageous fuels for the production of electricity in the downstream market, since the applicant does not deny that there are off-peak hours during which the lignite-fired power stations operate to the exclusion of the other thermal power stations, which may explain the fact that the percentage of electricity produced on the downstream market in lignite-fired power stations is much higher than the percentage of installed capacity belonging to those power stations (see paragraphs 70 and 167 above).

185 In the fourth place, as regards the increasing importance of coal, it is sufficient to point out that no authorisation had been granted for coal-fired power stations at the date of adoption of the contested decision (see paragraph 169 above).

186 Last, in the fifth place, as regards the costs borne by the lignite-fired power stations owing to their polluting emissions, it should be observed that the applicant does not explain the real extent of those costs or how they make lignite an undesirable fuel for the production of electricity. As an undertaking producing electricity in power stations using very diverse technologies, the applicant is well placed to provide the Court with data showing that the production of electricity from lignite is not more attractive in the ITS, from an economic viewpoint, than production on the basis of other fuels.

187 The first complaint must therefore be rejected.

Second complaint

188 The applicant claims that the Commission made a manifest error of assessment by not taking into account in the contested decision measures adopted by the Hellenic Republic in order to limit the applicant's market share, which has continuously fallen since 2001.

189 The Commission disputes the applicant's assertions.

190 It should be borne in mind that the measures adopted in order to limit the applicant's market share on the downstream market consist essentially in its exclusion from certain calls for tenders for the construction of subsidised power stations intended to guarantee a reserve of power (see paragraph 13 above). While it is indeed correct that the successful tenderers appointed following those calls for tenders will thus be able to apply a certain amount of competition vis-à-vis the applicant on the downstream market, it should be observed that those measures do not give access to power stations using lignite and are therefore not capable of eliminating the inequality of opportunity between the applicant and its competitors.

191 Furthermore, it should be borne in mind that, although the applicant's market share has fallen on the downstream market, that reduction does not affect its dominant position, as the applicant itself acknowledges that it will represent around 70% of installed electricity production capacity in Greece until 2011 (see paragraph 180 above).

192 In addition, the Greek legislation does not place any limit on the size of the applicant's overall portfolio and it is therefore still possible that the applicant will be granted new licences.

193 The present complaint must therefore be rejected.

194 In those circumstances, the fifth part of the first plea and, accordingly, the first plea in its entirety must be rejected.

2. Second plea, alleging breach of the obligation to state reasons

195 According to settled case-law, the statement of reasons required under Article 253 EC must be appropriate to the measure in question and must disclose in a clear and unequivocal fashion the reasoning followed by the institution which adopted that measure, in such a way as to enable the persons concerned to ascertain the reasons for the measure and to enable the competent court to carry out its review. 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 253 EC must be assessed with regard not only to its wording but also to its context and to all the legal rules governing the matter in question (see judgment of 2 April 1998, *Commission* v *Sytraval and Brink's France*, C-367/95 P, EU:C:1998:154, paragraph 63 and the case-law cited, and judgment of 4 July 2006, *Hoek Loos* v *Commission*, T-304/02, EU:T:2006:184, paragraph 58). The Commission, in stating the reasons for the decisions which it is led to take in order to apply the competition rules, is not obliged to adopt a position on all the arguments relied on by the parties concerned in support of their request; it is sufficient if it sets out the facts and legal considerations having decisive importance in the context of the decision (judgments of 29 June 1993, *Asia Motor France and Others* v *Commission*, T-7/92, EU:T:1993:52, paragraph 31, and of 27 November 1997, *Tremblay and Others* v *Commission*, T-224/95, EU:T:1997:187, paragraph 57).

196 The applicant claims that the Commission did not comply with the obligation to state reasons in the contested decision. First, the Commission relied on data preceding the creation of the mandatory day system and other significant developments in the downstream market. Second, it did not explain how the applicant's rights to exploit lignite might lead to an extension of its dominant position on the downstream market. The applicant queries, in that regard, the concept of 'primary fuels' referred to in Article 1 of the contested decision and the fact that the Commission used 'only segments of the market which it [defined]'. Third, the Commission does not explain the nature of the actual or potential abuse which the applicant is alleged to have committed, or how its high market share on the upstream market, owing to the fact that lignite is not an absolutely essential facility for the production of electricity and when its competitors had sufficient access to that market, might entail an infringement of Article 82 EC, or, last, the extent to which consumers' interests are harmed.

197 Although it does not devote a specific section of its statement in intervention to examining the reasoning on which the contested decision is based, the Hellenic Republic submits a number of observations on that issue. It claims, in particular, that Article 1 of the contested decision is badly drafted and contradictory as regards the concept of 'primary fuels' and the reference to Article 3(3) of Law No 134/1975, which does not appear in the body of the decision, except in recital 23. Likewise, it

claims that the Commission does not sufficiently state reasons for its general assertion concerning the importance of lignite in Greece and the resulting interest for the applicant's competitors, although it developed that assertion more fully in an article written by officials in the Commission's Directorate-General for Competition.

198 The Commission disputes those claims.

199 In the first place, it should be observed that a part of the applicant's arguments does not refer to lack of or insufficient reasoning in the contested decision, namely the arguments that the Commission relied on material predating the creation of the mandatory day system.

200 In fact, such arguments are confused, in reality, with the question whether the contested decision is well founded. The obligation to state reasons is an essential procedural requirement, as distinct from the question whether the reasons given are correct, which goes to the substantive legality of the measure at issue. The reasoning in a decision consists in a formal statement of the grounds on which that decision is based. If those grounds contain errors, the latter will affect the substantive legality of the measure in question, but not the statement of reasons in it, which may be adequate even though it sets out reasons which are incorrect (see judgment of 10 July 2008, *Bertelsmann and Sony Corporation of America* v *Impala*, C-413/06 P, EU:C:2008:392, paragraph 181 and the case-law cited). It should be observed, moreover, that such arguments have already been put forward, examined and rejected in the context of the first plea.

201 Even on the assumption that those arguments must be taken to mean that the applicant is taking issue with the Commission generally for not having sufficiently stated the reasons for its decision in so far as it did not refer to data later than 2005, it is apparent that such a criticism is unfounded. In fact, in the contested decision, the Commission cites a significant number of data from 2006 and 2007, most of which were communicated to it during the administrative procedure and are taken from the Hellenic Republic's letters of 19 June 2006 and 24 January 2007 and from the applicant's letters of 19 January and 4 April 2007.

202 Thus, in recitals 32 and 34 of the contested decision, the Commission refers to new material of which it became aware in particular from those letters and which concerns the call for tenders for the grant of exploitation rights for the deposits at Drama, Elassona, Vevi and Vegora. In recitals 48 and 49 of the contested decision, the Commission examines the impact of the new rules on the downstream market and the most recent information received concerning the applicant's lignite exploitation activity. In recitals 53 and 54 of the contested decision, the Commission takes into consideration the development of the use of lignite as a fuel for the production of electricity during the period immediately preceding the adoption of the contested decision. In recital 58 of the contested decision, the Commission examines the development of total consumption of electricity, including the market share of imports, on the downstream market in the light of the most recent information communicated to it. In recitals 68, 76, 77, 80 and 81 of the contested decision, the Commission examines, in the light of that information, the installed electricity production capacity on the ITS and the licences granted for the production of electricity and the construction of new power stations. Last, in recital 73 of the contested decision, the Commission examines the capacity of electricity production based on renewable energy sources during the period immediately preceding the adoption of that decision.

203 In the same way, the Hellenic Republic's letter of 24 January 2007 was used by the Commission in order to prepare tables 5 and 16 in the contested decision, which set out, respectively, the list of lignite deposits and the list of power stations using lignite in Greece. In addition, it is common ground that the Commission took account of the creation of the mandatory day market in 2005, which it presented in recitals 103 to 109 of the contested decision and to which it referred in the context of its assessment, in particular in recitals 164 to 166 of the contested decision. Last, in

recitals 191 to 237 of the contested decision, various arguments raised during the administrative procedure by, respectively, the applicant, in its letters of 19 January and 4 April 2007, and the Hellenic Republic, in its letter of 24 January 2007, are examined.

204 In the second place, as regards the arguments, developed by the applicant, relating explicitly to the insufficiency or the absence of reasoning in the contested decision, they must be rejected as unfounded.

205 First, the applicant cannot maintain that the Commission did not explain, in the contested decision, how the existing rights to exploit lignite might lead to the maintenance of its dominant position on the downstream market. The Commission first of all recalled, in recital 157 of the contested decision, the case-law relating to infringement of Article 86(1) EC in conjunction with Article 82 EC. Next, it undertook an exhaustive analysis of the present case, in recitals 158 to 188 of that decision. Last, in recitals 189 and 190 of that decision, the Commission applied that case-law to the present case. It thus explained the reasons why, in maintaining the quasi-monopolistic rights to explore and exploit lignite in favour of the applicant, the Hellenic Republic had allowed the applicant, in a dominant position on the upstream market, to maintain its dominant position on the downstream market as well, contrary to the rules on competition laid down in the Treaty.

206 Second, the applicant cannot maintain that the contested decision fails to state reasons as regards the concept of 'primary fuels' referred to in Article 1 of that decision. First of all, the Commission's reasoning and the conclusion which it reaches in recital 238 of the contested decision enable Article 1 of the decision to be understood without difficulty, in particular the fact that, in spite what is admittedly the regrettable use of the plural, the Commission is referring to lignite when it uses the expression 'primary fuels'. By using those words, which have no technical meaning, the Commission sought to refer to the importance and the essential role of lignite on the relevant markets (see paragraph 81 above).

207 Furthermore, although the word 'fuel' is used in specific points in the contested decision in connection with other fuels such as oil or gas, overall it is associated with lignite in that decision, in particular in order to define it, for example in recitals 12, 14, 41, 42, 88 and 161. Consequently, the applicant's argument concerning the failure to state reasons as regards the concept of 'primary fuels' must be rejected.

208 Third, as regards the alleged failure to state reasons in the contested decision form the Commission's use of 'only segments of the market which it [defined] in [that] decision', it must be stated that the applicant has provided no explanation to substantiate such an assertion.

209 In any event, in recitals 162 to 166 of the contested decision, the Commission explained that, until the creation of the mandatory day market, the segment of the production and wholesale supply of electricity corresponded de facto to the segment of supply to eligible customers of electricity produced at national level and imported electricity and that that segment was associated with the retail supply segment. It made clear, on the other hand, that, from the creation of that market, a distinction had to be drawn, since the wholesale electricity market, corresponding solely to the former market for the production and supply of electricity to eligible customers, had been put in place.

210 Thus, while bringing its analysis up to date and referring to the downstream market, the Commission considered that the analysis of the market for the production and supply of electricity to eligible customers carried out in the letters of formal notice on the basis of the data which had thus far been communicated to it by the applicant and the Hellenic Republic led to the same conclusions as the analysis that would have been carried out concerning the downstream market, which was a potential market on that date. It follows that the Commission in any event provided sufficient reasoning in that respect.

211 Fourth, the applicant's argument that the contested decision contains no reasoning as regards the actual or potential abuse to which the alleged extension of the dominant position led must also be rejected as unfounded. It follows from recitals 185 to 189 of the contested decision that the Commission carried out an analysis of the measures at issue and explained the reasons why, in granting the applicant privileged access to the most attractive source of production in Greece, the Hellenic Republic had enabled the applicant to maintain or strengthen its dominant position on the downstream market. The Commission also explained that such measures had the effect of impeding new entries to the market, thus creating inequality of opportunity between economic operators and therefore distorting competition, contrary to the rules of the Treaty. Furthermore, the Commission supplemented its analysis in recitals 199, 223 and 238 of the contested decision. Thus, the Commission clearly explained the nature of the infringement of the competition rules found in the present case, namely the infringement of Article 86(1) EC read with Article 82 EC.

212 Fifth, the applicant's argument that the Commission does not sufficiently explain in the contested decision how the applicant's high market share in the case of lignite, which is not a factor of production that is absolutely essential for electricity, and when its competitors have sufficient access to that market, may entail an infringement of Article 82 EC, or on what grounds its rights in relation to lignite adversely affects the interests of consumers, must be rejected.

213 In fact, the Commission stated in the contested decision that, for the applicant's competitors on the downstream market, access to significant quantities of lignite was not guaranteed and that those competitors and the applicant were thus in a situation of inequality of opportunity, having regard to the fact that lignite was the most attractive fuel for the production of electricity on the downstream market. The Commission's reasoning was therefore clear and could be challenged by the applicant, which did in fact challenge it.

214 Furthermore, it follows from the case-law that, in order to find the existence of an infringement of the combined provisions of Article 86(1) EC and Article 82 EC, the Commission is not required to demonstrate the impact of that infringement on consumers' interests (judgment on appeal, paragraph 68).

215 In the third place, as regards the Hellenic Republic's observations, the observation relating to the concept of 'primary fuels', which has already been answered (see paragraph 206 above) must be rejected at the outset. The observation relating to Article 3(3) of Law No 134/1975 must also be regarded as unfounded. Contrary to the Hellenic Republic's contention, the terms of that article are cited on two occasions, in recitals 21 and 39 of the contested decision. Furthermore, the Commission refers explicitly to those provisions on various occasions, notably in recitals 18, 22, 23, 30, 38, 41, 42, 117, 131, 184 and 237 of the contested decision.

216 In addition, it must be considered that the contested decision sufficiently explains the reasons that allow the Commission to conclude that lignite played an important role in Greece, as is apparent from footnote 255 and recitals 212 to 215 and 221 to 223 of that decision. Last, the fact that the Commission's agents wrote an article published in a legal journal and devoted to the contested decision cannot, irrespective of the content of that article, be taken into account in the context of the assessment of the reasoning on which that decision is based.

217 In the light of the foregoing, the second plea must be rejected.

3. Third plea, alleging breach of the principles of legal certainty, protection of legitimate expectations and protection of private property, and misuse of powers

218 The present plea may be divided into three parts, alleging, first, breach of the principle of protection of legitimate expectations; second, breach of the principle of protection of private property; and, third, misuse of powers.

219 Although breach of the principle of legal certainty is also mentioned in the title of the plea, the applicant does not put forward any arguments aimed specifically at a finding of such a breach. Consequently, it is sufficient to respond, in that regard, to the arguments relating to an alleged breach of the principle of protection of legitimate expectations.

First part, alleging breach of the principle of protection of legitimate expectations

220 The applicant, supported by the Hellenic Republic, claims that the Commission breached the principle of protection of legitimate expectations by adopting the contested decision, which the Commission disputes.

221 In support of its assertion, first, the applicant submits that the Commission took issue with the concentration of rights to exploit lignite in the applicant's hands for the first time in the contested decision. The Commission's inaction over decades reassured the applicant that its situation was lawful.

222 On that point, it should be observed that, since a person may not plead breach of the principle of protection of legitimate expectations unless he has been given specific assurances by the administration (see judgment of 22 May 2007, *Mebrom* v *Commission*, T-216/05, EU:T:2007:148, paragraph 105 and the case-law cited), the applicant cannot base its legitimate expectation on the Commission's mere inaction.

223 For the sake of completeness, it should be considered that traders cannot have a legitimate expectation that an existing situation which is capable of being altered by the EU institutions in the exercise of their discretionary power will be maintained (judgment of 14 February 1990, *Delacre and Others* v *Commission*, C-350/88, EU:C:1990:71, paragraph 33) and, furthermore, that the Commission has a broad discretion as to whether it is appropriate to initiate proceedings against a Member State which has infringed Article 86(1) EC (see, to that effect, judgment of 27 October 1994, *Ladbroke* v *Commission*, T-32/93, EU:T:1994:261, paragraphs 37 and 38, and order of 23 January 1995, *Bilanzbuchhalter* v *Commission*, T-84/94, EU:T:1995:9, paragraph 31 and the case-law cited). Therefore, even if the Commission had not initiated a procedure pursuant to the combined provisions of Articles 86 and 82 EC with respect to the measures at issue, although it was aware of those measures, that would not be sufficient for the applicant to have a legitimate expectation that such a procedure would not be initiated in the future.

224 Second, the applicant claims that the Commission, in the context of its Decision C(2002) 3729 final — State aid N 133/2001 — Greece, Scheme to offset stranded costs in Greece, approved a subsidy granted to the applicant by the Hellenic Republic in the light of the liberalisation of the downstream market to take account of certain 'stranded costs'. In that context, the applicant submits that the Commission considered that most of the investments made in lignite-fired power stations did not include such costs. The applicant could thus consider in good faith that it could continue to pursue its activity in such a way as to amortise those investments in full.

225 In that regard, it should be observed that the Commission's approval of the subsidy referred to in paragraph 224 above related to payments of compensation by the Hellenic Republic to the applicant to compensate for its investments in the least competitive power stations on the ITS, namely those

other than lignite-fired power stations, with the exception of a few small power stations. Furthermore, the Commission stated, without being contradicted on that point, that no subsidy had been notified to it as regards the applicant's lignite-fired power stations, and the situation concerning those power stations had not been assessed. The lawfulness of the measures at issue was therefore not formally examined and did not constitute a tacit precondition of the approval of the proposed payment of the subsidies in question.

226 It follows that the adoption by the Commission of the decision referred to in paragraph 224 above could not give rise to a legitimate expectation on the applicant's part that the Commission would not rely on Articles 86 and 82 EC in the case of the measures at issue.

227 Third, the applicant reiterates that it never received a request asking it to supply lignite to its competitors and asserts that its activities had no negative effect for consumers. However, there is no reason to consider that those facts, on the assumption that they are correct, may have caused the applicant to have a legitimate expectation that the measures at issue were lawful.

228 In those circumstances, the present part of the plea must be rejected.

Second part, alleging breach of the principle of protection of private property

229 The applicant claims that the contested decision obliges the Hellenic Republic to deprive it of its property rights and therefore constitutes an interference with those right, and affects their very existence, which the Commission denies.

230 In that regard, it is sufficient to point out that the contested decision does not require the Hellenic Republic to adopt any specific measure. In recital 248 of that decision, the Commission merely indicates that measures designed to ensure that the applicant's competitors have sufficient access to lignite must be taken. The Commission emphasises that it is for the Hellenic Republic to choose the measures to be adopted in that regard and that it is only by way of example that it identifies two possible courses of action. Among these, the Commission does indeed refer to the transfer of the rights to exploit certain of the applicant's lignite deposits to its competitors and the transfer of the power stations near those deposits. However, the Commission refers on the same basis to the grant to the applicant's competitors of exploitation rights which have not yet been allocated. That measure would not entail any interference whatsoever with the applicant's property rights, even though the Commission stated, in recital 250 of the contested decision, that it should be accompanied by transitional measures that would enable the infringement to be brought to an end within a shorter period than would be necessary in order to exploit a deposit which had not yet been allocated and to build a power station linked with that deposit.

231 Furthermore, even on the assumption that the Hellenic Republic eventually decided to adopt measures that might be regarded as affecting the applicant's property rights, such a decision would not necessarily be unlawful. The right to property, which forms part of the general principles of EU law, is not an absolute right, and its exercise may be restricted, provided that those restrictions in fact correspond to objectives of general interest pursued by the European Union and do not constitute a disproportionate and intolerable interference, impairing the very substance of the rights guaranteed (judgment of 23 October 2003, *Van den Bergh Foods* v *Commission*, T-65/98, EU:T:2003:281, paragraph 170).

232 The present part of the plea must therefore be rejected.

Third part, alleging misuse of powers

233 According to settled case-law, a measure may amount to a misuse of powers only if it appears, on the basis of objective, relevant and consistent factors, to have been taken with the exclusive purpose, or at least the main purpose, of achieving an end other than that stated (see judgment of 6 April 1995, *Ferriere Nord* v *Commission*, T-143/89, EU:T:1995:64, paragraph 68 and the case-law cited).

234 The applicant claims that the Commission misused its powers by trying to separate its electricity production activities from its other activities, although the legislative initiatives whereby it had sought to achieve that result in regard to the former electricity monopolies had failed owing to the opposition of the Member States. It maintains that, conversely, the Commission did not act in the same way in regard to other similar situations in other Member States.

235 The applicant's argument, which the Commission disputes, is factually incorrect.

236 In fact, in the contested decision, the Commission did not require that the applicant's lignite deposit exploitation activities be separated from its electricity production activities. It merely found that there was inequality of opportunity to the disadvantage of the applicant's competitors on the downstream market owing to a de facto situation created by the Hellenic Republic, and requested the Hellenic Republic to correct that situation by ensuring that those competitors could have sufficient access to the public deposits of lignite.

237 As for the fact that, in the field of energy, other Member States have failed to fulfil their obligations under the competition rules of the Treaty, it cannot exempt the Hellenic Republic from complying with those obligations. In any event, the Commission's alleged failure to act as against those Member States cannot be regarded as indicating that the contested decision was adopted with aim of achieving an end other than that stated.

238 The present part of the plea must therefore be rejected.

239 In those circumstances, the third plea must be rejected in its entirety.

4. Fourth plea, alleging breach of the principle of proportionality

240 According to settled case-law, the principle of proportionality, which is one of the general principles of EU law, requires that the measures in question should not exceed the limits of what is appropriate and necessary in order to attain the objectives pursued by the legislation in question, and where there is a choice between several appropriate measures, recourse must be had to the least onerous (judgments of 16 December 1999, *UDL*, C-101/98, EU:C:1999:615, paragraph 30, and of 12 March 2002, *Omega Air and Others*, C-27/00 and C-122/00, EU:C:2002:161, paragraph 62).

241 The applicant maintains that the Commission breached that principle by proposing the adoption of the measures referred to in paragraph 230 above to correct the anticompetitive effects of the infringement found. Furthermore, the Commission ought to have taken account of the unfavourable measures already borne by the applicant, such as the obligation to sell electricity at a regulated price on the retail market or restrictions on the construction of new power stations. The applicant states that it did not rely on Article 86(2) EC during the administrative procedure because it considered, and still considers, that there has been no infringement of Article 86(1) EC.

242 The Hellenic Republic adds that the Commission proposes that 40% of the reserves of lignite deposits should be granted to the applicant's competitors without taking account of the fact that certain of the applicant's deposits are of doubtful profitability and, moreover, that the measures to which the Commission refers are a 'gift' to the applicant's competitors that would result in the limitation, or

indeed the elimination, of the applicant's economic rights, making it impossible to amortise its investments in exploring and exploiting the lignite deposits, a fuel which, moreover, is not essential for the production of electricity.

243 The Commission disputes the assertions of the applicant and of the Hellenic Republic.

244 In that regard, it should be borne in mind that the contested decision does not require the Hellenic Republic to adopt any specific measure, as the measures referred to in recital 248 of that decision are mentioned only by way of example (see paragraph 230 above). The contested decision does, on the other hand, require the Hellenic Republic to take measures in order to achieve a result, as is apparent upon reading Article 2 of that decision, which provides that the Hellenic Republic is to implement measures capable of correcting the anticompetitive effects of the measures at issue, read in the light of the observations set out in recitals 246 and 247 of that decision, according to which those measures must ensure that the applicant's competitors on the downstream market have sufficient access to the lignite currently existing on Greek territory; and by 'sufficient' the Commission means in principle a proportion of exploitable reserves of not less than 40%.

245 Even on the assumption that the figure of 40% referred to in paragraphs 242 and 243 above was a figure definitively laid down by the Commission in the contested decision, it must be emphasised that neither the applicant nor the Hellenic Republic has put forward an argument that would show that access by the applicant's competitors to a lower percentage of those exploitable reservices could suffice to ensure that the anticompetitive effects of the measures at issue would be corrected. In particular, they put forward no argument to challenge the reasoning set out by the Commission in footnote 255 of the contested decision, on the basis of which the Commission initially determined the need for access to 40% of the reserves.

246 Likewise, neither the applicant nor the Hellenic Republic identifies alternative measures to those proposed by the Commission, and less onerous than those measures, that might suffice to correct the anticompetitive effects of the measures at issue.

247 In particular, nothing in the applicant's arguments supports the view that the unfavourable measures which it maintains it has to bear are capable of correcting the inequality of opportunity found by the Commission to the detriment of the applicant's competitors on the downstream market.

248 Likewise, the Hellenic Republic does not explain how the low profitability of certain deposits allocated to the applicant would justify the failure to adopt measures designed to correct the inequality of opportunity found in the contested decision. On that point, it should be pointed out that the Hellenic Republic itself does not claim that none of the exploitable deposits that might be allocated to the applicant's competitors might turn out to be of doubtful profitability. In any event, the Hellenic Republic does not explain the reasons why the allocation of the rights to exploit those deposits to those competitors following a tendering procedure should be regarded as a 'gift' to those competitors or as preventing the applicant from amortising its investments.

249 Having regard to all of the foregoing considerations, it must be held that no breach of the principle of proportionality has been established.

250 The present plea must therefore be rejected.

251 It follows that the action must be dismissed in its entirety.

Costs

252 Under Article 219 of the Rules of Procedure, in decisions of the General Court given after its decision has been set aside and the case referred back to it, it is to decide on the costs relating to the proceedings instituted before it and to the proceedings on the appeal before the Court of Justice.

253 Furthermore, 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. As the applicant has been unsuccessful, it must be ordered, in addition to bearing its own costs, to pay those incurred by the Commission, by the interveners and by the interveners in the appeal, in accordance with the forms of order sought by them, including the costs relating to the proceedings on the appeal before the Court of Justice.

254 Under Article 138(1) of the Rules of Procedure, the Member States which have intervened in the proceedings are to bear their own costs. The Hellenic Republic must therefore be ordered to bear its own costs, including those relating to the proceedings on appeal before the Court of Justice.

On those grounds,

THE GENERAL COURT (First Chamber)

hereby:

1. **Dismisses the action;**

2. **Orders Dimosia Epicheirisi Ilektrismou AE (DEI), in addition to bearing its own costs, to pay those incurred by the European Commission, by Elpedison Paragogi Ilektrikis Energeias AE (Elpedison Energeiaki), by Elliniki Energeia kai Anaptyxi AE (HE & D SA), by Mytilinaios AE, by Protergia AE and by Alouminion tis Ellados VEAE;**

3. **Orders the Hellenic Republic to bear its own costs.**

Kanninen Pelikánová Buttigieg

Delivered in open court in Luxembourg on 15 December 2016.

[Signatures]

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