Reports of Cases

JUDGMENT OF THE GENERAL COURT (Second Chamber)

3 December 2014* [i]

(State aid — Electricity — Compensation for additional production costs — Public service obligation to produce certain volumes of electricity from indigenous coal — Preferential dispatch mechanism — Decision not to raise objections — Decision declaring the aid compatible with the internal market — Action for annulment — Individual concern — Significant effect on a competitive position — Admissibility — Failure to initiate formal investigation procedure — Serious difficulties — Service of general economic interest — Security of electricity supply — Article 11(4) of Directive 2003/54/EC — Free movement of goods — Protection of the environment — Directive 2003/87/EC)

In Case T-57/11,

Castelnou Energía, SL, established in Madrid (Spain), represented initially by E. Garayar Gutiérrez, subsequently by C. Fernández Vicién, A. Pereda Miquel and C. del Pozo de la Cuadra, then by C. Fernández Vicién, L. Pérez de Ayala Becerril and D. Antón Vega and finally by C. Fernández Vicién, L. Pérez de Ayala Becerril and C. Vila Gisbert, lawyers,

applicant,

supported by

Greenpeace-España, established in Madrid (Spain), represented initially by N. Ersbøll, S. Rating and A. Criscuolo, and subsequently by N. Ersbøll and S. Rating, lawyers,

intervener,

v

European Commission, represented by É. Gippini Fournier and C. Urraca Caviedes, acting as Agents,

defendant,

supported by

Kingdom of Spain, represented initially by J. Rodríguez Cárcamo, subsequently by M. Muñoz Pérez and N. Díaz Abad, then by N. Díaz Abad and S. Centeno Huerta and finally by A. Rubio González and M. Sampol Pucurull, abogados del Estado,

* Language of the case: Spanish.

by

Hidroeléctrica del Cantábrico, SA, established in Oviedo (Spain), represented by J. Álvarez de Toledo Saavedra and J. Portomeñe López, lawyers,

by

E.ON Generación, SL, established in Santander (Spain), represented initially by E. Sebastián de Erice Malo de Molina and S. Rodríguez Bajón, and subsequently by S. Rodríguez Bajón, lawyers,

by

Comunidad Autónoma de Castilla y León, represented initially by K. Desai, solicitor, S. Cisnal de Ugarte and M. Peristeraki, lawyers, and subsequently by S. Cisnal de Ugarte,

and by

Federación Nacional de Empresarios de Minas de Carbón (Carbunión), established in Madrid (Spain), represented initially by K. Desai, solicitor, S. Cisnal de Ugarte and M. Peristeraki, lawyers, and subsequently by S. Cisnal de Ugarte and A. Baumann, lawyers,

interveners,

APPLICATION for annulment of Commission Decision C(2010) 4499 of 29 September 2010 concerning State aid N 178/2010 notified by the Kingdom of Spain in the form of a public service compensation linked to a preferential dispatch mechanism for indigenous coal power plants,

THE GENERAL COURT (Second Chamber),

composed of M.E. Martins Ribeiro, President, S. Gervasoni (Rapporteur) and L. Madise, Judges,

Registrar: J. Palacio González, Principal Administrator,

having regard to the written procedure and further to the hearing on 30 September 2014,

gives the following

Judgment

Background to the dispute

1 By Decision C(2010) 4499 of 29 September 2010 concerning State aid N 178/2010 notified by the Kingdom of Spain in favour of electrical energy production from indigenous coal ('the contested decision'), the European Commission, in essence, authorised the aid provided for in Real Decreto 134/2010, de 12 de febrero, por el que se establece el procedimiento de resolución de restricciones por garantía de suministro y se modifica el Real Decreto 2019/1997, de 26 de diciembre, por el que se organiza y regula el mercado de producción de energía eléctrica (Royal Decree 134/2010 of 12 February 2010 establishing the procedure for resolving restrictions for the purpose of ensuring security of supply, and amending Royal Decree 2019/1997 of 26 December 2010

organising and regulating the electricity generation market, BOE No 51, 27 February 2010, p. 19123), and in the draft amendments which led to the adoption, after the contested decision, of Real Decreto 1221/2010, de 1 de octubre, por el que se modifica el Real Decreto 134/2010 y se modifica el Real Decreto 2019/1997, de 26 de diciembre, por el que se organiza y regula el mercado de producción de energía eléctrica (Royal Decree 1221/2010 of 1 October 2010 amending Royal Decree 134/2010 and amending Royal Decree 2019/1997 of 26 December 2010 organising and regulating the electricity generation market, BOE No 239, 2 October 2010, p. 83983) ('the contested measure').

2 Under the contested measure, the ten electricity power plants identified in Annex II to Royal Decree 134/2010 are required to source 'indigenous' coal (i.e. coal of Spanish origin), the price of which is higher than that of other fuels, and to produce certain volumes of electricity from that coal (23.35 TWh per year).

3 In order to overcome the difficulties in accessing the daily market for the sale of electricity faced by the power plants benefitting from the measure, given the high price of the coal which they are required to use, the contested measure introduced a 'preferential dispatch mechanism'. The preferential dispatch mechanism provides, in essence, that the electricity produced by those power plants must be bought in preference to the electricity produced by power plants using imported coal, fuel-oil or natural gas and by those operating on a combined cycle, which is withdrawn from the daily energy market in order to ensure the sale on that market of electricity volumes produced from indigenous coal by the beneficiary power plants.

4 The owners of the beneficiary power plants receive compensation equal to the difference between the additional production costs which they have incurred and the sale price on the daily electricity market. Annex II to Royal Decree 134/2010 establishes the method for calculating that compensation and the method for setting the volumes of electricity which the beneficiary power plants must produce annually. The mechanism is financed through a State-controlled fund. The planned annual expenditure is EUR 400 million.

5 It is provided that the contested measure will expire on 31 December 2014 at the latest.

6 After engaging in pre-notification contacts, which began in January 2010, the Kingdom of Spain formally notified the contested measure to the Commission (paragraphs 1, 7 and 11 of the contested decision) pursuant to Article 108(3) TFEU.

7 The Commission considered that the requirements imposed by the contested measure on the owners of the beneficiary power plants were in keeping with the operation of a service of general economic interest ('SGEI') justified on the ground of safeguarding security of electricity supply (paragraphs 77 to 103 of the contested decision), and concluded that the measure constituted State aid since it did not satisfy the fourth condition set out in the judgment of 24 July 2003 in *Altmark Trans and Regierungspräsidium Magdeburg* (C-280/00, ECR, EU:C:2003:415) relating to the method for determining the level of compensation for discharging public service obligations (paragraphs 104 to 127 of the contested decision). However, the Commission declared the aid at issue compatible with the internal market under Article 106(2) TFEU, according to which '[u]ndertakings entrusted with the operation of [SGEIs] ... shall be subject to the rules contained in the Treaties, in particular to the rules on competition, in so far as the application of such rules does not obstruct the performance, in law or in fact, of the particular tasks assigned to them' (paragraphs 128 to 163 of the contested decision).

8 Therefore, the Commission decided, on the basis of Article 4(3) of Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article [108 TFEU] (OJ 1999 L 83, p. 1), not to raise objections to that State aid.

Procedure and forms of order sought by the parties

9 By application lodged at the Registry of the General Court on 27 January 2011, the applicant, Castelnou Energía SL, brought the present action.

10 By documents lodged at the Registry of the General Court on 3 and 17 March and 13 and 14 April 2011, the Kingdom of Spain, Hidroeléctrica del Cantábrico SA, E.ON Generación SL, the Comunidad Autónoma de Castilla y León and the Federación Nacional de Empresarios de Minas de Carbón (Carbunión) sought leave to intervene in support of the form of order sought by the Commission in the present case. By document lodged at the Registry of the General Court on 3 May 2011, Greenpeace-España sought leave to intervene in support of the form of order sought by the applicant.

11 The applicant requested confidential treatment, vis-à-vis those interveners, of certain elements of the application, the reply and the corrigendum to the reply, and of certain elements of the statement in intervention of the Kingdom of Spain.

12 By orders of 13 July 2011 of the President of the Eighth Chamber of the General Court, the Kingdom of Spain, Hidroeléctrica del Cantábrico, E.ON Generación, the Comunidad Autónoma de Castilla y León and Carbunión were granted leave to intervene in support of the form of order sought by the Commission. The decision on the merits of the requests for confidentiality was reserved.

13 The Kingdom of Spain and Hidroeléctrica del Cantábrico requested confidential treatment, vis-à-vis the other interveners, of certain elements of their respective statements in intervention.

14 By order of 6 November 2012, the President of the Eighth Chamber of the General Court granted Greenpeace-España leave to intervene in support of the form of order sought by the applicant. The decision on the merits of the requests for confidentiality was reserved.

15 The composition of the Chambers of the General Court having been changed, the Judge-Rapporteur was assigned to the Second Chamber, to which this case was consequently allocated.

16 By order of 9 December 2013, the President of the Second Chamber of the General Court granted all of the requests for confidentiality with the exception of those, made by the applicant vis-à-vis the Kingdom of Spain, relating to certain passages which were concealed in the application and in the reply, as amended. At the hearing, the applicant's representative stated on his own initiative that he would waive confidentiality in respect of the information for which he had sought protection, and this was recorded in the minutes of the hearing.

17 The applicant claims that the Court should:

– declare the action admissible;

– annul the contested decision;

– order the Commission and the interveners supporting it to pay the costs.

18 Greenpeace-España, intervening in support of the form of order sought by the applicant, submits that the Court should:

– annul the contested decision;

– order the Commission to pay the costs, including the costs that it has incurred.

19 The Commission, supported by the Kingdom of Spain, E.ON Generación, the Comunidad Autónoma de Castilla y León and Carbunión, submits that the Court should:

– dismiss the action as inadmissible and, in the alternative, as unfounded; and

– order the applicant to pay the costs.

20 Hidroeléctrica del Cantábrico submits that the Court should dismiss the action.

Law

1. Admissibility

21 Without formally raising an objection of inadmissibility under Article 114 of the Rules of Procedure of the General Court, the Commission, supported by the Kingdom of Spain, Hidroeléctrica del Cantábrico, E.ON Generación, the Comunidad Autónoma de Castilla y León and Carbunión, submits that the present action is inadmissible on the ground that the applicant lacked standing to bring proceedings.

22 It should be recalled at the outset that, under the fourth paragraph of Article 263 TFEU, '[a]ny natural or legal person may, under the conditions laid down in the first and second paragraphs, institute proceedings against an act addressed to that person or which is of direct and individual concern to them, and against a regulatory act which is of direct concern to them and does not entail implementing measures'.

23 In the present case, the sole addressee of the contested decision is the Kingdom of Spain and that decision concerns individual aid within the meaning of Article 1(e) of Regulation No 659/1999, since it was awarded to ten power plants identified in Annex II to Royal Decree 134/2010 (see paragraph 2 above). Therefore, since the contested decision is a measure of individual scope, it cannot constitute a regulatory act, within the meaning of the fourth paragraph of Article 263 TFEU, which covers all acts of general application apart from legislative acts (see, to that effect, order of 3 April 2014 in *CFE-CGC France Télécom-Orange* v *Commission*, T-2/13, EU:T:2014:226, paragraph 28).

24 It follows that, since the applicant is not the addressee of the contested decision, its action is admissible only if the applicant is directly and individually concerned by that decision.

25 According to settled case-law, persons other than those to whom a decision is addressed may claim to be individually concerned only if that decision affects them by reason of certain attributes which are peculiar to them or by reason of circumstances in which they are differentiated from all other persons and by virtue of those factors distinguishes them individually just as in the case of the person addressed (judgments of 15 July 1963 in *Plaumann* v *Commission*, 25/62, ECR, EU:C:1963:17, 223; of 19 May 1993 in *Cook* v *Commission*, C-198/91, ECR, EU:C:1993:197, paragraph 20; of 15 June 1993 in *Matra* v *Commission*, C-225/91, ECR, EU:C:1993:239, paragraph 14, and of 13 December 2005 in *Commission* v *Aktionsgemeinschaft Recht und Eigentum*, C-78/03 P, ECR, EU:C:2005:761, paragraph 33).

26 As the present action concerns a Commission decision on State aid, it must be borne in mind that, in the context of the procedure for reviewing State aid, the preliminary stage of the procedure for reviewing aid under Article 108(3) TFEU, which is intended merely to allow the Commission to form a prima facie opinion on the partial or complete compatibility of the aid in question, must be distinguished from the examination under Article 108(2) TFEU. It is only in connection with the latter examination, which is designed to enable the Commission to be fully informed of all the facts of the case, that the Treaty imposes an obligation on the Commission to give the parties concerned notice to submit their comments (judgment of 10 July 2012 in *Smurfit Kappa Group* v *Commission*, T-304/08, ECR, EU:T:2012:351, paragraph 45; see also, to that effect, judgment of 11 September 2008 in *Germany and Others* v *Kronofrance*, C-75/05 P, ECR, and C-80/05 P, EU:C:2008:482, paragraph 37 and the case-law cited).

27 It follows that, where, without initiating the formal investigation procedure under Article 108(2) TFEU, the Commission finds, on the basis of Article 108(3) TFEU, that aid is compatible with the internal market, the persons intended to benefit from those procedural guarantees may secure compliance therewith only if they are able to challenge that decision before the Courts of the European Union. For those reasons, the Court will declare to be admissible an action for the annulment of a decision based on Article 108(3) TFEU, brought by a person who is concerned within the meaning of Article 108(2) TFEU, where he seeks, by instituting proceedings, to safeguard the procedural rights available to him under the latter provision (*Germany and Others* v *Kronofrance*, cited in paragraph 26 above, EU:C:2008:482, paragraph 38 and the case-law cited; see also *Smurfit Kappa Group* v *Commission*, cited in paragraph 26 above, EU:T:2012:351, paragraph 46).

28 However, if the person bringing the action calls into question the merits of the decision assessing the compatibility of the aid with the internal market, the mere fact that it may be regarded as concerned within the meaning of Article 108(2) TFEU cannot suffice for the action to be considered admissible. It must then demonstrate that it enjoys a particular status within the meaning of the judgment in *Plaumann* v *Commission*, cited in paragraph 25 above (EU:C:1963:17).

29 In the present case, the applicant is a party concerned within the meaning of Article 108(2) TFEU, since, as submitted by the applicant, without being contradicted by the Commission, the interveners, or any of the documents in the file, it is a direct competitor of the power plants benefitting from the contested measure. However, the applicant does not confine itself, by the pleas in law put forward in support of its action, to calling into question the failure, in the circumstances of the present case, to initiate the formal investigation procedure, but also calls into question the merits of the decision appraising the aid. In this connection, the parties do not agree on whether the applicant has a particular status which distinguishes it from the other

operators concerned and whether, on that basis, it is open to the applicant to challenge, independently of the safeguarding of its procedural rights, the merits of the assessment of the compatibility of the aid in question with the internal market set out in the contested decision.

30 It should be noted, in that regard, that, where an applicant contests the merits of a decision taken by the Commission refusing to initiate the formal investigation procedure, the mere fact that a measure may exercise an influence on the competitive relationships existing on the relevant market and that the undertaking concerned is in a competitive relationship with the addressee of that measure cannot suffice. Therefore, an undertaking cannot rely solely on its status as a competitor of the undertaking in receipt of aid but must additionally show that its circumstances distinguish it in a similar way to the addressee of the decision (judgments of 22 November 2007 in *Spain* v *Lenzing*, C-525/04 P, ECR, EU:C:2007:698, paragraphs 32 and 33, and of 22 December 2008 in *British Aggregates* v *Commission*, C-487/06 P, ECR, EU:C:2008:757, paragraphs 47 and 48). That would in particular apply where the applicant's market position would be substantially affected by the aid to which the decision at issue relates, since that substantial adverse effect on its competitive position distinguishes it from other operators affected by that aid (see judgment in *Germany and Others* v *Kronofrance*, cited in paragraph 26 above, EU:C:2008:482, paragraph 40 and the case-law cited; see also, to that effect, judgment in *Smurfit Kappa Group* v *Commission*, cited in paragraph 26 above, EU:T:2012:351, paragraph 57).

31 According to equally settled case-law, demonstrating a substantial adverse effect on a competitor's position on the market cannot simply be a matter of the existence of certain factors indicating a decline in its commercial or financial performance. The grant of State aid can have an adverse effect on the competitive situation of an operator, in particular by causing the loss of an opportunity to make a profit or a less favourable development than would have been the case without such aid. Similarly, the seriousness of such an effect may vary according to a large number of factors such as, in particular, the structure of the market concerned or the nature of the aid in question (judgment in *Spain* v *Lenzing*, cited in paragraph 30 above, EU:C:2007:698, paragraph 35, and order of 11 January 2012 in *Phoenix-Reisen and DRV* v *Commission*, T-58/10, EU:T:2012:3, paragraph 46). Moreover, it is not for the EU courts, when considering whether an application is admissible, to make a definitive finding on the competitive relationship between an applicant and the beneficiaries of the measures at issue. In that context, it is for the applicant alone to adduce pertinent reasons to show that the alleged aid may adversely affect its legitimate interests by seriously jeopardising its position on the market in question (see the order in *Phoenix-Reisen and DRV* v *Commission*, cited above, EU:T:2012:3, paragraph 45 and the case-law cited).

32 In the present case, the applicant submitted evidence proving that the contested measure had a substantial effect on its competitive position which distinguishes it from other operators affected by that measure, or at least that its circumstances distinguish it.

33 Firstly, the applicant explained that its competitive position was more seriously affected than that of most of the other combined-cycle power plants because of the specific geographical location of its power plant. It is located in Aragon (Spain), a region which is not only suffering from overcapacity, but is, moreover, the region in which is located the main power plant benefitting from the contested measure (Teruel), which is responsible for generating more than a quarter of the volume of electricity to be produced from indigenous coal (see the table in paragraph 62 of the contested decision).

34 The applicant provided data in support of that claim. In both its reply and its observations on the statements in intervention in support of the Commission, it gave the percentages of electricity generated by combined-cycle power plants which were withdrawn from the daily market in June 2011 as a result of the implementation of the contested measure. In that connection, it should be noted first of all, as, indeed, the Commission has stated with reference to the data submitted by several interveners, that the data submitted after the contested decision was adopted and after the action was brought may be taken into account for the purpose of determining the admissibility of the present action. If the admissibility of an action is assessed when that action is brought, the specific condition for admissibility that the [applicant's] competitive position be significantly affected by an aid measure yet to be implemented requires prospective assessment which may be made on the basis of facts which occurred after that date (see, to that effect, judgments of 21 October 2004 in *Lenzing* v *Commission*, T-36/99, ECR, EU:T:2004:312, paragraph 87, and of 20 September 2007 in *Fachvereinigung Mineralfaserindustrie* v *Commission*, T-375/03, EU:T:2007:293, paragraph 60). In the present case, since the contested measure was implemented in February 2011, the applicant cannot be criticised for having failed to provide such data in its application of 27 January 2011. It should also be noted that neither the Commission nor the Kingdom of Spain, which were informed of the percentages in question following the refusal of the request for confidential treatment thereof, sought to establish that the percentages were incorrect, even though they could have done so, since the applicant had specified that the percentages had been calculated on the basis of figures published by the system operator for the electricity market in Spain (Red Eléctrica de España, REE).

35 It is apparent from the percentages communicated by the applicant that the implementation of the contested measure does not have the same effect on all combined-cycle power plants and that the applicant's power plant is one of the three most affected combined-cycle power plants among the 39 power plants identified. More specifically, the impact of the contested measure on the applicant's power plant is twice as great as the average impact on all the combined-cycle power plants (60.8% compared with 27.6%). Moreover, the power plant which is most affected by the contested measure (Escatrón 3) is located, like that of the applicant, in the region of Aragon.

36 Secondly, the applicant stated, without being contradicted on this point, that, unlike the two most affected combined-cycle power plants which belong to groups which own other power plants that benefit from the contested measure, the group to which it belongs did not own any other power plants and could not, therefore, compensate for the losses suffered as a result of the contested measure, which it estimates to be in excess of EUR 50 million, through the revenue generated by that measure.

37 The applicant thus established the existence of an adverse effect on its competitive position distinguishing it from other non-beneficiary power plants adversely affected by the contested measure.

38 The Commission and the interveners supporting it did not put forward any arguments or submit any evidence capable of calling that finding into question.

39 Firstly, contrary to what the Commission and the Kingdom of Spain maintain, and as held, in particular, in paragraphs 95 and 96 below, the preferential dispatch mechanism is an integral part of the notified aid measure, so the effects of that mechanism, as taken into account in paragraphs 33 to 36 above, may suffice to establish that the applicant is individually concerned by the contested measure to which the contested decision relates.

40 Secondly, the arguments and data put forward by the Commission and the Kingdom of Spain to establish that production by combined-cycle power plants has not been affected by the contested measure are not relevant in this case, since, as the applicant rightly points out, they relate, in general, to all power plants in that category and do not rule out the existence of special circumstances within that category. Moreover, if, as those parties have indicated, there has been an increase in the amount of electricity generated by combined-cycle power plants since the implementation of the contested measure, that increase would only reinforce the special nature of the applicant's situation among the power plants in its category, since it has stated that, in the months following the implementation of the contested measure, its power plant was closed down for long periods, inevitably leading to a reduction in its production, and neither the Commission nor the parties intervening in support of it have provided any evidence capable of casting doubt on that assertion.

41 Thirdly, the arguments, put forward by the Kingdom of Spain and Hidroeléctrica del Cantábrico, according to which, essentially, the applicant was able to avoid a decline in its commercial or financial performance by establishing its power plant in another region or by finding outlets on other markets, are also irrelevant for the purposes of disputing applicant's individual concern in the present case. Indeed, according to the case-law, the fact that an undertaking succeeds in avoiding or limiting such a decline, for example, by making savings or by expanding in other more profitable markets, cannot lead to the conclusion that it does not have standing to bring proceedings, since such steps do not call into question the substantial effects of the aid on its position, and are even taken as a result of those effects (see, to that effect, *Spain* v *Lenzing*, cited in paragraph 30 above, EU:C:2007:698, paragraph 36). It should be noted, in any event, that, according to the data provided by the Kingdom of Spain and the applicant, which were not disputed by the other parties, the applicant cannot be regarded as having avoided or limited the decline in its commercial position by finding outlets on other markets. During the first seven months of implementation of the contested measure, it was able to place on the so-called 'technical restrictions' market only around 15% of the amount of electricity which was withdrawn from the market as a result of the contested measure for June 2011 alone.

42 Fourthly, the claim made by Hidroeléctrica del Cantábrico at the hearing, and not disputed by the applicant, that the electricity generated by the latter was not withdrawn from the market pursuant to the contested measure between 2012 and 2014 is also irrelevant. Firstly, as stated by the applicant at the hearing, the reason it was not withdrawn was that the applicant decided no longer to place electricity on the daily market, and thus to prolong its closure, in view of the volume of its electricity that had been withdrawn in 2011 and the subsequent difficulty it had in fulfilling its contractual obligations to supply gas. That explanation, which only highlights how significant an impact the contested measure has had on the applicant's competitive position, is not contradicted by the claim made by a number of interveners that the applicant's electricity offers were not competitive. Such a problem of competitiveness may justify the absence of acceptance of an offer, but not the failure to make that offer, and it is not inconceivable that that alleged problem of competitiveness arose precisely because of the contested measure, since the applicant did not have any difficulty in placing electricity on the daily market before the aforementioned measure entered into force. Secondly, and in any event, since the parties acknowledged at the hearing that the impact of the contested measure had been greatest in 2011, and since the data which the applicant provided in order to prove that its competitive position had been substantially affected during that year were not disputed, the applicant cannot be required, for the purpose of establishing the admissibility of its action, also to demonstrate that it was substantially affected in the present case for the whole period during which the contested measure was applicable.

43 The applicant is, therefore, individually concerned by the contested decision. It is also directly concerned by the contested decision since, in the present case, the possibility that the Spanish authorities will decide not to grant the aid authorised is purely theoretical and there is no doubt that those authorities intend to act in that way (see, to that effect, judgment of 18 November 2009 in *Scheucher-Fleisch and Others* v *Commission*, T-375/04, ECR, EU:T:2009:445, paragraph 36 and the case-law cited).

44 It follows from all the foregoing that the present action must be declared admissible in its entirety.

2. Substance

45 The applicant formally raises eight pleas in law in support of its action, which may be combined into five pleas.

The first plea in law, alleging infringement of the applicant's procedural rights under Article 108(2) TFEU and of the general principles of respect for the rights of the defence and the right to good administration.

46 The applicant, supported by Greenpeace-España, claims that the Commission infringed its procedural rights by failing to initiate the formal investigation procedure provided for in Article 108(2) TFEU. According to the applicant, by refusing to initiate the formal investigation procedure, the Commission failed to fulfil its obligation to undertake a diligent and impartial investigation of the contested measure and, thus, infringed the principle of good administration and the principle of respect for the rights of the defence, since it was not given the opportunity to submit its observations as a party concerned.

47 It should be recalled at the outset that, in the context of the procedure for reviewing State aid, it is necessary to distinguish between the preliminary stage of the procedure for examining aid established in Article 108(3) TFEU and the formal investigation stage under Article 108(2) TFEU (see paragraph 26 above). According to settled case-law, the procedure provided for in Article 108(2) TFEU is obligatory if the Commission experiences serious difficulties in establishing whether or not aid is compatible with the internal market (see judgment of 10 February 2009 in *Deutsche Post and DHL International* v *Commission*, T-388/03, ECR, EU:T:2009:30, paragraph 88 and the case-law cited).

48 The Commission may therefore confine itself to the preliminary phase provided for in Article 108(3) TFEU for the purpose of taking a decision favourable to a State measure only if it is in a position to satisfy itself, on an initial examination, either that the measure in question does not constitute aid within the terms of Article 107(1) TFEU, or, if it is to be regarded as aid, that it is compatible with the Treaty. By contrast, if that initial examination has led the Commission to the contrary conviction, or even has not enabled it to overcome all of the difficulties raised by the appraisal of the measure in question, the Commission has a duty to obtain all necessary advice and to initiate, to that end, the procedure provided for in Article 108(2) TFEU (judgments in *British Aggregates* v *Commission*, cited in paragraph 30 above, EU:C:2008:757, paragraphs 186 and 187, and of 27 September 2011 in *3F* v *Commission*, T-30/03 RENV, ECR, EU:T:2011:534, paragraph 53).

49 That obligation follows directly from Article 108(3) TFEU, as interpreted by the case-law, and is confirmed by Article 4(4) of Regulation No 659/1999, when the Commission finds, after a preliminary examination, that the notified measure raises doubts as to its compatibility with the internal market (see judgment in *Smurfit Kappa Group* v *Commission*, cited in paragraph 26 above, EU:T:2012:351, paragraph 62 and the case-law cited).

50 Accordingly, it is for the Commission to decide, on the basis of the factual and legal circumstances of the case, whether the difficulties involved in assessing the compatibility of the aid require the initiation of the formal investigation procedure. That decision must satisfy three requirements (see judgment in *Deutsche Post and DHL International* v *Commission*, cited in paragraph 47 above, EU:T:2009:30, paragraph 89 and the case-law cited).

51 Firstly, under Article 108 TFEU the Commission's power to find aid to be compatible with the internal market upon the conclusion of the preliminary examination procedure is restricted to aid measures that raise no serious difficulties. That criterion is thus an exclusive one. The Commission may not, therefore, refuse to initiate the formal investigation procedure in reliance upon other circumstances, such as third party interests, considerations of economy of procedure or any other ground of administrative or political convenience (see judgment in *Deutsche Post and DHL International* v *Commission*, cited in paragraph 47 above, EU:T:2009:30, paragraph 90 and the case-law cited).

52 Secondly, where it encounters serious difficulties, the Commission must initiate the formal procedure, having no discretion in this regard (judgment in *Deutsche Post and DHL International* v *Commission*, cited in paragraph 47 above, EU:T:2009:30, paragraph 91).

53 Thirdly, the concept of serious difficulties is an objective one. The question of the existence of such difficulties requires investigation of both the circumstances under which the contested measure was adopted and its content; that investigation must be conducted objectively, comparing the grounds of the decision with the information available to the Commission when it took a decision on the compatibility of the disputed aid with the internal market. It follows that, contrary to what is argued by E.ON Generación, judicial review by the General Court of the existence of serious difficulties will not, by nature, be limited to consideration of whether or not there has been a manifest error of assessment (see, to that effect, judgment in *Deutsche Post and DHL International* v *Commission*, cited in paragraph 47 above, EU:T:2009:30, paragraph 92 and the case-law cited).

54 In that regard, it should be noted that the applicant bears the burden of proving the existence of serious difficulties and may discharge that burden of proof by reference to a body of consistent evidence concerning, on the one hand, the circumstances and duration of the preliminary examination procedure and, on the other hand, the content of the contested decision (judgments of 15 March 2001 in *Prayon-Rupel* v *Commission*, T-73/98, ECR, EU:T:2001:94, paragraph 49, and of 16 September 2013 in *Colt Télécommunications France* v *Commission*, T-79/10, EU:T:2013:463, paragraph 37).

55 In the present case, according to the applicant, the existence of serious difficulties requiring the initiation of the formal investigation procedure is revealed by evidence concerning, on the one hand, the preliminary examination procedure, and, on the other hand, the content of the contested decision.

The evidence relating to the preliminary examination procedure

56 According to the applicant, four circumstances of the preliminary examination procedure which led to the adoption of the contested measure indicate that the Commission encountered serious difficulties in its assessment of the contested measure.

– *The first indication, relating to the duration of the preliminary examination procedure*

57 The applicant states that the excessive duration of the preliminary examination procedure in the present case is indicative of the existence of serious difficulties. The contested decision was adopted almost four and a half months after the contested measure was notified, whereas the time-limit provided for in Regulation No 659/1999 is two months. The reason for the amount of time taken was that the Commission itself had doubts as to the compatibility of the contested measure with the internal market. The applicant adds, in its reply, that, given that the date of pre-notification of the contested measure was 18 December 2009, the preliminary examination procedure took even longer than nine months.

58 According to settled case-law, the duration of the preliminary examination can, alongside other factors, constitute evidence that the Commission has encountered serious difficulties if it considerably exceeds the time usually taken for such an examination (judgments of 10 May 2000 in *SIC* v *Commission*, T-46/97, ECR, EU:T:2000:123, paragraph 102, and of 10 July 2012 in *TF1 and Others* v *Commission*, T-520/09, EU:T:2012:352, paragraph 54).

59 Under Article 4(1) of Regulation No 659/1999, the preliminary examination begins on receipt of the notification of the measure concerned. Article 4(5) of Regulation No 659/1999 provides that the decisions bringing the preliminary examination to an end are to be taken within two months. According to that provision, that period is to begin on the day following the receipt of a complete notification.

60 It should be pointed out that, under Article 2(2) of Regulation No 659/1999, a notification is complete only if it enables the Commission to give a decision in accordance with the preliminary examination procedure and the formal investigation procedure. Furthermore, under Article 4(5) of that regulation, '[t]he notification will be considered as complete if, within two months from its receipt, or from the receipt of any additional information requested, the Commission does not request any further information'.

61 The combined effect of these provisions is that a notification cannot be regarded as complete until the Commission has received all the information enabling it to form a prima facie opinion on the nature and effects of the measure concerned. That information is deemed to have been included in the notification if the Commission does not request any additional information within two months of receiving it. However, if the Commission requests additional information, the notification must be regarded as complete when the last information requested is received, the two-month period provided for in Article 4(5) of Regulation No 659/1999 beginning to run only as from that date (judgment in *TF1 and Others* v *Commission*, cited in paragraph 58 above, EU:T:2012:352, paragraphs 61 and 62).

62 In the present case, the Kingdom of Spain notified the contested measure to the Commission on 12 May 2010 (paragraph 1 of the contested decision). That notification was completed on 14 and 15 June 2010 (paragraph 2 of the contested decision).

63 Since the Commission did not consider that notification to be complete, it asked the Kingdom of Spain for additional information by letter of 13 August 2010 (paragraph 3 of the contested decision).

64 The Spanish authorities responded to that request by letter of 31 August 2010 (paragraph 3 of the contested decision).

65 On 3 and 17 September 2010, the Spanish authorities, as they stated at the hearing, provided, on their own initiative, additional information to the Commission (paragraphs 4 and 5 of the contested decision).

66 Therefore, the duration of the preliminary examination procedure should be calculated as starting no earlier than the date of receipt of the last additional information sent by the Spanish authorities in response to a request from the Commission (see paragraph 60 above), namely 31 August 2010, which was the date of their last response to the request for information of 13 August 2010, and not, as claimed by the applicant, as starting on the date of the initial notification of 12 May 2010, or indeed as starting on 18 December 2009. Therefore, neither the period prior to the initial notification nor the period between the initial notification and the last response of the Spanish authorities is included for the purposes of calculating the duration of the preliminary examination procedure.

67 It should be noted, therefore, that, contrary to what is maintained by the applicant, the contested decision, dated 29 September 2010, was adopted within the two-month time-limit provided for in Regulation No 659/1999, which started to run on the day after 31 August 2010, and not after a period of four-and-a-half months, or indeed of more than nine months, as claimed by the applicant.

68 Consequently, the applicant cannot reasonably claim that the duration of the preliminary examination procedure constitutes evidence of the existence of serious difficulties.

– The second indication, relating to the exchanges between the Commission and the Spanish authorities

69 The applicant claims that the fact that the Commission received five letters from the Spanish authorities containing additional information highlights the complexity of the case. It points out that, if the Commission had not raised any doubts, the Kingdom of Spain would not have deemed it necessary to provide it with so much information.

70 In that regard, it must be recalled that the Court has consistently held that the mere fact that discussions took place between the Commission and the notifying Member State during the preliminary examination stage, and that, in that context, the Commission asked for additional information about the measures submitted for its review, cannot in itself be regarded as evidence that the Commission encountered serious difficulties of assessment. It is, however, conceivable that the content of the discussions between the Commission and the notifying Member State during that stage of the procedure might, in certain circumstances, be capable of revealing the existence of such difficulties (see judgment in *TF1 and Others* v *Commission*, cited in paragraph 58 above, EU:T:2012:352, paragraphs 76 and 77 and the case-law cited).

71 In the present case, on 13 August 2010 the Commission sent a request for information to the Kingdom of Spain and the latter sent the Commission not only a response to that request, but also some supplementary information, five letters in total in addition to the initial notification.

72 However, the Commission stated, as confirmed by the Kingdom of Spain at the hearing, that it requested only a series of technical clarifications, relating, in particular, to the calculation of the compensation, and some additional information concerning the risks to security of electricity supply. The scope of its investigation is, therefore, strictly limited to the assessment of the notified contested measure in the light of certain conditions laid down in Article 106(2) TFEU. That request for information cannot, therefore, be regarded, in itself, as being indicative of the existence of serious difficulties. Furthermore, the fact that the questions asked in the requests for information and the responses to them, particularly given that they are numerous, reveal that the Commission had doubts concerning the notified measure in the light of State aid rules is not regarded, by the case-law, as being indicative of serious difficulties, since those doubts were allayed by the national authorities' responses to those requests (see judgment in *Colt Télécommunications France* v *Commission*, cited in paragraph 54 above, EU:T:2013:463, paragraphs 63 and 65 and the case-law cited). In the present case, the fact that the Commission did not feel the need to send a second request for information following the responses given to the first request attests to the fact that, assuming that the Commission had expressed doubts concerning the contested measure, those doubts had been allayed.

73 In those circumstances, the exchanges between the Commission and the Spanish authorities cannot be regarded as being indicative of the existence of serious difficulties in examining the contested measure.

– *The third indication, relating to the amendment of the contested measure*

74 In its reply, the applicant claims, on the basis of the case-law, that the fact, confirmed by the Kingdom of Spain, that the Commission asked the Spanish authorities to amend the contested measure is indicative of the existence of serious doubts as to its compatibility with the internal market.

75 It should be noted, in that regard, that to consider, as the applicant does, that the amendment of the contested measure, assuming that it was made at the request of the Commission during the preliminary procedure, is indicative of serious difficulties is to disregard the objective of Article 108(3) TFEU and of the preliminary procedure provided for therein. In accordance with the objective of Article 108(3) TFEU and its duty of good administration, the Commission may engage in a dialogue with the notifying Member State in order to overcome, during the preliminary procedure, if necessary by means of amending the aid scheme provided for, any difficulties which it encounters in taking a decision on the notified measure, without it being necessary to initiate the formal investigation procedure (see, to that effect, judgment of 16 September 2013 in *Iliad and Others* v *Commission*, T-325/10, EU:T:2013:472, paragraphs 75 and 78, appeal pending, and the case-law cited).

76 Furthermore, even if, as the Commission claims, the amendment in question was made during the phase preceding the notification of the contested measure, it cannot constitute an indication of the existence of serious difficulties, since the existence of such difficulties is assessed by considering the national measure, as notified, in the light of State aid rules. In addition, exchanges between the Commission and the notifying State prior to notification are also intended to remedy the aspects of a proposed national measure which could be problematic as

regards State aid rules. Therefore, contrary to what is claimed by the applicant, either the problem at issue persists after notification, in which case the Commission would initiate the formal investigation procedure, enabling the third parties concerned to exercise their right to submit observations, or that problem is remedied and the third parties concerned would have no such right.

77 The foregoing considerations are not called into question by the judgment of 20 March 1984 in *Germany* v *Commission* (84/82, ECR, EU:C:1984:117), cited by the applicant, since, in the case which gave rise to that judgment, the Commission considered that, despite the substantial amendments made to the national legislation at issue, not all the difficulties raised had been resolved, and this, along with other circumstances, led the Court of Justice to annul the Commission's decision not to initiate the formal investigation procedure (paragraphs 16 and 19 of the judgment). Therefore, it is not the amendments to the national measure which were regarded as an indication of the existence of serious difficulties, but the inadequate nature of those amendments, which failed to eliminate all the Commission's concerns about that measure. In the present case, the applicant makes no claim that the amendment allegedly made to the contested measure was inadequate.

78 It follows that the amendment of the contested measure cannot be regarded as being indicative of serious difficulties in examining that measure.

– *The fourth indication, relating to the objections raised by the Spanish authorities and operators*

79 According to the applicant, the complexity of the case is also illustrated by the observations submitted to the Commission by a number of market operators, including its own, and by the reports of the Comisión Nacional de la Competencia (CNC, Spanish National Competition Commission) and of the Comisión Nacional de Energía (CNE, Spanish National Energy Commission). According to those observations and reports, the contested measure infringes certain provisions of the Treaty and secondary legislation and, therefore, should have led the Commission to initiate the formal investigation procedure. In its reply, the applicant points out that, even if the CNC and the CNE were not competent to give a decision as to the existence of aid and its compatibility with the internal market, their reports, stating that the three elements constituting the contested measure are indissociable and clearly disproportionate, are indicative, nevertheless, of the existence of serious difficulties in examining that measure.

80 Greenpeace-España pointed out that several third parties expressed concerns regarding the adverse effects on the environment of implementation of the contested measure.

81 It should be noted that the concept of serious difficulties is an objective one and that the existence of such difficulties must be assessed objectively, particularly given the circumstances under which the contested measure was adopted (see paragraph 53 above).

82 It follows that the number and seriousness of the objections raised against the contested measure cannot be taken into consideration for the purposes of establishing the existence of serious difficulties. Such a consideration of the objections raised against the contested measure would be tantamount to making the initiation of the formal investigation procedure dependent on the opposition to a national scheme rather than on the serious difficulties actually encountered by the Commission when examining that scheme. Moreover, as pointed out by the Kingdom of Spain, it would make it easy for opponents to delay the Commission's examination of the scheme

by obliging it, due to their intervention, to initiate the formal investigation procedure (judgment in *Colt Télécommunications France* v *Commission*, cited in paragraph 54 above, EU:T:2013:463, paragraphs 73 and 74).

83 However, it is conceivable that the nature of the objections raised by the operators and authorities at issue could be indicative of the existence of serious difficulties in examining the contested measure (judgment in *Colt Télécommunications France* v *Commission*, cited in paragraph 54 above, EU:T:2013:463, paragraph 75). Since those objections are consistent with the points made by the applicant and Greenpeace-España, relating to the alleged evidence of the existence of serious difficulties based on the content of the contested decision, they must be examined in that context (see paragraph 86 et seq. below).

84 Therefore, it must be concluded that the objections of the private and public operators in question, however numerous and even if consistent, cannot, as such, indicate the existence of serious difficulties.

85 In view of the foregoing considerations, it must be concluded that the evidence submitted in relation to the course of the preliminary examination procedure, whether taken individually or as part of a body of evidence, does not establish the existence of serious difficulties requiring the initiation of the formal investigation procedure.

The evidence relating to the content of the contested decision

86 The applicant and Greenpeace-España argue, in essence, that the contested decision reveals four indications that the examination of the contested measure presented serious difficulties.

– *The first indication, relating to the incomplete examination of the contested measure*

87 The applicant submits that the Commission carried out an incomplete examination of the contested measure. It claims, in particular, referring to the arguments it put forward in the context of the second plea, that the Commission did not examine, even though they are inextricably linked, the three constituent elements of the contested measure, namely the financial compensation paid to the electricity producers, the preferential dispatch mechanism and the obligation to purchase indigenous coal, thus avoiding giving a decision on several of the arguments put forward by the parties concerned. In its reply, the applicant added that the President of the General Court himself stated, in his order of 17 February 2011 in *Gas Natural Fenosa SDG* v *Commission* (T-484/10 R, EU:T:2011:53, paragraph 68), that the Commission had carried out an incomplete preliminary examination by examining only the compatibility of the financial compensation.

88 It should be recalled at the outset that, according to settled case-law, if the examination carried out by the Commission during the preliminary examination procedure is insufficient or incomplete, this constitutes evidence of the existence of serious difficulties (judgment in *Smurfit Kappa Group* v *Commission*, cited in paragraph 26 above, EU:T:2012:351, paragraph 81 and the case-law cited).

89 In the present case, it was actually on the basis of the first indication of the existence of serious difficulties, relating to the incomplete examination of the contested measure, that the court dealing with the application for interim relief accepted the existence of a prima facie case for

suspending the operation of the contested decision in the order in *Gas Natural Fenosa SDG* v *Commission*, cited in paragraph 87 above (EU:T:2011:53, paragraphs 62 to 70), and in the orders of 17 February 2011 in *Iberdrola* v *Commission* (T-486/10 R, EU:T:2011:54, paragraphs 56 to 64), *Endesa and Endesa Generación* v *Commission* (T-490/10 R, EU:T:2011:55, paragraphs 55 to 63) and *Comunidad Autónoma de Galicia* v *Commission* (T-520/10 R, EU:T:2011:56, paragraphs 50 to 58).

90 However, it cannot be inferred from those orders of the court dealing with the application for interim relief, which do not, by nature, have the force of *res judicata* [order of 14 February 2002 in *Commission* v *Artegodan*, C-440/01 P(R), ECR, EU:C:2002:95, paragraph 66], that the first plea alleging infringement of the applicant's procedural rights must, in the present case, be declared well-founded on the ground that the Commission did not examine all the elements of the aid in question during the preliminary procedure.

91 It is apparent from the contested decision, and from the above-mentioned interim orders, that the aid measure notified by the Spanish authorities, as has been acknowledged by the parties, consists of three elements, namely financial compensation, the priority dispatch mechanism and the obligatory purchase of indigenous coal (supplemented by an obligation to produce electricity from that coal).

92 More specifically, as evidenced by the description of the contested measure given in the contested decision (section 2), the purpose of the measure is to safeguard security of electricity supply in Spain by making the beneficiary power plants subject to a requirement to purchase indigenous coal from Spanish coal mines and to produce certain volumes of electricity from that coal. In order to ensure that the beneficiary power plants can sell on the electricity market the volumes of electricity produced from indigenous coal, and thus safeguard security of electricity supply in Spain, the contested measure introduced the preferential dispatch mechanism which gave them preferential access to that market, it being understood that the owners of the power plants concerned would be granted compensation equal to the difference between the additional production costs they incurred and the sale prices on the electricity market (see also paragraphs 2 to 4 above).

93 It follows, firstly, that the financial compensation provided for by the contested measure was intended to cover the costs incurred in discharging public service obligations to safeguard security of electricity supply in Spain, which consist of an obligation to purchase indigenous coal and an obligation to produce electricity from that coal.

94 Consequently, the analysis of the obligation to purchase indigenous coal which the Commission was required to make consisted of ascertaining whether such an obligation could actually be considered as a public service obligation capable of giving rise to compensation. The Commission carried out such an analysis in its assessment of the existence of an SGEI as provided for in Article 106(2) TFEU (see section 3.1 of the contested decision).

95 Secondly, it follows from the description of the contested measure, as referred to in paragraph 92 above, that the preferential dispatch mechanism constitutes a 'technical means of attaining the objective pursued', 'in order ... to guarantee the effectiveness of the SGEI'. According to the Spanish authorities, without that mechanism giving access onto the electricity market for electricity produced from indigenous coal, that national energy source could be under threat of

disappearance and Spain's dependence on foreign energy sources could not be reduced. The preferential dispatch mechanism therefore constitutes the essential link between the public service obligations and the general interest objective pursued.

96 Consequently, the Commission was required to examine the priority dispatch mechanism as a means of ensuring security of electricity supply in Spain and in terms of verifying the existence of a true SGEI. The Commission, therefore, rightly assessed the preferential dispatch mechanism in the context of verifying the existence of an SGEI (section 3.1 of the contested decision). It considered, in that regard, that the priority dispatch mechanism was compatible with Article 11(4) of Directive 2003/54/EC of the European Parliament and of the Council of 26 June 2003 concerning common rules for the internal market in electricity and repealing Directive 96/92/EC (OJ 2003 L 176, p. 37), under which '[a] Member State may, for reasons of security of supply, direct that priority be given to the dispatch of generating installations using indigenous primary energy fuel sources'.

97 The Commission even went beyond that examination of the preferential dispatch mechanism in the light of State aid rules, and assessed its compatibility with provisions other than Article 106(2) TFEU and Article 107 TFEU, such as those relating to the free movement of goods (paragraphs 151 to 154 of the contested decision) or the right to property enshrined in the Charter of Fundamental Rights of the European Union (paragraph 159 of the contested decision).

98 Furthermore, in the context of assessing the existence of State aid (in particular in paragraphs 113, 121 and 127 of the contested decision), the Commission took into consideration the combined effects of the financial compensation, the preferential dispatch mechanism and the obligation to purchase indigenous coal, hence taking into account the close links which the applicant claims exist between those three constituent elements of the contested measure. It inferred from that analysis that the beneficiaries of the contested measure were not only the power plants but also the producers of indigenous coal.

99 However, in view of the considerations set out in paragraphs 93 to 96 above, it was not for the Commission to carry out a separate examination of the preferential dispatch mechanism and of the obligation to purchase indigenous coal to determine whether, taken separately, they constituted State aid measures incompatible with the internal market.

100 It follows from all the foregoing that the Commission cannot be criticised for carrying out an incomplete examination of the contested measure and that it cannot be concluded, therefore, that, in examining that measure, serious difficulties were encountered which should have led to the initiation of the formal investigation procedure.

– The second indication, relating to the inadequate examination of the SGEI established in the present case

101 In its reply, the applicant claims, referring to the arguments it put forward in the context of the third plea, that, since the Commission did not initiate the formal investigation procedure, it was not in a position to know that, by preventing combined-cycle power plants from reacting quickly to an unexpected increase in electricity demand, the contested measure would jeopardise security of electricity supply in Spain and, thus, the SGEI on which the compatibility of that measure is based.

102 In support of that claim, the applicant relies, in essence, on the prolonged periods of closure of the combined-cycle power plants and the uncertain situation of those power plants since the implementation of the contested measure, which prevent them from responding flexibly and promptly to electricity demand.

103 Since those circumstances arose after the contested decision was adopted, the Commission was not required to take them into account in its examination (see, to that effect, judgments of 15 April 2008 in *Nuova Agricast*, C-390/06, ECR, EU:C:2008:224, paragraphs 54 and 55, and of 28 March 2012 in *Ryanair* v *Commission*, T-123/09, ECR, EU:T:2012:164, paragraph 103) and it cannot be claimed, therefore, that it carried out an insufficient examination of them during the preliminary procedure.

104 Although the applicant also states, in support of the allegedly insufficient examination of the SGEI established in the present case, that the Commission failed to take into account the reports by the CNE and the CNC which demonstrate that the contested measure was disproportionate in relation to the objective pursued by the SGEI (see paragraph 79 above), it should be noted that that claim is contradicted by the actual wording of the contested decision. It is apparent from the contested decision, firstly, that the Commission did set out, in essence, the content of those reports (paragraph 73 of the contested decision), as well as all of the information and arguments submitted by the third parties (section 2.8 of the contested decision), and, secondly, that the Commission stated that it would ascertain that there was no manifest error of assessment in establishing the SGEI at issue, contrary to its normal practice relating to public service obligations aimed at safeguarding security of electricity supply, on account of the objections raised in this case by third parties (paragraph 90 of the contested decision). It can therefore be concluded that, although it did not accept them, the Commission did take into account the objections raised by the third parties, including those set out in the reports issued by the CNC and the CNE. Therefore, the Commission cannot be criticised for having carried out an inadequate examination in that regard during the preliminary procedure.

– *The third indication, relating to the incompatibility of the contested measure with a number of provisions of the Treaty and secondary legislation*

105 The applicant infers from the alleged incompatibility of the contested measure with a number of provisions of the Treaty and secondary legislation, which were also invoked in the fourth and fifth pleas, that the Commission was not, *a fortiori*, in a position to refuse to initiate the formal investigation procedure.

106 According to the case-law, where an applicant claims that its procedural rights have been infringed as a result of the Commission's failure to initiate the formal investigation procedure, it may invoke any plea to show that the assessment of the information and the evidence which the Commission had at its disposal during the preliminary examination phase of the measure notified, should have raised doubts as to whether the notified measure should be classified as State aid and as to its compatibility with the internal market. The use of such arguments cannot, however, have the consequence of changing the subject-matter of the application or altering the conditions of its admissibility. On the contrary, the existence of doubts as to that classification or that compatibility is precisely the evidence which must be adduced in order to show that the Commission was required to initiate the formal investigation procedure (see, to that effect, judgment in *Smurfit Kappa Group* v *Commission*, cited in paragraph 26 above, EU:T:2012:351, paragraph 52 and the case-law cited).

107 It was therefore for the applicant to identify the evidence relating to the content of the contested decision which is capable of proving the existence of serious difficulties (see paragraph 54 above). It should also be noted that, when the applicant simply refers, as in the present case, to the arguments raised in respect of other pleas, disputing the validity of the contested decision, it must identify precisely which of the arguments raised in that respect are, in its view, capable of proving the existence of such difficulties (see, to that effect, judgment in *Iliad and Others* v *Commission*, cited in paragraph 75 above, EU:T:2013:472, paragraphs 83 and 84).

108 In the present case, since the applicant simply states that 'in the light of what has been set out [in the context of its arguments relating to the fourth and fifth pleas] and considering that the contested measure is incompatible not only with the provisions of the Treaty guaranteeing freedom of establishment and free movement of goods, but also with a number of instruments of secondary legislation, the Commission was not … in a position to refuse to initiate the formal investigation procedure', it should be considered that that vague and unsubstantiated reference does not enable the Court to identify the specific arguments put forward in support of the fourth and fifth pleas, which, according to the applicant, establish the existence of serious difficulties. Therefore, the arguments relating to the incompatibility of the contested measure with a number of provisions of the Treaty and secondary legislation must be examined only in the context of the assessment of the fourth and fifth pleas raised by the applicant.

– *The fourth indication, relating to the inadequate and incomplete examination of the contested measure in the light of environmental rules*

109 Greenpeace-España argues that the investigation carried out during the preliminary procedure was, firstly, insufficient, since the Commission did not have at its disposal the necessary information to give a decision on the environmental impact of the contested measure and, secondly, incomplete, in that the Commission did not examine whether that measure infringed any provisions of the Treaty or secondary legislation other than those relating to State aid, in this case environmental rules, and because its assessment of the compatibility of that measure with Directive 2003/87/EC of the European Parliament and of the Council of 13 October 2003 establishing a scheme for greenhouse gas emission allowance trading within the Community and amending Council Directive 96/61/EC (OJ 2003 L 275, p. 32), as amended, was incomplete. Greenpeace-España relies, in essence, on the same arguments in support of its claim that the Commission infringed its obligation to state reasons.

110 In its observations on the statement in intervention submitted by Greenpeace-España, the Commission states that the arguments of that intervener are inadmissible, because they shift the focus of the debate between the main parties towards a number of totally separate legal issues.

111 It should be noted that, according to settled case-law, although the fourth paragraph of Article 40 of the Statute of the Court of Justice of the European Union and Article 116(3) of the Rules of Procedure do not preclude an intervener from using arguments different from those used by the party it is supporting, that is nevertheless on the condition that they do not alter the framework of the dispute and that the intervention is still intended to support the form of order sought by the latter (judgments of 8 June 1995 in *Siemens* v *Commission*, T-459/93, ECR, EU:T:1995:100, paragraphs 21 to 23, and of 9 September 2009 in *Diputación Foral de Álava and Others*, T-230/01 to T-232/01 and T-267/01 to T-269/01, EU:T:2009:316, paragraph 301).

112 In this case, it is apparent from paragraphs 105 and 108 above that, even though the applicant did not put forward any arguments in support of its claim and though the claim was unsubstantiated, it stated that, in view of the incompatibility of the contested measure with a number of provisions of the Treaty and secondary legislation other than those relating to State aid, including environmental rules, the Commission could not refuse to initiate the formal investigation procedure. Consequently, contrary to what the Commission maintains, the argument based on the evidence of the existence of serious difficulties relied on by Greenpeace-España does not alter the framework of the dispute and must be declared admissible.

113 As to the claim that that evidence demonstrates the existence of serious difficulties, it is sufficient to note, without it being necessary at this stage to rule on its obligation to assess the compatibility of the contested measure with environmental rules (see paragraphs 187 to 191 below), that the Commission responded to all the concerns expressed by the third parties in relation to the negative environmental impact of the application of the contested measure. Accordingly, the Commission submitted, in response to the claims of an increase in harmful emissions caused by the contested measure (paragraphs 70 and 75 of the contested decision), that even though the measure led to an increase in CO_2 emissions from indigenous coal power plants and drove up the price of emission allowances, it would not lead to an increase in Spain's total CO_2 emissions, which would remain, in principle, within the limits corresponding to the commitments made by the Spanish authorities, having regard to the emissions trading scheme established by Directive 2003/87 (paragraphs 156 and 157 of the contested decision). In those circumstances, the Commission was not required either to examine the infringement of specific provisions of Directive 2003/87, or to request additional information concerning the increase in CO_2 emissions and the measures taken by the Spanish authorities to offset that increase.

114 Consequently, the Commission cannot be criticised for having carried out an insufficient or incomplete examination with regard to environmental rules and it cannot be inferred that there were serious difficulties in the examination of the contested measure justifying the initiation of the formal investigation procedure.

115 It follows from all the foregoing that the applicant and Greenpeace-España have not established that the Commission, in this case, should have initiated the formal investigation procedure. In those circumstances, the objections relating to the infringement of the principles of good administration and of respect for the rights of the defence, which are based on the fact that the formal investigation procedure was not initiated, cannot be accepted either, given that, in any event, the applicant, in its capacity as a party concerned, was entitled only to submit its observations during the formal investigation procedure, and not to engage in an exchange of views and arguments with the Commission, unlike the notifying State (see judgment in *TF1 and Others* v *Commission*, cited in paragraph 58 above, EU:T:2012:352, paragraph 217 and the case-law cited).

116 The first plea must therefore be rejected in its entirety.

The second plea in law, alleging infringement of Article 106(2) TFEU, Article 107 TFEU and the obligation to state reasons

117 The applicant takes issue with the Commission, in essence, firstly, for not having assessed the compatibility of all three constituent elements of the contested measure with the internal market, contrary to Article 106(2) TFEU and Article 107 TFEU and in disregard of the obligation

to state reasons, and, secondly, for not having regarded one of those constituent elements, the obligation to purchase indigenous coal, as incompatible State aid, also contrary to Article 106(2) TFEU and Article 107 TFEU.

The absence of an examination of all the constituent elements of the contested measure

118 The applicant claims that the Commission, although it acknowledged the interdependence of the three constituent elements of the contested measure, namely the financial compensation, the preferential dispatch mechanism and the obligation to purchase indigenous coal, examined only the compatibility of the compensation with the internal market.

119 The applicant also states that the Commission infringed its obligation to state reasons by failing to state why the preferential dispatch mechanism and the obligation to purchase indigenous coal did or did not fall within the scope of Article 107 TFEU or Article 106(2) TFEU and failing to examine their impact on the assessment of the compatibility of the contested measure.

120 It must be held that, both by its objection relating to the lack of an examination of all the constituent elements of the contested measure (see paragraph 118 above) and by its objection relating to the failure to state reasons in the contested decision as concerns two of the constituent elements of that measure (see paragraph 119 above), the applicant is, in essence, claiming that the Commission carried out an incomplete examination of the constituent elements of the contested measure.

121 Since it was found, when the first plea in law was examined, that the Commission cannot be criticised for having carried out an incomplete examination of the contested measure (see paragraphs 92 to 100 above), that first series of objections should also be rejected, on the same grounds, in the context of the second plea in law.

The failure to consider the obligation to purchase indigenous coal as incompatible State aid

122 The applicant takes issue with the Commission for not having considered, in the contested decision, that, taken individually, the obligation to purchase indigenous coal imposed on the beneficiary power plants constituted State aid involving, contrary to what the Commission maintained in its observations on the application for interim relief in Case T-490/10 R, a transfer of State resources to indigenous coal producers. Furthermore, that aid could not be declared compatible with the internal market under Article 106(2) TFEU.

123 Without it being necessary to rule on whether the obligation to purchase indigenous coal involves a transfer of State resources to the producers of that coal, or on the request that Annex A 23 to the application containing the Commission's observations on the application for interim relief in Case T-490/10 R be removed from the case-file, it should be noted that the obligation to purchase indigenous coal constitutes, within the notified aid scheme, one of the public service obligations imposed on the beneficiaries of the contested measure and that, accordingly, the Commission was not required to examine whether that purchase obligation, taken in isolation, constituted State aid or, *a fortiori*, to examine its compatibility with the internal market (see paragraphs 94 to 99 above).

124 It follows from all the foregoing that the second plea must be rejected.

The third plea in law, alleging infringement of Article 106(2) TFEU, of the SGEI framework, of Article 11(4) of Directive 2003/54, manifest errors of assessment and misuse of powers

125 The applicant submits, primarily, that the Commission infringed Article 106(2) TFEU, the Community framework for State aid in the form of public service compensation (OJ 2005 C 297, p. 4, 'the SGEI framework') and Article 11(4) of Directive 2003/54 and that it committed manifest errors of assessment in considering that the obligations imposed by the contested measure were consistent with an SGEI intended to safeguard security of electricity supply. The applicant submits, in the alternative, that, even if security of electricity supply in Spain were at risk, the contested measure would be disproportionate. The applicant concludes, furthermore, that the Commission misused its powers in the present case.

The justification for the establishment of an SGEI

126 It is acknowledged in a number of provisions of EU law that the establishment of an SGEI can be justified for reasons of security of electricity supply.

127 With regard, more specifically, to the electricity sector, it was acknowledged in Directive 2003/54, which was applicable at the material time, that public service obligations could pursue the objective of achieving security of electricity supply. In particular, according to recital 26 in the preamble to Directive 2003/54, '[t]he respect of the public service requirements is a fundamental requirement of this Directive, and it is important that common minimum standards, respected by all Member States, are specified in this Directive, which take into account the objectives of ... security of supply'. Similarly, Article 3(2) of Directive 2003/54 provides that '[h]aving full regard to the relevant provisions of the Treaty, in particular Article [106] thereof, Member States may impose on undertakings operating in the electricity sector, in the general economic interest, public service obligations which may relate to security, including security of supply'. Furthermore, under Article 11(4) of Directive 2003/54, '[a] Member State may, for reasons of security of supply, direct that priority be given to the dispatch of generating installations using indigenous primary energy fuel sources, to an extent not exceeding in any calendar year 15% of the overall primary energy necessary to produce the electricity consumed in the Member State concerned'.

128 In its Communication on Services of General Interest in Europe (OJ 2001 C 17, p. 4), the Commission also considered that security of electricity supply constituted an essential public service objective (Annex I, paragraph 3).

129 Recital 4 in the preamble to Council Regulation (EC) No 1407/2002 of 23 July 2002 on State aid to the coal industry (OJ 2002 L 205, p. 1), which was applicable when the contested decision was adopted, further states that 'the world political situation brings an entirely new dimension to the assessment of geopolitical risks and security risks in the energy sector, and gives a wider meaning to the concept of security of supplies'.

130 The applicant does not dispute that security of electricity supply constitutes a reason in the general economic interest capable of justifying the establishment of an SGEI. However, it does dispute the existence in this case of a risk to security of electricity supply in Spain and infers from this that the obligations imposed by the contested measure cannot be regarded as public service obligations.

131 In the contested decision, the Commission considered, on the basis of the provisions of Directive 2003/54 and of the wide discretion enjoyed by Member States in defining SGEIs, that States were not required to identify specific and imminent threats to the security of their electricity supply. It also drew attention to its previous practice in taking decisions according to which, where no third parties were disputing the need to adopt specific measures for security of supply reasons, the Commission would not ascertain whether the Member States concerned had provided detailed proof that they were facing specific threats to their security of supply. However, in the present case, in view of the objections from several third parties and the context of the liberalisation of the energy sector in Europe, the Commission considered it necessary to ascertain whether the Spanish authorities' treatment of the contested measure in the same way as an SGEI was manifestly incorrect (paragraphs 87 to 90 of the contested decision).

132 It is true that, according to Protocol 26 annexed to the Treaties and all the texts applicable to SGEIs, in particular the SGEI Framework, as well as settled case-law, as regards competence to determine the nature and scope of an SGEI mission within the meaning of the Treaty, Member States have a wide discretion to define what they regard as SGEIs (paragraph 22 of the Commission Communication on Services of General Interest in Europe; paragraph 9 of the SGEI Framework) (see judgments of 20 April 2010 in *Federutility and Others*, C-265/08, ECR, EU:C:2010:205, paragraphs 29 and 30 and the case-law cited, and of 12 February 2008 in *BUPA and Others* v *Commission*, T-289/03, ECR, EU:T:2008:29, paragraph 166 and the case-law cited). Recital 26 in the preamble to Directive 2003/54 also states that '[i]t is important that the public service requirements can be interpreted on a national basis, taking into account national circumstances'. There is no clear and precise regulatory definition of the concept of an SGEI mission and no established legal concept definitively fixing the conditions that must be satisfied before a Member State can properly invoke the existence and protection of an SGEI mission, within the meaning of Article 106(2) TFEU (judgment in *BUPA and Others* v *Commission*, cited above, EU:T:2008:29, paragraph 165).

133 However, according to those texts and the case-law, although Member States have a wide discretion to define what they regard as SGEIs, the definition of those services or missions by a Member State can be questioned by the Commission in the event of manifest error. Accordingly, although the determination of the nature and scope of an SGEI mission falls within the competence and discretionary powers of Member States, such competence is not unlimited and cannot be exercised arbitrarily (see, to that effect, judgment of 7 November 2012 in *CBI* v *Commission*, T-137/10, ECR, EU:T:2012:584, paragraphs 99 and 101 and the case-law cited).

134 Consequently, as with all the aspects of the definition of an SGEI, the issue of justification for the establishment of an SGEI, which, in this case, is the existence of a risk to security of electricity supply, cannot be regarded as falling outside the scope of the Commission's, albeit limited, review (see, to that effect, judgments of 15 June 2005 in *Olsen* v *Commission*, T-17/02, ECR, EU:T:2005:218, paragraph 217, and in *BUPA and Others* v *Commission*, cited in paragraph 132 above, EU:T:2008:29, paragraph 267). That limited review may include a prospective assessment, particularly where, as in the present case, it is the existence of a risk which is subject to review.

135 It is necessary, therefore, to assess whether the applicant's arguments disputing that there is, in the present case, a risk to security of electricity supply in Spain are well-founded.

136 It should be pointed out, in that regard, that, according to settled case-law, in the light both of the wide discretion enjoyed by a Member State in defining an SGEI mission and the conditions of its implementation and of the scope of the review which the Commission is entitled to exercise in

that regard being limited to one of manifest error, the Court's review of the Commission's assessment in that regard must also observe the same limit. When conducting that review, it is, more particularly, for the Court to examine whether the Commission's assessment in that regard is sufficiently plausible (see, to that effect, judgments in *BUPA and Others* v *Commission*, cited in paragraph 132 above, EU:T:2008:29, paragraphs 220 and 266 and the case-law cited, and in *CBI* v *Commission*, cited in paragraph 133 above, EU:T:2012:584, paragraphs 99 and 100).

137 In the contested decision, the Commission considered that the Spanish authorities had established the existence of specific risks jeopardising security of electricity supply (paragraph 91 of the contested decision). It took the view, in particular, that there was no manifest error of assessment in the Spanish authorities' claim that there was a risk that, because of their insufficient profitability, the power plants capable of safeguarding such security of supply, namely those running on indigenous coal, would be closed down between 2010 and 2014, with no possibility of being replaced with new power plants because of the low prices and uncertainty on the wholesale electricity market (paragraph 93 of the contested decision).

138 In so far as the applicant disputes, firstly, that the viability of power plants using indigenous coal is under threat due to the global economic recession, it should be noted, first of all, that the Commission's conclusion that there was no manifest error of assessment in the Spanish authorities' claim that power plants running on indigenous coal are at risk of closure was not based purely on the consequences of the economic recession. It took into account the combined effects of the economic recession and other structural aspects of the electricity market in Spain, such as the increasing proportion of electricity produced from renewable energy sources (paragraph 93 of the contested decision) and the isolation of the Spanish electricity market from other European markets (paragraph 96 of the contested decision). Thus, the Commission stated, in paragraph 96 of the contested decision, that the isolation of the Spanish electricity market due to the limited interconnections with other European countries would prevent the owners of indigenous coal power plants from mitigating the effects of the fall in demand and in wholesale prices of electricity in Spain resulting from the economic crisis by exporting to markets where prices are higher.

139 It should also be noted, as the Commission did, that the only evidence provided by the applicant in support of its argument, namely extracts from the IPN 33/09 report issued by the CNC, does not completely rule out the risk of closure of indigenous coal power plants, since that report states that it cannot 'necessarily be concluded that the economic crisis and subsequent fall in demand will result in the closure of coal-fired power plants'. Moreover, as the Commission also rightly points out, the CNC's assessment of the effects of the economic crisis on the viability of indigenous coal power plants was based not on objective data but on the fact that the sector concerned had not made a declaration of intention to decommission its assets. Accordingly, those analyses made by the CNC are not sufficient to render implausible the Commission's assessment relating to the alleged existence of a risk of closure of indigenous coal power plants.

140 Finally, it must be noted that the applicant did not in any way call into question the figures relating to electricity demand and their impact on electricity production which were relied on by the Spanish authorities and used by the Commission as the basis for its conclusion that there was no manifest error of assessment in the claim that there is a risk of closure of the indigenous coal power plants in Spain. It is clear from those figures that electricity demand in Spain has fallen sharply, down by 5% in 2009, and that power plants using indigenous coal have, at the same time, drastically reduced their production (paragraph 19 of the contested decision).

141 In so far as the applicant disputes, secondly, the allegedly unrealistic taking into account of the closure of all the indigenous coal power plants for the purpose of calculating the energy coverage, it should be noted that neither the calculation, made by the Spanish authorities and referred to in paragraph 24 of the contested decision, nor that possibility that all the indigenous coal power plants might be closed down were referred to by the Commission in its examination of the existence of a true SGEI in the present case. In accordance with the limited review that it is required to conduct in respect of the justification for the establishment of an SGEI, the Commission verified merely whether it was plausible that a risk of closure of indigenous coal power plants existed at all, not the likelihood that that risk would materialise or, *a fortiori*, the extent to which it could materialise (see, to that effect, judgment in *BUPA and Others* v *Commission*, cited in paragraph 132 above, EU:T:2008:29, paragraph 268). The possibility that all of the beneficiary power plants might be closed down did not, therefore, constitute the basis of the Commission's conclusion relating to the existence of an SGEI and, therefore, the applicant's argument must be rejected as immaterial.

142 In so far as the applicant disputes, thirdly, the failure, in the contested decision, to take into account the general overcapacity on the Spanish electricity market and, in particular, the production capacity of nuclear power plants, wind farms and hydraulic power plants which also operate on indigenous energy sources, it should be noted, first of all, that the reports and statements cited by the applicant, in particular, report 29/2009 of the CNE of 16 November 2009 and the framework report of the CNE of 22 December 2009, do, admittedly, indicate that Spain's generation system has sufficient production capacity to meet the demand for electricity, even in the most extreme circumstances. However, none of those reports or statements specifically takes into account the risk of closure of the indigenous coal power plants, which constitutes the main basis, not vitiated by a manifest error of assessment, for the Spanish authorities' claim that security of electricity supply is at risk.

143 It should also be noted that the Commission explicitly took account of electricity production from renewable sources by referring, in paragraph 93 of the contested decision, to the increasing share of renewable energy in Spain's electricity production. Moreover, as is clear from that paragraph of the contested decision and as rightly stated by the Commission in its written submissions, the risks to security of electricity supply in Spain arise, in particular, as a result of the substantial share of renewable energy sources, such as wind power, hydraulic power and solar power, in that supply. Those energy sources, which, according to the data provided by the Commission, some of which data are also referred to in the contested decision (paragraph 97 and footnote 40) and are not disputed and are even supplemented by the applicant, represented a considerable share of the electricity produced and consumed in Spain (44% of Spain's generation system in terms of installed capacity in 2009, 23% of Spain's electricity production in 2008 and 35% of the electricity consumed in Spain in 2010), are by definition dependent on the weather conditions and cannot, therefore, irrespective of their production capacity, be regarded as being capable of safeguarding security of supply in Spain in all circumstances. That is particularly so in this case because, as is apparent from the contested decision (paragraph 98) and not specifically disputed by the applicant, power plants using renewable energy sources cannot provide the balancing services which are essential in order to avoid supply disruptions, in that they make it possible to adjust the output of the power plants, either upwards or downwards, according to the requests of the system operator (see also paragraph 21 of the contested decision).

144 Likewise, the applicant does not dispute the Commission's conclusion in the contested decision (paragraphs 21 and 98) that nuclear power plants cannot provide those balancing services either. Moreover, although nuclear energy is not dependent on climate conditions, as renewable energy

sources are, it cannot be regarded as an indigenous energy source, like indigenous coal, and cannot, therefore, be treated as such by the Commission in its evaluation of the alleged risk to security of supply. Although, as stated by the applicant, nuclear fuel, that is to say enriched uranium, is produced in Spain, the source of that fuel, namely uranium, comes, as agreed by the parties at the hearing, from deposits located outside Spain. Consequently, nuclear electricity production capacity should not have been taken into account and cannot render implausible the Commission's assessment relating to the alleged existence of a risk to security of electricity supply in Spain.

145 In so far as the applicant states, in the context of its arguments relating to nuclear power plants, wind farms and hydraulic power plants, that the Commission infringed Article 11(4) of Directive 2003/54, that objection must be rejected as inadmissible, since it was raised for the first time in the reply and cannot be regarded as the amplification of a plea or an objection raised in the application. In the application, the applicant claimed that Article 11(4) of Directive 2003/54 had been infringed, pointing out that there had been no justification on the ground of safeguarding security of electricity supply, as required by that provision, whereas in the reply it claimed that that provision had been infringed on the ground that if nuclear energy benefitting from a preferential dispatch mechanism were taken into account the maximum limit of 15% fixed by that provision would be exceeded.

146 It follows from the foregoing that the Commission did not commit any manifest error in its assessment of the Spanish authorities' justification for the SGEI established in the present case.

The proportionality of the contested measure in relation to the objective pursued by the SGEI

147 It should be recalled, at the outset, that the review of the proportionality constitutes one of the reviews which the Commission is required to carry out in the context of its assessment of the compatibility of State aid measures with Article 106(2) TFEU.

148 Therefore, according to paragraph 23 of the Commission Communication on Services of General Interest in Europe (see also, to that effect, judgment in *TF1 and Others* v *Commission*, cited in paragraph 58 above, EU:T:2012:352, paragraphs 101 to 104):

'Proportionality under Article [106](2) [TFEU], implies that the means used to fulfil the general interest mission shall not create unnecessary distortions of trade. Specifically, it has to be ensured that any restrictions to the rules of the EC Treaty ... do not exceed what is necessary to guarantee effective fulfilment of the mission ...'

149 In particular, according to the case-law relating to Directive 2003/55/EC of the European Parliament and of the Council of 26 June 2003 concerning common rules for the internal market in natural gas and repealing Directive 98/30/EC (OJ 2003 L 176, p. 57), which displays many similarities with Directive 2003/54, adopted on the same day, establishing the internal electricity market, it follows from the very wording of Article 106 TFEU that the public service obligations which may be imposed on undertakings under Article 3(2) of Directive 2003/55 (comparable to Article 3(2) of Directive 2003/54) must comply with the principle of proportionality and that, therefore, those obligations may compromise the freedom to determine the price for the supply of natural gas only in so far as is necessary to achieve the objective in the general economic interest which they pursue (judgment in *Federutility and Others*, cited in paragraph 132 above, EU:C:2010:205, paragraph 33).

150 The Court has also consistently held that the review of the proportionality of a measure for discharging an SGEI mission is limited to ascertaining whether the measure provided for is necessary in order for the SGEI in question to be capable of being performed in economically acceptable conditions or whether, on the other hand, the measure in question is manifestly inappropriate in relation to the objective pursued (judgment in *BUPA and Others* v *Commission*, cited in paragraph 132 above, EU:T:2008:29, paragraphs 222, 266 and 287 and the case-law cited).

151 Contrary to what is claimed by the applicant, the Commission carried out such a review of proportionality in the present case. Indeed, it did not merely ascertain the absence of overcompensation by the contested measure (paragraphs 135 to 146 of the contested decision). It also ascertained, in essence, firstly, that the contested measure was appropriate in relation to the objective of safeguarding security of electricity supply and, secondly, that it was not excessive.

152 Before examining the objections to those assessments made by the Commission, it should be noted that, according to settled case-law, since the Commission's review of the proportionality of the SGEI is restricted (see paragraph 150 above), that circumstance must also be taken into account in the context of the review of the legality of the Commission's assessment carried out by the European Union judicature. That review by the Court must be even more restricted because the Commission's assessment relates to complex economic facts (see judgment in *BUPA and Others* v *Commission*, cited in paragraph 132 above, EU:T:2008:29, paragraph 269 and the case-law cited).

153 Firstly, as regards the appropriateness of the contested measure, the Commission took the view that coal power plants, and in particular indigenous coal power plants, played an important role in providing support to electricity production from renewable energy and were capable, despite being less flexible than gas-fired power plants, of providing balancing services to the system operator, which were essential to avoid supply disruptions (paragraph 98 of the contested decision). The Commission stated, furthermore, that, for coal power plants, a full switch from indigenous coal to imported coal could not be done quickly and would require major investments. It concluded that, in the absence of the contested measure, coal production in Spain could cease altogether and indigenous coal power plants, given the difficulty of fuel switching, would no longer be available to ensure the supply of electricity (paragraph 99 of the contested decision). Finally, the Commission noted that, apart from indigenous coal, all fossil fuels used for electricity generation come from non-EU countries which are not exempt from geostrategic risks, and this poses additional risks to Spain's security of supply (paragraph 100 of the contested decision). The Commission concluded from all of those considerations that the aim of the contested measure was to mitigate specific risks to Spain's security of supply over a period of four years and that it had not detected any manifest error of assessment in the justifications put forward by the Spanish authorities in support of that measure in terms of security of supply (paragraph 101 of the contested decision).

154 According to the applicant, the Commission wrongly regarded indigenous coal power plants as being capable of safeguarding security of electricity supply in Spain, whereas combined-cycle power plants are more capable of doing so.

155 It should be noted, in that regard, that Article 11(4) of Directive 2003/54 provides, in essence, that Member States may, for reasons of security of supply, give power plants using indigenous fuel sources priority access to the market. Furthermore, Regulation No 1407/2002, which was in force when the contested decision was adopted, acknowledges the importance of coal production, as concerns energy security, for electricity generation. After noting that the European Union has

become increasingly dependent on external supplies of primary energy sources, the Council concludes that the diversification of energy sources, both by geographical area and in products, will make it possible to create the conditions for greater security of supply, and adds that such a strategy includes the development of indigenous sources of primary energy (recital 3 in the preamble to Regulation No 1407/2002). The Court of Justice has held, furthermore, that a Member State may, without infringing the principle of the free movement of goods, limit the award of so-called 'green' electricity certificates, designed to promote renewable energy, to electricity producers established in its territory (see, by analogy, judgment of 1 July 2014 in *Ålands Vindkraft*, C-573/12, ECR, EU:C:2014:2037, paragraphs 98 to 104).

156 Accordingly, in order to render implausible the Commission's acknowledgement in the present case that the contested measure, which benefits indigenous coal power plants in order to safeguard security of supply in Spain, is appropriate, the arguments and evidence put forward by the applicant must be particularly detailed and based on any specific features of the present case.

157 However, that is not the case.

158 The applicant did not put forward any specific evidence in support of its claim regarding the stability of production by indigenous coal power plants, their profitability and the absence of any problems in supplying them with primary energy sources, and submitted merely, in essence, that that stability, profitability and absence of difficulty in obtaining primary energy sources also apply to power plants using imported coal or natural gas.

159 Furthermore, the specific evidence which the applicant put forward in support of its claim that indigenous coal power plants have insufficient production capacity does not render implausible the assessment that the measures adopted to benefit the aforementioned power plants were appropriate in relation to the objective pursued. After all, the objective pursued is not to ensure a supply of electricity that satisfies all electricity needs, but to safeguard security of supply, that is to say to have power plants which are capable of generating electricity regardless of the weather and political conditions. Accordingly, it is specified in recital 1 in the preamble to Directive 2005/89/EC of the European Parliament and of the Council of 18 January 2006 concerning measures to safeguard security of electricity supply and infrastructure investment (OJ 2006 L 33, p. 22), the purpose of which is to harmonise measures to safeguard security of supply, that those measures should not result in the creation of generation capacity that goes beyond what is necessary to prevent undue interruption of distribution of electricity to final customers. Therefore, in the present case, the amount of electricity generated is not a determining factor for assessing the appropriateness of the contested measure in relation to the objective pursued.

160 Similarly, the specific evidence which the applicant put forward in support of its claim that indigenous coal power plants are less flexible than power plants which use gas does not render implausible the assessment that the measures adopted to benefit the former are appropriate with regard to the objective pursued. It is sufficient, in order to meet that objective, to have a certain degree of flexibility, that is, in essence, to be capable of providing balancing services (see paragraph 143 above). The flexibility of the beneficiary power plants is not disputed by the applicant, which claims only, as the Commission itself acknowledged in paragraph 98 of the contested decision, that those power plants were less flexible than combined-cycle power plants which use gas. It may be added, in that regard, that the applicant also qualified its assertion regarding the flexibility of combined-cycle power plants by acknowledging, in its reply, that a period of closure exceeding two weeks would significantly increase their response time.

161 Secondly, as to the excessive nature of the contested measure and the distortions which it could create, the Commission considered that that measure could potentially affect, in particular, the natural gas and imported coal markets, pointing out that those distortions are inherent in any public service obligation established by Member States in accordance with Article 11(4) of Directive 2003/54 (paragraph 125 of the contested decision).

162 The applicant disputes that assessment, on the one hand, describing the numerous distortions on the electricity market created by the contested measure and, on the other hand, claiming that there are less restrictive measures capable of attaining the objective of achieving security of supply.

163 Firstly, it should be noted that the numerous distortions allegedly created by the contested measure, namely the adverse effects on the freedom to conduct a business, on energy efficiency and on electricity market prices, and the harm caused to power plants using imported coal and to the entire natural gas sector, are a consequence of regarding the contested measure as State aid which, by definition, distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods and, in particular, of the implementation of Article 11(4) of Directive 2003/54, which permits Member States to favour installations which generate electricity from indigenous energy sources to the detriment of those using other energy sources.

164 Accordingly, the contested measure could not be regarded as excessive unless it gave rise to distortion which was substantial and manifestly disproportionate in relation to the objective pursued. In order to for there to be a finding that such a distortion has been created, it must be established that the contested measure threatens the viability of other electricity generation sectors, even going so far as to jeopardise security of electricity supply in Spain (see, to that effect and by analogy, judgment of 11 July 2014 in *DTS Distribuidora de Televisión Digital* v *Commission*, T-533/10, ECR, appeal pending, EU:T:2014:629, paragraphs 155 and 160).

165 Therefore, the distortions which the applicant claims have arisen, relating to the freedom to conduct a business, energy efficiency and market prices, must be ruled out at the outset as they do not establish that the contested measure is disproportionate, especially since, in relation to some of the distortions claimed, the applicant did not use any qualifying terms to suggest that they were excessive.

166 As to the alleged harm caused to power plants running on gas and those using imported coal, it should be noted that the contested measure places strict limits on the advantages granted to beneficiary power plants. In accordance with the requirements of Article 11(4) of Directive 2003/54, the amount of indigenous coal used per year by beneficiary power plants must not exceed 15% of the overall primary energy necessary to produce the electricity consumed in Spain. As is apparent from the contested decision (paragraph 83) and confirmed by the Commission in its written submissions, and not disputed by the applicant, it is expected that the contested measure will stay well below that maximum limit, since the volume of primary energy concerned does not exceed 9% of the overall primary energy necessary to produce the electricity consumed annually, which corresponds to 23.35 TWh of electricity production per year (see paragraph 2 above). Furthermore, according to the data in the contested decision, as supplemented by the applicant, the installed capacity of the beneficiary power plants represents only around 5% of the total installed capacity in Spain in 2008, that is around 5 000 MW, as referred to in the application,

compared to 91 000 MW, as referred to in paragraph 18 of the contested decision. Finally, the contested measure, which entered into force in February 2011, is due to expire on 31 December 2014 (see paragraph 5 above).

167 The applicant has not established that the contested measure would, despite the limits set out therein, threaten the viability of the power plants concerned.

168 As regards power plants using imported coal, the applicant merely quotes an extract of Report 5/2010 of the CNE, which, although it refers to 'total closure' of those power plants, also indicates that those power plants would not be fully closed down as a result of the contested measure, on account of their role in providing certain balancing services. Furthermore, when the applicant mentioned the potential 'threat to the viability of power plants using imported coal', it based its claim on nothing other than the 'displacement of those power plants' as a result of the contested measure, that is to say in general terms and without further clarifications, and the consequences of the priority dispatch mechanism. The applicant also refers, in its observations on the statements in intervention, to a substantial increase in electricity production by imported coal power plants in 2011.

169 Similarly, as regards combined-cycle power plants using gas, other than the specific evidence submitted in support of the claim that its own competitive position was substantially affected, the applicant confines itself, in essence, to referring to the observations it submitted during the preliminary examination procedure, in which it refers, in general terms, only to the consequences of the contested measure on gas supply and on the maintenance of combined-cycle power plant turbines, without mentioning or even implying the existence of a threat to their viability. Moreover, and in any event, even if it were necessary to take into account the data relied on by the applicant which was submitted after the contested decision was adopted, it must be held, as the Commission considered, that the semi-permanent closure of most of the combined-cycle power plants cannot be inferred from that data. The average percentage of electricity production by combined-cycle power plants claimed to be withdrawn from the market as a result of the contested measure, namely 27%, is effectively limited and can be explained, as the applicant fails to take into account, by the fact that the contested measure provides for the preferential withdrawal of the electricity produced by the most polluting power plants, namely those using fuel-oil and coal, while the electricity produced by combined-cycle power plants is to be withdrawn only afterwards (see also paragraph 219 below). Finally, the maximum annual production by the beneficiary power plants provided for in the contested measure represented only around 30% of the annual electricity production by combined-cycle power plants in 2009 — according to information provided by the Kingdom of Spain, which was not contested by the applicant — and could not, therefore, have the alleged impact on the viability of those power plants, even though only the electricity produced by them was withdrawn from the market pursuant to the contested measure.

170 Secondly, as regards the existence of less restrictive measures capable of attaining the objective of achieving security of electricity supply, it should be noted that, according to the case-law, Member States must set out in detail the reasons for which, in the event of elimination of the aid measure in question, the performance of the tasks of general economic interest under economically acceptable conditions would be jeopardised, but they are not required to prove, positively, that no other conceivable measure, which by definition would be hypothetical, could enable those tasks to be performed under the same conditions (see, to that effect, judgment of

23 October 1997 in *Commission* v *France*, C-159/94, ECR, EU:C:1997:501, paragraph 101). Accordingly, States wishing to establish an SGEI under Article 11(4) of Directive 2003/54 are, *a fortiori*, not under such an obligation.

171 It follows that the Commission was not required, in the context of its restricted review, to carry out a comparative analysis of all the measures which could be capable of attaining the general interest objective pursued (see, to that effect, order in *Gas Natural Fenosa SDG* v *Commission*, cited in paragraph 87 above, EU:T:2011:53, paragraph 109).

172 In the present case, it follows that all of the arguments relating to the existence of other appropriate measures, less restrictive than that laid down by the Spanish authorities, must be rejected.

173 It follows from all the foregoing that the applicant has not established that the Commission made a manifest error of assessment in acknowledging that the SGEI established in the present case was justified and that the contested measure was proportionate in relation to the objective pursued by that SGEI. Accordingly, nor did the Commission infringe Article 106(2) TFEU, the SGEI framework or Article 11(4) of Directive 2003/54 by making those assessments.

The existence of misuse of powers

174 The applicant criticises the Commission for having misused its powers, since the real objective pursued by the adoption of the contested decision was to enable Spain to protect its coal producers. The applicant bases its argument in this regard on the lack of justification for and inappropriateness of the contested measure, on the reference to the above-mentioned objective in the contested decision and on the existence of specific EU measures to protect the coal sector.

175 It must be recalled that according to settled case-law, the concept of misuse of powers refers to cases where an administrative authority has used its powers for a purpose other than that for which they were conferred on it. A decision may amount to a misuse of powers only if it appears, on the basis of objective, relevant and consistent factors, to have been taken for such a purpose (judgments of 13 November 1990 in *Fedesa and Others*, C-331/88, ECR, EU:C:1990:391, paragraph 24, and of 9 October 2001 in *Italy* v *Commission*, C-400/99, ECR, EU:C:2001:528, paragraph 38).

176 In the present case, the applicant cannot be regarded as having provided such evidence, given that its arguments that the SGEI established in this case was unjustified and inappropriate were rejected (see paragraph 173 above), that the existence of an aid scheme for the coal sector does not imply that the Commission pursues such an objective in all of the decisions it adopts in relation to that sector, and that the reference in the contested decision to concern for the Spanish mining industry is not sufficient to constitute the basis of that decision. In that regard, furthermore, assuming that the provision of support to the Spanish mining industry could also be regarded as one of the objectives of the contested measure, as acknowledged by the Commission, that would not make the decision invalid for misuse of powers, in so far as the support to the mining industry would be provided only as a means of achieving security of electricity supply and it would not, therefore, nullify that main aim (see, to that effect, judgment of 21 September 2005 in *EDP* v *Commission*, T-87/05, ECR, EU:T:2005:333, paragraph 87 and the case-law cited).

177 Consequently, the plea alleging misuse of powers must be rejected.

178 The third plea must therefore be rejected in its entirety.

The fourth plea in law, alleging infringement of provisions of the Treaty and secondary legislation other than those relating to State aid

The relevance of the plea in law

179 The Commission takes the view that all of the objections raised in support of that plea are inadmissible, or at least irrelevant, since it is required to make an assessment in the light of relevant provisions not forming part of State aid legislation only if certain aspects of the aid at issue are so closely linked to its object that any failure on their part to comply with those provisions would necessarily affect the compatibility of the aid with the internal market. In the present case, the application does not contain any assessment of such a link.

180 In the contested decision, the Commission concluded that the contested measure was compatible with the internal market under Article 106(2) TFEU, rightly maintaining that certain aspects of the aid at issue would contravene specific provisions of the Treaty, other than Articles 107 TFEU and 108 TFEU, and would then be so inextricably linked to the object of the aid that it would be impossible to evaluate them separately (paragraph 148). Accordingly, it examined whether the contested measure was compatible with the rules on the free movement of goods and the freedom of establishment, with certain environmental rules and with Regulation No 1407/2002.

181 According to settled case-law, when the Commission applies the State aid procedure, it is required, in accordance with the general scheme of the Treaty, to ensure that provisions governing State aid are applied consistently with specific provisions other than those relating to State aid and, therefore, to assess the compatibility of the aid in question with those specific provisions (judgments in *Matra* v *Commission*, cited in paragraph 25 above, EU:C:1993:239, paragraphs 41 to 43, and of 31 January 2001 in *Weyl Beef Products and Others* v *Commission*, T-197/97 and T-198/97, ECR, EU:T:2001:28, paragraphs 75 and 77).

182 However, such an obligation is imposed on the Commission only where the aspects of aid are so inextricably linked to the object of the aid that it is impossible to evaluate them separately (judgments in *Matra* v *Commission*, cited in paragraph 25 above, EU:C:1993:239, paragraph 41, and in *Weyl Beef Products and Others* v *Commission*, cited in paragraph 181 above, EU:T:2001:28, paragraph 76). The obligation is not imposed, however, where the conditions or factors of an aid scheme, even though they form part of the aid, may be regarded as not being necessary for the attainment of its object or for its proper functioning (judgments of 22 March 1997 in *Iannelli & Volpi*, 74/76, ECR, EU:C:1977:51, paragraph 14, and in *Weyl Beef Products and Others* v *Commission*, cited above, EU:T:2001:28, paragraph 77).

183 If the Commission were required to adopt a definitive position, irrespective of the link between the aspect of the aid and the object of the aid at issue, in a procedure relating to State aid, on the existence or absence of an infringement of provisions of EU law distinct from those coming under Articles 107 TFEU and 108 TFEU, read together, where appropriate, with Article 106 TFEU, that would run counter to, first, the procedural rules and guarantees — which in part differ significantly and imply distinct legal consequences — specific to the procedures specially established for control of the application of those provisions and, second, the principle of autonomy of administrative procedures and remedies (judgment in *BUPA and Others* v *Commission*, cited in paragraph 132 above, EU:T:2008:29, paragraphs 313 and 314; see also, to that

effect, judgments in *Iannelli & Volpi*, cited in paragraph 182 above, EU:C:1977:51, paragraph 12, and in *Matra* v *Commission*, cited in paragraph 25 above, EU:C:1993:239, paragraph 44). Such a requirement would also conflict with the derogation from the rules of the Treaty provided for in Article 106(2) TFEU, which could never be effective if its application were at the same time required to ensure full compliance with the rules from which it is supposed to derogate (judgment in *BUPA and Others* v *Commission*, cited in paragraph 132 above, EU:T:2008:29, paragraph 318).

184 Accordingly, if the aspect of aid at issue is inextricably linked to the object of that aid, the Commission must assess its compatibility with provisions other than those relating to State aid in the context of the procedure provided for in Article 108 TFEU and that assessment may result in a finding that the aid concerned is incompatible with the internal market. By contrast, if the aspect at issue can be separated from the object of the aid, the Commission is not required to assess its compatibility with provisions other than those relating to State aid in the context of the procedure provided for in Article 108 TFEU (see, to that effect, judgments in *Weyl Beef Products and Others* v *Commission*, cited in paragraph 181 above, EU:T:2001:28, paragraph 77, and *BUPA and Others* v *Commission*, cited in paragraph 132 above, EU:T:2008:29, paragraph 314).

185 In the present case, it follows from the considerations set out in paragraphs 91 to 96 above that the obligation to purchase indigenous coal, the preferential dispatch mechanism and the financial compensation constitute aspects which are inextricably linked to the object of the aid at issue within the meaning of that case-law, as, moreover, the Commission implicitly considered in the contested decision, given that it assessed those aspects in the light of provisions other than those relating to State aid, in accordance with that case-law.

186 It should be noted, in that regard, that that case-law was applied to the assessment of the compatibility of aid measures with rules relating to the free movement of goods (judgment in *Iannelli & Volpi*, cited in paragraph 182 above, EU:C:1977:51), the freedom of establishment (judgment of 19 September 2000 in *Germany* v *Commission*, C-156/98, ECR, EU:C:2000:467, paragraphs 78 and 79), free competition (judgment in *Weyl Beef Products and Others* v *Commission*, cited in paragraph 181 above, EU:T:2001:28, paragraph 75) and to the prohibition of internal taxation which adversely affects the internal market (judgment of 3 May 2001 in *Portugal* v *Commission*, C-204/97, ECR, EU:C:2001:233, paragraphs 41 and 42).

187 However, contrary to what is claimed by Greenpeace-España, that case-law has laid down no obligation for the Commission to assess the compatibility with EU environmental protection rules of aid or aid schemes which do not pursue environmental protection objectives.

188 Admittedly, it has been held that it is for the Commission, when assessing an aid measure in the light of the EU rules on State aid, to take account of the environmental protection requirements referred to in Article 11 TFEU (judgments in *British Aggregates* v *Commission*, cited in paragraph 30 above, EU:C:2008:757, paragraphs 90 and 92, of 8 September 2011 in *Commission* v *Netherlands*, C-279/08 P, ECR, EU:C:2011:551, paragraph 75, and, as regards, in particular, taking account of the 'polluter pays' principle, of 16 July 2014 in *Germany* v *Commission*, T-295/12, appeal pending, EU:T:2014:675, paragraph 61). However, the courts of the European Union have established that the Commission has such an obligation when assessing aid which pursues objectives relating to environmental protection, since aid for the protection of the environment can be declared compatible with the internal market under Article 107(3)(b) or (c) TFEU.

189 However, when assessing an aid measure which does not pursue an environmental objective, the Commission is not required to take account of environmental rules in its assessment of the aid and of the aspects which are inextricably linked to it. After all, if aid for the protection of the environment can be declared compatible with the internal market under Article 107(3)(b) or (c) TFEU, aid which has harmful effects on the environment does not, by that fact alone, adversely affect the establishment of the internal market. Although it must be integrated into the definition and implementation of EU policies, particularly those which have the aim of establishing the internal market (Article 11 TFEU; see also judgment of 13 September 2005 in *Commission* v *Council*, C-176/03, ECR, EU:C:2005:542, paragraph 42), protection of the environment does not constitute, per se, one of the components of that internal market, defined as an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured (Article 26(2) TFEU). It is clear from the wording of the above-mentioned case-law, which broadened the scope of the Commission's review in the context of State aid procedures beyond the verification of compliance with Article 107 TFEU, and in particular with the third paragraph of that article, to include the verification of consistency between State aid rules and specific provisions of EU law, that the courts of the European Union limit to those rules capable of having a negative impact on the internal market the rules other than those relating to State aid to which compliance must be verified. They hold that 'the Commission is required to make an assessment by reference to the relevant provisions which are not, strictly speaking, covered by the law on aid only where certain aspects of the aid in issue are so closely linked to its object that any failure on their part to comply with those provisions would necessarily affect the compatibility of the aid with the internal market' (judgment in *BUPA and Others* v *Commission*, cited in paragraph 132 above, EU:T:2008:29, paragraph 314).

190 Moreover, if the assessment of the compatibility with the internal market of aid intended, as in the present case, to safeguard security of electricity supply were based, partly, on provisions of EU law relating to the environment, and if it were found, following that assessment, that the aspects of that aid, particularly those which provide support to electricity production from indigenous coal, infringed those provisions, that aid would be declared incompatible with the internal market, even if it fulfilled the conditions for the application of Article 106(2) TFEU. This would result in an encroachment on national authorities' discretion in connection with the establishment of an SGEI, and a corresponding extension of the Commission's remit in the exercise of the powers conferred on it by Articles 106 TFEU, 107 TFEU and 108 TFEU. However, the powers exercised by the Commission in that context and the specific procedure for assessing the compatibility of aid cannot replace infringement proceedings, which the Commission uses to ensure that Member States are complying with all provisions of EU law.

191 Lastly, it may be added that, in its judgment of 13 January 2004 in *Thermenhotel Stoiser Franz and Others* v *Commission* (T-158/99, ECR, EU:T:2004:2, paragraphs 156 to 161), the Court essentially responded to that effect to an argument alleging infringement by the Commission of provisions of EU law relating to environmental protection laid down in the current Article 191 TFEU, because of the failure to assess, pursuant to an environmental directive, the effects on the environment of the aid measure in question, which did not specifically pursue an environmental objective. It held, in that regard, that the possible infringement of the directive at issue by the competent national authorities could give rise, where appropriate, to proceedings for a declaration of failure to fulfil obligations but could not constitute a serious difficulty and therefore affect the Commission's assessment of the compatibility of the aid with the internal market (see also, to that effect and by analogy, judgment of 10 December 2013 in *Commission* v *Ireland and Others*, C-272/12 P, ECR, EU:C:2013:812, paragraphs 45 to 49).

192 It follows that, in the present case, contrary to what the Commission maintained in its written submissions, it was required, as indeed it did in the contested decision, to examine the contested measure in the light of provisions concerning the free movement of goods and the freedom of establishment. However, the Commission was not required, as it did in the contested decision, to examine the compatibility of the contested measure with environmental protection provisions.

193 From this it also follows that the objections alleging infringement of the free movement of goods, of the freedom of establishment and of Directive 2005/89, which supplements the directive governing the internal market in electricity, cannot be rejected as irrelevant. However, the objection alleging infringement of environmental rules directed against the additional considerations of the contested decision must be rejected as irrelevant.

The substance of the plea

– *The infringement of Articles 28 TFEU and 34 TFEU on the free movement of goods*

194 The applicant claims that the contested measure infringes Article 28 TFEU and 34 TFEU, in that it affects trade in electricity in the European Union and makes it difficult to import raw materials from other Member States for electricity production. Moreover, that infringement of provisions relating to the free movement of goods was not justified. In this connection, the applicant refers to its arguments criticising the findings that the SGEI established in the present case was justified and proportionate and disputes the relevance of the judgment which the Commission referred to in the contested decision in support of its view that the contested measure was justified on grounds of public security.

195 In the contested decision, the Commission considered, on the basis of the case-law, that the contested measure could not, simply because it benefitted national electricity and coal production, be regarded as a measure having equivalent effect to a quantitative restriction (paragraph 152). It pointed out that there was no indication that those restrictive effects on the electricity and fuel markets produced by the contested measure exceeded what was necessary to attain the objective of the aid at issue, namely, the SGEI consisting of producing electricity from indigenous coal, within the limits set by Directive 2003/54 (paragraph 153 of the contested decision). The Commission added, on the basis of the judgment of 10 July 1984 in *Campus Oil and Others* (72/83, ECR, EU:C:1984:256) and of Directive 2003/54, that the potential obstacles to the free movement of coal and electricity induced by the preferential dispatch mechanism were covered by the justification relating to the protection of public security provided for in Article 36 TFEU (paragraph 154 of the contested decision).

196 It should be noted that, in accordance with the case-law cited in the contested decision, firstly, the fact that a system of aids provided by the State or by means of State resources may, simply because it benefits certain national undertakings or products, hinder, at least indirectly, the importation of similar or competing products coming from other Member States is not in itself sufficient to put an aid as such on the same footing as a measure having an effect equivalent to a quantitative restriction within the meaning of Article 34 TFEU (judgment in *Iannelli & Volpi*, cited in paragraph 182 above, EU:C:1977:51, paragraph 10).

197 Secondly, the Court of Justice has already held that the objective of achieving security of electricity supply was covered by the concept of public security, which constitutes one of the reasons capable of justifying the restrictions on imports set out in Article 36 TFEU (judgment in *Campus Oil and*

Others, cited in paragraph 195 above, EU:C:1984:256, paragraph 35). The fact that the inevitable consequence of the aid itself is often protection and therefore some partitioning of the market in question, as far as concerns the production of undertakings which do not derive any benefit from it, cannot imply that the aid produces restrictive effects which exceed what is necessary to enable it to attain the objectives permitted by the Treaty (judgment in *Iannelli & Volpi*, cited in paragraph 182 above, EU:C:1977:51, paragraph 15).

198 The arguments put forward by the applicant are not capable of calling into question the applicability in the present case of any of that case-law.

199 Firstly, the applicant relies merely on general reasoning relating to the restrictive effects of the contested measure on the electricity and fuel markets, without providing the detailed evidence required by the aforementioned case-law to support the finding that State aid also constitutes a measure having equivalent effect. Moreover, even if the claim relating to the total closure of imported coal power plants as a result of the contested measure could be regarded as such detailed evidence, it is clear from paragraph 168 above that that claim is not sufficiently substantiated.

200 Secondly, the differences which the applicant claims exist between the present dispute and the case giving rise to the judgment in *Campus Oil and Others*, cited in paragraph 195 above (EU:C:1984:256), do not, in any event, call into question the justification of the contested measure on the ground of safeguarding security of electricity supply based on Article 36 TFEU. First of all, none of the arguments put forward by the applicant disputes that the objective of achieving security of supply is to be placed on the same footing as the justification on grounds of public security, which is provided for by that provision. Next, the applicant essentially reiterates the arguments and evidence which have already been rejected, particularly in the context of the reply to the arguments that the contested measure was unjustified and disproportionate and that there had been a misuse of powers, which were put forward in the context of the third plea (see paragraphs 173 and 177 above). Finally, the applicant disregards the limits placed on the alleged restrictions created by the contested measure, pursuant to, in particular, Article 11(4) of Directive 2003/54 (see paragraph 166 above).

201 It follows that the objection alleging infringement of Articles 28 TFEU and 34 TFEU must be rejected.

– *The infringement of Article 49 TFEU on the freedom of establishment*

202 The applicant claims that the contested measure infringes Article 49 TFEU, in that it may discourage undertakings operating power plants producing electricity from energy sources other than indigenous coal which are established in other Member States from entering the Spanish market.

203 In the contested decision, the Commission took the view that, for the same reasons as those which led it to conclude that the rules on free movement of goods had not been infringed, the contested measure did not contravene the rules relating to the freedom of establishment (paragraph 155).

204 Since the applicant did not put forward any arguments calling into question the appropriateness of applying the assessment relating to the free movement of goods to the review of a breach of the freedom of establishment and, in particular, since it did not put forward any arguments disputing the justification of a possible restriction of the freedom of establishment on grounds of

safeguarding security of supply (see, to that effect, judgment of 26 March 2009 in *Commission* v *Italy*, C-326/07, ECR, EU:C:2009:193, paragraph 69 and the case-law cited), the objection alleging infringement of Article 49 TFEU must also be rejected.

– *The infringement of Directive 2005/89*

205 The applicant claims that the contested measure undermines the objectives set by Directive 2005/89, in that it does not meet the requirement of being market-based and non-discriminatory (recital 10) and that it is not compatible with the requirements of a competitive internal market for electricity (Article 1(2)). In that connection, the applicant refers to the arguments it set out in the context of the third plea.

206 It should be noted, in that regard, that Directive 2005/89 supplements the provisions of Directive 2003/54 giving States the possibility of imposing public service obligations on electricity undertakings with a view to safeguarding security of supply (recital 1 in the preamble to Directive 2005/89), in particular, by harmonising policies on security of electricity supply within the European Union (recital 3 in the preamble to Directive 2005/89). Moreover, as rightly pointed out by the Commission, Directive 2005/89 confines itself, in essence, to setting the objectives (Article 1) and the factors to take into consideration when drafting and implementing measures to safeguard security of supply (Article 3).

207 It may be inferred therefrom that the specific measure giving priority to the dispatch of generating installations using indigenous fuel sources for reasons of security of supply, provided for in Article 11(4) of Directive 2003/54, cannot, as such, be regarded as being incompatible with Directive 2005/89. Therefore, since the applicant simply refers, in support of its objection, to the arguments put forward in support of the third plea, in which it disputed, in particular, that the contested measure was justified and proportionate in relation to the objective of safeguarding security of electricity supply, and that it has been held that those arguments did not establish that there had been an infringement of Article 11(4) of Directive 2003/54 (see paragraph 173 above), the objection alleging infringement of Directive 2005/89 must be rejected as unfounded, without there being any need to rule on its admissibility, which the Commission disputes.

– *The infringement of Articles 3 TEU, 11 TFEU and 191 TFEU and of Directive 2003/87*

208 For the sake of completeness, even if the objection alleging infringement of those environmental provisions were not ineffective, it should, in any event, be rejected, in part, as inadmissible and, in part, as unfounded.

209 With regard, first of all, to the admissibility of the claims relating to the infringement of environmental rules, some of them can be rejected as inadmissible because, firstly, the applicant raised them for the first time in the reply, contrary to Article 48(2) of the Rules of Procedure, and, secondly, they were raised by Greenpeace-España intervening in support of the applicant, contrary to the fourth paragraph of Article 40 of the Statute of the Court of Justice and Article 116(3) of the Rules of Procedure (see also the case-law cited in paragraph 111 above).

210 Both the applicant and Greenpeace-España claim, in essence, that the contested measure would lead to an increase in harmful emissions contrary to Article 3 TEU, Article 11 TFEU and Article 191 TFEU, concerning the taking into account of environmental protection objectives in the implementation of Union policies, and to the provisions of Directive 2003/87.

211 Under Article 3(3) TEU, '[t]he [Union] shall work for the sustainable development of Europe based on balanced economic growth and price stability, a highly competitive social market economy, aiming at full employment and social progress, and a high level of protection and improvement of the quality of the environment …'. Article 11 TFEU provides that '[e]nvironmental protection requirements must be integrated into the definition and implementation of the Union's policies and activities'. Article 191 TFEU provides:

'1. Union policy on the environment shall contribute to pursuit of the following objectives:

– preserving, protecting and improving the quality of the environment,

– protecting human health,

– prudent and rational utilisation of natural resources,

– promoting measures at international level to deal with regional or worldwide environmental problems, and in particular combating climate change.

– …'

212 It should also be noted that Directive 2003/87 establishes, for the purpose of enabling the Union and the Member States to meet the commitments made under the Kyoto Protocol (recitals 4 and 5 in the preamble to the directive), a scheme for greenhouse gas emission allowance trading within the Union in order to promote reductions of greenhouse gas emissions in a cost-effective and economically efficient manner (Article 1 of the directive).

213 In the reply, the applicant also claims infringement of the provisions of Directive 2003/87 ending, as of 2013, the partially free allocation of greenhouse gas emissions allowances. The principle of the auctioning of allowances, and therefore the ending of the free allocation of those allowances, is set out in Article 10 of Directive 2003/87, and Article 10a of that directive, specifically cited by the applicant, stipulates in its first and third paragraphs that no free allocation is to be given to electricity generators. Greenpeace-España also claims, as it made clear at the hearing, that the requirements laid down in the third indent of Article 10a(1) and in Article 10c of Directive 2003/87 were infringed.

214 Greenpeace-España further claims the infringement of the 'polluter pays' principle provided for in Article 191(2) TFEU.

215 It can, therefore, be deduced from that overview of the provisions relied on that the applicant is not entitled to raise for the first time, in its reply, the objection alleging infringement of the provisions of Directive 2003/87 relating to ending the free allocation of emissions allowances as of 2013. That objection is based on information that was known to the applicant when it brought its action and cannot be regarded as the amplification of the general claims relating to infringement of environmental protection objectives as a result of the increase in harmful emissions. It contains new factual and legal arguments, based on the infringement of a specific provision of Directive 2003/87 stipulating that, as of 2013, it will be necessary to pay for some of the greenhouse gas emissions allowances granted to each Member State (see, to that effect, judgment of 21 October in *Umbach* v *Commission*, T-474/08, EU:T:2010:443, paragraph 60 and the case-law cited).

216 Therefore, since the applicant cannot raise for the first time, in its reply, the objection referred to in the above paragraph, Greenpeace-España, as intervener, cannot raise that objection either. Furthermore, Greenpeace-España cannot claim infringement of Article 191(2) TFEU, as this was not claimed by the applicant in the context of the objection alleging infringement of environmental rules.

217 As regards the validity of the other claims relating to the infringement of environmental rules, it should be noted that, in the contested decision, the Commission considered, in response to the assertions of certain third parties that the contested measure would infringe EU environmental legislation, that even though the measure led to an increase in CO_2 emissions from indigenous coal power plants and drove up the price of emission allowances, it would not lead to an overall increase in Spain's CO_2 emissions, which would remain, in principle within the limits corresponding to the commitments made by the Spanish authorities, having regard to the emissions trading scheme established by Directive 2003/87 (paragraphs 156 and 157 of the contested decision).

218 It should be noted that Directive 2003/87 provides for the adoption of national allocation plans, specifically for the period 2008-2012, which are subject to approval by the Commission. Those plans enable each Member State to determine how the total quantity of allowances allocated to it will be distributed. That total quantity is fixed in advance and the emissions can then be traded within the limits of that total quantity, within the context of the so-called 'cap-and-trade' system, mentioned in paragraph 157 of the contested decision. Therefore, the alleged increase in greenhouse gas emissions from indigenous coal power plants caused by the contested measure cannot, in itself, prevent the Kingdom of Spain from complying with the emissions limits resulting from the implementation of Directive 2003/87 (see, to that effect, order in *Gas Natural Fenosa SDG* v *Commission*, cited in paragraph 87 above, EU:T:2011:53, paragraph 100) and, therefore, lead to an increase in harmful emissions in Spain.

219 Moreover, the applicant and Greenpeace-España have provided no evidence, of which the Commission could have been aware when it adopted the contested decision, capable of establishing that that increase would prevent the Spanish authorities from complying with the maximum limit set out in their allocation plan, *a fortiori* because, under the contested measure, production by indigenous coal power plants replaces as a priority that of the power plants which use fuel-oil and imported coal (paragraphs 41 and 161 of the contested decision). In other words, it should, in practice, result in production which, it is not contested, is polluting being replaced with other polluting production. In view of that replacement of imported coal with indigenous coal, it cannot, in any case, be found, as maintained in essence by Greenpeace-España, that the contested measure encourages electricity production from coal in disregard of the purpose and spirit of Directive 2003/87.

220 The fourth plea must therefore be rejected in its entirety.

The fifth plea in law, alleging infringement of Regulation No 1407/2002

221 The applicant maintains that the contested measure infringes Article 4(e) of Regulation No 1407/2002, prohibiting any distortion of competition on the electricity market, and Article 6 of the same regulation, establishing the principle of digression of aid to the coal industry.

222 It may be observed at the outset that Regulation No 1407/2002 established the principle of the maintenance of coal-producing capability supported by State aid (recital 7). Council Decision 2010/787/EU of 10 December 2010 on State aid to facilitate the closure of uncompetitive coal mines (OJ 2010 L 336, p. 24), which succeeded Council Regulation No 1407/2002 when it expired, extended until 2018 the possibility for Member States to grant aid to cover, inter alia, costs in connection with coal for the production of electricity (Articles 2 and 3 of Decision 2010/787).

223 Furthermore, in the contested decision, the Commission took the view that Regulation No 1407/2002 constituted a specific ground for the authorisation of certain aid measures and could not limit or constrain the scope of Article 106(2) TFEU. It then rejected the claim that the contested measure granted additional aid to coal mines above and beyond that authorised by Regulation No 1407/2002 (paragraph 150 of the contested decision).

224 As a basis for doing so, the Commission relied on the provisions of the contested measure according to which the quantities of coal to be purchased by the beneficiary power plants are not to exceed those set out in the 'National Strategic Coal Reserve Plan for 2006-2012', which it had approved in accordance with Regulation No 1407/2002. It also pointed out that aid granted under Regulation No 1407/2002 covered only the difference between the coal producers' production costs and their sales (paragraphs 64, 65 and 102 of the contested decision). It follows, as the Commission rightly pointed out in its written submissions, that the revenue generated by the contested measure for coal producers automatically reduces the amount of direct aid authorised under Regulation No 1407/2002.

225 In those circumstances and since the applicant has not put forward any specific arguments or evidence disputing the substance and the effects of the contested measure, as described above, the present plea alleging infringement of the provisions of Regulation No 1407/2002 prohibiting distortions of competition and providing for the digression of aid to the coal industry must be rejected.

226 It follows from all the foregoing that the action must be dismissed in its entirety.

Costs

227 Under Article 87(2) 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 to bear its own costs as well as those incurred by the Commission, in accordance with the form of order sought by the latter.

228 Under the first subparagraph of Article 87(4) of the Rules of Procedure, Member States which have intervened in proceedings are to bear their own costs. The Kingdom of Spain shall, therefore, bear the costs which it has incurred. The other interveners shall also each bear their own costs, pursuant to the third subparagraph of Article 87(4) of the Rules of Procedure.

On those grounds,

THE GENERAL COURT (Second Chamber)

hereby:

1. **Dismisses the application;**

2. **Orders Castelnou Energía, SL, to bear its own costs and to pay the costs incurred by the European Commission;**

3. **Orders the Kingdom of Spain, Greenpeace-España, Hidroeléctrica del Cantábrico, SA, E.ON Generación, SL, Comunidad Autónoma de Castilla y León and the Federación Nacional de Empresarios de Minas de Carbón (Carbunión) to bear their own costs.**

Martins Ribeiro Gervasoni Madise

Delivered in open court in Luxembourg on 3 December 2014.

[Signatures]

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[i] The wording in paragraph 184 of this document has been amended since it was first put online.