Reports of Cases

JUDGMENT OF THE COURT (Fourth Chamber)

14 December 2023 *

(Appeal – State aid – Environmental incentive measure adopted by the Kingdom of Spain for coal-fired power plants – Decision to initiate the formal investigation procedure – Action for annulment)

In Joined Cases C-693/21 P and C-698/21 P,

TWO APPEALS under Article 56 of the Statute of the Court of Justice of the European Union, lodged on 18 November 2021 and 19 November 2021 respectively,

EDP España SA, established in Oviedo (Spain), represented initially by J.L. Buendía Sierra, A. Lamadrid de Pablo and V. Romero Algarra, abogados, and subsequently by A. Lamadrid de Pablo and V. Romero Algarra, abogados,

appellant in Case C-693/21 P,

supported by:

Endesa Generación SAU, established in Seville (Spain), represented by M.B. Barrantes Díaz, abogada, and M. Petite, avocat,

intervener in the appeal,

the other parties to the proceedings being:

Naturgy Energy Group SA, formerly Gas Natural SDG SA, established in Madrid (Spain), represented by J. Blanco Carol and F.E. González Díaz, abogados,

applicant at first instance,

European Commission, represented by C.-M. Carrega, P. Němečková and D. Recchia, acting as Agents,

defendant at first instance,

Generaciones Eléctricas Andalucía SLU, formerly Viesgo Producción SL, established in Santander (Spain), represented by L. de Pedro Martín and L. Ques Mena, abogados,

intervener at first instance,

* Language of the case: Spanish.

and

Naturgy Energy Group SA, formerly Gas Natural SDG SA, established in Madrid, represented by J. Blanco Carol and F.E. González Díaz, abogados,

appellant in Case C-698/21 P,

supported by:

Endesa Generación SAU, established in Seville, represented by M.B. Barrantes Díaz, abogada, and M. Petite, avocat,

intervener in the appeal,

the other parties to the proceedings being:

European Commission, represented by C.-M. Carrega, P. Němečková and D. Recchia, acting as Agents,

defendant at first instance,

EDP España SA, established in Oviedo, represented initially by J.L. Buendía Sierra, A. Lamadrid de Pablo and V. Romero Algarra, abogados, and subsequently by A. Lamadrid de Pablo and V. Romero Algarra, abogados,

Generaciones Eléctricas Andalucía SLU, formerly Viesgo Producción SL, established in Santander, represented by L. de Pedro Martín and L. Ques Mena, abogados,

interveners at first instance,

THE COURT (Fourth Chamber),

composed of C. Lycourgos, President of the Chamber, O. Spineanu-Matei, J.-C. Bonichot (Rapporteur), S. Rodin and L.S. Rossi, Judges,

Advocate General: G. Pitruzzella,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after hearing the Opinion of the Advocate General at the sitting on 13 July 2023,

gives the following

Judgment

1 By their appeals, EDP España SA (C-693/21) and Naturgy Energy Group SA (C-698/21) seek to have set aside the judgment of the General Court of the European Union of 8 September 2021, *Naturgy Energy Group* v *Commission* (T-328/18, 'the judgment under appeal', EU:T:2021:548), by

which the General Court dismissed the action brought by Naturgy Energy Group, formerly Gas Natural SDG SA, for annulment of Commission Decision C(2017) 7733 final of 27 November 2017 on State Aid SA.47912 (2017/NN) – Environmental incentive for coal-fired power plants ('the decision at issue').

Legal context

2 Article 4(4) of Council Regulation (EU) 2015/1589 of 13 July 2015 laying down detailed rules for the application of Article 108 [TFEU] (OJ 2015 L 248, p. 9) provides:

'Where the [European] Commission, after a preliminary examination, finds that doubts are raised as to the compatibility with the internal market of a notified measure, it shall decide to initiate proceedings pursuant to Article 108(2) TFEU …'

3 Article 6(1) of that regulation states:

'The decision to initiate the formal investigation procedure shall summarise the relevant issues of fact and law, shall include a preliminary assessment of the Commission as to the aid character of the proposed measure and shall set out the doubts as to its compatibility with the internal market. The decision shall call upon the Member State concerned and upon other interested parties to submit comments within a prescribed period which shall normally not exceed 1 month. In duly justified cases, the Commission may extend the prescribed period.'

4 Article 9(1) and (2) of that regulation states:

'1. Without prejudice to Article 10, the formal investigation procedure shall be closed by means of a decision as provided for in paragraphs 2 to 5 of this Article.

2. Where the Commission finds that, where appropriate following modification by the Member State concerned, the notified measure does not constitute aid, it shall record that finding by way of a decision.'

Background to the dispute and the decision at issue

5 Between 1998 and 2007, every electricity generating plant in Spain, irrespective of the technology used, was entitled to aid known as the 'power guarantee', intended to encourage the establishment and maintenance of generation capacity in the electricity system, with a view to achieving an adequate level of guarantee of supply, with the exception, however, of renewable energy installations, which were the subject of a separate financial incentive.

6 In 2007, the Spanish legislature gave the Ministry for Industry, Tourism and Trade the authority to replace the power guarantee with a financial incentive known as 'remuneration for capacity'.

7 That decision was implemented by Real Decreto 871/2007, por el que se ajustan las tarifas eléctricas a partir del 1 de julio de 2007 (Royal Decree 871/2007 adjusting electricity tariffs as from 1 July 2007) of 29 June 2007 (BOE No 156 of 30 June 2007, p. 28324), which provides that the 'remuneration for capacity' was to enter into force from 1 October 2007.

8 The 'remuneration for capacity' scheme was set out in Orden ITC/2794/2007, por la que se revisan las tarifas eléctricas a partir del 1 de octubre de 2007 (Order ITC/2794/2007 revising electricity tariffs as from 1 October 2007) of 27 September 2007 (BOE No 234 of 29 September 2007, p. 39690, 'Order ITC/2794/2007').

9 That order provides for a 'remuneration for capacity' intended, inter alia, to promote investment in production. To that end, it includes two incentives, benefiting production installations falling under the ordinary regime of the system for the peninsula, with an installed capacity of 50 megawatts (MW) or more.

10 The first incentive measure applies to installations that entered into service after 1 January 1998 and that have not yet been in operation for 10 years. Its purpose is to encourage the construction and effective commissioning of new installations by providing financial compensation for investment costs. Its amount is set at EUR 20 000 per MW per year.

11 The second incentive measure ('the measure at issue'), which the Minister for Industry, Tourism and Trade is authorised to grant pursuant to paragraph 10 of Annex III to Order ITC/2794/2007, concerns expansion or other substantial modifications to existing installations and investment in new priority technology installations in order to meet the objectives of energy policy and security of supply.

12 The scheme of the measure at issue was set out in Orden ITC/3860/2007, por la que se revisan las tarifas eléctricas a partir del 1 de enero de 2008 (Order ITC/3860/2007 revising electricity tariffs as from 1 January 2008) of 28 December 2007 (BOE No 312 of 29 December 2007, p. 53781; 'Order ITC/3860/2007').

13 It is apparent from Order ITC/3860/2007 that only coal-fired power plants covered by the National Emission Reduction Plan for Existing Large Combustion Plants ('the PNRE-GIC'), approved by an act of the Consejo de Ministros (Council of Ministers, Spain) of 7 December 2007, are eligible for that measure.

14 Those power plants must be included in the emissions 'bubble' defined by the PNRE-GIC, prescribing the authorised quantities of emissions per undertaking, for one of the reasons listed by the PNRE-GIC.

15 In addition, the investments must have been approved before 1 October 2007, the date of entry into force of Order ITC/2794/2007, or the application for approval of those investments must have been submitted at least three months before that date.

16 In 2011, the benefit of the measure at issue was extended to cover coal-fired power plants that had made investments not only in desulphurisation installations, but also other 'environmental' investments to reduce sulphur oxide emissions, where they had been made before the date of entry into force of Order ITC/3860/2007.

17 Where those conditions are met, coal-fired power plants are entitled to financial aid amounting to EUR 8 750 per MW per year, for ten years from the date of the decision approving the act of commissioning the subsidised installations.

18 On 29 April 2015, the Commission launched a State aid investigation into the capacity mechanism market in 11 Member States, including the Kingdom of Spain.

19 On 4 April 2017, at the end of that investigation, the Commission notified the Spanish authorities of the initiation of an investigation into the measure at issue.

20 On 27 November 2017, the Commission adopted the decision at issue by which it initiated the formal investigation procedure provided for in Article 108(2) TFEU.

21 In that decision, the Commission stated that it had reached the preliminary conclusion that the measure at issue constituted State aid and that it had doubts as to its compatibility with the internal market.

The action before the General Court and the judgment under appeal

22 On 28 May 2018, by application lodged at the Registry of the General Court, Naturgy Energy Group, a Spanish undertaking involved, inter alia, in the generation of electricity by means of coal-fired power stations, sought the annulment of the decision at issue.

23 EDP España and Viesgo Producción SL, two Spanish companies benefiting from the measure at issue, were granted leave to intervene in support of Naturgy Energy Group.

24 By the judgment under appeal, the General Court dismissed the application for annulment.

25 In the first place, the General Court rejected as unfounded the first plea, alleging infringement of the obligation to state reasons as regards the selective nature of the measure at issue.

26 In paragraph 60 of the judgment under appeal, the General Court recalled that, pursuant to Regulation 2015/1589, a decision to initiate the formal investigation procedure may be confined to summarising the relevant issues of fact and law, to including a preliminary assessment as to the aid character of the State measure in question and to setting out the doubts as to the measure's compatibility with the internal market.

27 In paragraph 61 of the judgment under appeal, the General Court added that the Commission was required to initiate that procedure if an initial examination did not enable it to overcome all the difficulties raised by the question whether the measure under examination constituted aid for the purposes of Article 107(1) TFEU, unless, in the course of that initial examination, the Commission was able to satisfy itself that that measure was in any event compatible with the internal market, even if it was State aid.

28 In paragraph 62 of the judgment under appeal, the General Court recalled that the purpose of the decision to initiate the procedure was to give the parties concerned the opportunity effectively to participate in the formal investigation procedure. It also clarified that that decision included preliminary assessments and that the Commission was not obliged to clarify all potential unresolved issues at that stage.

29 In paragraph 63 of the judgment under appeal, the General Court added that the fact that classification of a measure as State aid in such a decision is merely provisional was confirmed by Article 9(2) of Regulation 2015/1589, which provides that, at the end of the formal investigation procedure, the Commission may find that the measure does not constitute aid.

30 In paragraphs 64 and 65 of the judgment under appeal, the General Court rejected as ineffective the appellant's arguments based on the cases that gave rise to the judgments of 20 December 2017, *Comunidad Autónoma de Galicia and Retegal* v *Commission* (C-70/16 P, EU:C:2017:1002), and of 21 December 2016, *Commission* v *Hansestadt Lübeck* (C-524/14 P, EU:C:2016:971), on the grounds that the first judgment related to a decision to close the formal investigation procedure and that the second judgment did not concern the review of compliance with the obligation to state reasons.

31 In paragraph 73 of the judgment under appeal, the General Court held that, in view of the nature of the decision at issue, its wording, its content, the context in which it was adopted and all the relevant legal rules, Naturgy Energy Group had been able, despite the summary nature of the statement of reasons relating to the selective nature of the measure at issue, to understand the reasons why the Commission had taken the preliminary view that that measure appeared to be selective in that it favoured certain coal-fired power plants over others or over power plants generating electricity from other technologies. It stated that that finding was also apparent from paragraph 30 of the decision at issue, which, even though it did not form part of the statement of reasons for the selective nature of the measure at issue, indicated that the beneficiaries of that measure were in competition with other electricity producers.

32 In paragraph 74 of the judgment under appeal, the General Court rejected Naturgy Energy Group's argument that the Commission had infringed the obligation to state reasons by failing to explain whether the measure at issue favoured certain undertakings or the production of certain goods over other undertakings in a comparable factual and legal situation in the light of the objective pursued by that measure. It pointed out, in the same paragraph, that to require in all circumstances, at the preliminary examination stage set out in a decision to initiate the formal investigation procedure, a statement of reasons relating to the comparability of the situations might prove to be premature and would pre-empt the conclusions to be drawn at the end of that procedure.

33 Consequently, in paragraph 81 of the judgment under appeal, the General Court rejected the first plea as unfounded.

34 In the second place, the General Court also rejected as unfounded the second plea in law, alleging infringement of Article 107(1) TFEU, as regards the selectivity of the measure at issue, and, consequently, dismissed the action in its entirety.

35 Lastly, the General Court ordered Naturgy Energy Group to bear its own costs and to pay those incurred by the Commission and also ordered Viesgo Producción and EDP España to bear their own costs.

The procedure before the Court of Justice and the forms of order sought

36 By their respective appeals, in Cases C-693/21 P and C-698/21 P, EDP España and Naturgy Energy Group, respectively intervener at first instance and applicant at first instance, claim that the Court of Justice should set aside the judgment under appeal and annul the decision at issue. EDP España further claims that the Commission should be ordered to pay the costs of the proceedings before the Court and Naturgy Energy Group claims that the Commission should be ordered to pay the costs of the proceedings at both instances.

37 In Cases C-693/21 P and C-698/21 P, the Commission contends that the Court should dismiss the appeals and order the appellants to pay the costs, whereas Generaciones Eléctricas Andalucía SLU, formerly Viesgo Producción, intervener at first instance, claims that the Court should set aside the judgment under appeal, annul the decision at issue and order the Commission to pay the costs of both sets of proceedings.

38 By orders of the President of the Court of 31 May 2022, *EDP España* v *Naturgy Energy Group SA and Commission* (C-693/21 P, EU:C:2022:415), and of 31 May 2022, *Naturgy Energy Group* v *Commission* (C-698/21 P, EU:C:2022:417), Endesa Generación SAU was granted leave to intervene in support of the appellants. By its statement in intervention in Case C-698/21 P, it claims that the Court should set aside the judgment under appeal, annul the decision at issue and order the Commission to pay the costs.

39 By decision of 31 January 2023, Cases C-693/21 P and C-698/21 P were joined for the purposes of the oral part of the procedure and the judgment.

The appeals

First grounds of appeal, which allege infringement of the obligation to state reasons as regards the selective nature of the measure at issue

Arguments of the parties

40 By their first grounds of appeal, which are in three parts, EDP España and Naturgy Energy Group submit that the General Court was wrong to reject as unfounded Naturgy Energy Group's plea alleging infringement of the obligation to state reasons as regards the selective nature of the measure at issue.

41 By the first parts of those first grounds of appeal, they submit that the General Court erred in law, in paragraphs 64 and 65 of the judgment under appeal, in its interpretation of the principles arising from the judgments of 21 December 2016, *Commission* v *Hansestadt Lübeck* (C-524/14 P, EU:C:2016:971), and of 20 December 2017, *Comunidad Autónoma de Galicia and Retegal* v *Commission* (C-70/16 P, EU:C:2017:1002).

42 They submit that the requirements concerning the statement of reasons for Commission decisions are the same whether the decision is to initiate or close the formal investigation procedure. Thus, the principles arising from the judgment of 20 December 2017, *Comunidad Autónoma de Galicia and Retegal* v *Commission* (C-70/16 P, EU:C:2017:1002), are not relevant solely to closure decisions.

43 Contrary to what the General Court stated in paragraph 65 of the judgment under appeal, the Court of Justice also ruled in the judgment of 21 December 2016, *Commission* v *Hansestadt Lübeck* (C-524/14 P, EU:C:2016:971), on the obligation to state reasons relating to the selective nature of a measure.

44 By the second parts of their first grounds of appeal, the appellants submit that, in paragraph 66 of the judgment under appeal, the General Court misinterpreted the principles stemming from the judgments of 10 March 2016, *HeidelbergCement* v *Commission* (C-247/14 P, EU:C:2016:149), and

of 16 October 2014, *Alcoa Trasformazioni* v *Commission* (T-177/10, EU:T:2014:897), in finding that the context in which a measure was adopted made it possible to 'offset the brevity or the vague and generic nature' of the statement of reasons for that measure.

45 The objective of the obligation to state reasons is to enable the addressee to ascertain the reasons for a decision and to enable the competent court to exercise its power of review, so that, contrary to what is stated in paragraph 72 of the judgment under appeal, the statement of reasons in paragraph 28 of the decision at issue is manifestly inadequate.

46 While recognising, in paragraph 73 of the judgment under appeal, the 'summary' nature of the Commission's reasoning relating to the selective nature of the measure at issue, the General Court attempted to remedy that, in paragraph 66 of the judgment under appeal, by referring to the context in which Naturgy Energy Group carries out its activities and to the information contained in its application at first instance.

47 Furthermore, contrary to what the General Court stated, in paragraph 74 of the judgment under appeal, the fact that the decision at issue is a decision to initiate a formal investigation procedure does not relieve the Commission of the obligation to analyse comparability in order to assess the selectivity criterion.

48 It is also necessary to take into account the legal consequences of the initiation of a formal investigation procedure, referred to in paragraph 28 of the judgment of 21 December 2016, *Commission* v *Hansestadt Lübeck* (C-524/14 P, EU:C:2016:971), with regard to the beneficiaries of the measure covered by that procedure.

49 By the third parts of their first grounds of appeal, the appellants submit lastly that, in paragraphs 68 to 73 of the judgment under appeal, the General Court also infringed the obligation to state reasons by acknowledging the 'summary' nature of the statement of reasons for the decision at issue while attempting to 'reconstruct' that statement. Furthermore, and in any event, paragraph 30 of the decision at issue, to which the General Court referred in paragraph 73 of the judgment under appeal, is not relevant in explaining the selective nature of the measure.

50 Generaciones Eléctricas Andalucía intervened in support of the forms of order sought by the appellants in Cases C-693/21 P and C-698/21 P, with similar arguments.

51 The Commission contends that the first ground of appeal in Cases C-693/21 P and C-698/21 P should be rejected as unfounded.

52 It submits that, in paragraphs 59 to 63 of the judgment under appeal, the General Court recalled, without erring in law, the requirements attached to the obligation to state reasons and that it then correctly rejected, in particular in paragraphs 64 and 66 to 77 of the judgment under appeal, the arguments of the applicant and of the interveners at first instance in support of the inadequacy of the statement of reasons as regards the selective nature of the measure at issue.

53 It adds that, in holding, in the judgment of 20 December 2017, *Comunidad Autónoma de Galicia and Retegal* v *Commission* (C-70/16 P, EU:C:2017:1002), that the obligation to state reasons had been infringed, the Court of Justice relied on the fact (i) that the decision in question in that case contained no indication making it possible to understand the selective nature of the measure covered by that decision and (ii) that the selectivity could not result solely from the information that the measure under examination applied only to one economic sector. According to the

Commission, the situation is different in the present case in so far as, in order to justify the selectivity of the measure at issue, it relied on the fact that that measure benefits only certain power plants using coal as the main fuel. Furthermore, and in any event, in that judgment, the Court of Justice did not have to take into account the specific context in which a formal investigation procedure was initiated.

54 The Commission also submits that the General Court did not, in paragraph 66 of the judgment under appeal, misinterpret and misapply the judgments of 10 March 2016, *HeidelbergCement* v *Commission* (C-247/14 P, EU:C:2016:149), and of 16 October 2014, *Alcoa Trasformazioni* v *Commission* (T-177/10, EU:T:2014:897), since it merely found that the decision at issue had been adopted in a context well known to the applicant at first instance.

55 As regards the argument that the General Court attempted to remedy the summary nature of the statement of reasons by relying on the context and knowledge of the applicant at first instance of the applicable regulatory framework, the Commission states that, unlike the statement of reasons for the measure at issue in the judgment of 10 March 2016, *HeidelbergCement* v *Commission* (C-247/14 P, EU:C:2016:149), the statement of reasons for the decision at issue is neither vague, generic nor extremely succinct.

56 The Commission adds that the statement of reasons for the decision at issue may be succinct if the interested parties are in a position to understand the reasons why it took the preliminary view that the measure at issue is selective and that the General Court may exercise its review of legality. It relies in particular on Article 6(1) of Regulation 2015/1589.

57 According to the Commission, as regards the alleged absence of any reasoning relating to the selectivity of the measure at issue, the General Court correctly noted, in paragraph 75 of the judgment under appeal, that the applicant at first instance had understood that the Commission had established that the measure was granted exclusively to coal-fired power plants, to the exclusion of power plants using other technologies. As regards the adverse legal consequences which would flow from the initiation of a formal investigation procedure for beneficiaries of a measure in the course of implementation, such consequences are hypothetical in the present case.

58 As regards the appellants' argument that the General Court erred in law by relying, in paragraph 73 of the judgment under appeal, on passages of the decision at issue which did not necessarily appear in the part of that decision devoted to the analysis of selectivity, the Commission submits that the finding set out in that paragraph served merely to support its analysis.

59 Furthermore, and in any event, compliance with the obligation to state reasons does not presuppose that Commission decisions follow a particular structure and it is sufficient, according to the Commission, that the parties be able to know the reasons on which the decision in question was based.

60 In addition, it is necessary to take account of various aspects of the decision and to examine its content 'in its entirety' (judgment of 25 July 2018, *Commission* v *Spain and Others*, C-128/16 P, EU:C:2018:591, paragraph 93).

Findings of the Court

61 It is settled case-law that the statement of reasons required by Article 296 TFEU must be appropriate to the measure at issue and must disclose in a clear and unequivocal fashion the reasoning followed by the institution which adopted that measure in such a way as to enable the persons concerned to ascertain the reasons for the measure and to enable the Courts of the European Union to exercise their power of review. The requirements to be satisfied by the statement of reasons depend on all the circumstances of each case, in particular, the content of the measure in question, the nature of the reasons given and the interest which the addressees of the measure, or other parties to whom it is of direct and individual concern, may have in obtaining explanations. It is not necessary for the reasoning to go into all the relevant facts and points of law, since the question whether the statement of reasons meets the requirements of Article 296 TFEU must be assessed with regard not only to its wording but also to its context and to all the legal rules governing the matter in question (judgment of 10 March 2016, *HeidelbergCement* v *Commission*, C-247/14 P, EU:C:2016:149, paragraph 16 and the case-law cited).

62 As regards a Commission decision to initiate the formal investigation procedure, it should be recalled that Article 6(1) of Regulation 2015/1589 provides that such a decision is to summarise the relevant issues of fact and law, include a 'preliminary assessment' of the Commission as to the aid character of the State measure at issue and set out the doubts as to its compatibility with the internal market.

63 Furthermore, and as the General Court rightly pointed out in paragraph 63 of the judgment under appeal, the provisional nature of the classification of a State measure as State aid in such a decision is confirmed by Article 9(2) of Regulation 2015/1589, which provides that, at the end of the formal investigation procedure, the Commission may find that that measure does not constitute aid.

64 However, as is apparent from Article 4(4) of that regulation, the fact remains that, in the context of a decision to initiate a formal investigation procedure, the Commission finds, even if only on a preliminary basis, both that the measure under examination is State aid and that there are doubts as to its compatibility with the internal market.

65 That decision also entails independent legal effects, particularly as regards the suspension of the measure under examination (see, to that effect, judgment of 24 October 2013, *Deutsche Post* v *Commission*, C-77/12 P, EU:C:2013:695, paragraph 53 and the case-law cited). National courts must refrain from taking decisions which conflict with such a decision of the Commission, even if it is provisional. Consequently, those courts are required to adopt all the necessary measures with a view to drawing the appropriate conclusions from an infringement of the obligation to suspend the implementation of the measure in question (see, to that effect, judgment of 21 November 2013, *Deutsche Lufthansa*, C-284/12, EU:C:2013:755, paragraphs 41 and 42).

66 Lastly, it is also necessary to take into account the fact that, in accordance with Article 6(1) of Regulation 2015/1589, the formal investigation procedure allows the Member State concerned and other interested parties to submit comments on the Commission's analysis.

67 It follows that, even if the Commission's analysis is provisional, that institution is nevertheless required to disclose in a clear and unequivocal fashion the reasons why it considered that the measure in question was liable to constitute State aid.

68 Consequently, the General Court's analysis, in paragraph 64 of the judgment under appeal, that the arguments of Naturgy Energy Group and of the interveners at first instance relating to the infringement of the obligation to state reasons for the decision at issue which are based on the case that gave rise to the judgment of 20 December 2017, *Comunidad Autónoma de Galicia and Retegal* v *Commission* (C-70/16 P, EU:C:2017:1002), were ineffective, on the sole ground that that case concerned a Commission decision closing the formal investigation procedure, is vitiated by an error of law.

69 In that regard, the case-law of the Court of Justice relating to the obligation to state reasons for a decision to close the formal investigation procedure cannot, as a matter of principle, be regarded as irrelevant to a decision to initiate that procedure.

70 Moreover, the General Court erred in law, in paragraph 74 of the judgment under appeal, by holding that the Commission was not obliged to set out, even succinctly, the reasons why the measure at issue favoured certain undertakings or the production of certain goods over other undertakings in a comparable factual and legal situation, on the ground, inter alia, that to require in all circumstances, at the preliminary analysis stage set out in a decision to initiate the formal investigation procedure, a statement of reasons relating to the comparability of the situations might prove to be premature.

71 It should be borne in mind that it follows from the case-law of the Court that a measure which benefits only one economic sector or some of the undertakings in that sector is not necessarily selective and is selective only if, within the context of a particular legal regime, it has the effect of conferring an advantage on certain undertakings over others, in a different sector or the same sector, which are, in the light of the objective pursued by that regime, in a comparable factual and legal situation (see, to that effect, judgments of 21 December 2016, *Commission* v *Hansestadt Lübeck*, C-524/14 P, EU:C:2016:971, paragraph 58, and of 20 December 2017, *Comunidad Autónoma de Galicia and Retegal* v *Commission*, C-70/16 P, EU:C:2017:1002, paragraph 61).

72 It follows from the foregoing that, if the Commission considers, in order to decide to initiate a formal investigation procedure, that a measure is selective, it must state, even in a succinct manner, the reasons why it considers that, within the context of a particular legal regime, that measure has the effect of conferring an advantage on certain undertakings over others which are, in the light of the objective pursued by that regime, in a comparable factual and legal situation.

73 However, it is in no way apparent from paragraphs 72 and 73 of the judgment under appeal, to which paragraph 74 thereof refers, that the Commission set out the reasons why the coal-fired power plants included in the PNRE-GIC, which benefited from the measure at issue, were in a factual and legal situation comparable to that of other power plants, which did not benefit from that measure, in the light of the objective pursued by that measure.

74 In paragraph 72 of the judgment under appeal, the General Court merely found that the contested decision indicated that the coal-fired power plants included in the PNRE-GIC benefited exclusively from the measure at issue, in order to consider that the word 'exclusively', in paragraph 28 of that judgment, made it possible to distinguish the coal-fired power plants listed in the PNRE-GIC from power plants using other technology or any power plant which was not included in that plan.

75 Furthermore, in paragraph 73 of the judgment under appeal, the General Court referred, in a general manner, to the nature of the decision at issue, its wording, its content, the context in which it was adopted and all the relevant legal rules in order to hold that, despite the fact – which it itself acknowledged – that the statement of reasons relating to the selective nature of the measure at issue was of a 'summary' nature, the applicant at first instance had been able to understand the reasons underlying the Commission's preliminary view that the measure at issue appeared to be selective.

76 It should be stated that although, in the same paragraph, the General Court, as a basis for its analysis, also referred to paragraph 30 of the decision at issue, which mentions the existence of a competitive relationship between the beneficiaries of the measure and other electricity producers, such a factor cannot moreover suffice to explain to the requisite legal standard the comparability of the situations between the power plants benefiting from the measure at issue and those which do not benefit from it (see, by analogy, judgment of 21 December 2016, *Commission* v *Hansestadt Lübeck*, C-524/14 P, EU:C:2016:971, paragraph 59).

77 It should be added that although, in order to assess the statement of reasons for a decision, it is indeed necessary to examine its content in its entirety (see, to that effect, judgment of 25 July 2018, *Commission* v *Spain and Others*, C-128/16 P, EU:C:2018:591, paragraph 93), such an examination cannot compensate for the absence of any indication of the comparability of the situations, as in the present case, as between the power stations which benefit from the measure at issue and those which do not.

78 In the light of the foregoing, the appellants' first grounds of appeal in Cases C-693/21 P and C-698/21 P must be upheld.

79 Accordingly, without it being necessary to analyse the second grounds of appeal put forward in the alternative by the appellants in support of their respective appeals which allege infringement of Article 107(1) TFEU as regards the criterion of selectivity, the judgment under appeal must be set aside.

The action before the General Court

80 In accordance with the first paragraph of Article 61 of the Statute of the Court of Justice of the European Union, if the Court quashes the decision of the General Court, it may itself give final judgment in the matter, where the state of the proceedings so permits.

81 That is so in the present case, since the pleas in the action seeking annulment of the decision at issue were the subject of an exchange of arguments before the General Court and the examination of those pleas does not require any further measure of organisation of procedure or inquiry to be taken in the cases (see, to that effect, judgment of 16 March 2023, *Commission and Others* v *Pharmaceutical Works Polpharma*, C-438/21 P to C-440/21 P, EU:C:2023:213, paragraph 98).

82 In that regard, it should be noted that, for the reasons set out in paragraphs 61 to 67 of the present judgment, in a decision to initiate a formal investigation procedure, the Commission is required, under Article 296 TFEU, to disclose in a clear and unequivocal fashion the reasons why it considered that the measure in question was liable to constitute State aid. As stated in paragraph 72 of the present judgment, if the Commission considers that a measure is selective, it

must state, even in a succinct manner, the reasons why it considers that, within the context of a particular legal regime, that measure has the effect of conferring an advantage on certain undertakings over others which are, in the light of the objective pursued by that regime, in a comparable factual and legal situation.

83 It is sufficient to note that, in the present case, for the reasons set out in paragraphs 73 to 77 of the present judgment, the Commission did not comply with its obligation to state reasons under Article 296 TFEU, in that it failed to set out the reasons why, in its view, the measure at issue favours certain undertakings or the production of certain goods over other undertakings in a comparable factual and legal situation and is, therefore, selective in nature.

84 Consequently, the first plea in law in the action brought by Naturgy Energy Group at first instance must be upheld and the decision at issue must be annulled, without it being necessary to examine the second plea in law of that action.

Costs

85 Under Article 184(2) of the Rules of Procedure of the Court of Justice, where the appeal is well-founded and the Court itself gives final judgment in the case, the Court is to make a decision as to costs.

86 According to Article 138(1) of the Rules of Procedure, applicable to appeal proceedings by virtue of Article 184(1) thereof, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. In the present cases, since the Commission has been unsuccessful and Naturgy Energy Group and EDP España have applied for costs, the Commission must be ordered to bear its own costs and to pay those incurred by Naturgy Energy Group at first instance and before the Court of Justice and by EDP España before the Court of Justice.

87 Article 184(4) of the Rules of Procedure provides that, where the appeal has not been brought by an intervener at first instance, he or she may not be ordered to pay costs in the appeal proceedings unless he or she participated in the written or oral part of the proceedings before the Court of Justice. Where an intervener at first instance takes part in the proceedings, the Court of Justice may decide that he or she is to bear his or her own costs. In accordance with those provisions, Generaciones Eléctricas Andalucía, intervener at first instance, which participated in the proceedings before the Court of Justice, must bear its own costs.

88 Lastly, in accordance with Article 140(3) of the Rules of Procedure, which applies to appeal proceedings by virtue of Article 184(1) of those rules, the Court may order an intervener other than those referred to in Article 140(1) and (2) thereof to bear his or her own costs. In accordance with those provisions, Endesa Generación, intervener in Cases C-693/21 P and C-698/21 P, must bear its own costs.

On those grounds, the Court (Fourth Chamber) hereby:

1. **Sets aside the judgment of the General Court of the European Union of 8 September 2021, *Naturgy Energy Group* v *Commission* (T-328/18, EU:T:2021:548);**

2. **Annuls Commission Decision C(2017) 7733 final of 27 November 2017 on State aid SA.47912 (2017/NN) – Environmental incentive for coal-fired power plants;**

3. Orders the European Commission to bear its own costs and pay those incurred by Naturgy Energy Group SA relating both to the proceedings at first instance in Case T-328/18 and the appeal proceedings in Cases C-693/21 P and C-698/21 P, and those incurred by EDP España SA relating to its appeal in Case C-693/21 P;

4. Orders Generaciones Eléctricas Andalucía SLU to bear its own costs;

5. Orders Endesa Generación SAU to bear its own costs.

[Signatures]