Reports of Cases

JUDGMENT OF THE GENERAL COURT (Sixth Chamber)

20 September 2012*

(Competition — Abuse of dominant position — Greek market for the supply of lignite and Greek wholesale electricity market — Decision finding an infringement of Article 86(1) EC, read in combination with Article 82 EC — Grant or maintenance of rights awarded by the Hellenic Republic in favour of a public undertaking for the extraction of lignite)

In Case T-169/08,

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

applicant,

supported by

Hellenic Republic, represented by K. Boskovits and P. Mylonopoulos, acting as Agents, assisted initially by A. Komninos and M. Marinos, and subsequently by M. Marinos, lawyers,

intervener,

v

European Commission, represented by T. Christoforou, A. Bouquet and A. Antoniadis, acting as Agents, assisted by A. Oikonomou, lawyer,

defendant,

supported by

Energeiaki Thessalonikis AE, established in Echedoros (Greece), represented by P. Skouris and E. Trova, lawyers,

and by

Elliniki Energeia kai Anaptyxi AE (HE & DSA), established in Kifissia (Greece), represented by P. Skouris and E. Trova,

interveners,

APPLICATION for annulment of Commission Decision C(2008) 824 final of 5 March 2008, concerning the grant or maintenance by the Hellenic Republic of rights in favour of DEI for the extraction of lignite,

* Language of the case: Greek.

THE GENERAL COURT (Sixth Chamber),

composed of H. Kanninen (Rapporteur), President, N. Wahl and S. Soldevila Fragoso, Judges,

Registrar: S. Spyropoulos, Administrator,

having regard to the written procedure and following the hearings of 6 April 2011 and 2 February 2012,

gives the following

Judgment

Background

1 The applicant, Dimosia Epicheirisi Ilektrismou AE (DEI), was created by Greek Law No 1468 of 2/7 August 1950 (FEK A' 169), in the form of a public undertaking belonging to the Hellenic Republic and enjoyed the exclusive right to produce, transport and supply electricity in Greece.

2 In 1996, Greek Law No 2414/1996 on the modernisation of public undertakings (FEK A' 135), permitted the transformation of the applicant into a company limited by shares, but still held by the State as sole shareholder.

3 The applicant was transformed into a limited liability company on 1 January 2001, in accordance, first, with Greek Law No 2773/1999 on the liberalisation of the electricity market (FEK A' 286), which in particular transposed Directive 96/92/EC of the European Parliament and of the Council of 19 December 1996 concerning common rules for the internal market in electricity (OJ 1997, L 27, p. 20), and, second, with Greek Presidential Decree No 333/2000 (FEK A' 278).

4 The Hellenic Republic holds 51.12% of the shares in the applicant. Under Article 43(3) of Law No 2773/1999, the State's shareholding in the capital of the applicant may not in any case be lower than 51% of the shares with voting rights, even after an increase of capital. Since 12 December 2001, the applicant's shares have been quoted on the Athens stock exchange and the London stock exchange.

5 Lignite is an ore of coal. That solid combustible is essentially used for producing electricity.

6 Greece is the fifth producer of lignite in the world and the second producer in the European Union, after Germany. According to the Institouto geologikon kai metallourgikon erevnon (Greek Institute for Geological and Mining Research), known reserves of lignite in Greece were estimated, as at 1 January 2005, at 4 415 million tonnes. According to the European Commission, 4 590 million tonnes of lignite reserves exist in Greece.

7 The Hellenic Republic has allocated to the applicant exploration and exploitation rights for lignite in respect of mines the reserves of which amount to about 2 200 million tonnes; 85 million tonnes of reserves belong to private third parties, and about 220 million tonnes of reserves are public deposits which are explored and exploited by private third parties, but which partially supply the power stations of the applicant. No exploitation rights have yet been allocated in respect of about 2 000 million tonnes of lignite reserves in Greece.

8 All Greek power stations functioning on lignite belong to the applicant.

9 Following the entry into force of Directive 96/92, the Greek electricity market was opened up to competition.

10 The granting of licences for electricity production and the construction of power stations is governed by Law No 2773/1999, as amended.

11 Greek Law No 3175/2003 (FEK A' 207) provided for the creation of a compulsory daily market for all sellers and buyers of electricity in the interconnected Greek network which comprises continental Greece and certain Greek islands. That creation took place in May 2005.

12 On the compulsory daily market, producers and importers of electricity feed in and sell their production and their imports on a daily basis. More precisely, they submit offers the day before (comprising the indication of a price and a quantity of electricity), while suppliers and customers submit load forecasts. Taking account of those factors, the prices offered, the quantities and the hours of operation of each power station, the body managing electricity transport networks, called the Hellenic Transmission System Operator SA (HTSO) draws up the hourly load programme of the power stations for the following day.

13 In drawing up such a programme, the HTSO takes into consideration the forecast of certain compulsory feed-ins of electricity (such as the feed-in of electricity by power stations producing from renewable energies, the production of combined heat and power plants, of compulsory hydroelectric power stations, imports and exports). Priority is thus given to those sellers on the wholesale electricity market; then come the other sellers (all thermal power stations, including lignite, gas and oil power stations).

14 In order to determine the market price, account is taken of the highest of the offers accepted. The system is as follows: the basic principle is that the hourly tariffs charged by producers must be at least equal to the variable cost of the power station; the offers of the electric power stations with the lowest variable cost are the first to be integrated into the network, except for power stations functioning with renewable energy, which are integrated as a matter of priority; the price at which electricity is bought and sold is determined each time by the last production centre (the most expensive) to be integrated into the distribution programme with a view to satisfying the demand concerned — called the System Marginal Unit; at the point of balance where offer corresponds to demand, the price offered is the market settlement price, called the 'System Ceiling Price'.

15 In 2003, the Commission received a complaint from an individual requesting confidentiality, informing it that, by virtue of Greek Legislative Decree No 4029/1959 of 12 and 13 November 1959 (FEK A' 250), and Greek Law No 134/1975 of 23 and 29 August 1975 (FEK A' 180), the Hellenic Republic had granted the applicant an exclusive licence to explore and exploit lignite in Greece. According to the complaint, those State measures were contrary to Article 86(1) EC, read in combination with Article 82 EC.

16 The Commission examined the facts and sent requests for information to the applicant and to Rythmistiki Archi Energias (RAE, the energy regulatory authority). The former replied by letters of 23 and 30 May and 11 July 2003, and the latter by letter of 25 June 2003.

17 On 1 April 2004, the Commission sent a letter of formal notice to the Hellenic Republic to inform it of the preliminary objections which it had adopted. In particular, the Commission referred to measures taken pursuant to Legislative Decree No 4029/1959 and Law No 134/1975, granting the applicant exploration and exploitation rights over the lignite deposits of the Megalopolis, of the region of Ptolemaïs, in the basins of Amynteon and in that of Flórina, those rights expiring respectively in 2026, 2024 and 2018. The Commission also referred to such rights granted for the deposits of Dráma and Elassona. It added that such measures had been taken in favour of the applicant without any financial consideration, whereas other entities enjoying such rights were required to provide such consideration.

By reason of those measures giving the applicant privileged access to the most attractive combustible for the production of electricity, the Commission considered that the Hellenic Republic had allowed the applicant to maintain or extend its existing dominant position over the market for the supply of lignite to the wholesale electricity market, in breach of Article 86 EC, read in combination with Article 82 EC. The Commission concluded by indicating that the infringement of those provisions had existed at least since February 2001, namely the date at which the Greek State should have liberalised the electricity market pursuant to Directive 96/92.

18 On 3 May 2004, the Commission sent a copy of that letter to the applicant offering it the possibility of formulating its observations on that subject. The Hellenic Republic and the applicant replied by letters of 2 July 2004. In their replies, the Hellenic Republic and the applicant referred in particular to recent legislative developments, concerning the adoption of Law No 3175/2003, developments in the electricity market with the grant of licences to entities other than the applicant for the construction of new power stations, and maintained that Greek legislation granted no exclusive right to the applicant, either concerning the exploitation of lignite or the production of electricity from that combustible.

19 By letter of 21 September 2005, the Commission requested certain clarifications from the Hellenic Republic, which replied by letters of 22 and 28 November 2005 and 19 June 2006. In those letters, the latter provided a series of information and new facts. It mentioned the adoption of Greek Law No 3426/2005 (FEK A' 309) and, for the first time, the seven small lignite deposits for which exploration and exploitation rights were granted to private law legal persons and physical persons after 1985, gave a list of the licences granted or refused for the construction of new power stations and indicated its intention, first, to modify Legislative Decree No 4029/1959 and Law No 134/1975, second to reallocate by tender the deposits of Vevi, then those of Vegora, and third to grant exploitation rights for the deposits of Dráma and Elassona.

20 On 18 October 2006, the Commission sent an additional letter of formal notice to the Hellenic Republic, in which it set out explicitly the conclusions which it had drawn from the new information sent by the latter. In particular, it indicated that those new elements did not change the objections which it had set out in its first letter of formal notice of 1 April 2004. The Commission thus reiterated its position according to which, by maintaining and granting quasi-monopolistic rights which offered the applicant privileged access to lignite, the Hellenic Republic gave the latter the possibility of maintaining a dominant position on the market for the production of electricity in a situation of quasi-monopoly, by excluding or hindering new entrants to the market.

21 In a letter dated 19 January 2007, the applicant sent its observations to the Commission on the complementary letter of formal notice, communicating at the same time certain information, in particular concerning exploitation rights for certain lignite deposits, the production costs of power stations functioning on lignite or gas, the market for the supply of lignite which it maintains extends beyond Greek territory, and the possible repeal of the provisions of Legislative Decree No 4029/1959 and Law No 134/1975. It further expressed its objections to the Commission's reasoning and denied any breach of EU law. The applicant sent a further letter to the Commission on 4 April 2007, in which it submitted further evidence, concerning in particular the extraction and potential imports of lignite.

22 The Hellenic Republic replied to the letter of formal notice by letter of 24 January 2007. In that letter, it referred to the current situation concerning lignite deposits exploited by the applicant and other entities. On the substance, it challenged the Commission's legal analysis as to the application in this case of the 'theory of the extension of a dominant position'.

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

24 On 5 March 2008, the Commission adopted Decision C(2008) 824 final, concerning the grant or maintenance by the Hellenic Republic of rights in favour of the applicant for the extraction of lignite ('the contested decision').

25 In that decision, the Commission indicates that the Hellenic Republic knew since the adoption of Directive 96/92, the transposition of which was due by 19 February 2001 at the latest, that the electricity market had to be liberalised (recitals 61 and 150).

26 The Commission considers that the Hellenic Republic has adopted certain State measures concerning two markets for distinct products, the first being that of supplying lignite and the second being the wholesale electricity market, which concerns the production and supply of electricity in power stations and the importation of electricity by means of interconnection provisions. The Commission indicates that, until May 2005, the date of the creation of the compulsory daily market, the second of those markets was that of the supply to eligible customers of electricity produced at national level and imported and that analysis of that market over the period up to May 2004 has led to the same conclusions as the analysis carried out concerning the wholesale electricity market, which was a potential market at that date. Thus, and taking account of that development of the Greek market indicated by the Hellenic Republic in its letter of 24 January 2007, the Commission emphasises that, whilst the second market must be regarded as the electricity wholesale market, it is nevertheless necessary to deal with the arguments submitted by the Hellenic Republic on the basis of the initial definition of the market (recitals 158 et seq.). As for the geographical markets in question, the market for the supply of lignite was of a national dimension whereas the wholesale electricity market extended to the 'territory of the interconnected network' (recitals 167 to 172).

27 The Commission then argues that the applicant holds a dominant position on the market for the supply of lignite. The applicant's share of the total quantity of lignite extracted in Greece since 2000 had always been more than 97%. The applicant also held a dominant position on the wholesale electricity market, since its share of that market remained above 85%. There was no prospect of new market entrants being capable of taking a significant share of the wholesale electricity market from the applicant, and imports, representing 7% of total consumption, did not constitute a genuine competitive restraint on that market (recital 177). Moreover, the wholesale electricity market in the interconnected Greek network, which represented more than 90% of total electricity consumption in Greece, constituted a substantial part of the common market (recital 179).

28 Concerning the State measures in question, the Commission notes that the applicant has been granted, pursuant to Legislative Decree No 4029/1959 and Law No 134/1975, exploitation rights for 91% of total public deposits of lignite for which rights were granted. It states that those measures were maintained while, despite possibilities offered by the mining code, introduced in Greece by Greek Legislative Decree No 210/1973 (FEK A' 277), then modified by Greek Law No 274/1976 (FEK A' 50) , no right over a significant deposit was granted. Moreover, it indicates that the applicant obtained exploration rights without calls for tender over exploitable deposits, essentially Dráma and Elassona, for which exploitation rights have not yet been granted. The Commission adds, finally, that power stations functioning on lignite, which are the cheapest in Greece, are the most used, since they produce 60% of the electricity permitting the supply of the interconnected network (recitals 185 to 187).

29 Consequently, by granting and maintaining quasi-monopolistic lignite exploration rights in favour of the applicant, the Hellenic Republic had created inequality of opportunity between economic operators on the wholesale electricity market and thus distorted competition, thereby reinforcing the dominant position of the applicant (recital 190).

30 The Commission concludes that, by granting and maintaining quasi- monopolistic rights in favour of the public undertaking which is the applicant over the exploitation of lignite, the Hellenic Republic has guaranteed the applicant privileged access to the most attractive combustible which existed in

Greece for the purposes of producing electricity. The Hellenic Republic thus gave that undertaking the possibility of maintaining a dominant position on the wholesale electricity market in a situation of quasi-monopoly, excluding or hindering any new entrants. Consequently, it allowed the applicant to protect its quasi-monopolistic position on the market despite the liberalisation of the wholesale electricity market and thus maintained and reinforced its dominant position on that market (recital 238).

31 Finally, the Commission finds that the Hellenic Republic has not invoked the provisions of Article 86(2) EC to justify the adoption of the measures granting the applicant lignite extraction rights (recitals 239 and 240). It also considers that the State measures affect trade between States, since they discourage any potential competitor from investing in the production and supply of electricity in Greece (recitals 241 to 244).

32 According to Article 1 of the contested decision, Article 22(1) of Legislative Decree No 4029/1959, Article 3(1) of Law No 134/1975 and the decisions of the Greek Minister for Industry, Energy and Technologies of 1976 (FEK B' 282), 1988 (FEK B' 596) and 1994 (FEK B' 633) are contrary to Article 86(1) EC, read in combination with Article 82 EC, in so far as they grant and maintain privileged rights in favour of the applicant for the exploitation of lignite in Greece, thereby creating a situation of inequality of opportunity between economic operators as regards access to primary combustibles for the purposes of producing electricity and allowing the applicant to maintain or reinforce its dominant position on the Greek wholesale electricity market by excluding or hindering any new entrants.

33 It must be observed that Article 1 of the contested decision contains a clerical error, in that reference is made to Article 3(1) of Law No 134/1975, whereas the documents before the Court show that the provision concerned by the contested decision is Article 3(3).

34 In Article 2 of the contested decision, the Commission requests the Hellenic Republic to inform it, within a time-limit of two months from notification of that decision, of the measures which it intends to take to correct the anti-competitive effects of the State measures referred to in Article 1. The Commission further indicates that those measures are to be adopted and put into effect within eight months from that decision.

Procedure and forms of order sought

35 By application lodged at the Registry of the General Court on 13 May 2008, the applicant brought the present action.

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

37 By documents lodged at the Registry of the General Court on 9 September 2008, Elliniki Energeia kai Anaptyxi AE (HE & DSA) and Energeiaki Thessalonikis AE, limited liability companies operating in the area of the production of electrical energy in Greece ('the interveners'), sought leave to intervene in support of the forms of order sought by the Commission. In accordance with Article 116(1) of the Rules of Procedure of the General Court, those applications were notified to the parties. The Commission submitted its observations on 23 October 2008. By documents lodged at the Registry of the General Court on 7 and 10 November 2008 respectively, the applicant raised objections against both those applications to intervene.

38 By an Order of the President of the Seventh Chamber of the General Court of 3 December 2008, the Hellenic Republic was granted leave to intervene in the present case in support of the form of order sought by the applicant.

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

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

41 The Hellenic Republic lodged its statement in intervention at the Registry of the General Court on 18 February 2009. In that document, it indicated in particular that Article 3(3) of Law No 134/1975, challenged in Article 1 of the contested decision, was repealed by Article 36(3) of Greek Law No 3734/2009 (FEK A' 8).

42 By orders of the President of the Seventh Chamber of the General Court of 18 September 2009, the interveners were granted leave to intervene in the present dispute in support of the forms of order sought by the Commission.

43 The interveners lodged a statement in intervention at the Registry of the General Court on 13 November 2009.

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

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

— annul the contested decision;

— order the Commission to pay the costs.

46 The Commission, supported by the interveners, contends that the Court should:

— dismiss the action;

— order the applicant to pay the costs.

47 When the composition of the chambers of the Court was altered, the Judge-Rapporteur was assigned, as President, to the Sixth Chamber, to which this case was, consequently, assigned.

48 Upon hearing the report of the Judge-Rapporteur, the General Court (Sixth Chamber) decided to open the oral procedure.

49 In the context of a measure of organisation of procedure, decided in accordance with Article 64 of the Rules of Procedure, the General Court invited the main parties and the Hellenic Republic, by letters of 14 December 2010, to lodge statistics and tables concerning the compulsory daily market, for the period from 2005 until the adoption of the contested decision. The applicant and the Hellenic Republic deferred to that measure, by letters lodged at the Registry of the General Court of 1 February 2011. By letter lodged at the Registry of the General Court of 7 March 2011, the

Commission deferred to the Court's request, sending two versions, one confidential for the applicant and the Hellenic Republic and the other non-confidential for the interveners. The parties were invited to formulate their observations on the content of those replies at the hearing.

50 The parties presented oral argument and their answers to the questions put by the Court at the hearing on 6 April 2011.

51 The Judge-Rapporteur having been prevented from sitting, the President of the General Court designated himself, pursuant to Article 32(3) of the Rules of Procedure, to complete the Sixth Chamber, as Judge-Rapporteur.

52 By order of 18 November 2011, the General Court (Sixth Chamber), in its new composition, reopened the oral procedure and the parties were informed that they could present oral argument at a further hearing.

53 Subsequently, the President of the General Court reallocated the case to the new President of the Sixth Chamber and designated him as Judge-Rapporteur.

54 The parties submitted oral argument at a further hearing on 2 February 2012.

Law

55 In support of its action, the applicant makes four pleas, claiming, first, error of law in applying the combined provisions of Article 86(1) EC and Article 82 EC, and a manifest error of assessment; second, infringement of the duty to state reasons under Article 253 EC; third, in the first place, infringement of the principles of legal certainty, the protection of legitimate expectations and the protection of private property, and, in the second place, misuse of powers; and, fourth, infringement of the principle of proportionality.

56 The first plea is divided into five parts, claiming, first, manifest error of assessment in the definition of the markets in question; second, the absence of any extension of the dominant position of the market for the supply of lignite on the wholesale electricity market as regards the interpretation of the condition concerning the existence of exclusive or special rights for the combined infringement of Article 86(1) EC and Article 82 EC; third, the absence of any situation of inequality of opportunity to the detriment of new competitors by reason of the Greek legislation allocating lignite exploitation rights to the applicant; fourth, absence of any extension of the dominant position of the market for the supply of lignite on the wholesale electricity market as regards alleged privileged access to a primary combustible; and, fifth, manifest error of assessment in taking account of developments on the Greek electricity market.

57 In the contested decision, the Commission concluded that the State measures in question concerned two markets: an upstream market, which is that for the supply of lignite, to the exclusion of other combustibles, and a downstream market, which is the wholesale electricity market, namely the market for the production and wholesale supply of electricity, to the exclusion of the markets for the transport and distribution of electricity (recitals 158 to 166). As for the geographical markets in question, the market for the supply of lignite was of national dimension and the wholesale electricity market extended to the territory of the Greek interconnected network (recitals 167 to 171).

58 According to the Commission, the measures adopted by the Hellenic Republic, by granting lignite exploitation rights to the applicant and by excluding or hindering any new entry of competitors to that market, allow the applicant to maintain or strengthen its dominant position on the downstream market, namely the electricity wholesale market.

59 The Court considers it appropriate first to examine the second and fourth parts of the first plea, without there being any need at this stage to rule on the validity of the definition of the relevant markets adopted by the Commission in the contested decision and thus on the premiss that the said definition, contrary to what the applicant argues, is not vitiated by a manifest error of assessment.

Arguments of the parties

60 The applicant challenges, in essence, the Commission's conclusion that the exercise of the lignite exploitation rights, of which the applicant is the owner, had the effect of extending its dominant position from the lignite market to the wholesale electricity market, in breach of the combined provisions of Article 86(1) EC and Article 82 EC.

61 First, the applicant maintains that, even if, as regards the general scope of Article 86(1) EC, it is sufficient for the undertaking to be a public undertaking, the existence of exclusive or special rights is a necessary condition to demonstrate an infringement of the combined provisions of Article 86(1) EC and 82 EC on the ground of an extension of a dominant position of a public undertaking from one market to another, neighbouring but distinct market. In all the judgments in which the Court of Justice has identified a combined infringement of those provisions my means of the extension of a dominant position, the undertaking concerned based its conduct on a special or exclusive right the existence of which was decisive.

62 The applicant argues that it is not the holder either of an exclusive right, as it does not have exclusivity for exercising the activity of extracting lignite, or of a special right, since no State decision determines the number of beneficiaries, even if that number of necessity cannot exceed the number of deposits existing in Greek territory.

63 Second, the applicant indicates that it has no regulatory power enabling it to determine at will the activity of its competitors and oblige them to depend upon it. Nor, in its submission, is there any undermining of competition, since the applicant does not, for example, impose high costs on its competitors or supply them with a raw material less appropriate for their activity. It argues that the Commission was wrong not to state precisely the nature of the abusive conduct to which the applicant was allegedly led by the alleged inequality of opportunities.

64 Third, the Commission should have explained, or at least examined, to what extent the alleged infringement of Article 82 EC harmed the interests of consumers. The Court of Justice examined, in judgments concerning infringement of Article 86(1) EC and Article 82 EC, to what extent the national legal context led to a situation detrimental to the interests of consumers for the purposes of Article 82(b) EC. In this case, there was no actual or potential damage to the interests of consumers, having regard to the fact that retail prices are fixed by the State at a low level for social reasons.

65 Fourth, according to the applicant, the Commission defined lignite as an essential production facility, without demonstrating that lignite was essential for operating on the wholesale electricity market.

66 The Commission should at least have demonstrated that lignite was much cheaper than all other combustibles to the point at which, without access to lignite, the possibility of access to the wholesale electricity market was excluded.

67 Relying on the judgment of the Court of Justice of 23 April 1991 in Case C-41/90 *Höfner and Elser* [1991] ECR I-1979 and subsequent case-law, the Hellenic Republic argues that the Commission does not mention any sort of abuse of a dominant position by the applicant, existing or even potential. In the present dispute, the existence of such an abuse is a necessary precondition for the purposes of the combined application of Article 86(1) EC and Article 82 EC. It was not enough for the Commission to

demonstrate that a State measure creates inequality of opportunity on the market. Moreover, the Commission did not demonstrate the existence of a strong causal link between the position of the applicant on the upstream market and the alleged infringement on the downstream market.

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

69 The Commission submits that the applicant's argument, that, first, the dominant undertaking must also enjoy special or exclusive rights for an infringement of the combined provisions of Article 86(1) EC and Article 82 EC to be established, and, second, such special or exclusive rights were not granted to it in this case, is devoid of legal foundation. First, the scope of those provisions is not limited to State measures which grant special or exclusive rights and, second, such rights were granted to the applicant by the very effect of granting the licence to exploit a lignite deposit.

70 The Commission adds that, even if in the judgments cited by the applicant the grant of special or exclusive rights played a role in the assessment of the infringement, that did not prevent it being held that, in the case of a public undertaking, one or more State measures infringe the combined provisions of Article 86(1) EC and Article 82 EC, without the existence of a special or exclusive right being necessary. The Court of Justice stated that, moreover, in its judgment of 22 May 2003 in Case C-462/99 *Connect Austria* [2003] ECR I-5197. The Commission also observes that the characteristics of the cases relied on by the applicant were not the same as those of the case in question.

71 The Commission reiterates that the rights to exploit lignite reserves in a given region, obtained by virtue of the disputed legislative provisions and ministerial decrees, grant the applicant the right to exploit those reserves in an exclusive manner. Although the fact of granting the applicant an exclusive right to exploit lignite, taken on its own, does not in itself constitute an infringement of the provisions of Article 86(1) EC and Article 82 EC, those rights – considered as a whole – provided the applicant with a privileged and exclusive access covering nearly all the exploitable public reserves of lignite in Greece. It is that result which the Commission describes as 'privileged access' and 'quasi-monopolistic rights' in the contested decision in order to describe the situation of the applicant which holds a dominant position on the market in question.

72 At the hearing on 2 February 2012, the Commission maintained, in reply to a question of the Court, that the application of Article 86(1) EC was made in this case on the basis of the criterion of the 'public undertaking'.

73 Relying on the judgment in *Connect Austria*, the Commission argues that, in order to apply the theory of the extension of a dominant position, it is not necessary for the dominant undertaking to exercise a regulatory function on a neighbouring market.

74 The applicant's claim that the Commission should have examined the potential damage caused to consumers by the infringement of the combined provisions of Article 86(1) EC and Article 82 EC is, the Commission submits, without foundation. A practice which affects the structure of competition on the wholesale electricity market in Greece is regarded as indirectly prejudicial to consumers.

75 The Commission states that it based its conclusion finding infringement of the combined provisions of Article 86(1) EC and Article 82 EC on the judgments of the Court of Justice in Case C-202/88 *France* v *Commission* [1991] ECR I-1223; Case C-18/88 *GB-Inno-BM* [1991] ECR I-5941; Case C-163/96 *Raso and Others* [1998] ECR I-533; and *Connect Austria*. That case-law recognised the existence of an infringement of Article 86(1) EC, read in combination with Article 82 EC, when State measures distort competition by creating an inequality of opportunities between operators, without at the same time requiring the definition of an actual abusive practice – real or potential. Consequently, the Commission disputes the claim that it should also have established, beyond the inequality of opportunities, an actual abusive practice of the applicant.

76 Contrary to the argument of the Hellenic Republic, the Commission considers that the reference of the judgment in *Connect Austria*, to inequality of opportunities and the criteria elaborated by the Court of Justice in *Höfner and Elser*, are not cumulative conditions.

77 The Commission disputes the applicant's claim that it regarded its quasi-monopolistic access to lignite as a form of 'essential facility', as it has not recourse to that concept.

78 Concerning the alleged unattractive character of lignite as a means of producing electricity, first, the Commission recalls that certain undertakings submitted applications in the context of the tendering procedure concerning rights to exploit the Vevi lignite mine. Second, the applicant demonstrated a constant interest in constructing new lignite power stations or replacing existing ones. That, the Commission submits, is sufficient to refute the applicant's arguments on that point.

Findings of the Court

79 Under Article 86(1) EC, Member States are not to enact or maintain in force, in the case of public undertakings and the undertakings to which they grant special or exclusive rights, any measure contrary to the rules contained in the Treaty, in particular those relating to competition, subject to Article 86(2) EC. That article has no independent application, and can apply only in combination with other provisions of the Treaty.

80 In this case, the Commission has applied Article 86(1) EC in combination with Article 82 EC. That latter provision prohibits undertakings from abusing a dominant position on the common market or a substantial part thereof in so far as trade between Member States is capable of being affected.

81 In Article 1 of the contested decision, the Commission considered that the State measures in question were contrary to those combined provisions in so far as they granted and maintained privileged rights in favour of the applicant for the exploitation of lignite in Greece. That created a situation of inequality of opportunity between economic operators as regards access to primary combustibles for the purposes of producing electricity permitting the applicant to maintain or strengthen its dominant position on the wholesale electricity market by excluding or hindering any new entry to the market.

82 In essence, the applicant makes two complaints against that conclusion of the Commission.

83 By its first complaint, the applicant argues that, even if Article 86(1) EC is in principle applicable to public undertakings to which Member States have not granted special or exclusive rights, the case-law shows that, in order to establish an infringement of that provision applied in combination with Article 82 EC on the ground of an extension of the dominant position, it is necessary for the undertaking concerned to enjoy an exclusive or special right within the meaning of Article 86(1) EC. In this case, the lignite exploitation rights granted to it did not constitute such a right.

84 By its second complaint, the applicant argues that the Commission has not established in the contested decision the existence of an actual or potential abuse of the applicant's dominant position on the markets concerned, whereas it was obliged to do so in order to be able to apply Article 86(1) EC in combination with Article 82 EC. That complaint must be examined first.

85 In that respect, the difference, in this case, focuses primarily on the question whether the Commission had to identify an actual or potential abuse of the dominant position by the applicant, or whether it was sufficient for it to establish that the State measures in question distorted competition by creating an inequality of opportunities between economic operators, in favour of the applicant. On this point, the parties draw differing conclusions from the case-law of the Court of Justice interpreting Article 86(1) EC in conjunction with Article 82 EC.

86 It should first be noted that the prohibitions laid down by Article 86(1) EC are addressed to Member States, whereas Article 82 EC is addressed to undertakings, prohibiting them from abusing a dominant position. In the case of the combined application of those two provisions, infringement of Article 86(1) EC by a Member State cannot be established unless the State measure is contrary to Article 82 EC. The question therefore arises as to the extent to which an abuse, even if only potential, of the dominant position by an undertaking must be identified, that abuse having a link with the State measure.

87 Regarding the market for the supply of lignite, the documents before the Court show that, by Article 22 of Legislative Decree No 4029/1959 and Article 3(3) of Law No 134/1975, out of a total of around 4 500 million tonnes of lignite reserves in Greece, the Hellenic Republic granted the applicant lignite exploitation rights in respect of mines the reserves of which amount to around 2 200 million tonnes. Those State measures, which were prior to the liberalisation of the electricity market, have been maintained and continue to affect the market for the supply of lignite.

88 The documents before the Court also show that, despite the interest shown by competitors of the applicant, no economic operator has been able to obtain from the Hellenic Republic exploitation rights over lignite deposits, even though Greece has around 2 000 million tonnes of lignite which have not yet been exploited.

89 However, the impossibility, for other economic operators, of having access to the lignite deposits still available cannot be imputed to the applicant. As it correctly pointed out at the hearing on 2 February 2012, the non-granting of lignite exploitation licences depends exclusively on the will of the Hellenic Republic. On the market for the supply of lignite, the applicant's role has been limited to exploiting deposits over which it holds rights and the Commission has not maintained that it abused its dominant position on that market as regards access to lignite.

90 According to the Commission, the impossibility for the applicant's competitors to enter the market for the supply of lignite has repercussions on the wholesale electricity market. Since lignite is the most attractive combustible in Greece, its exploitation allows the production of electricity with a low variable cost, which, according to the Commission, guarantees that the electricity thus produced may enter the compulsory daily market with a more favourable profit margin than electricity produced from other combustibles. According to the Commission, the consequence is the applicant can maintain or strengthen its dominant position on the wholesale electricity market by excluding or hindering all new entrants to that market.

91 In that respect, it should be remembered that, following the liberalisation of the wholesale electricity market, a compulsory daily market has been created and that the rules for its functioning have not been called into question by the contested decision. As is apparent from paragraphs 11 to 14 above, sellers on the wholesale electricity market, namely the applicant and its competitors, must comply with that system. Moreover, the applicant was present on that market before its liberalisation.

92 The Commission has not established that privileged access to lignite was capable of creating a situation in which, by the mere exercise of its exploitation rights, the applicant could have been able to commit abuses of a dominant position on the wholesale electricity market or was led to commit such abuses on that market. Similarly, the Commission does not accuse the applicant of having, without objective justification, extended its dominant position on the market for the supply of lignite to the wholesale electricity market.

93 By finding simply that the applicant, a former monopolistic undertaking, continues to maintain a dominant position on the wholesale electricity market by virtue of the advantage conferred upon it by privileged access to lignite and that that situation creates an inequality of opportunities on that market

between the applicant and other undertakings, the Commission has neither identified nor established to a sufficient legal standard to what abuse, within the meaning of Article 82 EC, the State measure in question has led or could lead the applicant.

94 It is important to add that, in the contested decision, the Commission mentioned first, citing *Raso and Others*, cited above (paragraph 27), the case-law of the Court of Justice according to which a Member State infringes the prohibitions laid down by Article 86(1) EC and Article 82 EC where the undertaking in question is led, by the mere exercise of the exclusive or special rights conferred upon it, to exploit its dominant position in an abusive manner or where those rights are capable of creating a situation in which that undertaking is led to commit such abuses. That case-law is consistent and recalled in particular in the judgments of the Court of Justice in *Höfner and Elser*, cited above (paragraph 29); Case C-179/90 *Merci convenzionali porto di Genova* [1991] ECR I-5889, paragraph 17; Case C-55/96 *Job Centre* [1997] ECR I-7119, paragraph 31; and Case C-49/07 *MOTOE* [2008] ECR I-4863, paragraphs 50 and 51.

95 It is apparent from those judgments, debated before the General Court, that the Court of Justice, after having recalled that the mere fact of creating or strengthening a dominant position, by a State measure within the meaning of Article 86(1) EC is not as such incompatible with Article 82 EC, verified in each case whether the undertaking in question could have been led, by the mere exercise of the exclusive or special right conferred by the State measure, to exploit its dominant position in an abusive manner.

96 It should be noted that, in *Raso and Others*, the Court of Justice recognised that, in so far as the national measure in question not only granted a port company the exclusive right to supply manpower to the undertakings authorised to operate in the port, but also allowed it to compete with those undertakings on the market for port services, that port company found itself in a situation of conflict of interest. The company in question was led to abuse its exclusive right by imposing on its competitors on the market for port operations excessive prices for the supply of manpower or placing at their disposal a workforce less capable of carrying out the tasks to be performed (*Raso and Others*, cited above, paragraphs 28 and 30).

97 In *MOTOE*, the question was whether Article 82 EC and Article 86(1) EC precluded national legislation giving a legal person, which could itself organise motorcycle competitions and their commercial exploitation, the power to give a consent to applications for authorisation submitted with a view to the organisation of those competitions, without that power being accompanied by limits, obligations and a control. The Court recognised that to confer by a State measure the rights in question to that entity was tantamount *de facto* to conferring upon it the power to designate the persons authorised to organise those events and to set the conditions in which those events were organised, thereby placing that entity at an obvious advantage over its competitors, which might lead it to prevent the access of other operators to the market concerned (*MOTOE*, cited above, paragraph 51).

98 In *Höfner and Elser*, the Court of Justice was called upon to determine whether the maintenance of a monopoly of executive recruitment activities, essentially consisting in putting applicants for employment into contact with employers, that activity being exercised by a public employment agency under an exclusive right, constituted an infringement of the combined provisions of Article 90(1) of the EC Treaty (now Article 86(1) EC) and Article 86 of the EC Treaty (now Article 82 EC). The Court held that there was an infringement of Article 86(1) EC if the public agency was necessarily led, by the simple exercise of the exclusive right conferred upon it, to exploit its dominant position in an abusive manner, which was the case where the public agency was clearly not in a position to satisfy market demand for activities of that kind and where the actual pursuit of those activities by private recruitment consultants was rendered impossible by the maintenance in force of a statutory provision under which such activities were prohibited and non-observance of that prohibition rendered the contracts concerned void (*Höfner and Elser*, cited above, paragraphs 30, 31 and 34).

99 In that judgment, the Court identified a State measure which led the public agency to abusive conduct, within the meaning of Article 86(b) of the EC Treaty (now Article 82(b) EC), in that the activity of the public agency could consist in a limitation of the service offered to the detriment of customers for the service in question.

100 In *Job Centre*, the Court also held that the national measure could create a situation in which the service was limited, within the meaning of Article 86(b) EC. By prohibiting, on pain of penal and administrative sanctions, any activity as an intermediary between supply and demand on the employment market unless carried on by public placement offices, a Member State creates a situation in which the provision of a service is limited, within the meaning of Article 82(b) EC, if those offices are manifestly unable to satisfy demand on the employment market for all types of activity (*Job Centre*, cited above, paragraphs 32 and 35).

101 The judgment in *Merci convenzionali porto di Genova*, concerns national legislation by virtue of which an undertaking enjoyed an exclusive right for port operations, particularly of embarkation, disembarkation and general movement of goods in the port.

102 In that judgment, the Court held that a Member State infringed Article 86(1) EC where it created a situation in which an undertaking endowed with exclusive rights was, by that fact, induced either to demand payment for services which have not been requested, to charge disproportionate prices, to refuse to have recourse to modern technology, or to grant price reductions to certain consumers and at the same time to offset such reductions by an increase in the charges to other consumers (paragraphs 19 and 20). In that respect, the Court referred expressly to Article 86(a) to (c) of the EC Treaty (now Article 82(a) to (c) EC).

103 It is apparent from those judgments, referred to in paragraphs 96 to 102 above, that the abuse of a dominant position by the undertaking enjoying an exclusive or special right may either result from the possibility of exercising that right in an abusive way or be a direct consequence of that right. However, it does not follow from that case-law that the mere fact that the undertaking in question finds itself in an advantageous situation in comparison with its competitors, by reason of a State measure, in itself constitutes an abuse of a dominant position.

104 Basing its argument in particular on the judgments in *France* v *Commission*, *GB-Inno-BM*, and *Connect Austria*, the Commission nevertheless argues that it based its conclusion finding infringement of the combined provisions of Article 86(1) EC and Article 82 EC more precisely on the case-law according to which a system of undistorted competition such as that required by the Treaty cannot be guaranteed unless equality of opportunities between the various economic operators is assured. If the inequality of opportunities between economic operators and thus distorted competition, is the result of a State measure, such a measure constitutes an infringement of Article 86(1) EC read in combination with Article 82 EC.

105 However, it does not follow from those judgments that, for it to be concluded that an infringement of Article 86(1) EC applied in combination with Article 82 EC has been committed, it is sufficient to establish that a State measure distorts competition by creating inequality of opportunities between economic operators, without it being necessary to identify an abuse of the dominant position of the undertaking.

106 In the judgment in *GB-Inno-BM*, the Régie des télégraphes et des téléphones (RTT) held, under Belgian law, a monopoly of the establishment and operation of the public telecommunications network and also cumulated, under that law, the powers to authorise or refuse the connection of telephones to the network, to specify the technical norms which had to be satisfied by such equipment and to verify whether telephones not produced by it complied with the specifications which it had adopted. The Court first held that the fact that an undertaking holding a monopoly in the market for the establishment and operation of the network, without any objective necessity,

reserves to itself a neighbouring but separate market, in that case the market for the importation, marketing, connection, commissioning and maintenance of equipment for connection to the said network, thereby eliminating all competition from other undertakings, constituted an infringement of Article 82 EC (*GB-Inno-BM*, paragraphs 15 and 19).

107 Next, having recalled that Article 82 EC applies only to anti-competitive conduct engaged in by undertakings on their own initiative and not State measures, the Court held that, if the extension of the dominant position of the public undertaking or the undertaking to which the State had granted special or exclusive rights was the result of a State measure, such a measure constituted an infringement of Article 90 EC (now Article 86 EC) in conjunction with Article 82 EC. Under Article 86 EC, Member States must not, by laws, regulations or administrative measures, put public undertakings and undertakings to which they grant special or exclusive rights in a position which the said undertakings could not themselves attain by their own conduct without infringing Article 82 EC (paragraph 20).

108 At the hearing on 2 February 2012, the Commission argued that, in that judgment, the Court held, at paragraph 24, in reply to an argument of RTT, that it was not necessary to find abusive conduct by the undertaking.

109 However, the Court took care to indicate that to entrust an undertaking which markets terminal equipment with the task of drawing up the specifications for such equipment, monitoring their application and granting type-approval in respect thereof was tantamount to conferring upon it the power to determine at will which terminal equipment might be connected to the public network, and thereby placing that undertaking at an obvious advantage over its competitors (paragraph 25). It was the extension of the monopoly in the establishment and operation of the telephone network to the market in telephone equipment, without any objective justification, which the Court regarded as prohibited as such by Article 86(1) EC in conjunction with Article 82 EC, where that extension resulted from a State measure (*GB-Inno-BM*, paragraphs 23 to 25).

110 In the judgment in *Connect Austria*, a public undertaking, which enjoyed an exclusive right to operate an analogue mobile telecommunications network, had received without charge the allocation of DCS 1 800 frequencies, allowing it to be the only operator able to offer the full range of mobile telecommunication services technically available, whereas one of its competitors, Connect Austria, was granted a licence for the provision of mobile telecommunication services on the DCS 1 800 frequency band for payment (paragraphs 43 to 45).

111 The Court held that national legislation, under which additional frequencies in the DCS 1 800 band could be allocated to a public undertaking in a dominant position without the imposition of a separate fee whereas the new entrant to the market at issue had to pay a fee for its DCS 1 800 licence, was likely to lead the public undertaking in a dominant position to breach Article 82 EC by extending or strengthening its dominant position. Given that, in that case, the distorted competition would result from a State measure which created a situation where equality of opportunity for the various economic operators concerned could not be ensured, it was capable of amounting to a breach of Article 86(1) EC in conjunction with Article 82 EC (*Connect Austria*, paragraph 87). In that respect, the Court stated that the public undertaking could find itself in a situation which would lead it, inter alia , to offer reduced rates, in particular to potential subscribers to the DCS 1 800 system, and to carry out intensive publicity campaigns in conditions with which Connect Austria would find it difficult to compete (paragraph 86). Thus, the Court also took into consideration the conduct of the public undertaking on the market.

112 Similarly, in its judgment in *France* v *Commission*, cited above (paragraph 51), the Court, after pointing out that a system of undistorted competition, such as required by the Treaty, could not be guaranteed unless equality of opportunities between the various operators was assured, observed that to entrust an undertaking which marketed terminal equipment with the task of drawing up the specifications for

such equipment, monitoring their application and granting type-approval in respect thereof was tantamount to conferring upon it the power to determine at will which terminal equipment could be connected to the public network, and thereby placing that undertaking at an obvious advantage over its competitors.

113 Thus, whilst it is true that the Court used the formulations referred to in paragraph 104 above, relied on by the Commission, the latter cannot rely solely on those formulations taken in isolation without taking their context into account.

114 At the hearing on 2 February 2012, the Commission also relied on the judgment of the Court in Case C-203/96 *Dusseldorp and Others* [1998] ECR I-4075, in support of its argument.

115 In that case, the Netherlands authorities had designated the company AVR Chemie CV as the sole end-processor for the incineration of dangerous waste in a high-performance rotary furnace. The company Chemische Afvalstoffen Dusseldorp BV was refused authorisation to export its oil filters, being dangerous waste, to Germany, on the ground that, in accordance with national provisions, treatment of that waste was to be carried out by AVR Chemie. The Court found that the prohibition on Chemische Afvalstoffen Dusseldorp from exporting its oil filters amounted, in practice, to imposing an obligation on it to deliver its oil filters – waste for recovery – to the national undertaking which held the exclusive right to incinerate dangerous waste, even though the quality of processing available in another Member State was comparable to that performed by the national undertaking.

116 The Court held that such an obligation, which had the effect of favouring the national undertaking by enabling it to process waste intended for processing by a third undertaking, resulted in the restriction of outlets in a manner contrary to Article 86(1) EC in conjunction with Article 82 EC (*Dusseldorp and Others*, paragraph 63).

117 It is true that, as the Commission argues, the restriction of outlets found in that case derived from the granting by the Netherlands statute of an exclusive right to process dangerous waste in favour of AVR Chemie, which prevented any other outlet ensuring the processing of the product in question, and not from the manner in which that undertaking exercised that exclusive right. The fact remains, however that the Court identified the abuse to which the Netherlands statute led the undertaking holding a dominant position, namely the limitation of outlets to the detriment of consumers within the meaning of Article 82(b) EC. Moreover, it should be noted that, in that judgment, the Court indicated that it was basing its reasoning on the case-law according to which a Member State breaches the prohibitions laid down by Article 86 EC in conjunction with Article 82 EC if it adopts a measure which enables an undertaking on which it has conferred exclusive rights to abuse its dominant position (paragraph 61).

118 It does not therefore appear that the case-law relied on by the Commission permits it to ignore the case-law cited in paragraph 94 above and to base its argument solely on the question whether the inequality of opportunities between economic operators, thereby distorting competition, is the result of a State measure. Thus, the Commission cannot maintain that it was not required to identify and establish the abuse of a dominant position to which the State measure in question led, or could lead, the applicant. As has been held in paragraphs 87 to 93 above, there is no demonstration in that regard in the contested decision.

119 It follows that the complaint referred to in paragraph 84 above, raised by the applicant in the context of the second and fourth parts of the first plea, is well-founded. The contested decision must therefore be annulled, without it being necessary to examine the other complaints, parts and pleas submitted.

Costs

120 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 Commission has been unsuccessful, it must be ordered to bear its own costs and also to pay those incurred by the applicant.

121 The first subparagraph of Article 87(4) of the Rules of Procedure provides that Member States which intervene in proceedings are to bear their own costs. It follows that the Hellenic Republic must bear its own costs. Pursuant to the final subparagraph of Article 87(4) of the Rules of Procedure, the interveners must be ordered to bear their own costs.

On those grounds,

THE GENERAL COURT (Sixth Chamber)

hereby:

1. **Annuls Commission Decision C(2008) 824 final of 5 March 2008, concerning the grant or maintenance by the Hellenic Republic of rights in favour of Dimosia Epicheirisi Ilektrismou AE (DEI) for the extraction of lignite.**

2. **Orders the European Commission to bear its own costs and pay those incurred by DEI.**

3. **Orders the Hellenic Republic, Elliniki Energeia kai Anaptyxi AE (HE & DSA) and Energeiaki Thessalonikis AE to bear their own costs.**

Kanninen Wahl Soldevila Fragoso

Delivered in open court in Luxembourg on 20 September 2012.

[Signatures]