Reports of Cases

JUDGMENT OF THE COURT (Fourth Chamber)

2 September 2021 *

(Appeal – State aid – Aid scheme – Article 108(2) and (3) TFEU – Regulation (EC) No 659/1999 – Article 4(3) and (4) – Concept of 'doubts as to the compatibility of a notified measure with the common market' – Decision not to raise objections – Formal investigation procedure not initiated – Guidelines on State aid for environmental protection and energy 2014-2020 – Code of Best Practice for the conduct of State aid control procedures – 'Pre-notification' contacts – Procedural rights of interested parties – Electricity capacity market in the United Kingdom)

In Case C-57/19 P,

APPEAL under Article 56 of the Statute of the Court of Justice of the European Union, brought on 25 January 2019,

European Commission, represented by É. Gippini Fournier and P. Němečková, acting as Agents,

appellant,

supported by:

Republic of Poland, represented by B. Majczyna, acting as Agent,

intervener in the appeal,

the other parties to the proceedings being:

Tempus Energy Ltd, established in Pontypridd (United Kingdom),

Tempus Energy Technology Ltd, established in Pontypridd,

represented by J. Derenne and D. Vallindas, avocats, and by C. Ziegler, Rechtsanwalt,

applicants at first instance,

United Kingdom of Great Britain and Northern Ireland, represented initially by F. Shibli, S. McCrory and Z. Lavery, and subsequently by F. Shibli, S. McCrory, G. Facenna QC and D. Mackersie, Barrister,

intervener at first instance,

* Language of the case: English.

THE COURT (Fourth Chamber),

composed of M. Vilaras (Rapporteur), President of the Chamber, N. Piçarra, D. Šváby, S. Rodin and K. Jürimäe, Judges,

Advocate General: E. Tanchev,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after hearing the Opinion of the Advocate General at the sitting on 3 June 2021,

gives the following

Judgment

1 By its appeal, the European Commission seeks to have set aside the judgment of the General Court of the European Union of 15 November 2018, *Tempus Energy and Tempus Energy Technology* v *Commission* (T-793/14, EU:T:2018:790; 'the judgment under appeal'), by which the General Court annulled Commission Decision C(2014) 5083 final of 23 July 2014 not to raise objections to the aid scheme for the capacity market in the United Kingdom (State aid 2014/N-2) (OJ 2014 C 348, p. 5; 'the decision at issue').

Legal context

Regulation (EC) No 659/1999

2 Article 4 of Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article [108 TFEU] (OJ 1999 L 83, p. 1), headed 'Preliminary examination of the notification and decisions of the Commission', applicable to the aid scheme at issue, provides, in paragraphs 2 to 5 thereof:

'2. Where the Commission, after a preliminary examination, finds that the notified measure does not constitute aid, it shall record that finding by way of a decision.

3. Where the Commission, after a preliminary examination, finds that no doubts are raised as to the compatibility with the common market of a notified measure, in so far as it falls within the scope of Article [107(1) TFEU], it shall decide that the measure is compatible with the common market (hereinafter referred to as a "decision not to raise objections"). The decision shall specify which exception under the Treaty has been applied.

4. Where the Commission, after a preliminary examination, finds that doubts are raised as to the compatibility with the common market of a notified measure, it shall decide to initiate proceedings pursuant to Article [108(2) TFEU] (hereinafter referred to as a "decision to initiate the formal investigation procedure").

5. The decisions referred to in paragraphs 2, 3 and 4 shall be taken within two months. That period shall begin on the day following the receipt of a complete notification. The notification will be considered as complete if, within two months from its receipt, or from the receipt of any additional information requested, the Commission does not request any further information. The period can be extended with the consent of both the Commission and the Member State concerned. Where appropriate, the Commission may fix shorter time limits.'

3 Article 6 of that regulation, headed 'Formal investigation procedure', provides, in paragraph 1 thereof:

'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 common 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 one month. In duly justified cases, the Commission may extend the prescribed period.'

The Code of Best Practice

4 The Code of Best Practice for the conduct of State aid control procedures (OJ 2009 C 136, p. 13; 'the Code of Best Practice') contains, inter alia, Title 3, headed 'Pre-notification contacts', which comprises paragraphs 10 to 18 of that code. Paragraphs 10 to 16 are worded as follows:

'10. The Commission's experience demonstrates the added value of pre-notification contacts, even in seemingly standard cases. Pre-notification contacts provide the Commission services and the notifying Member State with the possibility to discuss the legal and economic aspects of a proposed project informally and in confidence prior to notification, and thereby enhance the quality and completeness of notifications. In this context, the Member State and the Commission services can also jointly develop constructive proposals for amending problematic aspects of a planned measure. This phase thus paves the way for a more speedy treatment of notifications, once formally submitted to the Commission. Successful pre-notifications should effectively allow the Commission to adopt decisions pursuant to Article 4(2), (3) and (4) of Regulation … No 659/1999 within two months from the date of notification …

11. Pre-notification contacts are strongly recommended for cases where there are particular novelties or specific features which would justify informal prior discussions with the Commission services but informal guidance will be provided whenever a Member State calls for it.

3.1. Content

12. The pre-notification phase offers the possibility to discuss and provide guidance to the Member State concerned about the scope of the information to be submitted in the notification form to ensure it is complete as from the date of notification. A fruitful pre-notification phase will also allow discussions, in an open and constructive atmosphere, of any substantive issues raised by a planned measure. This is particularly important as regards projects which could not be accepted as such and should thus be withdrawn or significantly amended. It can also comprise an analysis of the availability of other legal bases or the identification of relevant precedents. In addition, a successful pre-notification phase will allow the Commission services and the Member State to address key competition concerns, economic analysis and, where appropriate, external expertise required to demonstrate the compatibility of a planned project with the common

market. The notifying Member State may thus also request the Commission services, in pre-notification, to waive the obligation to provide certain information foreseen in the notification form which in the specific circumstances of the case is not necessary for its examination. Finally, the pre-notification phase is decisive to determine whether a case qualifies prima facie for treatment under the simplified procedure …

3.2. Scope and timing

13. In order to allow for a constructive and efficient pre-notification phase, it is in the interest of the Member State concerned to provide the Commission with the information necessary for the assessment of a planned State aid project, on the basis of a draft notification form. In order to facilitate swift treatment of the case, contacts by emails or conference calls will in principle be favoured rather than meetings. Within two weeks from the receipt of the draft notification form, the Commission services will normally organise a first pre-notification contact.

14. As a general rule, pre-notification contacts should not last longer than 2 months and should be followed by a complete notification. Should pre-notification contacts not bring the desired results, the Commission services may declare the pre-notification phase closed. However, since the timing and format of pre-notification contacts depend on the complexity of the individual case, pre-notification contacts may last several months. The Commission therefore recommends that, in cases which are particularly complex (for example, rescue aid, large research and development aid, large individual aid or particularly large or complex aid schemes), Member States launch pre-notification contacts as early as possible to allow for meaningful discussions.

15. In the Commission's experience, involving the aid beneficiary in the pre-notification contacts is very useful, particularly for cases with major technical, financial and project-related implications. The Commission therefore recommends that beneficiaries of individual aid be involved in the pre-notification contacts.

16. Except in particularly novel or complex cases, the Commission services will endeavour to provide the Member State concerned with an informal preliminary assessment of the project at the end of the pre-notification phase. That non-binding assessment will not be an official position of the Commission, but informal guidance from the Commission services on the completeness of the draft notification and the prima facie compatibility of the planned project with the common market. In particularly complex cases, the Commission services may also provide written guidance, at the Member State's request, on the information still to be provided.'

The 2014-2020 Guidelines

5 Title 3 of the Guidelines on State aid for environmental protection and energy 2014-2020 (OJ 2014 C 200, p. 1; 'the 2014-2020 Guidelines'), headed 'Compatibility assessment under Article 107(3)[(c)] [TFEU]', contains the following wording:

'(25) Section 3.2 sets out the general compatibility conditions applicable to all aid measures falling within the scope of these Guidelines, unless the more specific sections of Chapter 3 specify or amend these general compatibility conditions. …

…

3.1. Common Assessment Principles

…

(27) … the Commission will consider a State aid measure compatible with the internal market only if it satisfies each of the following criteria:

…

(e) proportionality of the aid (aid kept to the minimum): the aid amount is limited to the minimum needed to incentivise the additional investment or activity in the area concerned: (Section 3.2.5);

…

3.2.5. Proportionality of the aid

…

(69) Environmental and energy aid is considered to be proportionate if the aid amount per beneficiary is limited to the minimum needed to achieve the environmental protection or energy objective aimed for.

…

3.2.6. Avoidance of undue negative effects on competition and trade

3.2.6.1. General considerations

…

(92) Aid may also have distortive effects by strengthening or maintaining substantial market power of the beneficiary. Even where aid does not strengthen substantial market power directly, it may do so indirectly, by discouraging the expansion of existing competitors or inducing their exit or discouraging the entry of new competitors.

…

3.9. Aid for generation adequacy

…

3.9.2. Need for State intervention

…

(223) The Member States should clearly demonstrate the reasons why the market cannot be expected to deliver adequate capacity in the absence of intervention, by taking account of on-going market and technology developments …

(224) In its assessment, the Commission will take account, among others and when applicable, of the following elements to be provided by the Member State:

…

(b) assessment of the impact of demand-side participation, including a description of measures to encourage demand side management …

…

3.9.5. Proportionality

(228) The calculation of the overall amount of aid should result in beneficiaries earning a rate of return, which can be considered reasonable.

(229) A competitive bidding process on the basis of clear, transparent and non-discriminatory criteria, effectively targeting the defined objective, will be considered as leading to reasonable rates of return under normal circumstances.

(230) The measure should have built-in mechanisms to ensure that windfall profits cannot arise.

(231) The measure should be constructed so as to ensure that the price paid for availability automatically tends to zero when the level of capacity supplied is expected to be adequate to meet the level of capacity demanded.

3.9.6. Avoidance of undue negative effects on competition and trade

(232) The measure should be designed in a way so as to make it possible for any capacity which can effectively contribute to addressing the generation adequacy problem to participate in the measure, in particular, taking into account the following factors:

(a) the participation of generators using different technologies and of operators offering measures with equivalent technical performance, for example, demand side management, interconnectors and storage. Without prejudice to the paragraph (228), restriction on participation can only be justified on the basis of insufficient technical performance required to address the generation adequacy problem. Moreover, the generation adequacy measure should be open to potential aggregation of both demand and supply;

…

(233) The measure should:

(a) not reduce incentives to invest in interconnection capacity;

(b) not undermine market coupling, including balancing markets;

(c) not undermine investment decisions on generation which preceded the measure or decisions by operators regarding the balancing or ancillary services market;

(d) not unduly strengthen market dominance;

(e) give preference to low-carbon generators in case of equivalent technical and economic parameters.’

Background to the dispute

6 The background to the dispute, as set out in paragraphs 1 to 20 of the judgment under appeal, may, for the purposes of the present proceedings, be summarised as follows.

7 Tempus Energy Ltd and Tempus Energy Technology Ltd (together, 'Tempus') hold a licence to operate as an electricity supply business in the United Kingdom and sell electricity consumption management technology, also known as 'demand-side response' ('DSR'), to individuals and professionals.

8 The aid scheme that is the subject of the decision at issue ('the measure at issue') consists of the establishment, by the United Kingdom of Great Britain and Northern Ireland, of a capacity market through the remuneration of electricity capacity providers in exchange for their commitment to provide electricity or reduce or delay their electricity consumption during times of system stress. As stated in recital 3 of the decision at issue, the purpose of such a scheme is to ensure security of supply.

9 As regards the functioning of the capacity market, the amount of capacity required is decided centrally and the appropriate price for the supply of that amount is determined by the market through auctions. Auctions take place each year in respect of the capacity that has to be delivered four years later ('the T-4 auctions'). Another auction takes place during the year prior to the delivery year of the main auction ('the T-1 auctions'). Some capacity will be systematically held back from the T-4 auctions and 'reserved' for the T-1 auctions; the amount of reserved capacity is to be based on an estimate of the amount of the 'cost-effective' DSR that could participate in the T-1 auctions. The decision at issue notes that, because the T-1 auctions provide a better route for DSR operators to access the market, the United Kingdom Government commits to procure in the T-1 auctions at least 50% of the capacity 'reserved' four years earlier. The T-4 auctions and the T-1 auctions ('the enduring auctions') form the enduring regime. In addition to the enduring regime, there was a transitional regime under which 'transitional' auctions were scheduled prior to the 2018/2019 delivery period, which was principally aimed at DSR operators.

10 If successful at auction, capacity providers are awarded a capacity contract at the clearing price, that is to say the lowest price determined via a descending-clock auction. The capacity contracts bid for by the participants differ in terms of their duration. Thus, while most existing capacity providers are to have access to one-year contracts, capacity providers undertaking capital expenditure above a threshold of 125 pounds sterling (GBP) (around EUR 141) per kilowatt (kW) (plants to be refurbished) are to be eligible for capacity contracts with a maximum term of 3 years, and capacity providers undertaking capital expenditure above a threshold of GBP 250 (around EUR 282) per kW (new plants) are to be eligible for capacity contracts with a maximum term of 15 years. Contracts with a term longer than one year will only be available to participants in T-4 auctions.

11 The costs incurred to fund capacity payments are to be paid by all licensed electricity suppliers. Electricity suppliers' charges are to be determined based on their forecast market share and calculated based on demand measured between 16.00 and 19.00 on all weekdays from November to February in order to incentivise suppliers to reduce their customers' electricity demand at those times when demand is typically highest. According to the decision at issue, this should reduce the amount of capacity that is needed, thereby also reducing the costs of the capacity market.

12 By the decision at issue, the Commission decided not to raise objections to the measure at issue, on the ground that it was compatible with the internal market, pursuant to Article 107(3)(c) TFEU, since it complied with the criteria laid down in Section 3.9 of the 2014-2020 Guidelines.

The action before the General Court and the judgment under appeal

13 By application lodged at the Registry of the General Court on 4 December 2014, Tempus brought an action for the annulment of the decision at issue.

14 In support of its action, it raised two pleas in law alleging (i) infringement of Article 108(2) TFEU, infringement of the principles of non-discrimination, proportionality and protection of legitimate expectations, as well as incorrect assessment of the facts, and (ii) a failure to state reasons.

15 By the judgment under appeal, the General Court upheld the first plea in law and, without examining the second plea in law, upheld the action and annulled the decision at issue.

16 In particular, as is apparent from paragraph 267 of the judgment under appeal, the General Court found that there was a body of objective and consistent indications, based on (i) the length and circumstances of the pre-notification phase and (ii) the incomplete and insufficient content of the decision at issue owing to the lack of appropriate investigation by the Commission at the preliminary examination stage with regard to certain aspects of the capacity market, which demonstrated that that decision had been adopted despite the existence of doubts within the meaning of Article 4 of Regulation No 659/1999, which should have led the Commission to initiate the procedure referred to in Article 108(2) TFEU.

Forms of order sought by the parties to the appeal

17 The Commission claims that the Court should:

– set aside the judgment under appeal;

– dismiss the application for annulment of the decision at issue or, in the alternative, refer the case back to the General Court for consideration of the second plea put forward at first instance; and

– in any event, order Tempus to pay the costs of the proceedings before the General Court and on appeal.

18 The United Kingdom of Great Britain and Northern Ireland supports the form of order sought by the Commission, as does the Republic of Poland, which was granted leave to intervene in support of the form of order sought by the Commission by decision of the President of the Court of 5 July 2019.

19 Tempus contends that the Court should:

– dismiss the appeal as inadmissible or unfounded;

– in the alternative, rule on the second plea put forward at first instance, alleging a failure to state reasons in the decision at issue, and annul the decision at issue;

– order the Commission to bear, in addition to its own costs, the costs incurred by Tempus in the proceedings before the General Court and the Court of Justice; and

– order the United Kingdom to bear its own costs.

The appeal

20 In support of its appeal, the Commission relies on a single ground, alleging misinterpretation of Article 108(2) and (3) TFEU and of Article 4(2) and (3) of Regulation No 659/1999.

21 That ground is divided into two parts; in the first part, the Commission alleges that the General Court misinterpreted the concept of ‘serious difficulties’ and erred by taking into account, as evidence of such difficulties, the length and circumstances of the pre-notification contacts, the existence of critical observations by third parties, and the complexity and novelty of the measure at issue, and, in the second part, it alleges that the General Court erred in finding that the Commission had failed to carry out an appropriate investigation into certain aspects of the capacity market in the United Kingdom.

The first part of the single ground of appeal

Arguments of the parties

22 The Commission relies on five objections in support of the first part of its single ground of appeal. By its first objection, the Commission, supported by the United Kingdom and the Republic of Poland, submits, in essence, that, in paragraphs 68 to 72 of the judgment under appeal, the General Court erred in law as regards the scale of the examination which it must carry out in respect of a State aid measure notified by a Member State. The General Court wrongly held that, in the present case, the Commission could not simply rely on the information provided by the United Kingdom, but should have carried out its own investigation and sought information from other sources for the purposes of its assessment during the preliminary examination phase.

23 According to the Commission, the findings of the General Court imply that the Commission has a duty to initiate a formal investigation procedure every time its decision is not entirely satisfactory vis-à-vis the critical observations of third parties regarding the aid measure concerned. The Commission explains that, in the present case, it did not receive any formal complaint concerning the measure at issue. Moreover, it did not ignore the comments made informally and spontaneously by third parties during the informal pre-notification phase. It submits that it was not, however, required to seek information from other sources. The General Court’s finding to the contrary has the effect of transforming the preliminary examination procedure into an *ex officio* measure, thereby nullifying the Commission’s discretion in establishing whether there are doubts as to the compatibility of a measure with the internal market.

24 Moreover, on account of significant differences between notified aid and unlawful aid implemented in breach of Article 108(3) TFEU, the Commission argues that it cannot be inferred from the judgment of 2 April 1998, *Commission* v *Sytraval and Brink’s France* (C-367/95 P, EU:C:1998:154, paragraph 62), that it is required, in the case of notified aid, to carry out, on its own initiative, an investigation of all the circumstances and to hear the interested parties and respond to all their arguments where the information provided by the notifying Member State is

sufficient to enable it to satisfy itself, following its initial examination of the notified measure, that that measure does not constitute aid or, if it must be classified as aid, that it is compatible with the internal market.

25 The United Kingdom and the Republic of Poland also claim that the General Court applied a threshold that is manifestly too low to find that there were doubts in the present case and ignored the Commission's discretion in applying Article 107(3) TFEU and in deciding whether or not to initiate the formal investigation procedure. They submit that the approach adopted by the General Court effectively amounts to eliminating any distinction between the preliminary examination and the formal investigation procedure, contrary to what is provided for in Regulation No 659/1999. Furthermore, that approach requires the Commission to continue its investigation as soon as an interested party raises concerns about the relevant measure during the preliminary examination, even if that party has not produced any evidence. Moreover, the fact that, in the present case, the Commission did not respond to each of the arguments put forward by Tempus during the procedure does not mean that it could not adopt the decision at issue on the basis of the information available to it. The fact that that decision did not satisfy Tempus does not show that the Commission lacked the information enabling it to adopt a measure of that nature.

26 By its second objection, the Commission submits that the General Court erred in law in finding, in paragraph 79 et seq. of the judgment under appeal, that the characteristics of a measure, such as its technical complexity, its novelty or the amount of aid in absolute terms, may point towards the existence of 'serious difficulties' in determining the compatibility of that measure with the Treaty on the Functioning of the European Union. In reality, those factors are not relevant to the assessment of that question, and the Commission endeavours specifically to overcome the technical difficulties of a file during pre-notification contacts. Moreover, it has been acknowledged in case-law that such evidence may justify the preliminary examination procedure taking longer, without triggering the obligation to initiate the formal investigation procedure. The judgment under appeal calls that case-law into question, by treating the complexity of the measure as a factor which does not justify prolonged exchanges with the Member State concerned, but which may give rise to an obligation for the Commission to initiate a formal investigation procedure.

27 By its third objection, the Commission claims that the General Court erred in law in finding, in paragraphs 85, 92, 106, 109 and 111 of the judgment under appeal, that the length of pre-notification contacts and the multiplicity of observations submitted by three types of operator constituted an indication of the existence of serious difficulties and in thus departing from its own case-law, from which it is apparent that it is only where the length of the preliminary examination substantially exceeds the two-month period, calculated from receipt of the complete notification, that that length must be taken into account as an indication of serious difficulties. According to the Commission, the decision to notify an aid measure lies entirely with the Member State concerned and, as long as an aid measure has not been notified, the Commission's inaction is without consequence.

28 By its fourth objection, the Commission criticises the General Court for taking into consideration, in particular in paragraphs 101 to 109 and 111 of the judgment under appeal, the multiplicity and origin of the observations submitted to the Commission by several operators as indications capable of raising doubts as to the compatibility of the measure at issue with the internal market. It maintains, in that regard, that the case-law according to which it must act diligently on complaints concerning illegal aid, namely aid granted without first having been notified to the Commission, cannot be extended to plans for aid which have not yet been notified or

implemented, for which spontaneous observations by third parties cannot be treated in the same way as a complaint which would trigger a duty not to delay an investigation and to examine the allegations contained therein within a particular time frame.

29 Lastly, by its fifth objection, the Commission criticises the General Court for having held, in paragraphs 86 to 91 of the judgment under appeal, that the pre-notification phase must not be concerned with examining the compatibility of the planned measure and that the Commission must not confuse the – possibly prior – phase of preparing the notification of a measure with the phase of examining that notification. According to the Commission, the objective of the pre-notification phase is to enable it to discuss with the Member State concerned, in an informal and confidential matter, the information that is needed to ensure that the notification of that measure, when carried out, will be regarded as complete. In many cases, as in the present case, pre-notification exchanges give the opportunity to address any aspects of a proposed measure which might not be fully in line with the rules on State aid, which allows the Member State concerned to make the necessary amendments to that measure prior to its notification. Such exchanges are particularly encouraged in complex cases.

30 The United Kingdom and the Republic of Poland also submit that the General Court failed to have regard to the legal and policy framework for the pre-notification phase, as set out in the Code of Best Practice. An effective pre-notification phase minimises the risk of a delay to the implementation of an aid measure, which was particularly important for the United Kingdom in the present case. Contrary to the findings of the General Court, it is highly likely that a comprehensive pre-notification phase for a novel and complex measure will allow the most minor of doubts to be raised as to the compatibility of the measure concerned with the Treaty on the Functioning of the European Union.

31 According to the United Kingdom, in the present case, the consequence of the pre-notification phase – during which it gathered information to enable it to respond to the Commission's questions, amended the measure which it intended to notify and carried out national consultations to obtain evidence from interested parties – was that the Commission did not need to carry out its own assessment. If the length of the exchanges during the pre-notification phase were to constitute an argument in favour of initiating a formal investigation procedure, neither the Commission nor the Member States would be interested in close cooperation during that phase.

32 Tempus contends, in response to the first objection, that the Commission's line of argument fails to take account of the objective nature of the concept of 'doubts', which means that the Commission must go beyond the subjective state of mind of the Member State concerned and request all relevant information for the purpose of carrying out a global assessment, in addition to the factual and legal information provided by that Member State or, as the case may be, by the complainant. Thus, the General Court did not in any way disregard case-law in finding that the Commission could not merely accept the information and affirmations submitted by the United Kingdom and that it had not, in the present case, appropriately considered the information provided by third parties. On the contrary, it is clear from the case-law that the Commission's examination would have been sufficient only if it had questioned the substance of the arguments put forward by the notifying Member State. Furthermore, the Commission's argument that the findings set out in the judgment under appeal have the effect of compelling it to initiate a formal investigation procedure every time third parties submit critical observations regarding a notified measure is based on a misreading of the judgment under appeal. According to Tempus, the

General Court ruled on the existence of doubts not by relying solely on the existence of observations by third parties, but by relying on an insufficient analysis of the information provided by the Member State concerned and of the observations made by third parties.

33 In addition, Tempus argues that the Commission's obligation, referred to in the judgment of 2 April 1998, *Commission* v *Sytraval and Brink's France* (C-367/95 P, EU:C:1998:154, paragraph 62), to extend the examination of a State aid measure beyond a mere analysis of the matters of fact and points of law brought to its attention either by the complainant or by the Member State which notified that measure, flows directly from the principle of sound administration, which applies indiscriminately both to a complaint and to a notification. Tempus adds that the Commission cannot always rely on the notifying Member State's statements, since that State, in so far as it intends to grant the aid, cannot be regarded as an impartial actor. Therefore, where contradictions are found in the notification or where third parties point to issues, the Commission's obligation to extend its examination of the matters of fact and points of law brought to its attention is an appropriate procedural safeguard.

34 As regards the Commission's second to fifth objections, Tempus contends, as a preliminary point, that they are inadmissible, since they relate to questions of fact and the Commission has not alleged any distortion or incorrect characterisation of the facts by the General Court. The Commission has also failed to specify the paragraphs of the judgment under appeal to which those objections relate.

35 As regards the substance, Tempus maintains, in response to the second objection, that, in paragraphs 79 to 84 of the judgment under appeal, the General Court merely described the relevant facts, namely that the measure at issue was significant, complex and novel. The General Court did not establish any new legal principle but relied on the particular circumstances of the case, which needed to be considered specifically.

36 As regards the third, fourth and fifth objections, Tempus argues that, in paragraph 85 et seq. of the judgment under appeal, the General Court correctly found that the preliminary examination had been expedited, since it had lasted only one month, whereas the pre-notification contacts had been long and substantial. The General Court recalled the objectives of the pre-notification phase, as set out in the Code of Best Practice, and the purpose of the preliminary examination provided for in Regulation No 659/1999 and concluded from this that the Commission could not confuse the preparation of the notification with the examination of the notification, initially as a preliminary examination and subsequently as a formal examination. As the General Court observed, substantive issues concerning important aspects of the measure at issue were raised during the pre-notification phase. However, the Commission decided that it had no doubts, although it was on the verge of starting the preliminary examination. In that context, according to Tempus, the brevity of the preliminary examination had to constitute an indication that the Commission should have had doubts. The facts at issue in the present case are exceptional, which justifies the findings of the General Court set out in paragraphs 111 to 115 of the judgment under appeal.

37 As regards the fourth objection, Tempus contends that the General Court took into consideration the fact that there was a body of consistent evidence, and not merely the fact that complaints had been submitted, in order to conclude that the Commission had erred in finding that there were no doubts. In other words, it was rather the failure to take into consideration the substance of the 'complaints' in the decision at issue which led the General Court to conclude that there were

doubts in the present case. In reality, the exceptional feature of the present case is that the pre-notification phase was misused as a preliminary examination, transforming the latter into an artifice.

Findings of the Court

38 The lawfulness of a decision not to raise objections, such as the decision at issue, based on Article 4(3) of Regulation No 659/1999, depends on the question whether the assessment of the information and evidence which the Commission had at its disposal during the preliminary examination phase of the measure notified should objectively have raised doubts as to the compatibility of that measure with the internal market, given that such doubts must lead to the initiation of a formal investigation procedure in which the interested parties referred to in Article 1(h) of that regulation may participate (judgment of 3 September 2020, *Vereniging tot Behoud van Natuurmonumenten in Nederland and Others* v *Commission*, C-817/18 P, EU:C:2020:637, paragraph 80 and the case-law cited).

39 When an applicant seeks the annulment of a decision not to raise objections, that applicant essentially contests the fact that the Commission adopted the decision in relation to the aid at issue without initiating the formal investigation procedure, thereby infringing the applicant's procedural rights. In order to have its action for annulment upheld, the applicant may invoke any plea capable of showing that the assessment of the information and evidence which the Commission had at its disposal during the preliminary examination phase of the measure notified should have raised doubts as to the compatibility of that measure with the internal market. The use of such arguments cannot, however, have the consequence of changing the subject matter of the application or of altering the conditions of its admissibility. On the contrary, the existence of doubts concerning that compatibility is precisely the evidence which must be adduced in order to show that the Commission was required to initiate the formal investigation procedure under Article 108(2) TFEU (judgment of 3 September 2020, *Vereniging tot Behoud van Natuurmonumenten in Nederland and Others* v *Commission*, C-817/18 P, EU:C:2020:637, paragraph 81 and the case-law cited).

40 Evidence of the existence of doubts as to the compatibility of the aid at issue with the internal market, which requires investigation of both the circumstances in which the decision not to raise objections was adopted and its content, must be adduced by the applicant seeking the annulment of that decision on the basis of a body of consistent evidence (judgment of 3 September 2020, *Vereniging tot Behoud van Natuurmonumenten in Nederland and Others* v *Commission*, C-817/18 P, EU:C:2020:637, paragraph 82 and the case-law cited).

41 In particular, if the examination carried out by the Commission during the preliminary examination procedure is insufficient or incomplete, this constitutes an indication of the existence of serious difficulties in the assessment of the measure at issue, which should have triggered the Commission's obligation to initiate the formal investigation procedure (see, to that effect, judgment of 12 October 2016, *Land Hessen* v *Pollmeier Massivholz*, C-242/15 P, not published, EU:C:2016:765, paragraph 38).

42 In addition, the lawfulness of a decision not to raise objections at the end of a preliminary examination procedure falls to be assessed by the EU judicature, in the light not only of the information available to the Commission at the time when the decision was adopted, but also of

the information which could have been available to the Commission (judgment of 29 April 2021, *Achemos Grupė and Achema* v *Commission*, C-847/19 P, not published, EU:C:2021:343, paragraph 41).

43 However, the information which 'could have been available' to the Commission includes that which seemed relevant to the assessment to be carried out in accordance with the case-law referred to in paragraph 38 above and which could have been obtained, upon request by the Commission, during the administrative procedure (judgment of 29 April 2021, *Achemos Grupė and Achema* v *Commission*, C-847/19 P, not published, EU:C:2021:343, paragraph 42).

44 The Commission is required to conduct a diligent and impartial examination of the contested measures, so that it has at its disposal, when adopting the final decision establishing the existence and, as the case may be, the incompatibility or unlawfulness of the aid, the most complete and reliable information possible for that purpose (judgment of 29 April 2021, *Achemos Grupė and Achema* v *Commission*, C-847/19 P, not published, EU:C:2021:343, paragraph 43).

45 However, although the Court has held that, when the existence and legality of State aid is being examined, it may be necessary for the Commission, where appropriate, to go beyond a mere examination of the facts and points of law brought to its notice (judgment of 2 April 1998, *Commission* v *Sytraval and Brink's France*, C-367/95 P, EU:C:1998:154, paragraph 62), it cannot be inferred from that case-law that it is for the Commission, on its own initiative and in the absence of any evidence to that effect, to seek all information which might be connected with the case before it, even where such information is in the public domain (see, to that effect, judgment of 29 April 2021, *Achemos Grupė and Achema* v *Commission*, C-847/19 P, not published, EU:C:2021:343, paragraphs 49 and 50).

46 In the present instance, in paragraph 70 of the judgment under appeal, the General Court found that, in order to establish the existence of doubts within the meaning of Article 4(4) of Regulation No 659/1999, it was sufficient that Tempus show either that the Commission had not researched and examined, thoroughly and impartially, all of the relevant information for the purposes of that analysis, or that it had failed duly to take it into account in such a way as to eliminate all doubt as to the compatibility of the notified measure with the internal market.

47 In addition, after noting, in paragraph 71 of that judgment, the case-law cited in paragraphs 42 and 43 above, the General Court stated, in paragraph 72 of the judgment under appeal, that, in order to establish doubts as to the compatibility of the aid with the internal market, Tempus might therefore rely on all relevant information that was or could have been available to the Commission on the date when it adopted the decision at issue.

48 As is claimed, in essence, by the Commission, the General Court misinterpreted the scale of the Commission's obligations during the preliminary examination phase for a notified measure and, therefore, erred in law.

49 In paragraph 70 of the judgment under appeal, the General Court held, in essence, that the Commission had an obligation to seek, examine and take into consideration 'all the relevant information', which necessarily includes information not brought to the attention of the Commission; information of which the Commission was unaware as regards its existence or its relevance to the examination of the notified measure. An obligation of such scope would greatly exceed the obligations of the Commission as set out in the Court's case-law referred to in paragraphs 38 to 45 above.

50 The same is true of paragraph 72 of the judgment under appeal, from which it is apparent that, in order to establish the existence of doubts as to the compatibility of the measure at issue with the internal market, Tempus could rely not only on all relevant information that was available to the Commission, but also on all information that ‘could have been available’ to that institution. By reasoning in this way, the General Court implied that the Commission should have had doubts as to whether an aid measure was compatible with the internal market solely on the ground that there was a relevant piece of information which could have been available to it without it being necessary to show that that institution was actually aware either of that information itself or of other information obliging it, in accordance with the case-law of the Court of Justice cited in paragraph 45 above, to go beyond a mere examination of the information brought to its notice.

51 The mere existence of a potentially relevant piece of information of which the Commission was not aware and which it was not required to investigate, in the light of the pieces of information that were actually in its possession, cannot demonstrate that there were serious difficulties obliging the Commission to initiate the formal investigation procedure.

52 It follows that the first objection put forward by the Commission in the first part of the single ground of appeal is well founded.

53 However, the error of law made by the General Court established in paragraph 48 above is not, in itself, such as to require the judgment under appeal to be set aside.

54 In paragraph 267 of the judgment under appeal, the General Court justified the annulment of the decision at issue by reference to ‘a body of objective and consistent indications, based (i) on the length and circumstances of the pre-notification phase and (ii) on the incomplete and insufficient content of the [decision at issue] owing to the lack of appropriate investigation by the Commission at the preliminary examination stage with regard to certain aspects of the capacity market, that demonstrates that the Commission adopted the [decision at issue] despite the existence of doubts’.

55 The Commission disputes the reasoning which led to that twofold conclusion in the other objections put forward in the first part of the single ground and by the second part of that ground. Consequently, the judgment under appeal will have to be set aside only if it follows from an analysis of those other objections and of the second part of that ground that that conclusion is vitiated by errors of law.

56 At the outset, it is appropriate to reject the plea of inadmissibility raised by Tempus in respect of the second to fifth objections in the first part of the single ground of appeal.

57 It follows from Article 256 TFEU and from the first paragraph of Article 58 of the Statute of the Court of Justice of the European Union that, while the General Court has exclusive jurisdiction to establish the facts, except where the substantive inaccuracy of its findings is apparent from the documents submitted to it, and to assess those facts, save where the evidence produced before that court has been distorted, the Court of Justice has jurisdiction, under Article 256 TFEU, to review the legal characterisation of those facts by the General Court and the legal conclusions which it has drawn from them (see, to that effect, judgment of 4 February 2020, *Uniwersytet Wrocławski and Poland* v *REA*, C-515/17 P and C-561/17 P, EU:C:2020:73, paragraph 47).

58 In the present case, first, the Commission indicated to the requisite legal standard, in its appeal, which paragraphs of the judgment under appeal are covered by the second to fifth objections in the first part of the single ground of appeal. Second, it is apparent from the Commission's arguments that, by those objections, it is calling into question not the accuracy of the facts found by the General Court, but their legal characterisation as indications capable of establishing the existence of doubts as to the compatibility of the measure at issue with the internal market.

59 It is therefore necessary to examine, in the first place, the substance of the second objection in the first part of the single ground of appeal.

60 In that regard, it should be noted that, in paragraph 79 of the judgment under appeal, the General Court stated that the measure at issue was 'significant, complex and novel'. It justified those characterisations, first, by referring, in paragraph 80 of that judgment, to the fact that the amounts involved in the aid scheme authorised by the decision at issue were particularly high and by stating, in paragraph 81 of that judgment, that both the definition and the implementation of that aid scheme were proving to be complex, and, second, by noting, in paragraph 82 of that judgment, that, in the decision at issue, the Commission had, for the first time, assessed a capacity market in the light of the 2014-2020 Guidelines, which, according to the General Court, showed that the measure at issue was novel in terms of both its subject matter and its implications for the future.

61 However, first of all, it is apparent from the case-law of the Court that the size of aid cannot, in itself, constitute serious difficulties of such a kind as to oblige the Commission to initiate the formal investigation procedure under Article 108(2) TFEU (see, to that effect, judgment of 15 June 1993, *Matra* v *Commission*, C-225/91, EU:C:1993:239, paragraph 36).

62 Next, although the complexity of an aid measure is one of the circumstances specific to a case which are capable of justifying the long duration of the preliminary examination phase (see, by analogy, judgment of 13 June 2013, *HGA and Others* v *Commission*, C-630/11 P to C-633/11 P, EU:C:2013:387, paragraphs 82 and 83), such complexity does not mean, as the Advocate General noted, in essence, in point 117 of his Opinion, that the Commission must, in any event, initiate the formal investigation procedure.

63 Lastly, the Commission is also not required to initiate such a formal investigation procedure merely because the aid measure is novel in the sense that the Commission has not previously examined a similar measure.

64 Therefore, by taking the high amount of the aid granted under the measure at issue and the complexity and novelty of that measure as indications of serious difficulties requiring the initiation of a formal investigation procedure, the General Court erred in law.

65 In the second place, it is appropriate to examine together the third and fifth objections put forward by the Commission in the first part of its single ground of appeal, by which it challenges paragraphs 85, 90 to 92, 106, 109 and 111 of the judgment under appeal, on the ground, in essence, that the General Court erred in law and disregarded the objective of the pre-notification phase by taking into consideration, as indications of the existence of serious difficulties, the length and content of the pre-notification contacts.

66 In that regard, it is apparent from Article 4(3) and (5) of Regulation No 659/1999 that the decision by which the Commission finds, following a preliminary examination, that a notified measure is compatible with the internal market must be taken within two months of the day following the receipt of the complete notification.

67 According to the case-law of the Court, while it is true that if the duration of a preliminary examination procedure exceeds the two-month period provided for in Article 4(5) of Regulation No 659/1999, this cannot of itself lead to the conclusion that the Commission should have initiated the formal investigation procedure, the fact remains that that information can constitute an indication that the Commission may have had doubts regarding the compatibility of the aid in question with the internal market (judgment of 24 January 2013, *3F* v *Commission*, C-646/11 P, not published, EU:C:2013:36, paragraph 32; see also, to that effect, judgment of 22 September 2011, *Belgium* v *Deutsche Post and DHL International*, C-148/09 P, EU:C:2011:603, paragraph 81).

68 In the present case, since the preliminary examination procedure for the measure at issue lasted only one month, as the General Court pointed out in paragraph 85 of the judgment under appeal, it could not, in accordance with the case-law cited in the preceding paragraph of this judgment, constitute an indication of the existence of doubts as to the compatibility of the aid at issue with the internal market.

69 The General Court nevertheless held, in the same paragraph of the judgment under appeal, that, ‘given the circumstances of the present case’, the length of the preliminary examination procedure for that measure could not, however, constitute a reliable indication that there were no doubts as to the compatibility of the aid at issue with the internal market, since it was also important to take into account the length and content of the contact between the United Kingdom and the Commission during the pre-notification phase.

70 In that regard, the General Court, first, in paragraphs 86 to 91 of the judgment under appeal, recalled the provisions of the Code of Best Practice which relate to the pre-notification phase and, second, in paragraphs 92 to 105 of that judgment, summarised both the contact that took place between the Commission and the United Kingdom prior to notification of the measure at issue and the spontaneous interventions made by third parties. It inferred from the above, in paragraph 106 of that judgment, that ‘the length of the pre-notification phase [had been] significantly longer than the two-month period that is envisaged, as a general rule, in the [Code of Best Practice]’.

71 On the basis of those findings, the General Court stated, in paragraph 109 of the judgment under appeal, that ‘the length and the circumstances of the pre-notification phase … [were] not such as to allow it to be concluded that the brevity of the preliminary examination procedure [was] an indication that there were no doubts as to the compatibility of that scheme with the internal market, and [were], on the contrary, likely to constitute an indication that such doubts did exist’. It added, in paragraph 111 of that judgment, that the measure at issue was ‘significant, complex and novel’.

72 As is apparent from the case-law cited in paragraph 40 above, evidence of the existence of doubts as to the compatibility of an aid measure with the internal market must be adduced by the applicant seeking the annulment of the decision not to raise objections as to the content of that measure, where appropriate, on the basis of a body of consistent evidence.

73 Therefore, contrary to the findings in paragraph 85 of the judgment under appeal, it was not for the General Court to determine whether there were reliable indications that there were no doubts as to the compatibility of the measure at issue with the internal market. On the contrary, it was for the General Court to ascertain whether Tempus had adduced evidence of such doubts, if necessary by adducing a body of consistent evidence.

74 However, the General Court did not confine itself to holding that the length and circumstances of the pre-notification phase meant that it could not be concluded that the relative brevity of the preliminary examination phase constituted an indication that there were no doubts. As is apparent from paragraph 109 of the judgment under appeal, the General Court concluded that the length and circumstances of the pre-notification phase were themselves indications that there were doubts as to the compatibility of the measure at issue with the internal market.

75 In so doing, the General Court erred in law.

76 It is clear from paragraphs 10 and 12 of the Code of Best Practice that, as the General Court itself found, in essence, in paragraph 89 of the judgment under appeal, the essential objective of the pre-notification phase is to ensure that the notification form is in good order so as to enable the Commission, once the notification has been made, to adopt its decision within the period prescribed for that purpose in Article 4(5) of Regulation No 659/1999.

77 Admittedly, as the Commission submits, it is entirely possible that the Commission and the Member State concerned may also discuss, during the pre-notification phase, the conformity with the internal market of the aid measure which that Member State intends to notify. It is clear from paragraph 10 of the Code of Best Practice that exchanges between the Commission and the Member State concerned may also relate to the problematic aspects of a planned measure. Similarly, paragraph 12 of that code states that a fruitful pre-notification phase will also allow discussions of any substantive issues raised by a planned measure.

78 The fact remains that the definitive examination of the conformity of a given measure with the internal market cannot commence until that measure has taken its final form, at the time it is notified to the Commission. Therefore, the General Court's findings, set out in paragraphs 90 and 91 of the judgment under appeal respectively, that the purpose of the pre-notification phase is not to assess the compatibility of the notified measure with the internal market and that it is only once the notification is received that the Commission is to start its examination of the notified measure are not, as such, vitiated by error.

79 However, it is precisely for that reason that the length and circumstances of the pre-notification phase cannot constitute indications of any difficulties raised by the notified measure. It is entirely possible that, during a long pre-notification phase, the Member State concerned could have benefited from its exchanges with the Commission in order to amend the planned measure in such a way as to resolve any problems which that measure may have had in its original form, so that that measure, in its final form – which is fixed when it is notified – no longer causes any difficulty.

80 In the light of the foregoing, the third and fifth objections in the first part of the single ground of appeal must also be upheld.

81 In the third place, it is appropriate to examine the fourth objection put forward by the Commission in the first part of the single ground of appeal, relating to the fact that the General Court took into account the number and multiplicity of the observations sent to the Commission as evidence of serious difficulties raised by the measure at issue.

82 In that regard, in paragraph 101 of the judgment under appeal, the General Court noted that it was apparent from the notification and the decision at issue that, 'in the light of the information available to them when they intervened, three types of operator [had] wished to communicate directly and spontaneously to the Commission their observations on the compatibility of the aid'. In paragraphs 102 to 104 of that judgment, the General Court provided brief details regarding the operators in question and the subject matter of their observations.

83 In paragraph 109 of the judgment under appeal, the General Court merely stated that the 'multiplicity of observations submitted in respect of [the measure at issue] by three different types of operator' was a factor which was likely to constitute an indication that there were doubts as to the compatibility of that measure with the internal market.

84 Furthermore, after pointing out, in paragraph 111 of that judgment, that that measure 'was challenged in three respects by various operators who were supposed to benefit from it', without providing further details as to the grounds for those statements or as to any problems they raised, the General Court concluded that that circumstance was among those which, according to paragraph 115 of that judgment, constituted an indication capable of establishing the existence of doubts as to the compatibility of the measure at issue with the internal market.

85 As the Advocate General observed, in essence, in point 103 of his Opinion, the Commission cannot be required to trigger the formal investigation procedure in respect of an aid measure solely on the ground that interested third parties have spontaneously submitted observations regarding a notified measure, irrespective of the origin or number of such observations. It is only if such observations refer to factors capable of revealing the existence of serious difficulties in the assessment of the notified measure that the Commission must trigger the formal investigation procedure.

86 In the present case, the General Court did not state that the observations submitted to the Commission referred to factors of that nature and relied solely on the number and 'multiplicity' of those observations as factors capable of showing that there were doubts as to the compatibility of the measure at issue with the internal market.

87 In so doing, as the Commission correctly submits, the General Court erred in law in the judgment under appeal, with the result that the fourth objection in the first part of the single ground of appeal must be upheld and, consequently, that part must be upheld in its entirety.

88 Nevertheless, for the reasons set out in paragraphs 53 to 55 above, it is also necessary to examine the second part of the single ground of appeal.

The second part of the single ground of appeal

Arguments of the parties

89 By the second part of the single ground of appeal, the Commission, supported by the United Kingdom and the Republic of Poland, submits that the General Court erred in law in criticising it for failing to conduct an appropriate investigation into certain aspects of the capacity market in the United Kingdom.

90 By its first objection, the Commission criticises the General Court's assessment, set out in paragraphs 146, 152, and 154 to 156 of the judgment under appeal, that it had failed sufficiently to envisage the real potential of DSR in the capacity market, which prevented it from having doubts as to the compatibility of the measure at issue with the internal market.

91 In that regard, it states that, although the 2014-2020 Guidelines provide for an assessment of the impact of demand-side participation, including a description of measures to encourage DSR, they in no way require systematic support favouring DSR technology, as the General Court appears to be requiring in the judgment under appeal.

92 The Commission adds that the judgment under appeal does not mention any reason which should have led it to doubt the documents at its disposal regarding the potential of DSR. It asserts that it is common ground that, at the time of the adoption of the measure at issue, neither the United Kingdom nor the Commission was in a position to give a fully accurate estimate of the long-term potential of DSR technology. Furthermore, the Commission did verify that the measure at issue was open and provided adequate incentives to the operators concerned, with the result that it did not need to carry out its own studies and give its own estimates concerning the potential of DSR in order to determine whether the UK capacity market was compatible with the 2014-2020 Guidelines. The fact that DSR operators wanted more incentives under the measure at issue does not mean that there were serious difficulties. Consequently, the Commission asserts that it did not have any reason to consider that the assessment of the potential of DSR presented by the UK and, consequently, of the level of capacity to be auctioned could give rise to serious difficulties.

93 By its second objection, the Commission disputes the analysis set out in paragraphs 159 to 259 of the judgment under appeal concerning the allegedly discriminatory or disadvantageous treatment of DSR. In particular, the Commission criticises the General Court's conclusion that it should have had doubts as to the compatibility of the measure at issue with the internal market in the light, first, of the duration of the capacity contracts, second, of the cost recovery method, and, third, of the conditions of participation in the auctions.

94 In the first place, as regards the duration of the capacity contracts, the Commission submits that the General Court erred by finding, inter alia, in paragraphs 181 and 182 of the judgment under appeal, that it should have examined the capital expenditure and financing difficulties of DSR operators before endorsing the UK's position that it was not necessary to offer those operators capacity contracts with a term longer than one year. One-year contracts are the norm rather than the exception, and Tempus has never contested the fact that DSR operators' upfront investment costs are in no way comparable to those of new capacity generators. Moreover, experience since the implementation of the capacity market in 2014 does not support the conclusion that differentiated access to longer-term contracts has placed new generation capacity at a competitive advantage.

95 In the second place, as regards the cost recovery method, the Commission submits that that aspect of the measure at issue, which concerns the financing of the capacity market, was not directly relevant for the purpose of assessing the compatibility of that measure with the internal market, since the revenue from the charge levied on electricity suppliers is not hypothecated to the amount of the aid. In addition, the General Court incorrectly referred, in paragraphs 199 and 211 of the judgment under appeal, to paragraphs 27(e), 69 and 92 of the 2014-2020 Guidelines, whereas the relevant assessment criteria are set out in Sections 3.9.5 and 3.9.6 of those guidelines.

96 In any event, the General Court erred in holding, in paragraph 210 of the judgment under appeal, that the Commission should have investigated whether the measure at issue contained an incentive to reduce electricity consumption during peak hours equivalent to that contained in a previous draft of that measure. According to the Commission, it was sufficient to conclude that that measure contained such a predictable incentive, which was the case here. By requiring it to examine whether the financing method chosen was the most suitable for encouraging DSR, the General Court paid excessive and unjustified attention to measures seeking to encourage DSR. The Commission observes, in that regard, that the cost recovery method reconciles the interest in maintaining an incentive to reduce consumption with the need to reduce uncertainty for suppliers as to their likely share of the costs. Unless there are indications that the Member State's assessment is incorrect or flawed, the Commission cannot be required to analyse the design of national measures which it regards as solidly justified.

97 The Republic of Poland also submits that, in paragraph 210 of the judgment under appeal, the General Court focused too narrowly on whether the measure at issue encouraged the development of DSR and disregarded the Commission's discretion as regards the compatibility of a measure with the 2014-2020 Guidelines.

98 In the third place, the Commission submits that the General Court was wrong to find that it should have had doubts as to the conditions of participation in the capacity market imposed on the DSR operators, since the United Kingdom had committed to procure at least 50% of the reserved volume in the T-1 auctions, which offered a better route to market for DSR operators. Paragraphs 242 and 243 of the judgment under appeal contain a clearly incorrect assessment in that regard, since that commitment, which appears in recital 46 of the decision at issue, is legally binding. If the Member State were to depart from that commitment, the adopted measure would no longer be covered by the decision at issue.

99 The United Kingdom also argues that, in the light of its commitment to procure in the T-1 auctions at least 50% of the volume initially reserved, the General Court's assessment in that regard, set out in paragraphs 242 and 243 of the judgment under appeal, is unfounded. Furthermore, it submits that the Commission was entitled to accept that commitment without requiring it to demonstrate that the commitment had been incorporated into national law. Lastly, the United Kingdom points out that, although the T-1 auctions may be the preferred route for some DSR operators, they also have the possibility of taking part in the T-4 auctions, in which they have, moreover, seen excellent results.

100 As regards the participation threshold of 2 megawatts (MW) established in the decision at issue, the Commission observes that no third party had raised any objections in that regard, which meant that the information available to it during the preliminary examination could not give rise to doubts as to the compatibility of the measure at issue with the internal market. It was only when Tempus lodged its reply with the General Court that that threshold was challenged by that party, with the result that that objection should have been declared inadmissible. In any event, the

comparison made by the General Court, in paragraph 256 of the judgment under appeal, with the Pennsylvania-New Jersey-Maryland (PJM) capacity market in the United States is misplaced and demonstrates its failure to consider critically the merits of the criticisms made by Tempus. Moreover, in the second transitional auction, the United Kingdom lowered the threshold for participation to 500 kW with little effect: only 2.7% of the bids submitted by DSR operators were below the 2 MW threshold referred to above.

101 The Commission therefore submits that it was entitled to take the view, on the basis of the information available to it, that the scheme at issue contained adequate incentives for DSR operators to participate, in accordance with the 2014-2020 Guidelines.

102 The United Kingdom and the Republic of Poland draw attention, generally, to the fact that the objective of the 2014-2020 Guidelines is to enable the Commission to determine whether an aid measure enables an objective of common interest to be achieved; in the present case, that objective is the securing of capacity adequacy on the electricity market, at the lowest cost for consumers and in a manner which is technologically neutral, while minimising the adverse effects on trade between Member States and on competition. However, those guidelines are not intended to impose specific conditions as regards the structure of the aid measure or to define aspects of the capacity mechanism intended to ensure capacity adequacy. The objective of those guidelines is therefore not to facilitate or encourage DSR operators, as the General Court wrongly found throughout the judgment under appeal. Consequently, by concluding that there were doubts as to the compatibility of the measure at issue with the internal market, the General Court misinterpreted the objective of the capacity market and erred in its application of those guidelines.

103 In response to the first objection, Tempus contends, first of all, that the Commission’s line of argument stems from an incorrect reading of the judgment under appeal. The General Court merely held that, without disregarding the data provided by the Member State, the Commission has to take an overall view of all the relevant information available and seek further evidence, through the formal investigation procedure, when, as in the present case, that further evidence is objectively necessary to resolve doubts.

104 As regards, specifically, the assessment of DSR potential, Tempus fully supports the General Court’s assessment as set out in paragraphs 152 to 158 of the judgment under appeal. It maintains, in particular, that the Commission should have required the United Kingdom to evaluate from the outset the potential for DSR operator participation, as required by paragraphs 223 and 224 of the 2014-2020 Guidelines, without waiting for the first auction to reveal that potential. Furthermore, Tempus argues that the Commission failed to take sufficient account of the fact that DSR technology had to be adequately encouraged in order to achieve its full potential, which could lead to the capacity market becoming obsolete in the near future.

105 Tempus contends that the Commission’s second objection is also unfounded. In the first place, as regards the discriminatory nature of the duration of capacity contracts, the Commission misread the judgment under appeal, since that judgment did not find that there was a normal regime of contracts with a term longer than one year from which DSR operators were excluded. In addition, Tempus requests the Court to substitute grounds in order to find that there were other factors showing that there were doubts in that regard. As the General Court pointed out in paragraph 190 of the judgment under appeal, the Commission should have determined whether the fact that it was impossible for DSR operators to obtain contracts of the same duration as those of other capacity providers reduced their potential contribution to solving the capacity

adequacy problem. The mere fact that technology is expensive should not mean that it has an undue auction advantage when the capacity market is supposed to deliver security of supply at the lowest cost to the customer.

106 In the second place, as regards the cost recovery method, Tempus contends that paragraphs 208 to 213 of the judgment under appeal concern exclusively an assessment of the facts by the General Court, which is not subject to review by the Court of Justice on appeal. In any event, the General Court's analysis regarding the existence of doubts as to the incentive effect of the measure at issue is correct, for the reasons set out in paragraphs 194 to 213 of the judgment under appeal. As regards the absence of a connection between the financing of the measure and the aid measure as such, relied on by the Commission, Tempus argues that, on the contrary, the measure at issue is a perfect example of a mechanism involving hypothecation between the charge levied and the aid. The price signals imposed by the cost recovery method in one year have a direct impact on the incentives for consumers to shift their usage and their ability to do so and, accordingly, on the peak demand, which in turn is used to calculate the amount of capacity to be procured in future years. The fact that that aspect is not mentioned in the 2014-2020 Guidelines does not mean that it could not have been taken into account for the purpose of assessing the compatibility of the measure at issue. Lastly, Tempus maintains that the General Court did not err in finding that the Commission could not be satisfied with a mere commitment by the Member State if that commitment was not reflected in national legislation.

107 In the third place, as regards the conditions of participation in the capacity market and, in particular, the participation threshold of 2 MW, Tempus contends that the General Court was right to consider that argument admissible, in so far as it develops an objection set out in the application. In addition, paragraphs 249 to 252 of the judgment under appeal clearly indicate how the bid bond could actually constitute a barrier preventing DSR operators from participating in the capacity market.

Findings of the Court

108 By the first objection put forward in the second part of the single ground of appeal, the Commission criticises paragraphs 146, 152, and 154 to 156 of the judgment under appeal, which form part of the reasoning set out in that judgment under the heading 'Available information on the potential of DSR'.

109 In that regard, it is apparent from recital 122 of the decision at issue, the content of which is set out in paragraph 150 of the judgment under appeal, that, in order to support the DSR sector, the United Kingdom had expressed its intention to evaluate the data coming from the first T-4 auction in December 2014, with a view to ensuring that the demand curves were adjusted appropriately. In addition, the United Kingdom had developed transitional auction arrangements to support the growth of the DSR sector from 2015 to 2016, as well as a pilot project on energy efficiency. The United Kingdom had also stated that, in response to the report, published on 30 June 2014, by the panel of technical experts ('the PTE') responsible for examining recommendations concerning the capacity to be auctioned on the capacity market in December 2014, National Grid plc had suggested a joint project with the Energy Networks Association, including Distribution Network Operators.

110 In paragraph 151 of the judgment under appeal, the General Court recalled recital 128 of the decision at issue, according to which, even if the measure at issue might have resulted in support for fossil fuel generation, the Commission noted that the evaluation of the capacity adequacy

problem, which was carried out annually, took into account all types of operator, including DSR operators. According to the General Court, the Commission concluded from this, in recital 129 of that decision, that the measure at issue was 'technology neutral' and did not strengthen the position of fossil fuel generation operators.

111 In paragraph 146 of the judgment under appeal, the General Court stated, inter alia, that, when the Commission had carried out its preliminary examination of the measure at issue, it was in a position to analyse elements allowing it not only to envisage the current role of DSR, but also to envisage its real potential.

112 In paragraph 152 of the judgment under appeal, the General Court observed that the assessments set out in recitals 122, 128 and 129 of the decision at issue, recalled in paragraphs 150 and 151 of that judgment and in paragraphs 109 and 110 above were 'insufficient to allow the Commission to dispel doubts emerging from the elements that were already in its possession or that could have been available to it when it adopted the [decision at issue]'.

113 The General Court added, in paragraph 154 of that judgment, that, 'given the elements available and taking into account the role of DSR, in the present case, the Commission could not be satisfied merely by the "openness" of the measure and conclude, consequently, that it was technology neutral, without examining in greater detail the reality and the effectiveness of the appreciation of that technological solution in the capacity market'.

114 In that regard, in paragraph 155 of the judgment under appeal, the General Court noted, inter alia, that no element referred to in the decision at issue proved that the Commission had carried out its own examination concerning the actual appreciation of DSR. It observed, 'by way of example', that in the decision at issue there is no reference to National Grid's 3 gigawatt (GW) estimate of the potential of DSR. The General Court therefore concluded that the Commission had accepted the United Kingdom's information and assumptions.

115 It added, in paragraph 156 of the judgment under appeal, that it could not be excluded that 'if the Commission had carried out its own examination of the potential of DSR, in particular with regard to the modalities of the appreciation of [National Grid's] estimates and of other sources and with regard to the reasons for the success of the US examples, the detailed rules for the participation of DSR operators would have been different'.

116 It is on the basis of those findings that the General Court concluded, in paragraph 158 of the judgment under appeal, that 'the available elements concerning the potential of DSR [were] such as to give an indication that there were doubts as to the compatibility of [the measure at issue] with the internal market, which, upon reading the [decision at issue], [could not] be held to have been allayed following the Commission's preliminary examination'.

117 That conclusion by the General Court is vitiated by an error of law.

118 It should be noted, in that regard, that, as is apparent from the case-law cited in paragraph 39 above, it is for the party seeking the annulment of a Commission decision not to raise objections to adduce evidence which shows that the assessment of the information and evidence available should have raised doubts as to the compatibility of the measure concerned with the internal market.

119 It follows from the findings of the judgment under appeal set out in paragraphs 111 to 115 above that the General Court did not verify whether Tempus had succeeded in demonstrating that the assessment of the information and evidence available should have caused the Commission to have doubts as to the compatibility of the measure at issue with the internal market which should have led it to carry out its own examination of that potential, if necessary after initiating the formal investigation procedure. Instead, the General Court imposed on the Commission the obligation to seek evidence going beyond the 'available elements concerning the potential of DSR' referred to in paragraph 158 of the judgment under appeal.

120 In particular, the General Court did not indicate either the specific point to which the Commission's doubts had to relate or the specific element which should have given rise to such doubts. It should also be noted that, although the General Court referred, in paragraphs 136 to 145 of the judgment under appeal, to certain elements relating to the potential of DSR that the Commission could take into consideration, it is not apparent from reading that part of the judgment under appeal that one or other of those elements was such as to cause the Commission to have doubts as to whether the potential of DSR had actually been taken into account in the design of the measure at issue and, consequently, as to the compatibility of the latter with the internal market.

121 As regards the PTE's report specifically, extracts from which are cited in paragraphs 142 and 145 of the judgment under appeal, the General Court did indeed note, in paragraph 143 of that judgment, that the PTE's analysis '[highlighted] the urgent need to identify adequate incentives to allow DSR to participate effectively in the capacity market, taking into account its full potential' and that 'the PTE [noted] that it [was] regrettable that currently no organisation [was] even collecting the data needed to understand and gather information on the various aspects of the potential of DSR, despite some already being available'. It added, in paragraph 147 of that judgment, that the Commission was aware of the difficulties referred to by the PTE regarding the appreciation of the potential of DSR in the capacity market.

122 However, although those considerations reveal some difficulty in estimating the potential of DSR, they are not such as to demonstrate that the measure at issue did not take account of, or did not take sufficient account of that potential and that, consequently, doubts must have arisen as to whether it was compatible with the internal market. As the General Court itself pointed out in paragraphs 136, 137 and 150 of the judgment under appeal, the United Kingdom was aware of the need for DSR to participate in the capacity market and certain elements of the measure at issue had been designed so as to ensure such participation. However, the General Court does not explain why the Commission should have had doubts as to whether those elements are sufficient and adequate.

123 It follows from the foregoing that the first objection in the second part of the Commission's single ground of appeal must be upheld.

124 In the second objection raised in support of the present part of the single ground of appeal, the Commission disputes, in the first place, certain explanations in the analysis carried out by the General Court in paragraphs 160 to 192 of the judgment under appeal, which relates to the issue of the duration of capacity contracts and at the end of which the General Court found, in paragraph 193 of that judgment, that the difference between the duration of the capacity contracts offered to DSR operators and the duration of those offered to electricity generators constituted an indication that there were doubts as to whether the measure at issue was compatible with the internal market.

125 In that regard, it must be borne in mind that, in paragraphs 165 to 168 of the judgment under appeal, the General Court found, without that finding being called into question in the present appeal, that the measure at issue did not offer DSR operators any opportunity to obtain capacity contracts with a term longer than one year, whereas capacity providers incurring expenditure of a level necessary to refurbish an existing plant or build a new one were eligible to obtain contracts with a maximum term of 3 years and 15 years respectively.

126 In paragraph 169 of the judgment under appeal, the General Court noted in that regard that the Commission had endorsed the United Kingdom's position that, in essence, new generation capacity and refurbishment involve high investment costs, which justified their eligibility for contracts with a longer term, in order to enable operators to obtain the necessary financing, whereas DSR operators had lower capital expenditure needs. After analysing in detail whether that action on the Commission's part was well founded, the General Court concluded, in paragraph 180 of that judgment, that the decisive criterion used by the measure at issue to decide which operators are eligible to obtain capacity contracts with a term longer than one year is the level of capital expenditure and the financing difficulties.

127 The General Court therefore found, in paragraph 181 of the judgment under appeal, that it was necessary to consider what duration was required to allow each category of capacity provider fully to participate in the capacity market, having regard to their investment costs and their financing difficulties, in order to comply with the obligation to provide sufficient incentives to all operators, and that it was therefore for the Commission to investigate whether reserving capacity contracts with a term longer than one year to certain technologies was discriminatory and was contrary to the objective of establishing a technology neutral capacity market.

128 In paragraph 182 of the judgment under appeal and again in paragraph 192 of that judgment, the General Court found that the Commission had endorsed the United Kingdom's position that it was not necessary to offer contracts with a term longer than one year to DSR operators without examining whether the capital expenditure and financing difficulties of that type of operator might make it necessary to offer them the possibility of obtaining such contracts.

129 However, it is not apparent from the grounds set out in paragraphs 183 to 191 of the judgment under appeal that Tempus had shown, as is required by the case-law cited in paragraph 39 above, that the assessment of the information and evidence which the Commission had at its disposal should have caused it to have doubts as to the merits of the United Kingdom's position.

130 In paragraph 187 of the judgment under appeal, the General Court itself found that both Tempus and the UK Demand Response Association (UKDRA) – the latter of which had submitted observations to the Commission – had accepted that new DSR operators did not necessarily incur the same capital expenditure as generators building new plants. Furthermore, it is apparent from paragraph 188 of that judgment that neither Tempus nor UKDRA had submitted detailed information to the Commission in that regard.

131 It is true that the General Court found, also in paragraph 188 of that judgment, that the Commission itself had to seek the relevant information and that, therefore, in order to establish doubts within the meaning of Article 4(4) of Regulation No 659/1999, it was sufficient for Tempus to show that the Commission had neither researched nor examined, diligently and impartially, all of the relevant information.

132 However, it is apparent from the grounds set out in paragraphs 48 to 51 above that that finding is vitiated by an error of law.

133 It follows that, by finding, in paragraph 193 of the judgment under appeal, that the difference between the duration of the capacity contracts offered to DSR operators and that of those offered to generators indicates that there were doubts as to the compatibility of the measure at issue with the internal market, the General Court erred in law.

134 In the second place, the Commission submits that the General Court was wrong to use the cost recovery method as a basis for establishing that there were doubts as to the compatibility of the measure at issue with the internal market, the purpose of that method being, as has been pointed out in paragraph 11 above, to secure funding for the costs incurred in respect of capacity payments by means of a charge levied on electricity suppliers determined based on their forecast market share and calculated based on demand measured between 16.00 and 19.00 on all weekdays from November to February.

135 As is apparent from paragraph 203 of the judgment under appeal, the General Court found that the cost recovery method was relevant when assessing, in particular, the proportionality of the measure at issue, that is, in order to determine whether the amount of aid granted was limited to the minimum necessary to achieve the expected result.

136 In order to substantiate that finding, the General Court stated, in essence, in paragraphs 204 and 205 of the judgment under appeal, that the amount of aid granted under the measure at issue depended on the volume of capacity auctioned through the capacity market and the auction clearing price. It stated that, in so far as the volume of the capacity auctioned is determined by reference to demand peaks, the lower the demand peaks, the lower the volume of capacity auctioned and, accordingly, the lower the amount of the aid.

137 Since the charge levied on suppliers is calculated on the basis of electricity demand, it constitutes an incentive to reduce electricity consumption, which, in turn, reduces both the volume of capacity auctioned in order to cope with demand peaks and the auction clearing price, which ultimately results in a reduction in the amount of the aid.

138 In that regard, the General Court found, in paragraph 206 of the judgment under appeal, that, although the United Kingdom had initially envisaged that the amount of the charge would be calculated on the basis of the electricity suppliers' market share in the electricity demand registered during the so-called 'triad' periods, that is to say during the three half-hour periods registering the highest annual electricity consumption during the period from November to February, after public consultation the United Kingdom ultimately amended the detailed rules for calculating the charge so as to adopt the method described in paragraph 134 above.

139 As is apparent from paragraph 207 of the judgment under appeal, the General Court found that, as regards the amendment to the method for calculating the charge intended to finance the aid, the Commission endorsed the United Kingdom's position without examining the consequences of that amendment on the total amount of the aid and, consequently, on whether the measure at issue was proportionate.

140 In addition, in paragraph 210 of the judgment under appeal, it criticised the Commission for not having investigated whether the new cost recovery method effectively maintained an equivalent incentive to reduce electricity consumption during demand peaks by, inter alia, encouraging the development of DSR.

141 It added, in paragraph 211 of that judgment, that the Commission had also failed to investigate whether the cost recovery method adopted affected, inter alia, DSR operators' access to the market, in particular by increasing the barriers to entry and expansion resulting from the strong position of vertically integrated suppliers. The General Court referred, in that regard, to paragraph 92 of the 2014-2020 Guidelines.

142 The General Court therefore concluded, in paragraph 213 of the judgment under appeal, that it was for the Commission to examine the potential effect of the change to the cost recovery method on whether the measure at issue was proportionate and, consequently, whether it was compatible with the internal market. It therefore took the view that the fact that the Commission did not have all the information with regard to the consequences of the change to the cost recovery method, in the context of the preliminary examination procedure, was another indication that there were doubts as to the compatibility of the measure at issue with the internal market.

143 In that regard, it should be noted that the Commission may adopt guidelines in order to establish the criteria on the basis of which it proposes to assess the compatibility with the internal market of aid measures envisaged by the Member States. In adopting such guidelines and announcing, through their publication, that they will apply to the cases to which they relate, the Commission imposes a limit on the exercise of that discretion and cannot, as a general rule, depart from those guidelines, at the risk of being found to be in breach of general principles of law, such as equal treatment or the protection of legitimate expectations (judgment of 29 July 2019, *Bayerische Motoren Werke and Freistaat Sachsen* v *Commission*, C-654/17 P, EU:C:2019:634, paragraphs 81 and 82 and the case-law cited).

144 In the present case, it is common ground that, according to the 2014-2020 Guidelines, the proportionality of an aid measure is one of the relevant criteria for assessing its compatibility with the internal market.

145 In so far as the recovery method involves a charge, namely a tax paid by electricity suppliers, the Commission has also relied on the case-law of the Court according to which, for a tax to be capable of being regarded as forming an integral part of an aid measure, it must be hypothecated to the aid measure under the relevant national rules, in the sense that the revenue from the tax is necessarily allocated for the financing of the aid. In the event of such hypothecation, the revenue from the tax has a direct impact on the amount of the aid and, consequently, on the assessment of the compatibility of that aid with the internal market (judgments of 27 October 2005, *Distribution Casino France and Others*, C-266/04 to C-270/04, C-276/04 and C-321/04 to C-325/04, EU:C:2005:657, paragraph 40, and of 3 March 2020, *Vodafone Magyarország*, C-75/18, EU:C:2020:139, paragraph 27).

146 In the present case, although it is not apparent from the judgment under appeal that the revenue from the charge imposed as part of the recovery method is necessarily allocated to financing the measure at issue, the detailed rules for calculating that charge are capable, as the General Court held, in essence, in paragraphs 203 to 205 of the judgment under appeal, of affecting the amount of the aid.

147 It can reasonably be presumed that electricity suppliers, who must pay the charge, will pass on the charge, in whole or in part, to their customers, with the result that the charge is likely, ultimately, to affect electricity consumption and to encourage customers to limit its use. That, in turn, limits the capacity required and, consequently, the aid paid under the measure at issue in order to ensure that capacity.

148 It follows that the General Court cannot be said to have erred in law in so far as it found that the cost recovery method selected was likely to be relevant for the assessment of whether the measure at issue was proportionate and, accordingly, compatible with the internal market.

149 That said, it is necessary to ascertain whether the General Court was justified in finding, as it did in paragraph 213 of the judgment under appeal, that the fact that the Commission did not have 'all the information with regard to the consequences of changing the cost recovery method' was an indication that there were doubts as to the compatibility of the measure at issue with the internal market.

150 In that regard, it is important to point out that it was for the Commission to assess the compatibility of the measure at issue with the internal market, and not to compare that measure with a different measure previously envisaged by the United Kingdom. It follows that the mere fact that the method of financing the measure at issue was amended from the method initially envisaged cannot in itself be regarded as capable of showing that there were doubts as to the compatibility of the measure at issue with the internal market.

151 Thus, contrary to what the General Court found in paragraph 210 of the judgment under appeal, it was not necessary for the Commission to investigate whether the cost recovery method provided for by the measure at issue maintained an incentive to reduce electricity consumption equivalent to that which would have resulted from the method initially envisaged.

152 It follows from the foregoing that, by holding, in paragraph 213 of the judgment under appeal, that the fact that the Commission did not have all the information with regard to the consequences of changing the cost recovery method was an indication that there were doubts which may have justified the Commission initiating the formal investigation procedure for the measure at issue, the General Court erred in law.

153 In the third place, the Commission challenges some of the grounds of the judgment under appeal relating to the conditions of participation in the capacity market applicable to DSR operators. After having analysed three sets of arguments put forward by Tempus, the General Court concluded, in paragraph 259 of the judgment under appeal, that the interplay between the T-4 auctions and the T-1 auctions and some of the conditions of participation in the capacity market applicable to DSR operators should have led the Commission to have doubts as to, first, the capacity of the measure at issue to achieve the objectives claimed by the United Kingdom in terms of encouraging the development of DSR and, second, its compatibility with the requirements of the 2014-2020 Guidelines in terms of adequate incentives for DSR operators and, consequently, as to the compatibility of the measure at issue with the internal market.

154 That conclusion is, in essence, based on two grounds of the General Court, which are disputed by the Commission.

155 First, in paragraph 243 of the judgment under appeal, the General Court acknowledged that the organisation of T-1 auctions could encourage the development of DSR, but added that the Commission should have had doubts as to the size of the incentive, having regard to the limited volume of capacity reserved to the T-1 auctions and the absence of an express legal provision guaranteeing that the United Kingdom would procure at least 50% of the volume reserved for those auctions, as noted in paragraph 242 of the judgment under appeal.

156 As the Commission points out in recital 46 of the decision at issue, it took note of the United Kingdom's commitment to procure in the T-1 auctions at least 50% of the volume of capacity reserved four years earlier.

157 Such a commitment forms an integral part of the measure at issue, in respect of which the Commission decided, by the decision at issue, not to raise any objections (see, to that effect, judgment of 13 June 2013, *Ryanair* v *Commission*, C-287/12 P, not published, EU:C:2013:395, paragraph 67).

158 It follows, as the Advocate General observed in point 170 of his Opinion, that, if the United Kingdom were to grant aid such as that provided for by the measure at issue without honouring that commitment, that aid would not be covered by the decision at issue and could not, therefore, be regarded as having been authorised by the Commission.

159 Therefore, the question whether the United Kingdom laid down the commitment referred to in recital 46 of the decision at issue in an express provision of its national law was irrelevant to the assessment of the compatibility of the measure at issue with the internal market. Therefore, contrary to the findings of the General Court, the absence of such a provision could not be a source of doubt in that regard.

160 It should be added that, in paragraph 241 of the judgment under appeal, the General Court noted that the volume of capacity reserved in the T-1 auctions is limited when compared with the volume of capacity auctioned during the T-4 auctions and that, moreover, the T-1 auctions were not exclusively reserved for DSR operators.

161 However, those findings cannot, in themselves, show that there were doubts as to the compatibility of the measure at issue with the internal market on account of allegedly discriminatory or unfavourable treatment of DSR operators.

162 In the first place, the United Kingdom undertook to auction at least 50% of the reserved volume in the T-1 auctions, and it is therefore difficult to understand why the General Court described the volume of capacity reserved for the T-1 auctions as 'limited'. In the second place, the fact that all operators may participate in the T-1 auctions does not mean that the treatment of DSR operators is disadvantageous or discriminatory.

163 Second, the Commission disputes the grounds set out in paragraphs 256 and 257 of the judgment under appeal, which led the General Court to conclude, in paragraph 258 of that judgment, that the Commission should have had doubts as to whether the statement that the setting of a 2 MW *de minimis* participation threshold by the United Kingdom was a measure encouraging the development of DSR was well founded.

164 It should be noted, in that regard, that, as is apparent from paragraph 255 of the judgment under appeal, in its notification of the measure at issue, the United Kingdom presented the 2 MW *de minimis* participation threshold as low having regard to the participation threshold adopted by National Grid in the context of other measures and, consequently, as being one of the measures incentivising DSR operators to participate in the capacity market.

165 It is not apparent from the judgment under appeal that that statement by the United Kingdom was challenged in the observations submitted spontaneously to the Commission. Moreover, the Commission merely referred, in recitals 16 and 17 of the decision at issue, to the 2 MW threshold, without ruling on whether it was favourable or unfavourable for DSR operators.

166 As is apparent from paragraph 253 of the judgment under appeal, it was only in response to the arguments put forward by the Commission in its defence before the General Court that Tempus claimed that the setting of a 2 MW *de minimis* participation threshold was a barrier to entry to the capacity market for new DSR operators.

167 After finding, in paragraph 254 of the judgment under appeal, that Tempus's line of argument was admissible despite having been submitted at a late stage in the proceedings, the General Court held, first, in paragraph 256 of that judgment, that the participation threshold for the PJM capacity market – which the United Kingdom had expressly taken as a reference in the notification in support of its statement that the measure at issue would allow the DSR sector to develop – was only 100 kW, that is, 20 times lower.

168 Second, in paragraph 257 of the judgment under appeal, the General Court noted that, while it was indeed possible for DSR operators to aggregate several sites in order to reach the 2 MW *de minimis* threshold, they were liable to pay a bid bond on the whole of the 2 MW, if even a tiny proportion of that volume was unproven DSR capacity. According to the General Court, the amount of the bid bond could constitute a barrier to entry for new DSR operators.

169 It was on the basis of those findings that the General Court concluded, in paragraph 258 of the judgment under appeal, that the Commission should have had doubts as to the statement that the setting at 2 MW of the *de minimis* participation threshold for the capacity auctions was a measure encouraging the development of DSR.

170 Without it being necessary to examine whether the General Court was right to have found that Tempus's line of argument concerning the *de minimis* participation threshold was admissible, which is contested by the Commission, it should be noted, first, that, as the Advocate General observed in point 177 of his Opinion, the participation threshold adopted by National Grid in the context of other measures was indeed higher than 2 MW. Therefore, the United Kingdom's statement, as reiterated in paragraph 255 of the judgment under appeal, is not inaccurate, which the General Court did not assert, in any case.

171 Second, the General Court did not in any way set out, in paragraph 256 of the judgment under appeal, the reasons which could justify a comparison between the participation threshold for the PJM capacity market and that provided for in the context of the measure at issue. The fact, alluded to by the General Court, that the United Kingdom referred to the PJM capacity market in support of its statement that that measure would encourage development of the DSR sector cannot, in itself, justify such a comparison.

172 Third, it should be noted that, in paragraph 258 of the judgment under appeal, the General Court merely stated that the Commission should have had doubts as to the statement that the setting of a 2 MW *de minimis* participation threshold was a measure encouraging the development of DSR.

173 Even if doubts as to whether setting the *de minimis* participation threshold at 2 MW was favourable for the development of DSR were justified, that does not necessarily mean that that threshold was unfavourable to such development in the sense that it constituted a significant impediment to the participation of DSR operators in the capacity market.

174 It follows from the foregoing that the General Court's conclusion set out in paragraph 259 of the judgment under appeal and referred to in paragraph 153 above cannot be justified either by the findings set out in paragraphs 242 to 243 of that judgment, relating to the lack of a provision of UK national law guaranteeing that at least 50% of the capacity reserved four years previously would be procured in the T-1 auctions, or by those set out in paragraphs 256 to 258 of the judgment under appeal, relating to the doubts which the Commission should have had as to whether setting the *de minimis* participation threshold for the capacity market at 2 MW was favourable for DSR operators.

175 Consequently, since the conclusion set out in paragraph 259 of the judgment under appeal is vitiated by an error of law, the second part of the single ground of appeal must be upheld.

176 Since both parts of the single ground of appeal are well founded, the judgment under appeal must be set aside.

The action before the General Court

177 In accordance with the second sentence of the first paragraph of Article 61 of the Statute of the Court of Justice of the European Union, if the decision of the General Court is set aside, the Court of Justice may itself give final judgment in the matter, where the state of the proceedings so permits.

178 In the present case, in the light in particular of the fact that the action for annulment brought by Tempus in Case T-793/14 is based on pleas that were the subject of an exchange of arguments before the General Court and whose examination does not require any further measure of organisation of procedure or inquiry to be taken in the case, the Court of Justice considers that the state of the proceedings is such that it may give final judgment in the matter and that it should do so (see, by analogy, judgment of 8 September 2020, *Commission and Council* v *Carreras Sequeros and Others*, C-119/19 P and C-126/19 P, EU:C:2020:676, paragraph 130).

179 As an interested party and in order to safeguard its procedural rights under Article 108(2) TFEU and Article 6(1) of Regulation No 659/1999, Tempus puts forward two pleas in law in support of its action, alleging (i) infringement of Article 108(2) TFEU, infringement of the principles of non-discrimination, proportionality and protection of legitimate expectations, as well as incorrect assessment of the facts, and (ii) a failure to state reasons.

The first plea in law

180 The first plea in law is divided into seven parts. In support of the first part, alleging an incorrect assessment of the potential of DSR, Tempus relies on the evidence examined by the General Court in paragraphs 136 to 158 of the judgment under appeal under the heading 'Information available on the potential of DSR'. However, for the reasons set out in paragraphs 117 to 122 above, that evidence is not capable of demonstrating that the assessment of the potential of DSR had to raise doubts as to whether the measure at issue was compatible with the internal market and that those doubts should have led the Commission to initiate the formal investigation procedure. Accordingly, the first part of the first plea in law must be rejected.

181 In the second part of the first plea in law, Tempus relies on the evidence examined by the General Court in paragraphs 160 to 193 of the judgment under appeal under the heading 'Length of capacity contracts'. However, it is apparent from paragraphs 129 to 133 above that that evidence does not demonstrate that the Commission should have had doubts as to the compatibility of the measure at issue with the internal market. Consequently, the second part of the first plea in law must also be rejected.

182 By the third part of the first plea in law, Tempus claims, in essence, that the conditions of participation for the various auctions provided for in the measure at issue were such that they led to a de facto exclusion of DSR operators from the first T-4 auction. That part must be rejected as unfounded for the reasons set out in paragraphs 231 to 235 of the judgment under appeal, which the Court of Justice endorses.

183 By the fourth part, Tempus puts forward arguments relating to the cost recovery method, as summarised in paragraphs 194 to 197 of the judgment under appeal. However, for the reasons set out in paragraphs 150 and 151 above, those arguments do not demonstrate that the Commission should have had doubts as to the compatibility of the measure at issue with the internal market. Accordingly, the fourth part must be rejected.

184 By the fifth part, Tempus submits that the measure at issue discriminates against DSR operators by treating all participants in the enduring auctions in the same way and obliging them all, including those operators, to bid for open-ended capacity events.

185 That part must be rejected as unfounded. It is common ground that the obligation to bid for open-ended capacity events applies to all operators, since, as the Commission has explained, that obligation pursues the objective of achieving a higher level of security of supply than that provided by bids limited to covering time-bound capacity events. In those circumstances, it cannot be considered either that DSR operators are discriminated against or that the Commission should have had doubts as to the compatibility of the measure at issue with the internal market on account of the obligation to bid for open-ended capacity events.

186 By the sixth part, Tempus claims that imposing the same bid bond requirement on all participants in the capacity market may cause a market entry problem for DSR operators, given that the DSR sector is still in its infancy. That part must be rejected as unfounded for the reasons set out in paragraphs 249 to 252 of the judgment under appeal, which the Court of Justice endorses.

187 Lastly, by the seventh part, Tempus claims that the measure at issue gives rise to doubts as to its compatibility with the internal market in that it does not remunerate DSR operators for savings in the amount of electricity lost during transmission and distribution. According to Tempus, the

capacity provided by DSR operators reduces not only the overall amount of capacity required and circulating in the capacity market, but also the amount of capacity lost in the transmission and distribution of electricity by around 7-8%. It argues that those savings should be incorporated into the remuneration of DSR operators in order to incentivise improvements to grid efficiency. That part must also be rejected for the reasons set out in paragraphs 263 to 266 of the judgment under appeal, which the Court of Justice endorses.

188 Consequently, the first plea in law must be rejected.

The second plea in law

Arguments of the parties

189 In support of the second plea in law, alleging a failure to state reasons in the decision at issue, Tempus puts forward seven arguments.

190 First, as regards the assessment of the potential role of DSR in the UK capacity market, Tempus claims that the decision at issue contains contradictory reasoning. While recital 107 of that decision refers to 'mature DSR providers', it is stated, in recital 131 of that decision, that the DSR sector 'is still in its infancy'. That contradiction in the statement of reasons shows that the Commission failed properly to assess the role that DSR plays and could play within the UK capacity market.

191 Second, as regards the duration of the contracts, Tempus claims that the Commission did not explain, first, why the lead times for new investment needed by DSR operators to make capacity available were not taken into consideration, with only the lead times of generators being mentioned in recital 134 of the decision at issue and, second, why it maintains, in recital 152 of that decision, that the contracts available to DSR operators have a 'sufficiently long term duration of capacity contracts for new investments' and 'allow new entrants [to] secure the necessary financing hence countering the risk of market dominance'.

192 Third, as regards the choice of DSR operators between participating in the transitional auctions or participating in the enduring auctions, Tempus submits that, although the Commission stated, in recital 128 of the decision at issue, that the transitional auctions aim to improve DSR, it did not explain why the mutual exclusion from those auctions would improve DSR. Nor did it explain, as is required by paragraph 232(a) of the 2014-2020 Guidelines, how DSR was insufficient vis-à-vis the 'technical performance required to address the generation adequacy problem', with such insufficiency being capable of justifying that exclusion.

193 Fourth, as regards the cost recovery method, the Commission confined itself to examining, in the decision at issue, the question whether the measure at issue has any incentive effect, even if that effect is small and inadequate to resolve the identified market failure in the most effective and cost-efficient way. Consequently, the Commission did not examine the problems arising from the fact that the cost recovery method selected fails to sharpen the price signal to consumers with regard to their energy consumption during the triad demand periods and therefore failed to fulfil its obligation to state reasons.

194 Fifth, the Commission did not address, in the decision at issue, the matter of the use of contracts covering open-ended capacity events rather than time-bound capacity contracts for the enduring auctions.

195 Sixth, the Commission also failed to address in that decision the issue of the requirement to provide bid bonds in the auctions and therefore failed to explain why DSR operators should be required to pay the same bid bonds as generators.

196 Seventh, the decision at issue failed to provide adequate reasons with regard to the lack of additional remuneration for savings, made as a result of DSR, in transmission and distribution losses. Recital 140 of that decision is circular and does not address the objection of DSR operators, namely that avoiding transmission and distribution losses increases the capacity available on the network. The Commission should have explained why choosing not to take into account the savings achieved by DSR undertakings is objectively justified.

197 The Commission and the United Kingdom dispute Tempus's arguments.

Findings of the Court

198 It is settled case-law that the statement of reasons required by Article 296(2) 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 the measure in such a way as to enable the persons concerned to ascertain the reasons for it and to enable the competent Community court to exercise its power of review. The requirements to be satisfied by the statement of reasons depend on the circumstances of each case, in particular, the content of the measure in question, the nature of the reasons given and the interest which the addressees of the measure, or other parties to whom it is of direct and individual concern, may have in obtaining explanations. It is not necessary for the reasoning to go into all the relevant facts and points of law, since the question whether the statement of reasons meets the requirements of Article 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 (judgments of 1 July 2008, *Chronopost and La Poste* v *UFEX and Others*, C-341/06 P and C-342/06 P, EU:C:2008:375, paragraph 88, and of 22 December 2008, *British Aggregates* v *Commission*, C-487/06 P, EU:C:2008:757, paragraph 172).

199 As regards, specifically, a decision not to raise objections under Article 108(3) TFEU, as in the present case, the Court has held previously that such a decision, which is taken within a short period of time, must simply set out the reasons for which the Commission takes the view that it is not faced with serious difficulties in assessing the compatibility of the aid at issue with the internal market, and that even a succinct statement of reasons for that decision must be regarded as sufficient for the purpose of satisfying the requirement to state adequate reasons laid down in Article 296(2) TFEU if it nevertheless discloses in a clear and unequivocal fashion the reasons for which the Commission considered that it was not faced with serious difficulties, the question of whether the reasoning is well founded being a separate matter (judgments of 15 June 1993, *Matra* v *Commission*, C-225/91, EU:C:1993:239, paragraph 48; of 22 December 2008, *Régie Networks*, C-333/07, EU:C:2008:764, paragraphs 65, 70 and 71; and of 27 October 2011, *Austria* v *Scheucher-Fleisch and Others*, C-47/10 P, EU:C:2011:698, paragraph 111).

200 It is in the light of those considerations that the seven arguments put forward by Tempus in the second plea in law must each be examined in turn.

201 As regards the first argument, it should be noted that there is no contradiction between recital 107 and recital 131 of the decision at issue. While recital 107 summarises the United Kingdom's line of argument concerning the distinction which must be drawn between mature DSR operators and operators which are not yet mature and require support, recital 131 sets out the Commission's assessment of the appropriateness of the aid, an assessment according to which, in particular, the DSR sector, taken as a whole, was only in its infancy.

202 As regards the second argument, relating to recitals 134 and 152 of the decision at issue, it should be noted that recital 152, according to which the sufficiently long term duration of new capacity agreements for new investments will allow new market entrants to secure the necessary financing, is drafted in general terms and does not refer to a specific category of operators. Although it may be inferred from recital 134 of that decision that the lead times for DSR operators are different and possibly shorter than those of other types of operator, in the light also of the case-law cited in paragraphs 198 and 199 above, it was in no way necessary for the Commission to refer specifically, in recital 152 of that decision, to the most appropriate length of the agreements that DSR operators might find it necessary to conclude.

203 As regards the third argument, relating to recital 128 of the decision at issue, it should be noted that the Commission stated therein that, as had already been stated in recitals 88 to 94 of that decision, the United Kingdom was examining or implementing additional measures in order, inter alia, to improve DSR. Recital 89 of that decision refers, inter alia, to the fact that the United Kingdom is pursuing DSR opportunities. Accordingly, it cannot be said that the Commission failed to state reasons or provided an inadequate statement of reasons in that part of the decision at issue.

204 The question whether, in the light of the fact that DSR operators can obtain a contract either at the transitional auctions or at the enduring auctions, but not at both types of auction, the measure at issue made it possible to improve DSR and complied with paragraph 232(a) of the 2014-2020 Guidelines, goes to the merits of the reasoning and, accordingly, to the substantive legality of the decision at issue, which is a separate question from that of compliance with the essential procedural requirement constituted by the obligation to state reasons (see, by analogy, judgment of 10 July 2008, *Bertelsmann and Sony Corporation of America* v *Impala*, C-413/06 P, EU:C:2008:392, paragraph 181 and the case-law cited).

205 In addition, the question referred to in the preceding paragraph of the present judgment is the subject of the third part of the first plea in law, which, as is apparent from paragraph 182 above, has been rejected.

206 Equally, Tempus's fourth argument, relating to the cost recovery method, does not seek to challenge the Commission's compliance with its obligation to state reasons, but rather the merits of the statement of reasons in the decision at issue. It is apparent from paragraph 183 above that that argument has been rejected.

207 As regards the fifth argument, which concerns the alleged failure by the Commission to address, in the decision at issue, the matter of the use of open-ended, rather than time-bound, capacity contracts, it is true that the decision to require that the contracts be open-ended rather than time-bound was not analysed in the decision at issue. However, as the Advocate General stated in point 188 of his Opinion, in the light, first, of the fact that that question had not been raised before the Commission during the preliminary examination of the measure at issue and, second, of the

case-law referred to in paragraphs 198 and 199 above, it cannot be said that the Commission failed to fulfil the obligation to state reasons, on the ground that it did not specifically refer to that question in the decision at issue.

208 The same is true, essentially for the same reasons, of Tempus's sixth argument, alleging that the Commission failed to explain, in the decision at issue, why, in order to participate in the auctions, DSR operators had to provide the same bond as electricity generators.

209 Recital 26 of the decision at issue explains that, in order to participate in auctions, potential DSR or generation units are required to provide collateral as an indication of the seriousness of their intention to participate in the auction and to deliver an operational unit by the start of the delivery year. In so far as the question of DSR operators potentially being treated differently as regards the obligation to provide collateral had not been raised at the preliminary examination stage, including in the observations submitted spontaneously to the Commission, that institution was not required, in order to comply with the obligation to state reasons, to set out in the decision at issue the reasons why such different treatment was not necessary.

210 In the last place, as regards the question of the lack of additional remuneration on the capacity market in the event that electricity transmission and distribution losses are limited as a result of DSR, it should be noted that, in recital 140 of the decision at issue, the Commission claimed that, in the light of the objective pursued by the measure at issue, the lack of additional remuneration for DSR operators on that basis was justified. Although relatively succinct, that information was sufficient to make it possible to understand the reasons why the Commission did not conclude that the lack of such additional remuneration was capable of raising doubts as to the compatibility of the measure at issue with the internal market.

211 As is apparent from the case-law referred to in paragraph 204 above, the question of compliance with the obligation to state reasons, as regards that part of the decision at issue, must be distinguished from that of the merits of that reasoning. It is apparent from paragraph 187 above that Tempus's arguments in relation to the latter issue have been rejected.

212 It follows from all of the foregoing that the second plea in law must be rejected and the action must be dismissed in its entirety.

Costs

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

214 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.

215 In the present case, since Tempus has been unsuccessful and the Commission has applied for costs relating to the proceedings before the General Court and the Court of Justice, Tempus must be ordered to pay the costs of those proceedings. Since the United Kingdom has not applied for costs, it must be ordered to bear its own costs.

216 In accordance with Article 140(1) of the Rules of Procedure, applicable to appeal proceedings by virtue of Article 184(1) thereof, the Member States which have intervened in the proceedings are to bear their own costs. Consequently, the Republic of Poland, intervener before the Court of Justice, must be ordered to 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 15 November 2018, *Tempus Energy and Tempus Energy Technology* v *Commission* (T-793/14, EU:T:2018:790);**

2. **Dismisses the action in Case T-793/14;**

3. **Orders Tempus Energy Ltd and Tempus Energy Technology Ltd to bear their own costs and to pay those incurred by the European Commission in the proceedings before the General Court of the European Union and before the Court of Justice;**

4. **Orders the Republic of Poland and the United Kingdom of Great Britain and Northern Ireland to bear their own costs.**

Vilaras Piçarra Šváby

Rodin Jürimäe

Delivered in open court in Luxembourg on 2 September 2021.

A. Calot Escobar
Registrar

M. Vilaras
President of the Fourth Chamber