

COMMISSION DECISION C(2015) 3919 final

of 12.6.2015

ON TARIFFS APPLIED BY HIDROELECTRICA of ROMANIA

to

S.C. ArcelorMittal Galați, S.C. Alro SA, S.C. Alpiq RomEnergie S.R.L., S.C. Alpiq RomIndustries S.R.L., S.C. Energy Financing Team Romania S.R.L. (EFT), S.C. Electrica S.A., S.C. Electromagnetica SA, S.C. Energy Holding S.R.L., S.C. EURO-PEC S.A., S.C. Luxten-Lighting Group S.A., S.C. Electrocarbon S.A. Slatina, and S.C. ELSID Titu S.A.

SA.33623 (2012/C), SA.33624 (2012/C), SA.33451 (2012/C) and SA.33581 (2012/C)

(Text with EEA relevance)

(Only the Romanian version is authentic)

<p>In the published version of this decision, some information has been omitted, pursuant to articles 30 and 31 of Council Regulation (EU) 2015/1589 of 13 July 2015 laying down detailed rules for the application of Article 108 of the Treaty on the Functioning of the European Union, concerning non-disclosure of information covered by professional secrecy. The omissions are shown thus [...]</p>		<p>PUBLIC VERSION</p> <p>This document is made available for information purposes only.</p>
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THE EUROPEAN COMMISSION,

Having regard to the Treaty on the Functioning of the European Union, and in particular the first subparagraph of Article 108(2) thereof,

Having regard to the Agreement on the European Economic Area, and in particular Article 62(1)(a) thereof,

Having regard to the decisions by which the Commission initiated the procedure laid down in Article 108(2) of the Treaty on the Functioning of the European Union, in respect of the aid SA.33623 (2012/C,

ex 11/NN)¹; SA. 33624 (2012/C, ex 2011/CP)²; SA.33451 (2012/C, ex 2012/NN)³; and SA. 33581 (2012/C)⁴.

Having called on interested parties to submit their comments pursuant to the provisions cited above, and having regard to their comments,

Whereas:

1. PROCEDURE

- (1) On 28 January 2011 and on 2 August 2011, the Commission received three complaints from the investment fund S.C. FP Proprietatea S.A. ('FP' or 'the complainant') in relation to the sale of electricity by S.C. Hidroelectrica S.A. ('Hidroelectrica') to several buyers at prices allegedly set below market level.
- (2) On 25 April 2012, the Commission informed Romania that it had decided to initiate the procedure laid down in Article 108(2) of the Treaty on the Functioning of the European Union⁵ ('TFEU') in respect of the alleged State aid measures, hereinafter jointly referred to as 'the opening decisions':
 - SA.33623 concerning S.C. ArcelorMittal Galați S.A. ('ArcelorMittal');
 - SA.33624 concerning S.C. Alro S.A. ('Alro');
 - SA.33451 concerning S.C. Alpiq RomEnergie S.R.L. ('S.C. Alpiq RomEnergie'), S.C. Alpiq RomIndustries S.R.L. ('Alpiq RomIndustries'), S.C. Energy Financing Team Romania S.R.L. ('EFT'), S.C. Electromagnetica S.A. ('Electromagnetica'), S.C. Energy Holding S.R.L. ('Energy Holding'), S.C. Euro-Pec S.A. ('Euro-Pec'), S.C. Electrica S.A. ('Electrica') and S.C. Luxten-Lighting Group S.A. ('Luxten-Lighting'); hereinafter jointly referred to as 'electricity traders';
 - and SA 33581 concerning S.C. Electrocarbon S.A. Slatina ('Electrocarbon') and S.C. ELSID Titu S.A. ('Elsid'), hereinafter 'electrode producers'.
- (3) The opening decisions were published in the *Official Journal of the European Union*⁶. The Commission called on the Romanian authorities and interested parties to submit their comments.
- (4) On 23 July 2012 the Romanian authorities provided the Commission with their comments on the opening decisions.

¹ Commission Decision C(2012) 2516 final of 25 April 2012 concerning case SA. 33623 (OJ C 189, 29.06.2012, p. 3).

² Commission Decision C(2012) 2517 final of 25 April 2012 concerning case SA. 33624 (OJ C 268, 05.09.2012, p. 21).

³ Commission Decision C(2012) 2542 final of 25 April 2012 concerning case SA. 33451 (OJ C 395, 20.12.2012, p. 5).

⁴ Commission Decision C(2012) 2556 final of 25 April 2012 concerning case SA. 33581 (OJ C 395, 20.12.2012, p. 34).

⁵ OJ L 115, 9.5.2008, p. 92.

⁶ Case SA. 33623 - OJ C 189, 29.6.2012, p. 3; case SA. 33624 - OJ C 268, 5.9.2012, p. 21; case SA. 33451 - OJ C 395, 20.12.2012, p. 5 and case SA. 33581 - OJ C 395, 20.12.2012, p. 34.

- (5) The Commission received comments from 11⁷ interested parties, i.e.:
- in case SA.33623 from ArcelorMittal on 30 July 2012 and 2 August 2012. On 5 December 2012 the Commission forwarded the comments of the interested parties to the Romanian authorities.
 - in case SA.33624 from Alro on 3 October 2012, 28 November 2012, 12 April 2013 and 30 May 2013, and on 5 October 2012 from a competitor. On 13 November 2012 the Commission forwarded the comments of the interested parties to the Romanian authorities.
 - in case SA.33451 from Alpiq RomEnergie and Alpiq RomIndustries on 1 August 2012 and 20 January 2013, from EFT on 4 February 2013, from Energy Holding on 18 and 21 January 2013, and from Electromagnetica on 22 January 2013. On 13 February 2013, the Commission forwarded the comments of the interested parties to the Romanian authorities.
 - in case SA.33581 from Electrocarbon and Elsid on 18 May 2012 and 18 January 2013. On 13 February 2013, the Commission forwarded the comments of the interested parties to the Romanian authorities.
- (6) The Romanian authorities replied to the comments of the interested parties on 15 January 2013 in case SA.33624 and on 24 March 2013 in cases SA.33451 and SA.33581.
- (7) The Commission requested further information from the Romanian authorities:
- in case SA.33623 (ArcelorMittal) by letters dated 30 October 2012, 15 April 2013 and 29 July 2013;
 - in case SA.33624 (Alro) by letters dated, 22 May 2012, 30 October 2012 and 15 April 2013;
 - in cases SA.33451 and SA.33581 (electricity traders and electrode producers) by letters dated 6 August 2014 and 25 September 2014.
 - in all four cases on 29 July 2013 and 21 February 2014.
- (8) The Romanian authorities provided further information:
- in case SA.33623 (ArcelorMittal), on 30 November 2012, 3 and 10 June 2013, 16 July 2013, 11 September 2013, 18 December 2013, 20 March 2014, 24 March 2014 and 14 May 2014;
 - in case SA.33624 (Alro) on 19 June 2012, 23 July 2012, 30 November 2012, 15 January 2013, 3 June 2013, 11 September 2013, 18 December 2013, 24 March 2014 and 14 May 2014;
 - in cases SA.33451 and SA.33581 (electricity traders and electrode producers) on 11 September 2013, 24 March 2014, 14 May 2014, 3 September 2014 and on 10 October 2014.
- (9) On 11 March 2014, the Commission sent a request for further clarifications to Energy Holding concerning its comments made in case SA.33451 (electricity traders). Energy Holding replied on 8 May 2014.
- (10) The Commission received further submissions from interested parties:
- in case SA.33623 (ArcelorMittal) by email on 30 July and 2 August 2012;
 - in case SA.33624 (Alro) by letters of 30 May, 28 June, and 2 July 2013 and 21 March 2014;

⁷ Including the preliminary observations submitted by Luxten-Lighting and Euro-Pec before publication of the invitation to provide comments on the opening decision: Luxten-Lighting on 14 August 2012 and Euro-Pec on 13 August 2012.

- in case SA.33451 (electricity traders) by letters dated 18 and 19 November 2013, 16 and 18 June 2014, and 25 July and 25 November 2014;
- in case SA.33581 (electrode producers) by fax and by email on 18 January 2013.

2. DESCRIPTION OF THE ALLEGED AID MEASURES

- (11) This section describes the contracting parties (i.e. Hidroelectrica and alleged beneficiaries), as well as the electricity sale contracts, in the context of the Romanian electricity market.

2.1. *The contracting parties*

2.1.1. *Hidroelectrica*

- (12) Hidroelectrica was established in 2000, when the Romanian Government created four independent wholly State-owned companies. Hidroelectrica is governed by ordinary company law. Its share capital is held by the Romanian State through the Ministry of Economic Affairs and Trade (80.056 %) and the complainant (19.943 %). The Romanian State is represented in the general meetings of shareholders and appoints members of Hidroelectrica's Board of Directors. In fact, the members of Hidroelectrica's Board of Directors can combine this function with government posts⁸.
- (13) Hidroelectrica is Romania's main electricity producer with an annual production capacity of around 17.5 TWh in a normal hydrological year. Hidroelectrica produces electricity through dams and run-of-the river generation plants. However, this production is subject to wide variations depending on hydrological conditions: in 2004, Hidroelectrica's output was 17.6 TWh whereas in 2009 it was 16.4 TWh and in 2010, 21.3 TWh. In 2013, Hidroelectrica's market share was 28.24 %, ahead of Complexul Energetic Oltenia, a thermo-coal based electricity producer, with a 20.83 % market share and Nuclearelectrica with a 20.65 % market share. Both Complexul Energetic Oltenia and Nuclearelectrica are State-owned companies.
- (14) The cost structure of Hidroelectrica is characterised by high fixed costs (relating to the amortisation of power dams and of civil works and to regular maintenance) and low variable productions costs. Hydroelectricity often has lower marginal costs than other electricity sources, in particular fossil fuels. This cost structure stems from the fact that the production of electricity based on hydropower does not typically have significant fuel costs or marginal costs⁹. It follows that policies for sales and the full recovery of costs above marginal costs of production across the range of output sold by hydropower producers are largely determined individually by each producer. Beyond the basic rule that full costs should be recovered in the long term for hydro power (or other power) generation,

⁸ All members of Hidroelectrica's Board of Directors except the General Director of Hidroelectrica and the representative of Fondul Proprietatea (2010), cumulated other functions in various Ministries and were appointed through Orders issued by the Ministry of Economy and Trade, as follows: (i) in 2005-2006: the personal adviser in the cabinet of the Minister of Economy and Trade; the director of cabinet of the Minister for Small and Medium Enterprises; the personal adviser in the cabinet of the Minister in the Ministry of Public Finance and the personal adviser in the General Secretariat of the Government were members of Hidroelectrica's Board of Directors; (ii) in 2007 – 2008 – situation unknown; (iii) in 2009: the State Secretary in the Ministry of Economy and Trade was also the President of Hidroelectrica's Board of Directors (2009), while another State Secretary in the Ministry of Public Finance and two general directors in the Ministry of Economy and Trade were also members of Hidroelectrica's Board of Directors; (iv) in 2010: three personal advisers in the Ministry of Economy and Trade, a State Secretary in the Ministry of Finance and a General Director in the Ministry of Economy and Trade were members of Hidroelectrica's Board of Directors.

⁹ See International Energy Agency: 'Projected costs of generating electricity' 2010 edition, section 4.2 'Country by country data on electricity generating costs' pp. 89-97.

there are no prescriptive or normative economic rules for optimal price determination based solely on the costs for specific segments of buyers in the short to medium term. This rules out, for instance, all KWh sold necessarily having to have the same contribution to full recovery of fixed costs, irrespective of the output sold to each buyer. However, due to its dependency on the level of hydrology and its inability to adjust its fixed cost base, Hidroelectrica is, generally speaking, exposed in the long run to a degree of risk due to uncontrollable volatility of its output and, consequently, of its revenues. Hidroelectrica thus requires a stable output for its production in the long term in order to yield stable and predictable revenues.

- (15) By 2005, when most of the contracts under investigation were signed, Hidroelectrica's strategy involved modernising and building new hydro facilities with a capacity of 1.6 GW. The total investment was estimated at EUR 5.9 billion in the period 2005-2025. The modernisation programme required EUR 800 million of external financing.

Hidroelectrica began insolvency proceedings on 26 June 2012¹⁰, and these ended on 26 June 2013¹¹. As of 25 February 2014, Hidroelectrica again began insolvency proceedings. According to the Insolvency Report drawn up by the receiver, Hidroelectrica's insolvency was triggered by several factors, namely the obligation to sell a sizeable part of its production on the regulated market at prices below production cost, the obligation to buy large quantities of electricity from more expensive State-owned Romanian electricity producers (quantities that were then re-sold at lower prices), the portfolio of sale contracts, over-investment, bad management and inflated labour costs – all of which led to Hidroelectrica's not being able to pay its debts to its creditors¹².

2.1.2. *The alleged beneficiaries*

- (16) The clients with which Hidroelectrica entered into the contracts under investigation were:
- eight electricity traders: **Alpiq RomEnergie**, previously SC EHOL Distribution, the legal successor to Energy Holding. EHOL Distribution was sold to Alpiq and renamed Alpiq RomEnergie; **Alpiq RomIndustries**, previously SC Buzmann Industries SRL, both owned by the private Swiss operator Alpiq, which was created by the merger of Aare-Tessin Ltd. for Electricity and EnergieOuest Suisse in 2008 and which is active mainly in south-east Europe; **EFT**, a subsidiary of the Cyprus-based EFT Group, which is active mainly in the Balkan region; **Electrica**, a provider of electricity services to both eligible retail clients and its own subsidiary companies, active in Romania; **Electromagnetica**, a provider of lighting products and services and electricity trader based in Romania; **Energy Holding**, a privately owned energy supplier which is active in Romania and also in south-east Europe; **EURO-PEC**, a trader in iron and steel products for civil, industrial and naval constructions and electricity trader active in south-east Europe; and **Luxten-Lighting**, a producer of lighting products and electricity trader.
 - Two electrode producers: **Electrocarbon**, a publicly listed company manufacturing graphite electrodes, calcined petroleum coke, Soderberg paste, and carbon blocks for blast furnaces; and **Elsid**, which was set up in 1984 to produce graphite electrodes for the metallurgical industry.
 - **ArcelorMittal**, a subsidiary of the multinational group active under the same name, which is the leading steel producer worldwide. ArcelorMittal produces hot rolled and cold rolled coils, galvanised coils, pickled and oiled coils, and plates. ArcelorMittal is Romania's largest steel producer and the second largest industrial consumer of electricity in Romania, with an annual consumption of electricity exceeding 1.7 TWh.

¹⁰ Decision of Tribunal of Bucharest No 22456/3/2012 dated 26.6.2012.

¹¹ Decision of Tribunal of Bucharest No 6482 dated 26.6.2013.

¹² Available in Romanian only at <http://www.euroinsol.eu/uploads/Raport%2059%20Hidro%20v11.pdf>

- **Alro**, a subsidiary of Vimetco NL, a Russian-owned holding company with its headquarters in the Netherlands. With an annual consumption of electricity exceeding 3 TWh/year in continuum band (24 hours per day), Alro is the largest industrial consumer of electricity in Romania.

2.2. *The contracts*

- (17) Hidroelectrica concluded 14 contracts for the supply of electricity to the alleged beneficiaries, namely one contract with each of the eight electricity traders except for Electrica¹³, Electrocarbon, Elsid and Alro, and two one-year contracts with ArcelorMittal. The main characteristics of these contracts are described in detail in recitals 19 to 23, below. For more comprehensive descriptions and further details, reference is made to the opening decisions in each case and to Annex I to this Decision.
- (18) Date of signature of the contracts: Nine contracts were already in force in 2007, i.e. at the time of Romania's accession to the EU, and five contracts were signed after Romania's accession to the EU¹⁴.
- (19) Duration of the contracts: Most contracts were signed for long periods, of between five and ten years, i.e.: five contracts were concluded for an initial period of ten years¹⁵; two contracts were concluded for an initial period of seven years¹⁶; and three contracts were concluded for an initial period of five years¹⁷, two of which were extended for additional periods of five years in 2004¹⁸; the four remaining contracts were concluded for periods of one year¹⁹ or less²⁰.
- (20) Current status of the contracts: Only the contract with Alro is still in force. All the other contracts were either: (i) terminated by Hidroelectrica's receiver during the insolvency proceedings in 2012; (ii) terminated individually by one of the parties²¹; or (iii) they expired²².
- (21) Contract prices applied: the prices set out in the contracts under investigation were *ad hoc* prices negotiated with each buyer and not determined by reference to a pre-existing tariff grid applied by Hidroelectrica, e.g. as a discount or mark-up on an applicable tariff or as a tariff step.
- In the contract with Luxten-Lighting (electricity trader), the price was initially set at a fixed amount for an undetermined period. Subsequent addenda increasing the initial contract price were signed yearly.
- In the contracts with Electrocarbon and Elsid, the prices were initially set at a fixed amount only for the first year of the contract. On 1 September 2003²³, the price was adjusted to a fixed amount, identical for each of the years until the end of the initial contract period. Again, before 2007, the parties readjusted the pre-set price for subsequent years until the end of the period of the contracts

¹³ Electrica concluded two short-term contracts with Hidroelectrica.

¹⁴ Contract with AlpiqRomEnergie; two contracts with Electrica; and two contracts with ArcelorMittal.

¹⁵ Five contracts with electricity traders (Alpiq RomIndustries; Electromagnetica; Energy Holding; Euro-Pec; Luxten-Lighting).

¹⁶ Contracts with EFT (electricity trader) and Alro.

¹⁷ Contracts with Electrocarbon and Elsid and Alpiq RomEnergie (electricity trader).

¹⁸ Contracts with Electrocarbon and Elsid.

¹⁹ Two contracts with Arcelor Mittal.

²⁰ Two contracts with Electrica.

²¹ The contract with Luxten-Lighting (electricity trader) was terminated by Luxten-Lighting by notice dated 15.11.2011, with effect from 1.1.2012.

²² Contracts with Electrocarbon and Elsid expired on 13 March 2013 and the contract with Electromagnetica (electricity trader) expired on 30 April 2014.

²³ Addendum 1 to the contract with Electrocarbon provided for a pre-set price (at a fixed amount – the same price) until 28.2.2008; Addendum 2 to the contract with Elsid provided for a pre-set price until 31.12.2007.

to a fixed amount identical for each year²⁴. In practice, despite the fact that the contract price was predetermined at a fixed amount, the parties each year renegotiated, and agreed on, prices above the contract level. However, when in 2010 Electrocarbon and Elsid refused to accept the whole price increase requested by Hidroelectrica, and Hidroelectrica wished to unilaterally interrupt the supply of electricity, the matter was brought before the competent court, which did not accept Hidroelectrica's request to increase prices above the level set out in the contracts²⁵.

(22) *Right of the parties to terminate the contract unilaterally:*

- In the contracts with Luxten-Lighting, Electrocarbon and Elsid, the buyer had the opportunity to individually terminate the contract upon prior written notice given 30 days before termination. In the event of this clause not being complied with, the buyer was obliged to pay the contractual amounts due until such time as Hidroelectrica signed a new electricity supply contract under equivalent conditions with a new buyer²⁶.
- In the contracts with Luxten-Lighting, Electrocarbon and Elsid, Hidroelectrica was also able to terminate the contract in the following circumstances: (i) repeated non-payment of the contract price for the electricity bought and/or repeated non-payment of any penalties due under the contract; (ii) loss by the buyer of its status as an eligible consumer in accordance with Romanian law (which is a key element for the contract), in which case termination was possible within five working days from the date when this status was lost; (iii) refusal of the buyer to conclude a new contract or to amend the existing contract in the event of a change in the economic and technical circumstances obtaining at the date of the contract's being entered into, in which case termination was possible with prior notice of 30 calendar days; as well as (iv) in other cases stipulated by any applicable laws or regulations²⁷.

2.3. The Romanian electricity market

- (23) Electricity trading in Romania in the period under consideration could take place on two markets: (i) the regulated electricity market on which electricity is traded on the basis of regulated tariffs and conditions and (ii) the competitive electricity market on which electricity is traded freely, including through two main types of contract: bilateral contracts traded on the centralised market, and freely negotiated bilateral contracts, the so-called market for directly negotiated contracts.

The regulated electricity market

- (24) Transactions on the regulated electricity market are implemented through sale-purchase framework agreements concluded between the electricity producers active on the regulated market, including Hidroelectrica, and the 'suppliers of last resort', which ensure distribution of electricity to the end-user. The suppliers of last resort have the obligation to supply electricity to eligible consumers who are either: (i) final consumers that did not exercise their right to choose their supplier and to buy electricity on the competitive market or (ii) households and non-household customers that have

²⁴ On 1 July 2004 the parties agreed on a table pre-setting a per year fixed price for the period 2006-2013 (i.e.: Addendum 4 to the contract with Electrocarbon and Addendum 5 to the contract with Elsid). The prices were subsequently modified on 1.1.2005 with prices pre-set at a fixed amount until 31.12.2007 for Elsid and until 28.2.2008, for Electrocarbon.

As of 2006 the contract prices were readjusted yearly for Electrocarbon and Elsid.

²⁵ Court of first instance: Olt Tribunal - File 2800/104/2010 (Electrocarbon) and Dambovitza Tribunal – File 4102/120/2010 (Elsid).

²⁶ Article 10(2) of each of the three contracts.

²⁷ Article 10(1) of each of the three contracts.

fewer than 50 employees and a yearly turnover of below EUR 10 million²⁸. The eligible consumers buy electricity on the basis of regulated tariffs.

- (25) On the regulated markets, the Romanian Energy Regulatory Authority ('ANRE') sets out the prices and volumes to be delivered by the electricity producers *ex-ante* every year. In line with ANRE's request, Hidroelectrica is obliged to supply electricity wholesale to distributors that supply electricity retail on the regulated market. The wholesale prices paid to Hidroelectrica are set by ANRE on the basis of a justified level of eligible costs plus a rate of return. Between 2004 and 2010, the wholesale prices paid to Hidroelectrica were as follows (RON/MWh)²⁹:

2004	2005	2006	2007	2008	2009	2010
40	67	54.59	62.46	60.53	67.65	72

The competitive electricity market

- (26) Since 2005, Romania's competitive electricity market has been divided into five specific markets, i.e.:
- the centralised markets administered by OPCOM;
 - the market for directly negotiated contracts;
 - the ancillary services market;
 - the balancing market, and
 - the export market.
- (27) The centralised markets are administered by OPCOM. OPCOM was set up in 2001, pursuant to Government Decision No 627/2000, as a joint stock company and wholly-owned subsidiary of Transelectrica, the transmission system operator. By virtue of the licence granted by ANRE, OPCOM was designated as a platform for the wholesale trading of electricity in Romania. OPCOM is the only power exchange in Romania offering a framework for electricity trading and having a facilitator role.
- (28) There are five big types of market segment on OPCOM: (i) the day-ahead market; (ii) the intra-day market, which has been administered by OPCOM only as of July 2011, (iii) the centralised bilateral markets, i.e. the centralised market for bilateral contracts through public auction ('OPCOM-PCCB') and the centralised market for bilateral contracts through continuous negotiation ('PCCB-NC'); (iv) the centralised market for green certificates, and (v) the trading platform for greenhouse gas emission certificates. Green certificates and greenhouse gas emission certificates do not directly involve the trading of electricity and, therefore, are not described below.

²⁸ Article 55 paragraph 1 of the Electricity and Gas Law No 123/2012 as further amended by Law No 127/2014.

²⁹ KPMG Report, Annex 3 to Memorandum of Energy Holdings dated 27 February 2012, p. 8, source: Hidroelectrica's Annual Reports, 2010 Administrator's Report, KPMG Analysis.

Transactions on OPCOM started only in 2005 and only on the day-ahead and OPCOM-PCCB markets.

- (29) At the time of Romania's accession to the EU in 2007, electricity was traded mainly on the regulated electricity market (approximately 29 TWh or about 55 % of final demand). On the competitive electricity market, electricity was traded: (i) on OPCOM – PCCB, and (ii) on the day-ahead market, both administered by OPCOM; then (iii) under directly negotiated contracts, often of long duration, both wholesale and retail, (iv) on the balancing market, on which the transmission system is the sole buyer, and finally (v) on the export market (3.3 TWh in 2007). Between 2007 and 2010, sales of electricity on these non-regulated markets in Romania were as follows³⁰:

(TWh)	2007	2008	2009	2010	Average 2007-2010
Electricity production - total	61.39	64.01	56.69	59.14	60.31
Balancing market - total	3.49	3.55	3.21	2.97	3.30
Day-ahead market - total	5.04	5.21	6.35	8.70	6.32
OPCOM PCCB - total	5.88	8.77	6.33	4.39	6.34

Hidroelectrica sales across market segments

- (30) With annual sales of 18.2 TWh and a 30.2 % market share on average in the period 2007-2010, Hidroelectrica was (and remains) Romania's main electricity producer. Since 2003, in line with the progressive opening of the market to electricity buyers entitled to choose their suppliers, Hidroelectrica's sales were made predominantly through directly negotiated bilateral contracts. By 2007, such sales accounted for nearly two thirds of Hidroelectrica's total sales. As shown in the table below, during the period after Romania's accession to the EU, the proportion of Hidroelectrica's sales out of its total sales remained, between 2007 and 2010, relatively stable at around 19 % on the regulated market segment and at around 1 % for sales to other electricity producers. In the meantime, the proportion on the balancing, bilateral contracts and export markets decreased slightly, while the proportion of sales on OPCOM's administered market segments increased from near insignificance in 2007 and 2008 to[...] % in 2010.

<i>Hidroelectrica sales per market segment</i>	2007	2008	2009	2010	Average 2007-2010
Regulated market	[...]	[...]	[...]	[...]	19 %
Balancing market	[...]	[...]	[...]	[...]	6 %
Export market	[...]	[...]	[...]	[...]	7 %
Other electricity producers	[...]	[...]	[...]	[...]	1 %
Bilateral contracts	[...]	[...]	[...]	[...]	63 %
of which contracts under scrutiny	[...]	[...]	[...]	[...]	58 %
OPCOM (day-ahead & PCCB)	[...]	[...]	[...]	[...]	4 %

³⁰ KPMG report, Annex 3 to the Memorandum of Energy Holdings dated 27 February 2012, p. 21, source: ANRE.

* Business secret

- (31) The contracts of Hidroelectrica with electricity traders Electrocarbon, Elsid and Alro were concluded on the market for directly negotiated contracts. The two contracts with ArcelorMittal for electricity supplies from 2010 and 2011 were concluded on OPCOM - PCCB, following the principle of the highest offer price. Although the economic and legal assessment of the contracts under examination should refer to the broader context of the Romanian electricity market, two segments in this market are, therefore, mainly relevant to, and concerned with, the Hidroelectrica contracts that are the subject of this Decision:
- OPCOM-PCCB as identified and referred to in the opening decisions, which is also particularly relevant for the contracts with ArcelorMittal;
 - the market for directly negotiated contracts, on which all other contracts subject to the current proceedings were concluded.

OPCOM-PCCB

- (32) On the OPCOM-PCCB market segment, OPCOM organises public auctions for the sale and purchase of electricity. Sale or purchase offers by each supplier or consumer are submitted to the market operator. Each offer must specify the following: (i) either the minimum price at which the party will sell electricity or the maximum price at which it will buy electricity and (ii) the framework agreement under which the party making the offer is planning to supply/purchase electricity. Sale and purchase offers specify supply conditions, including those relating to the amount of electricity, duration (minimum one month and up to one year) and the envisaged framework agreement. The price follows the principle of the best offer price.
- (33) After publication of the opening decisions, the Commission adopted a Decision in application of Article 102 TFEU, finding that the power exchange managed by OPCOM constituted a relevant service market, on which OPCOM was an undertaking holding a dominant position and that was separate from the market for directly negotiated contracts³¹.

The market for directly negotiated contracts:

- (34) The market for directly negotiated contracts is a free market which is not regulated by ANRE. Contracting parties negotiate quantities, prices and other contract clauses bilaterally. This provides the parties with a high degree of flexibility in negotiating the terms and conditions of the sale contracts. These terms and conditions are confidential.
- (35) By letter dated 21 February 2014, the Commission asked the Romanian authorities to provide it with data and information about contracts concluded on the Romanian market other than the contracts that are the subject of this Decision and with comparable durations and quantities of electricity supply. The Commission's request covered all Romanian electricity suppliers, whether

³¹ Commission Decision of 5 March 2014, in application of Article 102 TFEU imposing fines pursuant to Article 7 of Regulation (EC) No 1/2003 in case AT.39 984 'Romanian Power Exchange/OPCOM'.

state- or privately owned. On 14 May 2014, the Romanian authorities provided the requested data on all long-term contracts that had been signed by electricity buyers with an annual electricity consumption of more than 150 GWh and that were in force at a point in time between 2007 and 2013³².

- (36) In particular, relevant data from 96 contracts in force between 2007 and 2013 were submitted by the Romanian authorities. The Romanian authorities underlined the fact that all the contracts concluded by non-household consumers on the retail market under competitive conditions in the relevant period of time were subject to the *ad hoc* data collection requested by the Commission. On the supply side, the contracts were entered into by virtually all significant suppliers active on the Romanian market, whether producers in the nuclear power or fossil fuel sectors or traders having purchased wholesale for retail resale. On the demand side, the data reported covers contracts of major, relatively energy-intensive industries, such as the steel, chemicals, cement, car manufacturing and petrol & gas and coal & lignite extraction industries³³.
- (37) The buyers concerned entered into bespoke long-term contracts on the basis of bilateral negotiations with other suppliers for durations and quantities similar, on average, to those for Hidroelectrica's contracts under scrutiny. As for Hidroelectrica contracts, the data reported show prices varying each year. On average for the period 2007-2010, these long-term contracts not covered by the proceedings represented 11.1 TWh of electricity, whereas Hidroelectrica's sale contracts under scrutiny represented 10.5 TWh. In relative terms, the latter Hidroelectrica contracts represented 35 % of the volume of electricity subject to directly negotiated contracts in 2007 whereas the other contracts covered approximately 41 % of the volume of electricity subject to directly negotiated contracts. The remainder (around 24 %) concerned contracts for lower quantities. Therefore, the relevant data from all the contracts fulfilling the Commission's required criteria of comparable periods and quantities reveal, by and large, a quantity similar to that for the total quantity supplied by Hidroelectrica under the contracts that are the subject of the proceedings.
- (38) The Commission does not possess information that would indicate that the conclusion of the contracts covered by the data supplied by Romania stemmed from non-market-compliant commercial behaviour or would have been affected by regulatory requirements. Likewise, for purposes of comparison with the Hidroelectrica contracts under scrutiny, Romania stressed that retail supply contracts based on wholesale supply by Hidroelectrica to parties subject to the investigation (electricity traders) had been excluded from the analysis. Accordingly, the contracts in the dataset can be deemed to represent market conditions agreed between willing buyers and willing sellers.

3. GROUNDS FOR INITIATING THE FORMAL INVESTIGATION PROCEDURE

³² The dataset used for benchmarking included 114 observations, covering the period 2007-2010. The dataset included the following information: the identity of the seller and the buyer, the type of contract, the date of entry into force and the expiry date, as well as the quantity, profile of supply and the weighted average price for each year from 2007 to 2013.

³³ The list of buyers is provided in Annex II, Table 1.

- (39) In the opening decisions, the Commission expressed doubts as to whether the prices for the supply of electricity under the contracts were market-compliant and did not constitute State aid.
- (40) The Commission compared the prices stipulated in the contracts with the electricity traders, Electrocarbon and Elsid with the prices at which electricity was traded on OPCOM-PCCB and noticed that the prices at which Hidroelectrica sold electricity to the alleged beneficiaries were between 10 % and 70 % lower than the average prices on OPCOM-PCCB throughout the period 2007-2010.
- (41) In the case of the contract with Alro, the Commission took the preliminary view that Alro derived an undue advantage in the form of reduced, preferential electricity prices over the period 1 January 2007 to 31 December 2009 and from 1 January 2010 to 31 December 2011 respectively, based on the formulae for price indexation applicable in each period.
- (42) In case of the two contracts with ArcelorMittal, the Commission took the preliminary view that, by concluding the 2009 and 2010 contracts for deliveries of electricity in 2010 and 2011, Hidroelectrica had sold electricity at prices below what could have been obtained either: i) by accepting one of the parallel 'buy' offers available on OPCOM at the time for higher prices or ii) by placing its own sale offer on OPCOM for a price probably higher than that paid by ArcelorMittal. In the preliminary view of the Commission, the prices agreed could have constituted an undue advantage for ArcelorMittal.
- (43) The Commission reached the preliminary conclusion that the electricity tariffs under examination were selective in nature, since they applied only to certain undertakings. In so far as these undertakings were active on electricity and industrial markets open to competition on which trade between Member States took place, the Commission held that any possible economic advantage for the beneficiaries would be liable to distort competition and affect trade between Member States.
- (44) Furthermore, the Commission reached the preliminary conclusion that the preferential electricity tariffs could involve a transfer of State resources that would be imputable to the State, since Hidroelectrica was controlled by the Romanian State (80.06 % of its share capital was held by Romania). In addition, the Commission referred to Ministerial Order No 445/2009, through which the representatives of the Ministry of Economy, Trade and Business Environment and members of the boards of directors of the State-owned electricity companies were obliged to ensure that, as of 31 March 2010, the portion of electricity intended for the wholesale market should be traded exclusively on OPCOM. Consequently, the representatives of the Ministry of Economy, Trade and Business Environment could be deemed to have had control, or at least influence, over the contracting practices of State-owned companies, including those of Hidroelectrica.
- (45) Should these contracts have involved State aid, they would have been considered aid granted in breach of the notification and stand-still obligations laid down in Article 108(3) TFEU. The Commission also expressed doubt as to whether such aid would be compatible with the TFEU.

- (46) In the light of the above, the Commission reached the preliminary conclusion that the preferential electricity tariffs could potentially involve State aid and it invited Romania to provide sufficient information to alleviate its doubts.

4. ROMANIA'S COMMENTS

- (47) The Romanian authorities made observations only in relation to the opening decision concerning contracts with electricity traders, ArcelorMittal and Alro and abstained from making any observations in relation to the contracts with Electrocarbon and Elsid.
- (48) The Romanian authorities hold the view that the contracts with ArcelorMittal and Alro involved no aid. They stressed that the receiver did not terminate the contract with Alro during the insolvency proceedings, which proves that it was profitable.
- (49) In relation to the contracts with the electricity traders, the Romanian authorities did not provide substantial arguments. They argued that some of the contracts might have involved State aid (those with Alpiq RomEnergie, Alpiq RomIndustries, EFT, Energy Holding and Euro-Pec), abstained from expressing any views on certain contracts (those with Electrica and Luxten-Lighting) and claimed that there was no aid involved in one of the contracts (that with Electromagnetica). The Romanian authorities did not provide detailed explanations in support of their observations.
- (50) As regards the possibility of terminating the contracts individually (and particularly those with the electricity traders), the Romanian authorities explained that, in Romanian commercial practice, any party to a contract could have terminated the contract, incurring the risk of having to pay damages as determined by the competent court. Bearing in mind the characteristics of the contracts in question, the Romanian authorities made it clear that such damages would have been unusually high. Furthermore, the party requesting termination of the contract could also have faced the additional risk of being required by the competent court, through the so-called 'Presidential Order', to fulfil the contract until the dispute was settled, as happened in the cases of Electrocarbon and Elsid.
- (51) In addition, the Romanian authorities made it clear that the main difference between, on the one hand, the contracts concluded by Hidroelectrica with industrial consumers and, on the other hand, the contracts concluded by Hidroelectrica with the electricity traders consisted in the additional costs required to be paid under the contracts with the industrial consumers (i.e.: the payment of the 'T' component of the transport fee, system services charge, distribution fee and charges for imbalances).

5. COMMENTS BY THIRD PARTIES

- (52) All the alleged beneficiaries, except Electrica, submitted observations regarding the opening decisions, summarised in section 5.1.
- (53) In addition, a competitor of Alro, an aluminium producer, submitted its observations regarding the opening decision on 5 October 2012.
- (54) On 6 September 2012 an anonymous citizen submitted observations in relation to the opening decisions concerning Alro and the electricity traders

5.1. Comments from alleged beneficiaries

- (55) The main observations of the alleged beneficiaries are similar and refer to: (i) the Commission's lack of competence to assess either the contracts concluded prior to Romania's accession to the EU³⁴ or the subsequent addenda to the contracts³⁵; (ii) there being no appropriate market-prices benchmark for comparing contract prices; (iii) Hidroelectrica's having acted like a private market vendor without conferring any economic advantage on the alleged beneficiaries; (iv) there having been no imputability to the State and no transfer of State resources; (v) the fact that there was no distortion of competition; (vi) the absence of selectivity; (vii) there having been no severability of the amendments from the initial contract; and (viii) Hidroelectrica's having declared itself insolvent to avoid its contractual obligations.

5.1.1. Commission's lack of competence to assess the contracts and their subsequent addenda

- (56) The interested parties argue that the Commission does not have competence to review alleged State aid measures implemented before Romania's accession to the European Union ('EU') in 2007. The same applies, in their view, to the addenda to the contracts that were signed after 2007, because the addenda were not severable from the initial contracts. The addenda were simply implementing contractual rules for future supplies, originally determined under the contracts.
- (57) According to the interested parties, the alleged State aid measures stemming from the contracts were not applicable after Romania's accession to the EU since the contracts were concluded prior to 2007; also the first addenda establishing the exact parameters of the price indexation³⁶ system were signed prior to 2007.
- (58) Furthermore, in the opinion of the interested parties, even if it were proven that the contracts contained State aid, this would have to be regarded as existing, not new, aid, considering that all the conditions for granting existing State aid were met in accordance with Regulation (EC) No 659/1999³⁷. In particular: the alleged State aid measure did not meet the conditions for being

³⁴ Certain electricity traders (i.e.: Alpiq RomIndustries, EFT, Alro Electrocarbon and Elsid).

³⁵ One electricity trader (EFT) and Alro.

³⁶ Only in the case of Alro.

³⁷ OJ L 83, 27.3.1999, p. 1.

classified as State aid when it was put into effect; it became State aid only later and due to changes in the market environment; and, finally, the alleged State aid measure was not substantially altered after it was put into effect. Consequently, the interested parties claimed that the Commission cannot investigate the alleged State aid measure under the regime for new State aid and cannot request the Member State to recover the aid retroactively.

- (59) The interested parties also argued that, according to the case-law, the relevant time for assessing any transaction with regard to the market vendor/market operator test was the time when the transaction was concluded. Therefore, for transactions concluded before 2007, the question would have been whether they would have constituted State aid if the State aid rules had been applicable at the time when they were concluded. The same principle was also applicable to the time when the economic advantage had to be assessed, i.e.: the moment when the contracts were concluded. The interested parties argued in particular that, in Romania³⁸, there were no legal or economic changes on the electricity market to justify taking 2007 as the reference point for assessing the economic advantage: the Romanian energy markets were already emerging before 2004; the Romanian wholesale market was opened in September 2000.

5.1.2. *No appropriate price benchmark*

5.1.2.1. *OPCOM-PCCB was not an appropriate and valid price benchmark*

- (60) All the alleged beneficiaries that submitted comments regarding the opening decision claimed that there was no appropriate and valid price benchmark for comparing the prices stipulated in the contracts. The interested parties (the alleged beneficiaries) argued that OPCOM-PCCB prices were not a relevant price benchmark for the following reasons:
- OPCOM-PCCB prices did not reflect the correct situation in the relevant period;
 - the contracts under OPCOM-PCCB differ from the contracts under investigation on various counts (i.e.: a long-term obligation to purchase quantities at prices fixed in the context of a volatile market is completely different from the obligation to purchase executed either on a day-ahead market or on a fully operational power exchange, especially in the context of a liberalised market. The OPCOM-PCCB market deprived private suppliers of the flexibility of being able to modify their contracts once an agreement had been reached. The OPCOM-PCCB market had not been organised by then as a platform suitable in terms of large industrial clients' electricity needs and the options they required);
 - they did not match the same delivery period;

³⁸ Contrary to the Hungarian preferential electricity tariffs cases - T-80/06 and T-182/09 *Budapesti Erőmu v Commission*, judgment of 13 February 2012.

- OPCOM-PCCB and the contracts represented two separate markets (e.g.: the period of the supply contracts traded on the OPCOM-PCCB market was of one year or less compared with a much longer period for the contracts under discussion; the prices on the OPCOM-PCCB platform were higher than those negotiated individually under the contracts³⁹ and were volatile and dependent on the fluctuations of demand and supply;
 - OPCOM-PCCB did not even exist when most of the contracts were concluded, as it became operative only in 2005; and
 - only a small portion the total electricity available on the Romanian market was traded on the OPCOM-PCCB platform.
- (61) One of the interested parties⁴⁰ argued that OPCOM-PCCB was either a non-representative benchmark or a benchmark inappropriate for the prices stipulated in the contracts, since only a small portion of the electricity available on the Romanian electricity market was actually sold on the OPCOM-PCCB market during the period of the Commission's assessment (i.e., ranging from 2 % of total internal consumption in 2006 to 14.62 % in 2012).
- (62) In addition, other interested parties⁴¹ claimed that a proper benchmark for market prices could only have been found and developed through the use of a 'fundamentals' model, based on: (i) similar facts and conditions, (ii) concomitant expectations and (iii) the same period of time as the one covered by the present Decision.
- (63) Finally, one of the interested parties⁴² argued that, on Romania's complex and specific electricity market, there was no valid price benchmark available that would have been relevant for the prices stipulated in the contracts.

5.1.2.2. *Other electricity traders' offer in the case of the contracts with ArcelorMittal*

- (64) ArcelorMittal claimed that the assumption that Hidroelectrica could have accepted one of the parallel offers of OPCOM-PCCB traders for a price higher than that obtained under the two contracts with ArcelorMittal was not realistic because the Romanian electricity market was characterised by overcapacity.
- (65) ArcelorMittal further argued that, in a market characterised by overcapacity, Hidroelectrica had to take into account the risk that, if it had sold the electricity to the traders, they might not have been able to place it on the market or have had to re-sell it at a loss. It also claimed that the traders placed

³⁹ For further reference please see the ANRE Annual Monitoring Report for 2007 and for the following years.

⁴⁰ Energy Holding.

⁴¹ Alpiq RomIndustries and Alpiq RomEnergie.

⁴² Energy Holding.

those purchase offers on OPCOM with the evident intention of re-selling the electricity to ArcelorMittal at a higher price.

- (66) Moreover, ArcelorMittal argued that a comparison between the price specified in the two contracts concluded with Hidroelectrica and the prices under the traders' offers would have been valid only if:
- ArcelorMittal had been forced to buy from the traders – whereas ArcelorMittal claims that this was not the case, as it had the alternative of buying from other Romanian producers or from Hungary or Bulgaria.
 - the traders had been able to re-sell the quantities that ArcelorMittal did not buy from them – whereas the fact that the offers were withdrawn shows that the traders had not counted on selling those quantities to clients other than ArcelorMittal;
 - the traders had not had the capacity to withstand the losses in the event of their not having been able to re-sell the electricity bought from Hidroelectrica. In this connection, ArcelorMittal produces evidence that Arelco and Petprod were not financially robust companies.
- (67) ArcelorMittal also argues that the 2009 and 2010 contracts cannot be benchmarked against OPCOM prices, because OPCOM was not yet operating normally at that time. It considers that the average price, published by ANRE, for large bilateral transactions is more representative.

5.1.3. Hidroelectrica acted like a private market vendor/without conferring any financial advantage on the alleged beneficiaries.

- (68) Most of the interested parties claimed that Hidroelectrica had acted like a private market vendor when entering into the contracts and that they had therefore not obtained any financial advantage: (i) the contracts were negotiated and concluded on market conditions; (ii) Hidroelectrica benefited from certainty of income by concluding the contracts; (iii) the contracts ensured the sale of a large quantity of Hidroelectrica's electricity production; (iv) the contracts ensured that Hidroelectrica was protected from any price decreases relating to alternative sales on other different markets; (v) the price agreed in the contracts takes into account the risks and obligations imposed on the buyer, and the contract conditions were negotiated primarily in the interest of Hidroelectrica; (vi) the contract prices paid for the electricity bought from Hidroelectrica were constantly between 80 % and 100 % higher than the prices for electricity sold by Hidroelectrica on the regulated market; and (vii) the contracts were the best alternative for Hidroelectrica on the date when they were signed.
- (69) In addition, the interested parties claimed that the Commission should have looked into Hidroelectrica's financial position on the date when the contracts were signed, considering that, in

accordance with case-law⁴³, the Commission's assessment may have taken no account at all of information not available, and developments not foreseeable, when the contracts were signed.

- (70) Alro argued that each successive amendment to its contract with Hidroelectrica was always in Hidroelectrica's favour, for the following reasons: (i) a price indexation clause was introduced, taking into account Hidroelectrica's own costs; (ii) the currency used was changed from USD to RON in June 2007, at a time when the leu was appreciating against the USD, which allowed Hidroelectrica to gain 40 % on the price and eliminate its currency risks; (iii) the LME formula was introduced in 2010, leading to a sharp increase in prices.
- (71) Moreover, Alro submitted comprehensive and extensive economic studies performed by Brattle Group and Nera in order to support its argument that the contract with Hidroelectrica did not involve State aid. According to the Brattle Group's 2005 study, the estimated net present value (hereinafter the 'NPV') of the Alro contract (EUR 393.09 million) was higher than that resulting from the counterfactual sales scenario (EUR 355 million) based on the assumption of a perfectly competitive market. Similar estimates were also provided by Brattle Group for 2007, with similar results as for 2005: the EUR 348 million NPV for the 2007 Alro contract was, in addition, higher than the EUR 300 million NPV of its counterfactual.
- (72) Alro also submitted Brattle Group and Nera studies and reports in order to sustain its argument that no illegal aid was granted through its contract with Hidroelectrica.
- (73) Energy Holding, an electricity trader, submitted an economic analysis, price model simulations and price reports produced by KPMG, an independent consultancy firm, in order to sustain its argument that there had been no illegal aid. KPMG confirmed that the contract with Energy Holding was: (i) Hidroelectrica's best alternative at the time and (ii) that it brought Hidroelectrica a higher return or presented it with a lower risk compared with the next-best alternative. KPMG's analysis was based on an absolute and relative valuation analysis rather than on any other method of contract valuation (e.g.: marginal profitability analysis, truncated IRR analysis). It referred to two valuation periods (i.e.: 2004-2013 and 2010-2018) and reflected the terms of the contract concluded with Hidroelectrica in 2004 and the terms renegotiated in 2009 when the contract was renewed. The same analysis was at a later stage extended by KPMG for 1 January 2007. Its conclusion was the same as the one described above for both absolute and relative valuation.

5.1.4. *No imputability to the State and no transfer of State resources*

- (74) Almost all interested parties⁴⁴ claimed that their contracts with Hidroelectrica were not imputable to the State, because in accordance with Hidroelectrica's statutes, the board of directors delegated its executive powers to the chief executive officer. It was therefore claimed that the board members did not participate in the day-to-day business of Hidroelectrica, including the negotiation of the contracts.

⁴³ Case C-482/99 *French Republic v Commission (Stardust Marine)* [2002] ECR I-4397.

⁴⁴ AlpiqRomEnergie, AlpiqRomIndustrie, Electromagnetica, Energy Holding, Electrocarbon and Elsid, ArcelorMittal and Alro.

- (75) According to one interested party⁴⁵, the burden of proof concerning the imputability rested on the Commission. The interested party claimed that concluding that a measure was imputable to the State just because the State had a majority shareholding in Hidroelectrica was not sufficient. It further argued that the Commission had reached that conclusion on the basis only of 'indications' and presumptions and not of concrete facts, which was contrary to the requirements of case-law. The interested party argued that concrete evidence such as documents, factual elements and concrete actions on behalf of the State were required to sustain that conclusion.
- (76) Other interested parties⁴⁶ argued that there was no transfer of State resources. In particular, they argued that the allegedly lower prices offered by an undertaking under State control were not a factor sufficient to invoke the existence of State resources. They also claimed that the Romanian State's intervention regarding the use of these resources needed to have been established *in concreto*. Furthermore, the interested parties emphasised that, according to Hidroelectrica's statutes, concluding contracts fell within the exclusive competence of the General Director and not of the Board of Directors, and therefore the State was not involved in Hidroelectrica's contractual decision-making process.

5.1.5. *No distortion of competition*

- (77) Some of the interested parties⁴⁷ argued that there was no potential or actual distortion of competition deriving from their contracts with Hidroelectrica for the following reasons: (i) no relevant market was identified on which the State aid granted strengthened the position of an undertaking in relation to other undertakings within intra-EU trade and (ii) the Romanian electricity market is not concentrated as shown by the Herfindahl-Hirschman (HHI) concentration index.

5.1.6. *No selectivity*

- (78) Some of the interested parties⁴⁸ argued that there was no selectivity deriving from their contracts with Hidroelectrica because contracts of the same or a similar type were concluded with other traders (for the electricity traders) or were available to other parties on the market (for non-traders).

5.1.7. *No severability of the amendments from the initial contract*

- (79) Electrocarbon and Elsid claimed that the amendments to the contracts were not separate from the contracts. They also suggested that, even in a situation in which such amendments would have been regarded as separate commitments, the price changes were still complying with the market economy vendor principle and they therefore did not involve State aid.

⁴⁵ Energy Holding, an electricity trader.

⁴⁶ EFT, Electromagnetica, Luxten-Lighting and Energy Holding.

⁴⁷ EFT, Electromagnetica, Luxten-Lighting and Alro.

⁴⁸ EFT, Luxten-Lighting, Electrocarbon and Elsid.

5.1.8. *The only reason why Hidroelectrica declared itself insolvent was to get out of its contractual obligations*

- (80) Some of the electricity traders⁴⁹ argued that the only reason why Hidroelectrica declared itself insolvent was to terminate its contractual obligations. They argued that, while Hidroelectrica took full advantage of contracts in the past, it was no longer prepared to honour the obligations assumed and, therefore, the declaration of insolvency seemed to be a way of exiting the contracts.

5.2. Comments from other interested parties

- (81) In relation to the opening decision concerning Alro, the Commission received comments from parties other than the alleged beneficiaries: (i) comments from one of Alro's competitors, and (ii) comments from an anonymous party (citizen).

5.2.1. *Comments submitted by one of Alro's competitors*

- (82) One of Alro's competitors argued that both power exchange market prices and spot-market prices were irrelevant as a price benchmark for electricity supply contracts for aluminium smelters. According to Alro's competitor, aluminium smelters need to rely mainly on long-term and relatively predictable electricity supply contracts in order not to have to suspend operations because of unsustainably high electricity costs and in order to avoid any potential risk of their having to shut down because of electricity prices and the generator's profits.
- (83) Alro's competitor also argued that by comparing the tariffs under the long-term electricity supply contracts with electricity prices on the power exchange and/or on spot markets and/or with other industries' tariffs, the market reality could have been distorted and a bad precedent set, entailing a significant risk not only for Alro and/or its competitors but also for the entire European market.
- (84) In addition, Alro's competitor argued that the impact on competition should have been assessed by reference to the prices paid by aluminium smelters for their electricity at global, or at least European, level. Since electricity costs represented more than one third of the total costs of aluminium production and considering that aluminium producers bought electricity on the national market and afterwards engaged in competition worldwide, a relevant assessment would have required an assessment based on electricity prices paid by aluminium producers all over the world. Consequently, Alro's competitor claimed that, for a proper assessment of a potential distortion of competition, the Commission should have verified whether the alleged State aid had actually reduced Alro's production costs to below those of its competitors and, therefore, conferred on Alro an advantage, given the tariffs of its European and/or global competitors.

⁴⁹ Alpiq RomEnergy and Alpiq RomIndustries.

- (85) Furthermore, Alro's competitor argued that, in the absence of relevant information for defining a comparable 'market price', 'benchmarking prices to costs and a reasonable profit margin could have been acceptable as a legitimate pricing methodology'. The same logic might have been applied 'to a decision to offer prices indexed on the basis of LME prices'. It also claimed that aluminium smelters' unique characteristics and client profile might objectively justify an electricity price below power exchange prices, cost-based pricing and LME-indexed pricing.

5.2.2. *Comments submitted by a citizen*

- (86) The citizen argued that Alro bought electricity from Hidroelectrica at a preferential price, i.e. at a price below market price (such as OPCOM and ANRE prices). In addition, the citizen invoked the argument that the adjustment of the contract price for Alro through an indexation mechanism based on the LME formula was a pricing mechanism discriminatory in relation to other buyers of electricity on the market.
- (87) The Commission received comments from the same citizen concerning the contracts with the electricity traders, to the effect that the contracts entailed State aid. No evidence was provided to justify this argument.

6. COMMENTS BY THE ROMANIAN AUTHORITIES ON THE OBSERVATIONS BY THIRD PARTIES

- (88) The Romanian authorities responded to the observations made by the interested parties. In particular, the Romanian authorities maintained its view, expressed in July 2012, with regard to the contracts concluded by Hidroelectrica with the electricity traders and explained that those contracts were not typically robust and long-term contracts for at least two reasons: (i) the buyer was able unilaterally to terminate any of the contracts with 30 days' notice without having to pay adequate compensation, while Hidroelectrica was not able to do so, and (ii) the hourly output deliverables to the buyer could be, and were, variable at the buyers' discretion.
- (89) In addition, the Romanian authorities claimed that after the contracts had been concluded, or the amendments made to them, the buyers had the right (which they actually exercised) to increase or decrease the quantity of electricity needed by means of notices issued even just one day before delivery, which is a characteristic of spot transactions.
- (90) In relation to the contracts with Electrocarbon and Elsid, the Romanian authorities abstained from expressing any views. As reasons for doing so, the Romanian authorities added that they did not know whether Electrocarbon and Elsid were also involved in wholesale electricity trading.
- (91) The Romanian authorities provided well-substantiated and detailed comments on the observations made by Alro and ArcelorMittal in support of their conclusion that their contracts did not entail State aid. In particular, the Romanian authorities explained that the State had not given any instructions to its representatives on Hidroelectrica's board of directors and that Romanian company

law obliges board members to act in the interests of the company, and not in the interests of the shareholders who appointed them.

- (92) The Romanian authorities claimed that Alro was served from Hidroelectrica's own production and that, therefore, profitability had to be measured only by reference to Hidroelectrica's own production costs. The Romanian authorities also made it clear that ArcelorMittal is the second-largest consumer of electricity in Romania, after Alro, and they explained that the same was true of electricity as of any other product: the higher the volume purchased, the lower the contract price.
- (93) In addition, the Romanian authorities confirmed the observations made by ArcelorMittal, to the effect that, as reported by ANRE, the average price paid by industrial consumers with demand in the order of 150 000 MWh/year was only 11 RON/MWh higher than the price paid by ArcelorMittal in 2010. The authorities used the following arguments to explain this difference: (i) delivery in this linear profile provides the electricity supplier with the opportunity to optimise its productions costs; (ii) maintenance costs are significantly reduced; (iii) both the number and duration of accidental stoppages are reduced; and (iv) imbalances on the electricity market are significantly reduced, a factor also reflected in a reduction in electricity acquisition costs.
- (94) In relation to the observations made by Alro's competitor, the Romanian authorities entirely endorsed the latter's position and supported its view according to which a European aluminium producer was in competition with any other global aluminium producer. Moreover, the Romanian authorities argued that the contract with Alro did not distort competition on the global aluminium market.
- (95) Furthermore, the Romanian authorities argued that, from a financial point of view, any rational electricity producer would have offered the aluminium producer a tariff better than the OPCOM-PCCB or spot market ones, given the aluminium producer's specific characteristics. They also explained that the price on the spot market would not have been a correct benchmark for a long-term contract concluded with an industrial consumer. The prices under bilateral contracts with advantageous payment conditions and covering large volumes of electricity in predictable band consumption had to be much lower than electricity prices on the spot market.
- (96) As regards the observations made by the citizen, the Romanian authorities claimed that these were groundless. As regards the allegation made by the citizen to the effect that the prices granted to Alro were below the prices for equivalent transactions in Romania, the Romanian authorities explained that the citizen had completely disregarded the price fluctuation based on the specific elements of each transaction (i.e. large volumes of electricity with band consumption, the high level of predictability, and advantageous financial conditions for the seller).
- (97) As regards the second argument invoked by the citizen, to the effect that the opportunity given to Alro to adjust prices on the basis of the LME formula discriminated against other participants in the electricity market, the Romanian authorities argued as follows: (i) this practice was allowed under Romanian legislation as long as Hidroelectrica made a profit out of the contract concerned, and

(ii) the arrangement was a form of partnership between seller and buyer, who were sharing the profit from the sale of the aluminium.

7. ASSESSMENT

7.1. Existence of State aid

(98) By virtue of Article 107(1) TFEU, any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between Member States, be incompatible with the internal market. In order to constitute State aid within the meaning of Article 107(1) TFEU, the measure at issue must fulfil all these conditions.

(99) It is therefore necessary to assess whether the contracts under investigation provided State aid within the meaning of Article 107(1) TFEU to the buyers of electricity sold by Hidroelectrica, i.e. Alpiq RomEnergie, Alpiq RomIndustries, EFT, Electrica, Electromagnetica, Energy Holding, EURO-PEC, Luxten-Lighting, Alro, ArcelorMittal, Electrocarbon and Elsid after Romania's accession to the European Union.

(100) This would be the case, among other conditions of application of Article 107(1) TFEU, only if the contracts at issue favoured certain buyers by affording them an economic advantage above normal market conditions and, if so, only if the advantage deriving from the contracts and their subsequent amendments can be attributed not only to resources of the Romanian State, but also to actions, instructions or decisive influence of the State, as opposed to independent commercial decisions of Hidroelectrica.

(101) According to the decision in the case of *Budapesti Erőmű*⁵⁰, State aid measures put into effect before accession and still applicable after accession should be considered either existing aid or new aid following accession. In order to be considered existing aid, these measures should be listed expressly in the Act of Accession of a Member State to the European Union; in the present case by Annex V to the Treaty of Accession of Romania and Bulgaria to the European Union ('Act of Accession')⁵¹. The contracts were not listed explicitly in Annex V to the Act of Accession. Considering that the contracts were still applicable after the date of accession, they could be regarded only as new and, in the light of the quoted case-law, must therefore be assessed as from the date of accession (1 January 2007) in the light of the four conditions laid down in Article 107(1) TFEU.

Therefore, the Commission would have to evaluate the contracts as possible new aid measures as from the time of Romania's accession on 1 January 2007. That evaluation cannot be based on the circumstances obtaining on the market when the contracts were entered into (see recital 19), in particular for the purpose of deciding whether the contracts in question were in line with market

⁵⁰ Joined Cases T-80/06 and T-182/09 *Budapesti Erőmű v European Commission*, paragraphs 50 to 62.

⁵¹ OJ L 157, 21.6. 2005, p. 96.

prices when they were concluded. Such circumstances will not, therefore, be further assessed hereinafter.

7.2. Assessment of possible economic advantage over market conditions

- (102) In order to establish whether the prices and conditions at which Hidroelectrica supplied electricity to the alleged beneficiaries would not have been otherwise available on the Romanian market as from 2007, the Commission must first find an appropriate price benchmark that reflects a market price (i) available in a period of time when the contracts were in force after Romania's accession to the EU and (ii) for the period of time for which the Commission initiated the formal procedure in relation to the contracts.

7.2.1. Economic advantage over market conditions

- (103) In assessing whether or not there was economic advantage, the Commission takes as its point of reference a market operator subject to the same or similar obligations as Hidroelectrica, having the same opportunities and faced with the same legal and economic conditions as those obtaining in Romania in the period examined, given the operator's constraints and commercial objectives⁵². If the presence of State aid is to be excluded, a publicly owned company must, when selling its products, behave as would a private operator in the market economy, seeking to maximise revenues or minimise losses. In other words, assessing the presence of a possible undue economic advantage in a commercial supply contract from a State-owned supplier involves assessing to what extent a non-State-owned supplier in a similar situation would have behaved in the same way.
- (104) Likewise, whereas price differences between electricity tariffs set by the State and higher free market prices might, on first examination, indicate the presence of State aid, it may, for objective reasons, still be possible to find that lower price levels in the contracts under investigation do not afford electricity buyers an economic advantage over market conditions⁵³. Finally, in examining the possibility of State aid defined as electricity prices above market conditions on electricity markets under complex market settings, the Commission may lawfully rely on specific methods or economic models to determine to what extent contract prices differ from market prices⁵⁴.
- (105) In fact, the price for the contracts was either adjusted annually above the price set out in the contract or established annually for a number of contracts, except in the case of Alro, for which the actual annual price resulted from the application of the contractual indexation formulae. Whether or not there was economic advantage is therefore assessed for each of the years covered by the investigation as of 1 January 2007.

- Contracts with electricity traders, electrode producers and Alro

⁵² See case-law in footnote 39, paragraphs 69 to 89.

⁵³ Commission Decision of 4 February 2014 in case C3/2007 - Spanish Electricity Tariffs: consumers, OJ L 205, 12.7.2014, p. 25, recitals 113 to 120.

⁵⁴ Joined Cases T-80/06 and T-182/09 *Budapesti Erőmű v European Commission*, paragraphs 104-114.

- (106) As described in recitals 24 – 35, the Commission examined several electricity market segments in Romania between 2007 and 2010. In order to compare like with like, it is appropriate to examine the closest and most adequate comparators for the prices provided for in the contracts in the period under examination.
- (107) In well-functioning electricity markets with adequate liquidity and instruments allowing the prices of future deliveries to be predicted, spot prices are a good indication or approximation of market prices and can be used as benchmarks for assessing price levels in specific contracts. However, in the present case, given the relatively high proportion of demand that, in Romania in 2007, was still being satisfied on the basis of regulated tariffs, the limited liquidity of OPCOM trading platforms in the period 2007-2010, the volumes of electricity subject to the contracts under investigation, the establishment of power exchanges managed by OPCOM as a relevant antitrust market on which abuse of dominant position was practised (recitals 30-31 and 34), and taking into account the comments made by third parties (recitals 60-63), it cannot be established on a *prima facie* basis that spot prices or prices on the OPCOM PCCB platform can be deemed to constitute suitable benchmarks for assessing the possible presence of an economic advantage over market prices.
- (108) The Commission has therefore set aside its reliance on average OPCOM prices as benchmarks for comparing Hidroelectrica's contract prices, on which it had based the doubts raised in the relevant opening decisions about the presence of an economic advantage in the ten contracts with electricity traders and the two with electrode producers. The investigation has shown that trading on platforms like OPCOM, for shorter durations and on standard terms and whether on a 'day-ahead' or 'one-year or less' basis or with a view to providing ancillary or balancing services to the electricity network operator, cannot be viewed as a reasonable alternative to Hidroelectrica's bespoke contracts under scrutiny in the specific circumstances of the Romanian market in the period under consideration. The contracts concerned were negotiated directly to accommodate the specific supply needs of the buyer and the seller, with flexibility not available in other market segments. Therefore, in order to ascertain the presence of an economic advantage over market conditions, it is necessary also to examine the conditions obtaining on other market segments available in Romania in 2007 and thereafter, even if these were not identified in the opening decisions.
- (109) As regards the regulated market, on which Hidroelectrica effectively supplied approximately one fifth of its production at the time of the facts (recital 31), a comparison with the regulated prices charged yearly by Hidroelectrica based on eligible costs and a rate of return set by the electricity regulator ANRE shows that all the contract prices under scrutiny were constantly and significantly above the regulated prices between 2007 and 2010 (recital 26 and Annex 1). It was therefore economically rational for Hidroelectrica to continue supplying all alleged beneficiaries in the current proceedings as from 2007, as the contracts concerned were more lucrative than those supplied on the regulated markets. In any event, and drawing a comparison with the theoretical alternative of increasing the quantities supplied on the regulated market, Hidroelectrica could not at will switch its supplying of electricity from the contracts under scrutiny to the regulated market, since the quantities supplied on the regulated market were set *ex ante* by ANRE.
- (110) The same is true, *mutatis mutandis*, for trading conditions on the balancing and day ahead markets. Given the characteristics of Hidroelectrica's production, based partly on dispatchable electricity and

low marginal costs, it is arguable that Hidroelectrica could have secured occasionally higher revenues by switching its supplying of electricity from the contracts under consideration to the day-ahead and balancing markets, focusing in particular on supplying electricity at peak times, when prices rise considerably. However, for various reasons, the market conditions and prices prevailing on those market segments cannot be considered representative of market conditions with which the contracts under examination can be compared in order to ascertain whether they conferred an economic advantage on the buyers.

- (111) Firstly, it is apparent that Hidroelectrica supplied electricity on these market segments too between 2007 and 2010, albeit to a limited extent – in the order of less than 10 % of its sales (recital 31). The relevant issue is whether such markets could have constituted a valid alternative for a rational operator acting in lieu of Hidroelectrica and determining the destination of 63 % of its sales – sales that Hidroelectrica made on the basis of bilateral contracts between 2007 and 2010.
- (112) Trading on those market segments involved distinct features that make it impossible to determine market conditions valid for the whole Romanian market or for Hidroelectrica's long-term contracts. Indeed, balancing or ancillary services are supplied by electricity producers to the transmission system operator on the basis of unpredictable demand and patterns of demand on the part of a single buyer. Day-ahead supply also implies prices and quantities unpredictable from one day to the next. In other words, the long-term contracts under examination, even leaving aside their contract provisions and assuming they could be segmented into a succession of annually revisable contracts, cannot be compared with a succession of 365 one-day contracts for the same period. None of these alternative market segments would offer the predictability and stability of revenue required by Hidroelectrica or match Hidroelectrica's production characteristics and investment plan (recitals 13-15).
- (113) Finally, and as a matter of fact, the total volumes traded each year from 2007 until 2010 between all Romanian suppliers and the relevant buyers on the day-ahead and balancing markets always altogether amounted to less than the annual volume supplied under the contracts under investigation (see recitals 30, 31 and 38). During that period, none of the market segments had the capacity and liquidity necessary for absorbing the volumes of sales made under the contracts under investigation. In other words, even on the unrealistic assumption that Hidroelectrica could have replaced all Romanian producers and sellers on one or both of those two markets segments, Hidroelectrica would still have needed to find additional buyers for the volumes in question. Accordingly, the terms and prices applied in those rather niche market segments, whatever they amount to, cannot be used as a reference for a significant and objective comparison with Hidroelectrica's prices under long-term contracts.
- (114) Given the essential characteristics of the contracts in terms of flexibility of supply, long duration and quantities contracted, and in the specific circumstances of the Romanian market in the period under investigation, the closest comparators available for determining the possible presence of an economic advantage over prevailing market conditions in Romania were the prices agreed by large consumers having concluded bespoke contracts negotiated directly in terms that were non-rigid and pre-established. It is therefore appropriate to analyse whether the contracts under scrutiny were in line with the prices of other sellers on the Romanian market for directly negotiated contracts. The dataset described in recitals 35–38 above covering the directly negotiated bilateral contracts in

force that were contemporaneous with the contracts under investigation constitutes the most adequate basis available to the Commission in this case for comparing the contract prices charged to electricity traders, Alro, Electrocarbon and Elsid. Therefore, the Commission compared those prices with the prices resulting from the dataset referring to the period from 1 January 2007 to the end of 2010.

- Contracts with ArcelorMittal

- (115) As regards the two contracts concluded in 2009 and 2010 by Hidroelectrica with ArcelorMittal on the OPCOM-PCCB market, the Commission does not consider that the prices under the parallel offers of the two traders available on the OPCOM-PCCB market referred to in the relevant opening decision represent an adequate price benchmark, for the following reasons:
- In relation to the 2009 contract, neither of the two parallel offers made on OPCOM were actually valid. Energy Holding withdrew its parallel offer for the same period, quantity and delivery terms before the offer of ArcelorMittal was auctioned⁵⁵. The other offer, by Petprod, was not acceptable for benchmarking purposes because it covered only half of the quantity that ArcelorMittal offered to buy;
 - In relation to the 2010 contract, the financial data for the two traders with parallel offers showed that they would not have been able to withstand losses if they had been unable to re-sell the large quantity of electricity that they intended to purchase from Hidroelectrica: the real intent of these two traders in 2010 was to re-sell the electricity to ArcelorMittal at a higher price. In fact, both offers were withdrawn immediately after the buy offer on the part of ArcelorMittal was accepted by Hidroelectrica on 29 December 2010, which shows that the traders concerned did not count on selling those quantities to clients other than ArcelorMittal⁵⁶.
- (116) In the absence of fully comparable contracts having been applied, OPCOM-PCCB average prices are not a valid benchmark for the two contracts with ArcelorMittal, given that the volume of energy traded on OPCOM was limited and the types of transaction effectively carried out were not comparable.
- (117) Notwithstanding the preliminary views put forward in the opening decisions, and in consideration of the large quantities of electricity purchased by ArcelorMittal, the fact that ArcelorMittal was a reliable and financially stable client of Hidroelectrica's and the fact that neither of the two parallel offers by traders nor the average OPCOM-PCCB prices represented a valid comparator for the two contracts with ArcelorMittal, the Commission considers that the best indicator for a price benchmark for comparison purposes would be that used for the other contracts identified under the dataset. Therefore, in the light of the comments received in response to the opening decision, the Commission has modified its analysis and examined the prices of these two contracts with ArcelorMittal on the basis of the same dataset used to compare long-term contracts.

⁵⁵ The ArcelorMittal offer was auctioned by Hidroelectrica on 23 December 2009, while Energy Holding withdrew its offer on 22 December 2009.

⁵⁶ The two parallel offers of Arelco and Petroped were withdrawn on 20 and 30 December 2010, respectively.

- The Commission's econometric analysis of long-term contract prices

- (118) In well-functioning electricity markets with adequate liquidity and instruments allowing the prices of future deliveries to be predicted, spot prices are a good indication or approximation of market prices and can be used as benchmarks for assessing price levels in specific contracts. However, in the present case, given the relatively high proportion of demand that, in Romania in 2009, was still being satisfied on the basis of regulated tariffs, the limited liquidity of OPCOM trading platforms in the period 2007-2010 and the fact that the power exchanges managed by OPCOM had been designated as a relevant antitrust market on which abuse of dominant position is practised, it is appropriate to rely on other suitable benchmarks for assessing the possible presence of an economic advantage over market prices.
- (119) Accordingly, the Commission used the dataset provided by the Romanian authorities, considering it the best available source of evidence to reflect the market conditions in Romania. The dataset contains information adequate to enable the Commission to analyse the conditions on the Romanian electricity market in the period of time under investigation, as shown in recitals 36 and 37. On the basis of the dataset, the Commission carried out an econometric analysis in order to estimate a price benchmark based on electricity supply contracts contemporaneous with the investigated Hidroelectrica contracts throughout the investigated period. The use of economic models to quantify possible advantages over market conditions is in line with precedent in complex market settings (recital 104), such as the one at issue in Romania as from 2007 (recitals 24-38 and 107). A full and detailed technical description of the econometric analysis and its results is provided in Annex II.
- (120) In order, in the absence of a definite reference for establishing the 'market conditions', to check whether the contracts had prices above market level, a benchmark of market prices was estimated as a proxy, under conservative assumptions, namely by taking account of important deviations downwards from the estimated market price. Based on this conservative approach, the Commission performed a comparison between the prices of Hidroelectrica's contracts and the annual benchmark market price between 2007 and 2010. The comparison was made on an annual basis because, in fact, the selling prices were modified each year⁵⁷, despite the relevant provisions in the contracts.
- (121) The analysis shows that only three alleged beneficiaries benefited from prices lower than those within the range in which they could be considered in line with the benchmark market price:
- In each year between 2007 and 2010, Electrocarbon and Elsid exhibit contract prices below the benchmark market price for the corresponding year.
 - For Luxten-Lighting, this difference is higher than the benchmark price only in 2008 and 2009.
- (122) The analysis shows that the prices applied by Hidroelectrica in nine of the contracts between 2007 and 2010, namely those with Alpiq RomIndustries, Alpiq RomEnergie, EFT, Electromagnetica,

⁵⁷ See Annex I to the present Decision.

Energy Holding, Euro-Pec, Electrica, ArcelorMittal and Alro, were fully in line with the benchmark market price. In the case of the contract with Luxten-Lighting, the prices applied in 2007 and 2010 do not differ significantly from those for other directly negotiated contracts concluded on the Romanian market.

- (123) In view of the above, the Commission concludes that there was no undue economic advantage over market conditions granted under the contracts with Alpiq RomIndustries, Alpiq RomEnergie, EFT, Electromagnetica, Energy Holding, Euro-Pec, Electrica, ArcelorMittal and Alro for the entire period of time under investigation, as well as with Luxten-Lighting for the years 2007 and 2010.
- (124) At the same time, the empirical analysis identifies three contracts as having prices not in accordance with the benchmark price, namely the contract between Hidroelectrica and Luxten-Lighting for 2008 and 2009 and those with Electrocarbon and Elsid for 2007-2010.
- (125) In view of the above, Hidroelectrica's decision to maintain the three contracts with Elsid, Electrocarbon and Luxten-Lighting cannot be deemed to be that of a rational market operator, since the contracts with Luxten-Lighting for 2008 and 2009 and with Electrocarbon and Elsid for 2007-2010 appear to be below market conditions, under conservative assumptions (Annex II). Therefore, Hidroelectrica's contracts conferred an undue economic advantage on Luxten-Lighting for 2008-2009 and on Electrocarbon and Elsid for 2007-2010.
- (126) It follows that Hidroelectrica's contracts with Luxten-Lighting for 2008 and 2009 and with Electrocarbon and Elsid for 2007-2010 appear to have favoured the buyers by affording them an undue economic advantage above normal market conditions and, therefore, the possibility cannot be excluded of the contracts having involved State aid within the meaning of Article 107(1) TFEU.
- (127) Therefore, in the light of the findings of the Commission's econometric analysis described in recital 120, it is necessary to analyse further whether one of the other cumulative conditions for the existence of State aid is fulfilled as regards Luxten-Lighting, Electrocarbon and Elsid.

7.3. State resources and imputability to the State

- (128) Considering that Hidroelectrica is 80 %-owned by the State and that a potential shortfall of sales revenues reduces the resources available to Romania in its capacity as shareholder, the Commission can conclude that revenues or shortfalls thereof from the sale of electricity under the three contracts with Luxten-Lighting for 2008-2009 and Electrocarbon and Elsid for 2007-2010 involve State resources within the meaning of Article 107(1) TFEU.
- (129) However, the same conclusion is not necessarily warranted as regards the imputability to the Romanian State of commercial decisions of Hidroelectrica in relation to prices and sales revenues accrued through the three contracts with Luxten-Lighting, Electrocarbon and Elsid after 1 January 2007. Indeed, the mere fact that the prices in application of the contracts under scrutiny were

charged by Hidroelectrica, a public undertaking majority controlled by the Romanian State, is not sufficient reason to conclude that these decisions were imputable to the Romanian State.

- (130) In fact, all three contracts were in force on 1 January 2007 (recital 19, Annex I). The Commission is not competent to establish whether the conclusion of the three contracts in question in 2002 and 2004 and of any amendments in the period before Romania's accession to the EU were imputable to the Romanian State, or to assess the market circumstances in which the contracts were concluded or amended before the relevant date (recital 101). The decisions of Hidroelectrica that the Commission is competent to assess are therefore as follows:
- an express or tacit decision to maintain in force after 1 January 2007 the sales contracts concluded before Romania's accession to the EU and,
 - any decisions to substantially modify the contract conditions after Romania's accession to the EU, in particular decisions to amend contract prices.
- (131) In that respect, even if the Romanian State had been in a position to control Hidroelectrica's policy and to exercise a dominant influence over its decisions, it cannot automatically be presumed that, in the matter of maintaining the contracts with Luxten-Lighting for the years 2008-2009 and with Electrocarbon and Elsid for the years 2007-2010, and amending the contract prices, it actually exercised that control.
- (132) Pursuant to the relevant case-law⁵⁸ it is necessary to examine both whether the Romanian authorities can be considered as having been involved, in one way or another, in maintaining the contracts in force and in modifying the contract prices, and the unlikelihood of their not having been involved in these decisions. To that effect, the imputability to the Romanian State of the decisions regarding the contracts under investigation may be inferred from a set of indicators arising from the circumstances, and from the context, in which Hidroelectrica supplied electricity to Luxten-Lighting for the years 2008-2009 and to Electrocarbon and Elsid after 2007.
- (133) In particular, and on the basis of the relevant case-law, maintaining the three ongoing contracts and introducing modifications to the contract prices after 2007 may be imputable to Romania (i) if Hidroelectrica could not have decided on these matters without taking account of the requirements of the public authorities, or (ii) if Hidroelectrica had to take account of directives issued by a governmental or an interministerial body. Likewise, regard must be also had to (iii) whether Hidroelectrica is integrated into the structures of the public administration, (iv) the nature of its activities and the exercise of the latter on the market in normal conditions of competition with private operators, (v) the legal status of Hidroelectrica (in the sense of its being subject to public law or ordinary company law), (vi) the intensity of the supervision exercised by the public authorities over its management, or (vii) any other indicator of either involvement by the public authorities in maintaining the contracts and modifying the contract prices, or the unlikelihood of

⁵⁸ Judgment in *France v Commission (Stardust Marine)*, C-482/99, EU:C:2002:294, paragraphs 51 to 58.

their not being involved, having regard also to (viii) the compass of the decisions taken by Hidroelectrica, their content or the conditions which they contain⁵⁹.

- (134) Hidroelectrica is a company governed by ordinary company law and not integrated into the structures of the public administration. In fact, members of Hidroelectrica's board of directors can cumulate functions with government posts (recital 12). This could suggest that members of the board of directors were chosen mainly on the grounds of their closeness to the Government rather than on the basis of their business experience or competence. While there are indications that Hidroelectrica is obliged to take into account directives issued by a governmental or interministerial body, there are no indications that any such directives were issued for the purposes of maintaining in force the three contracts at issue and increasing the contract prices. In particular, there are no indications that Hidroelectrica's general meeting of shareholders or board of directors played any role in decisions related to (maintaining) commercial electricity supply contracts and/or to amending prices applied in application of those contracts (recital 12). As noted by several interested parties, according to Hidroelectrica's articles of incorporation and Romanian company law, the chief executive officer manages the company, represents it in its day-to-day business and independently takes decisions on matters other than those reserved for the general meeting of shareholders and the board of directors. The Romanian authorities stress that members of the board of directors must take decisions in the interest of the company.
- (135) Ministerial Order 445/2009, to which the Commission referred in the opening decisions (recital 44), had no effect on the terms and conditions of the three contracts at issue. Pursuant to Article 1(2) of this Order, ongoing bilateral contracts were generally exempted from the rule on the basis of which the representatives of the Ministry of Economy, Trade and Business Environment and members of the boards of directors of the State-owned electricity companies were obliged to ensure that, as of 31 March 2010, the volume of electricity intended for the wholesale market should be traded exclusively on OPCOM. As noted in recital 101, the competence to examine the contracts at issue from the perspective of EU State aid rules started as from Romania's accession to the EU, that is to say three years before the time-limit set in Ministerial Order No 445/2009 and more than two years before the Order's adoption. It follows that no such rule existed when the contracts at issue became susceptible of review under EU rules. Furthermore, the retail contracts between Hidroelectrica and Elsid and, respectively, with Electrocabon – in force before 31 March 2010 – would not have been involved, even if the measure had applied also to contracts that existed when the order came into force, since only (future) wholesale sales were of relevance.
- (136) Moreover, although Ministerial Order 445/2009 suggests a degree of influence on the part of the State on the commercial policy of State-owned electricity producers, its aim is mainly of a regulatory nature, namely to increase transparency of energy transactions on the wholesale market and to ensure greater volumes and liquidity on the trading platforms administered by OPCOM. This Ministerial Order applies to all State-owned producers, not only to Hidroelectrica. It cannot therefore be deduced from the terms and aims of Ministerial Order 445/2009 that the Romanian State exercised control over every transaction, contract or contract amendment regarding the supply of electricity by State-owned electricity producers, which account for the large majority of producers on the Romanian market, or, in particular, by Hidroelectrica. In other words, the Order does not make it plausible that the Romanian State was involved in the ordinary day-to-day

⁵⁹ Judgment in *France v Commission*, C482/99, paragraphs 51 to 58.

commercial activity, sales contracts, amendments thereof, price negotiations, etc. in relation to the three contracts under examination.

- (137) Except for the supply of electricity on the regulated market (recitals 25-26) Hidroelectrica exercises its electricity supplying activities in open markets with non-captive buyers, in competition with other private or publicly owned suppliers. In particular, a significant volume of electricity well above the total amount of Hidroelectrica's supplies under all the contracts under investigation was traded through bilateral bespoke long-term contracts on the Romanian market, where many other suppliers compete (recitals 30 and 38). Hidroelectrica's contracts under scrutiny and, in particular, the three bespoke long-term contracts with Luxten-Lighting, Electrocarbon and Elsid, maintained after 1 January 2007, are, therefore, not abnormal or extraordinary, which would suggest a particular interest of the State in maintaining them.
- (138) Furthermore, the contracts with Electrocarbon and Elsid were maintained and renegotiated by Hidroelectrica's receiver after insolvency proceedings were begun in 2012, which provides an indication that these contracts were still of interest to Hidroelectrica's temporary new management, well after Romania's accession to the European Union in 2007 and well after the contracts were concluded and were amended, in particular with regard to prices. Likewise, Hidroelectrica requested increased prices above contract levels and gave notice to Electrocarbon and Elsid of the interruption of supplies in order to prompt them to accept further price increases in 2010 (recital 22), thus behaving like a revenue-maximising seller and not like a grantor of aid.
- (139) This is not to say that the Romanian State is not in the position of being involved with the commercial contracts of State-owned electricity suppliers in the interests of specific and major industrial buyers. For instance, before Romania's accession to the EU, an Internal Note dated 2 February 2006, signed by the State Secretary of the Economy and Trade Ministry and approved by the Prime Minister, proposed the implementation of special preferential treatment for the ten largest energy-intensive users in Romania (including aluminium or steel producers supplied by Hidroelectrica or Nuclearelectrica). As regards the contract with Arcelor-Mittal, in particular, Hidroelectrica's board of directors' decision No 13/2009 dated 16 December 2009 empowered Hidroelectrica's chief executive officer '*to negotiate the ongoing sale-of-electricity contract in the best conditions for Hidroelectrica*'. The board of directors did this by approving the main terms of the contracts of 2009 and 2010 with ArcelorMittal. Addendum No 17 in 2009 to the contract with Alro (inserting the LME formula in the calculation of the contract price) was also approved by Hidroelectrica's board of directors.
- (140) Likewise, a memorandum of 3 February 2011 from the two General Managers of Nuclearelectrica and CE Hunedoara, which, like Hidroelectrica, are State-owned, requested the approval of the Ministry of Economy and Trade for the conclusion of a wholesale sale of electricity contract between Nuclearelectrica as a seller and CE Hunedoara as a purchaser. This transaction needed a derogation from the provisions of Order 445/2009 requiring that any wholesale electricity transaction involving a State-owned enterprise should take place only on OPCOM. This derogation was requested in view of the fact that the electricity acquired would serve '*the electricity needs of a number of industrial consumers of national importance in 2011*'. This memorandum was fully endorsed by the Minister of Economy and Trade.

- (141) It follows that there is some indirect evidence that does not allow it to be completely ruled out that the Romanian State would have been involved in concluding, or making major amendments to, Hidroelectrica's contracts with big energy-intensive industrial buyers.
- (142) Moreover, the Commission has concluded that other purchase contracts into which Hidroelectrica entered with two other State-owned companies, Electrocentrale Deva and Termoelectrica, in 2008 and 2009, were imputable to the Romanian State. That conclusion was based mainly on direct evidence of the other two State-owned companies having sought approval of the contracts from the Minister responsible also for the State-owned Hidroelectrica as a means of (cross) financing their current operations and that of the State-owned mines which supplied them with coal, for social and other non-commercial reasons⁶⁰.
- (143) However, the considerations that may render plausible (or not exclude the possibility of) the Romanian State's being involved in a number of Hidroelectrica's contracts with big industrial buyers of national importance for the Romanian economy and with other State-owned sellers cannot be extrapolated from in such a way that all Hidroelectrica's commercial contracts and, in particular, those with Elsid, Electrocarbon and electricity traders are considered to be imputable to the Romanian State. Unlike Electrocentrale Deva and Termoelectrica, Elsid, Electrocarbon and the electricity traders were privately-owned and none of them can be held to be a big industrial buyer of national importance for the Romanian economy. In particular, the evidence available in the investigation does not point at any specific interest or involvement on the part of the Romanian State in prompting Hidroelectrica to conclude or, after Romania's accession, to maintain the contracts with Elsid, Electrocarbon and the electricity traders.
- (144) Moreover, as regards Elsid, Electrocarbon and Luxten-Lighting, which were specifically singled out in the previous section 7.1, several facts make it implausible that the decision to maintain the contracts and amend the prices of the contracts with Luxten-Lighting for 2008-2009 and with Electrocarbon and Elsid for 2007-2010 could be attributed to the Romanian authorities.
- (145) In particular, the actual prices under the three contracts were constantly increased each year. Between 2007 and 2010, the prices charged to Elsid, Electrocarbon and Luxten-Lighting increased by 44.5 %, 44.5 % and 41.4 %, respectively. Price increases reduce the absolute value of the aid granted. These contract changes which reduce the putative amount of the alleged State aid, were always triggered by, and for the benefit of, Hidroelectrica. A strategy aimed at reducing the amount of aid granted to the beneficiaries seems to contradict the purpose of granting aid or, at least, to be too sophisticated to be plausible. Moreover, contrary to Alro and ArcelorMittal, Elsid, Electrocarbon and Luxten-Lighting cannot be deemed to be industrial consumers of national importance: by way of illustration, their annual consumption purchases from Hidroelectrica amounted to less than one tenth of those of Alro (Annex I). It is therefore unlikely that decisions reducing the amount of aid by considerably increasing the contract prices can be imputed not to a commercial decision of Hidroelectrica but to a decision of the Romanian State aimed at providing aid to the alleged beneficiaries.

⁶⁰ Commission Decision of 20.4.2015 on Tariffs charged by Hidroelectrica to S.C. Termoelectrica S.A. and S.C. Electrocentrale Deva S.A. (SA.33 475 2012/C), recitals 96 – 100, not yet published.

- (146) The fact that it is unlikely that the State would be involved in subtly reducing the amount of aid is also apparent with respect to the contracts with Electrocarbon and Elsid. In particular, it is implausible that Hidroelectrica was acting under instructions from the State when requesting price increases above the contract prices in 2010, threatening to discontinue the electricity supply and arguing the matter in court (recital 22), for the requested price increases had the effect of reducing the putative amount of aid, and discontinued supplies could have jeopardised the productive activities of the buyers. This behaviour of not adhering to a contract price that purportedly provides aid, threatening to interrupt supplies and defending price increases in court is not behaviour typical of a grantor of aid, but is, rather, that of a revenue-maximising company defending its commercial interests and not concerned with following non-commercial goals, possibly under instructions received from the State.
- (147) As regards Luxten-Lighting, there is no obvious reason of public policy, such as low end-user prices, behind sales to a trader which can only sell retail at higher prices than if Hidroelectrica had sold the same electricity retail on its own. For instance, before being supplied retail by Hidroelectrica as from 2005, Alro purchased electricity from a trader, Energy Holding, that bought electricity wholesale from Hidroelectrica. It was rational behaviour for Alro to be supplied directly by Hidroelectrica, thus saving a trading margin, if its supplier was not adding value to Hidroelectrica's wholesale supply. In the same vein, it is rather implausible that the Romanian State should have prompted Hidroelectrica to maintain the contract with Luxten-Lighting in 2008 and 2009, for, if Luxten-Lighting did not add value to its retail sales to industrial users or other buyers, the latter would have obtained lower prices by contracting directly with Hidroelectrica. Furthermore, Luxten-Lighting unilaterally terminated its contract with Hidroelectrica in November 2011, before the Commission opened proceedings; this behaviour is not consistent with that of a beneficiary of State aid.
- (148) On the basis of all the above considerations, it is not established that the contracts with Luxten-Lighting for 2008-2009 and for Electrocarbon and Elsid for 2007-2010 are imputable to Romania.
- (149) As the essential element of imputability to Romania for the existence of State aid is not present in the three contracts with Luxten-Lighting for 2008-2009 and with Electrocarbon and Elsid for 2007-2010, it is not necessary to analyse whether the other cumulative conditions for the application of this provision, such as the potential effect on competition and trade between Member States, are met.
- (150) In the light of the above, the three contracts under scrutiny, with Luxten-Lighting for 2008-2009 and with Electrocarbon and Elsid for 2007-2010, do not constitute State aid within the meaning of Article 107(1) TFEU.

8. CONCLUSION

(151) The contracts covered by the present Decision do not constitute State aid within the meaning of Article 107(1) TFEU,

HAS ADOPTED THIS DECISION:

Article 1

The contracts concluded between Hidroelectrica and ArcelorMittal, Alpiq RomEnergie, Alpiq RomIndustries, EFT, Electrica, Electromagnetica, Energy Holding, EURO-PEC, Luxten-Lighting, Electrocarbon and Elsid, and the contract with Alro, do not constitute State aid within the meaning of Article 107(1) of the Treaty on the Functioning of the European Union.

Article 2

This Decision is addressed to Romania.

If the decision contains confidential information which should not be published, please inform the Commission within fifteen working days of the date of receipt. If the Commission does not receive a reasoned request by that deadline, you will be deemed to agree to publication of the full text of the decision. Your request specifying the relevant information should be sent by registered letter or fax to:

European Commission,
Directorate-General Competition
State Aid Registry
B-1049 Brussels
Fax: +32 2 296 12 42
Stateaidgreffe@ec.europa.eu

Done at Brussels,

For the Commission

Margrethe VESTAGER
Member of the Commission

ANNEX I - OVERVIEW OF THE CONTRACTS

SA.33451 ELECTRICITY TRADERS	Date of signature and contract period (initial period/after extension of period)	Date of termination	Quantity	Price (RON/MWh)
Alpiq RomEnergie	03.4.2008 Initial period: 5 years Prolongation (2009): by 5 additional years (until 2018)	20.7.2012	- 2008: [...] GWh - 2009: [...] GWh - 2010: [...] GWh	- 2008: [...] - 2009: [...] - 2010: [...]
Alpiq RomIndustries	29.11.2004 Initial period: 10 years Prolongation (2009): by 5 additional years (until end of 2019)	20.7.2012	Initial quantity: 1 GWh - 2007: [...] - 2008: [...] - 2009: [...] - 2010: [...]	- 2007: [...] - 2008: [...] - 2009: [...] - 2010: [...]
Energy Financing Team Romania (EFT)	25.3.2004 Initial period: 7 years Prolongation (2010): by 5 additional years (until end of 2015)	18.7.2012	Initial quantity (2006): [...] GWh - 2007: [...] GWh - 2008: [...] GWh - 2009: [...] GWh - 2010: [...] GWh	- 2007: [...] - 2008: [...] - 2009: [...] - 2010: [...]

Electrica	<i>Contract 111</i> : 17.8.2010 <i>Contract 112</i> : 14.9.2010	<i>Contract 111</i> 31.7.2011 <i>Contract 112</i> 31.12. 2010	<i>Contract 111</i> [...] GWh from Sept. 2010 to 31.7.2011 <i>Contract 112</i> [...] GWh from Oct. to Dec. 2010	<i>Contract 111</i> - 2010: [...] <i>Contract 112</i> - 2010: [...]
Electromagnetica	21.4.2004 Initial period: 10 years	30.4.2014	Initial quantity: [...] GWh - 2007: [...] GWh - 2008: [...] GWh - 2009: [...] GWh - 2010: [...] GWh	- 2007: [...] - 2008: [...] - 2009: [...] - 2010: [...]
Energy Holding	14.1.2004 Initial period: 10 years	24.7.2012	Initial quantity: 3 692 GWh - 2007: [...] GWh - 1 st half 2008: [...] GWh - 2 nd half 2008: [...] GWh - 2009: [...] GWh - 2010: [...] GWh	- 2007: [...] - 2008: [...] - 2009: [...] - 2010: [...]
EURO-PEC	03.3.2004 Initial period: 10 years	26.6.2012	Initial quantity: [...] GWh - 2007: [...] GWh - 2008: [...] GWh - 2009: [...] GWh - 2010: [...] GWh	- 2007: [...] - 2008: [...] - 2009: [...] - 2010: [...]

Luxten-Lighting	02.3.2004 Initial period: 10 years	December 2011	Initial quantity: [...] GWh - 2007: [...] GWh - 2008: [...] GWh - 2009: [...] GWh - 2010: [...] GWh	- 2007: [...] - 2008: [...] - 2009: [...] - 2010: [...]
SA.33581 ELECTRODES PRODUCERS	Date of signature and contract period (initial period/after extension of period)	Date of termination	Quantity	Price (RON/MWh)
Electrocarbon	28.3.2003 Initial period: 5 years Prolongation (2004): by 5 additional years (until 31.3.2013)	31.3.2013	Initial quantity: 800 GWh - 2007: [...] GWh - 2008: [...] GWh - 2009: [...] GWh - 2010: [...] GWh	- 2007: [...] - 2008: [...] - 2009: [...] - 2010: [...]
ELSID	18.12.2002 Initial period: 5 years Prolongation (2004): by 5 additional years (until 31.3.2013)	31.3.2013	Initial quantity: 280 GWh - 2007: [...] GWh - 2008: [...] GWh - 2009: [...] GWh - 2010: [...] GWh	- 2007: [...] - 2008: [...] - 2009: [...] - 2010: [...]
SA.33624 Alro	Date of signature and contract period (initial period/after extension of period (if applicable))	Date of termination	Quantity	Price (RON/MWh)

Alro	08.9.2005 Initial period: 7 years Prolongation (2010): by 5 additional years (until 31.01.2018)	Ongoing until end of 2018	Initial quantity: [...] GWh - 2007: [...] GWh - 2008: [...] GWh - 2009: [...] GWh - 2010: [...] GWh	- 2007: [...] - 2008: [...] - 2009: [...] - 2010: [...]
SA.33623 ARCELORMITTAL GALAȚI	Date of signature and contract period (initial period/after extension of period (if applicable))	Date of termination	Quantity	Price (RON/MWh)
ArcelorMittal	23.12.2009 Period: 1 year 22.12.2010 Period: 1 year	31.12.2010 06.1.2012	[...] GWh [...] GWh	2010: [...] 2011: [...]

ANNEX II –ASSESSMENT OF THE ALLEGED ECONOMIC ADVANTAGE – ECONOMETRIC ANALYSIS

Rationale and description of the econometric analysis

The econometric analysis undertaken by the Commission is designed to create benchmark prices for contracts. These prices result from a regression analysis carried out on the features of the contracts in the dataset. As a first step, the regression analysis allows a benchmark price to be constructed on the basis of the characteristics of the contracts in the dataset ('in-sample predictions'). As a second step, the results of the regression analysis are used to predict a benchmark price for the contracts investigated, taking into account the characteristics of the contracts ('out-of-sample predictions'). In the regression analysis, the variation in prices among the contracts in the dataset is explained with reference to the following characteristics: quantity purchased, supplier identity and year dummies. The 'contract duration' and 'buyer off-take profile' variables are not included since they are not statistically significant.

The econometric analysis rests on the principle that there are a number of drivers of prices, such as quantities. It would be misleading to compare the prices across different contracts without considering these drivers. In particular, whereas the contracts in the dataset have certain characteristics in common with the contracts under investigation (bilateral negotiation, bespoke conditions, quantities above 150 GWh per year, etc.), no contract in the dataset has exactly the same quantities, or was concluded for the same duration and with the same entry into force, as the contracts under investigation – a factor that may justify price differences. For example, two contracts under investigation concern supplies of[...] GWh/year (Alro 2007-2010) and [...] GWh/year (Energy Holding 2007-2008). In the meantime, the contract with the highest quantity in the dataset out of the 114 price/contract data observed between 2007 and 2010 did not exceed 1 400 GWh/year. It is doubtful whether a mere comparison of prices for these contracts could allow any valid conclusion to be drawn as to whether the contracts under investigation were in line with market prices. Alternatively, it could be concluded that these two contracts could not simply be compared with other market contracts. The rationale of this quantitative exercise is therefore that, once a number of external factors are taken into account, the prices across different contracts can be better compared. In the absence of normalisation, only perfectly identical contracts could be compared meaningfully.

It should be noted that this empirical exercise is not aimed at estimating a causal relationship between prices and certain external factors. For example, estimating a causal relationship between certain factors and prices would require the risk of endogeneity to be taken into consideration: that is, the risk that a causal variable (e.g. the quantities) might itself be influenced by the explained variable (e.g. the price), due to omitted variables or simultaneity bias. The purpose of the quantitative exercise is to 'normalise' the prices across different contracts to enable a better comparison to be made between them. This normalisation is necessary in the absence of perfectly identical contracts and supply characteristics.

The regression analysis reflects the main features of the bilateral contracts at issue:

- including the quantity variable in the regression reflects the fact that prices are in general lower when quantities purchased are higher¹;
- including the supplier identity reflects the fact that some suppliers have characteristics which would allow them to establish prices differently from others, taking into account that contract supplies from virtually all electricity suppliers active in Romania are included in the dataset;
- including year dummies reflects the time dimension and the possible change in market conditions from one year to another.

As regards the first step of the empirical analysis, the results of the regression analysis of the dataset contracts are reported in Table 1 below.

As regards the second step of the empirical analysis, the Commission has identified a benchmark for every year and has then tested the position of the contracts relative to this benchmark in order to conclude whether the prices charged by Hidroelectrica were lower or higher than the modelled benchmark price. The following steps describe in detail the methodology used to determine the benchmark:

Firstly, for each contract of the dataset, it was calculated how far the actual price departed from its corresponding benchmark price, calculated on the basis of the regression and of the characteristics of the contract;

Secondly, the most-downward-diverging contract ('MDD') was identified; this was the dataset contract whose observed price departed most from its own corresponding benchmark price (in absolute terms). There were reasons, very conservative as they were, for choosing the MDD contract, involving a range of variation below the central estimated value of the benchmark price. Firstly, the econometric model does not fully explain the observed price in the dataset, and the single estimate of the benchmark price was provided with a confidence interval and a margin of error above or below the estimate. Secondly, deviations from a single possible price exist on the real market; the MDD contract, which stems from a contract based on market conditions (see recitals 36 to 38) supplies quantified information about the possible extent of such deviations and provides a market-based range around the calculated benchmark price.

Thirdly, the price difference in relation to the MDD contract is used to separate contracts below the benchmark price from contracts above this:

¹ A preliminary processing of the data eliminated four (non-suspect) contracts corresponding to the intra-group sales of ALRO from 2007 to 2010, as they are likely to reflect market conditions different from those prevailing in bilateral contract negotiations between a supplier and an independent buyer, which is the crucial factor in this case.

- If a contract has an observed price below its corresponding benchmark price and if the price difference for this contract is larger than the MDD price difference, then this contract is considered *prima facie* not to be market-compliant;
- Otherwise the contract should be deemed to be market-compliant;

The table below presents detailed results from the regression analysis of the sample of contracts from the dataset. The regression explains 74 % of the variations in the data, which is a relatively good fit. The coefficient estimates presented in the table below are used at a second stage to predict the 'benchmark' price for the sample of contracts under investigation ('out-of-sample predictions').

Results of the econometric Table 1: Regression analysis ²	Dependent variable: Average price			analysis
	Annual quantity (GWh)	Coefficient	Std error	
	Year 2008	22.58369***	4.781887	
	Year 2009	30.73545***	5.471158	
	Year 2010	21.32171***	5.695673	
	ALPIQ ROMENERGIE	-2.34966	9.310078	
	ALPIQ ROMINDUSTRIES	-5.47044	9.975876	
	ARCELORMITTAL GALATI	-1.78779	14.62595	
	AXPO ENERGY RO	0.896041	10.40766	
	CE HUNEDOARA	38.02612***	11.41575	
	CE OLTENIA	27.86802***	9.458818	

² Standard errors are presented in parentheses: *** means that the coefficient is statistically significant at a 1 % level, ** means that it is statistically significant at a 5 % level and * means that it is statistically significant at a 10 % level.

CEZ VANZARE	9.515878	11.40325
EFT RO	2.966594	18.83573
ELECTRICA	9.787691	11.04511
ELECTROMAGNETICA	-9.19285	9.553932
ENEL ENERGIE MUNTENIA	16.97181	12.529
ENERGY HOLDING	-34.5329***	9.620757
ENERGY NETWORK	36.58137***	12.47443
EON ENERGIE	3.589147	12.43953
EURO-PEC	0.511251	9.50637
HIDROELECTRICA	-30.3327**	12.62379
NUCLEARELECTRICA	-9.804	18.78678
OMV PETROM	6.482914	18.79837
RAAN	33.0402**	14.6577
RENOVATIO TRADING	29.5599	18.95553
TINMAR IND	0	(omitted)
Constant	160.5678***	8.50624
Number of observations: 109		
R-squared = 0.7426		
Adjusted R-squared = 0.6691		

Note: Prices are in RON/MWh

Source: Commission's regression analysis based on the data submitted by the Romanian authorities

The following tables show the results of the empirical analysis, which uses the regression analysis detailed in Table 1 in which, for each year, the most-downward-diverging contract ('MDD') is selected on the basis of the difference in price levels (in RON/MWh) between each contract's estimated price and its corresponding observed price. Tables 2-4 below show the differences between Hidroelectrica's contract prices for each of the years (i.e.: 2007-2010) vis-à-vis the 'simulated' benchmark prices for all the contracts under investigation.

For 2007, the MDD contract, that is to say the contract in the non-suspect dataset with the highest difference between the observed price and its corresponding estimated price, has a price difference estimated at [...] RON/MWh. Two Hidroelectrica contracts have an observed price below

their estimated price with a price difference larger than [...] RON/MWh, namely the contracts with *Electrocarbon* and *Elsid*, with an observed price difference of approximately [...] RON/MWh (see Table 2).

Table 2: Analysis of contracts from 2007

Name of customer	Name of supplier	Observed price	Benchmark price	Price difference (in absolute terms)	In line with benchmark indices
MDD contract in the dataset					
AZOMURES SA	HIDROELECTRICA	[...]	124	[...]	
Contracts under investigation					
Alro	HIDROELECTRICA	[...]	72	[...]	Yes
Energy Holding	HIDROELECTRICA	[...]	50	[...]	Yes
EFT	HIDROELECTRICA	[...]	127	[...]	Yes
Electromagnetica	HIDROELECTRICA	[...]	111	[...]	Yes
EURO-PEC	HIDROELECTRICA	[...]	111	[...]	Yes
Luxten-Lighting	HIDROELECTRICA	[...]	125	[...]	Yes
ELSID	HIDROELECTRICA	[...]	126	[...]	No
Electrocarbon	HIDROELECTRICA	[...]	126	[...]	No

Note: Prices are rounded up to the nearest RON/MWh.

Source: calculations based on the regression analysis and on the data submitted by the Romanian authorities

For 2008, the price difference in relation to the MDD contract is estimated at [...] RON/MWh, and three Hidroelectrica contracts have a larger price difference, namely those with Luxten-Lighting, Electrocarbon and Elsid, with an observed price difference of approximately [...] RON/MWh for Luxten-Lighting and [...] RON/MWh for Electrobarbon and Elsid (see Table 3).

Table 3: Analysis of contracts from 2008

Name of customer	Name of supplier	Observed price	Benchmark price	Price difference (in absolute terms)	In line with benchmark indices
MDD contract in the dataset					
PETROM SA	Energy Holding	[...]	147	[...]	
Contracts under investigation					
Alro	HIDROELECTRICA	[...]	94	[...]	Yes
Electromagnetica	HIDROELECTRICA	[...]	133	[...]	Yes
EFT	HIDROELECTRICA	[...]	149	[...]	Yes
Energy Holding	HIDROELECTRICA	[...]	73	[...]	Yes
EURO-PEC	HIDROELECTRICA	[...]	133	[...]	Yes
Luxten-Lighting	HIDROELECTRICA	[...]	147	[...]	No
ELSID	HIDROELECTRICA	[...]	148	[...]	No
Electrocarbon	HIDROELECTRICA	[...]	149	[...]	No

Note: Prices are rounded up to the nearest RON/MWh.

Source: calculations based on the regression analysis and on the data submitted by the Romanian authorities

For 2009, the MDD price difference is estimated at[...] RON/MWh and, again, three Hidroelectrica contracts have a larger price difference, namely those with Luxten-Lighting, Electrocarbon, and Elsid, with an observed price difference of approximately[...] RON/MWh for Luxten-Lighting and of[...] RON/MWh for Electrobarbon and Elsid (see Table 4).

Table 4: Analysis of contracts from 2009

Name of customer	Name of supplier	Observed price	Benchmark price	Price difference (in absolute terms)	In line with benchmark indices
MDD contract in the dataset					
Ductil Steel SA	Alpiq RomEnergie	[...]	187	[...]	
Contracts under investigation					
Alro	HIDROELECTRICA	[...]	102	[...]	Yes
EURO-PEC	HIDROELECTRICA	[...]	142	[...]	Yes
Alpiq RomEnergie	HIDROELECTRICA	[...]	126	[...]	Yes
Electromagnetica	HIDROELECTRICA	[...]	142	[...]	Yes
Energy Holding	HIDROELECTRICA	[...]	116	[...]	Yes
EFT	HIDROELECTRICA	[...]	157	[...]	Yes
Luxten-Lighting	HIDROELECTRICA	[...]	156	[...]	No
ELSID	HIDROELECTRICA	[...]	157	[...]	No
Electrocarbon	HIDROELECTRICA	[...]	157	[...]	No

Note: Prices are rounded up to the nearest RON/MWh.

Source: calculations based on the regression analysis and on the data submitted by the Romanian authorities

For 2010, the price difference in relation to the MDD contract is estimated at[...] RON/MWh, and two Hidroelectrica contracts have a larger price difference, namely those with *Electrocarbon* and *Elsid*, with an observed price difference of approximately[...] RON/MWh (see Table 5).

Table 5: Analysis of contracts from 2010

Name of customer	Name of supplier	Observed price	Benchmark price	Price difference (in absolute terms)	In line with benchmark indices
MDD contract in the dataset					
SILCOTUB SA ZALAU	Energy Network	[...]	214	[...]	
Contracts under investigation					
ArcelorMittal Galati	HIDROELECTRICA	[...]	118	[...]	Yes
Electrica	HIDROELECTRICA	[...]	132	[...]	Yes
Energy Holding	HIDROELECTRICA	[...]	107	[...]	Yes
Alpiq RomEnergie	HIDROELECTRICA	[...]	116	[...]	Yes
Electromagnetica	HIDROELECTRICA	[...]	132	[...]	Yes
EURO-PEC	HIDROELECTRICA	[...]	144	[...]	Yes
Alro	HIDROELECTRICA	[...]	93	[...]	Yes
Luxten-Lighting	HIDROELECTRICA	[...]	146	[...]	Yes
EFT	HIDROELECTRICA	[...]	148	[...]	Yes
ELSID	HIDROELECTRICA	[...]	147	[...]	No
Electrocarbon	HIDROELECTRICA	[...]	148	[...]	No

Note: Prices are rounded up to the nearest RON/MWh.

Source: calculations based on the regression analysis and on the data submitted by the Romanian authorities

Sensitivity analysis

In the previous empirical analysis, the MDD contract was defined as the contract in the dataset, for a given year, that presented the highest price difference in absolute terms (RON/MWh) between the observed price and its corresponding estimated price.

In order to check the robustness of the results, a sensitivity analysis was performed. The same analysis was now performed, but defining the MDD contract as the contract with the largest difference between the estimated price and its corresponding observed price, expressed as a percentage of the estimated price. In the sensitivity analysis, the MDD contract was now defined as the contract with the largest difference between the estimated price and its corresponding observed price, expressed as a percentage of the estimated price. While this analysis should not affect significantly the selection of the MDD contract, it could affect the contracts that are selected. The results are shown in Tables 5-8 below. They confirm the validity of the results from the main analysis.

Table 6: Sensitivity analysis of contracts from 2007

Name of customer	Name of supplier	Observed price	Benchmark price	Price difference (as a percentage)	In line with benchmark indices
MDD contract in the dataset					
AZOMURES SA	HIDROELECTRICA	[...]	124	[...] %	
Contracts under investigation					
Alro	HIDROELECTRICA	[...]	72	[...]	Yes
Energy Holding	HIDROELECTRICA	[...]	50	[...]	Yes
EFT	HIDROELECTRICA	[...]	127	[...]	Yes
Electromagnetica	HIDROELECTRICA	[...]	111	[...]	Yes
EURO-PEC	HIDROELECTRICA	[...]	111	[...]	Yes
Luxten-Lighting	HIDROELECTRICA	[...]	125	[...]	Yes
ELSID	HIDROELECTRICA	[...]	126	[...]	No
Electrocarbon	HIDROELECTRICA	[...]	126	[...]	No

Note: Prices are rounded up to the nearest RON/MWh.

Source: calculations based on the regression analysis and on the data submitted by the Romanian authorities

Table 7: Sensitivity analysis of contracts from 2008

Name of customer	Name of supplier	Observed price	Benchmark price	Price difference (as a percentage)	In line with benchmark indices
MDD contract in the dataset					
PETROM SA	Energy Holding	[...]	147	[...] %	
Contracts under investigation					
Alro	HIDROELECTRICA	[...]	94	[...]	No
Electromagnetica	HIDROELECTRICA	[...]	133	[...]	Yes
EFT	HIDROELECTRICA	[...]	149	[...]	Yes
Energy Holding	HIDROELECTRICA	[...]	73	[...]	Yes
EURO-PEC	HIDROELECTRICA	[...]	133	[...]	Yes
Luxten-Lighting	HIDROELECTRICA	[...]	147	[...]	No
ELSID	HIDROELECTRICA	[...]	148	[...]	No
Electrocarbon	HIDROELECTRICA	[...]	149	[...]	No

Note: Prices are rounded up to the nearest RON/MWh.

Source: calculations based on the regression analysis and on the data submitted by the Romanian authorities

Table 8: Sensitivity analysis of contracts from 2009

Name of customer	Name of supplier	Observed price	Benchmark price	Price difference (as a percentage)	In line with benchmark indices
MDD contract in the dataset					
Ductil Steel SA	Alpiq RomEnergie	[...]	187	[...] %	
Contracts under investigation					
Alro	HIDROELECTRICA	[...]	102	[...]	Yes
EURO-PEC	HIDROELECTRICA	[...]	142	[...]	Yes
Alpiq RomEnergie	HIDROELECTRICA	[...]	126	[...]	Yes
Electromagnetica	HIDROELECTRICA	[...]	142	[...]	Yes
Energy Holding	HIDROELECTRICA	[...]	116	[...]	No
EFT	HIDROELECTRICA	[...]	157	[...]	Yes
Luxten-Lighting	HIDROELECTRICA	[...]	156	[...]	No
ELSID	HIDROELECTRICA	[...]	157	[...]	No
Electrocarbon	HIDROELECTRICA	[...]	157	[...]	No

Note: Prices are rounded up to the nearest RON/MWh.

Source: calculations based on the regression analysis and on the data submitted by the Romanian authorities

Table 9: Sensitivity analysis of contracts from 2010

Name of customer	Name of supplier	Observed price	Benchmark price	Price difference (as a percentage)	In line with benchmark indices
MDD contract in the dataset					
ARCELORMITTAL GALAȚI	Electrica	[...]	182	[...] %	
Contracts under investigation					
ArcelorMittal Galați	HIDROELECTRICA	[...]	118	[...]	Yes
Electrica	HIDROELECTRICA	[...]	132	[...]	Yes
Energy Holding	HIDROELECTRICA	[...]	107	[...]	Yes
Alpiq RomEnergie	HIDROELECTRICA	[...]	116	[...]	Yes
Electromagnetica	HIDROELECTRICA	[...]	132	[...]	Yes
EURO-PEC	HIDROELECTRICA	[...]	144	[...]	Yes
Alro	HIDROELECTRICA	[...]	93	[...]	Yes
Luxten-Lighting	HIDROELECTRICA	[...]	146	[...]	Yes
EFT	HIDROELECTRICA	[...]	148	[...]	Yes
ELSID	HIDROELECTRICA	[...]	147	[...]	No
Electrocarbon	HIDROELECTRICA	[...]	148	[...]	No

Note: Prices are rounded up to the nearest RON/MWh.

Source: calculations based on the regression analysis and on the data submitted by the Romanian authorities

The prices of electricity in contracts between Hidroelectrica and Luxten-Lighting, Electrocarbon and Elsid are still found not to be in line with the benchmark price. The percentage price differences are considerably higher for the contracts with Luxten-Lighting for the years 2008 and 2009 and with Electrocarbon and Elsid for the period 2007-2010. In addition, two other contracts appear, namely with Alro in 2008 and Energy Holding in 2009. The percentage price difference in both cases is very close to the percentage price difference of the MDD contract. The observed price for the 2008 contract with Alro is [...] % lower than its estimated price, whereas the percentage price difference in relation to the

MDD contract was[...] % in 2008. The observed price for the 2009 contract with Energy Holding is[...] % lower than its estimated price, whereas the percentage price difference in relation to the MDD contract was[...] % in 2009. Overall, these two contracts should be considered to be in line with the benchmark price.

In addition to the main sensitivity analysis performed by defining the MDD as a percentage difference in relation to the benchmark price, which confirms the validity of the results, further sensitivity tests of the results obtained from the preferred definition of MDD in absolute values were carried out, as follows:

- An arbitrary 10 % mark-up was deducted from the absolute value of the MDD: the modified MDD does not affect the conclusion for the contracts under investigation from 2008, 2009 and 2010. For 2007, a difference of 2.5 RON/MWh below the applied price of[...] RON/MWh would appear for EFT (i.e. the benchmark-compliant price would have been[...] RON/MWh); this difference, not observed for EFT prices in 2008, 2009 and 2010, is deemed to be negligible;
- Likewise, use of the second downward deviation (2nd DD) as reference would capture only two more contracts (Luxten-Lighting and EFT) for 2007, but this does not mean that any other of the contracts under investigation in the period analysed would appear as being below the benchmark prices or that the contract with EFT would appear as being below the benchmark price for 2008, 2009 and 2010;
- Regression data from 2011, not initially tested, was introduced: even if the values shown in Tables 2 to 5 change slightly, the qualitative results remain unchanged;
- Investigated contract prices deemed to be in line with the benchmark price were reintroduced in the regression as dataset (in-sample): in this case too, the conclusion for the contracts under investigation does not change.

It follows that these additional sensitivity tests relating to the main approach confirm the robustness of the results of the econometric analysis.

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