EUROPEAN COMMISSION

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PUBLIC VERSION

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Subject: **State Aid SA. SA.38101 (2015/NN) (ex 2013/CP) – Greece**
Alleged State Aid to Aluminium S.A. in the form of electricity tariffs below cost following Arbitration Decision

Sir,

1. PROCEDURE

(1) On 23 December 2013, the Commission received a complaint by a Greek electricity producer and retailer (the "complainant") concerning an alleged illegal State aid granted to Aluminium S.A. ("Aluminium") on the basis of Decision 1/2013 of the Arbitration Tribunal appointed by the complainant and Aluminium ("Arbitration Decision"). This Arbitration Decision set the tariff to be applied by the complainant to Aluminium for the period 1 July 2010 until 31 December 2013.

(2) On 31 January 2014, the Commission submitted the complaint to the Greek authorities, asking for their comments on the alleged State aid measure. By letter dated 14 April 2014 and received by the Commission on 28 April 2014, the Greek authorities submitted comments on the complaint arguing that no State aid is present in this case. On 6 May 2014, the Commission sent the non-confidential version of the comments by Greece to the complainant. In this letter the Commission services indicated that, as a preliminary view and in light of the information available and the comments provided by Greece, no State aid seemed to have been granted on the basis of the Arbitration Decision. The Commission, furthermore, inquired whether the complainant wished to pursue the matter further and, if this was the case, asked for any new facts or arguments that could dispute the preliminary assessment of the case set out in its letter and that could demonstrate the existence of an infringement of State aid rules. By letters dated

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20 May 2014 and 6 June 2014 the complainant upheld its complaint and essentially reiterated its arguments put forth already in its original complaint and other correspondence.

(3) By letter dated 12 June 2014 (the "2014 letter") the Commission services informed the complainant that they did not consider that its letters dated 20 May 2014 and 6 June 2014 contained any new facts or any new arguments to dispute the preliminary assessment of the case set out in their letter dated 6 May 2014. The Commission services, therefore, reiterated their assessment set out in the letter dated 6 May 2014 to the end that, based on the information available, no State aid seemed to be involved in the case.

(4) On 22 August 2014 the complainant lodged an application for annulment at the General Court against the 2014 letter, alleging that the 2014 letter constituted a Commission decision, which wrongly qualified the tariff established by the Arbitration Decision as not involving State aid (Case T-639/14). By Order dated 24 October 2014 following a joint request of the parties, the General Court stayed the proceedings until 7 April 2015.

(5) The Commission assessed the case with a view to adopting a formal decision and, in that context, a meeting with the complainant took place on 16 December 2014. On 25 March 2015 the Commission adopted a formal decision finding that the alleged measure does not constitute State aid (the "2015 decision"). On 29 June 2015, the complainant lodged before the General Court an application for the annulment of that decision (Case T-352/15).

(6) On 9 February 2016, the General Court issued an order holding that there was no longer any need to rule on the action for annulment against the 2014 letter because the 2015 decision had annulled it and formally replaced it (Order in Case T-639/14 *DEI v Commission* EU:T:2016:77). The complainant submitted an appeal against the order of the General Court.

(7) By judgment of 31 May 2017 the Court of Justice stated that the 2015 decision did not replace the 2014 letter, because the 2015 decision was merely confirmatory of the 2014 letter (Judgment in Case C-228/16P *DEI v Commission* EU:C:2017:409). According to the Court of Justice, it would have been otherwise only if the 2015 decision had withdrawn the 2014 letter in order to remedy an illegality affecting that letter, while stating the nature of the illegality vitiating that letter.

(8) With the present decision the Commission explicitly states the reasons vitiating the 2014 letter and withdraws it, as well as the confirmatory 2015 decision, replacing them with the present formal decision.

2. THE COMPLAINT

(9) The complainant is a Greek undertaking having its seat in Athens.[1] It is mainly active in the Greek electricity sector and is listed in the Stock Exchanges of Athens and London.

[1] The complainant initially requested that its identity should not be revealed to Aluminium or any third party.

(10) 51% of the complainant's shares are owned by the Greek State. The Greek Ministry of Environment, Energy and Climate Change supervises the company. The Greek State can appoint the majority of the members of the board and is directly represented by the Greek Minister of Environment, Energy and Climate Change in the General Assembly of the company.

(11) The complainant alleges that the Arbitration Decision, which settled a long lasting dispute concerning the tariff for electricity supplied to Aluminium by it, obliges it to supply electricity to Aluminium below market prices (and even below its costs), thereby granting an advantage.[2] The complainant also argues that the Arbitration Decision is a binding measure of the Greek State which is binding on the parties according to Greek law and that it is, as such, imputable to the State. According to the complainant, the application of the tariff set in the Arbitration Decision by the complainant involves State resources since it concerns the supply of electricity below a market price by a State-owned company. According to the complainant, the tariff set the in the Arbitration Decision applies only to Aluminium, thereby granting a selective advantage, and since Aluminium is in competition with other companies in the Union the tariff threatens to distort competition and affects trade between Member States. As such, the complainant argues that it is forced, on the basis of the Arbitration Decision, to grant illegal State aid to Aluminium.

(12) In the complaint in the present case the complainant also refers to another complaint brought by it in 2012 (registered under SA.34991). In this complaint it alleged that Decision 346/2012 by the Greek Regulatory Authority for Energy ("RAE"), which set an interim tariff for the electricity supplied to Aluminium for the time until the dispute between those two parties concerning the tariff was settled, obliged it to supply electricity to Aluminium below market prices and, thereby, to grant State aid to Aluminium. However, as the Arbitration Decision fully and retroactively replaced the interim tariff set by RAE, the Commission considers that the complaint in SA.34991 has become without object.

(13) Thus, the present decision only assesses the complaint brought by the complainant in December 2013 concerning the question whether any State aid was granted to Aluminium in the form of electricity tariffs below costs following the arbitration decision.

2.1. The dispute between the complainant and Aluminium

(14) The complainant and Aluminium have been involved in a long-lasting dispute concerning the electricity tariff the latter should pay for the electricity supplied to it by the former. The background to this dispute was that a preferential tariff stemming from an agreement signed in the 1960s is no longer applicable and since the expiry of that agreement in 2006 the parties could not agree on a new

[2] As a further argument in relation to the alleged advantage granted to Aluminium, the complainant claimed that supplying Aluminium with electricity at the tariff set by the Arbitration Decision would consist in a State guarantee, as it is allegedly not set at market level but rather at a level which aimed to ensure that Aluminium can remain in business. According to the complaint, this has the effect of an implied State guarantee against the risk of insolvency.

tariff for the electricity consumption profile of Aluminium.[3] In the course of the negotiations between the complainant and Aluminium, on 4 August 2010, the two parties signed a "Framework Agreement", concerning the electricity tariff as well as the settlement of the outstanding debts of Aluminium amounting to around EUR 107 million.[4] However, the "Supply and Settlement Agreement" dated 5 October 2010, which would have laid down in detail the contractual relationship between the two parties with the aim of implementing the Framework Agreement, was never signed. As such, the dispute concerning the contractual relationship and the applicable tariff remained unresolved.

(15) Due to the disagreement on said tariff and Aluminium's refusal to sign the Supply and Settlement Agreement, Aluminium continued to accumulate substantial amounts of debt, stemming from electricity invoices on the basis of the Framework Agreement not (fully) paid.

(16) In light of this situation and with the aim of settling the dispute within a reasonable timeframe the parties mutually agreed to refer the dispute to the permanent arbitration of RAE ("Arbitration Tribunal") under Article 37 of Law 4001/2011.[5]

(17) In this regard, the complainant explained that it agreed to arbitration under the condition that Aluminium would make an immediate payment of a part of its outstanding debt and that it would pay its monthly electricity invoices during the course of the arbitration proceeding. As such, at the time when the decision to agree to refer the matter to arbitration was taken, the complainant regarded this decision to be the advisable course of action for obtaining payment of Aluminium's outstanding debt within a commercially acceptable timeframe.

(18) Furthermore, according to the information provided by the complainant, it seems that terminating the electricity supply on grounds of the disagreement on the tariff did not appear to be an alternative available to it, as there was a risk that it would have been prevented from doing so by regulatory intervention.[6] This became especially clear during the course of the arbitration procedure, when the complainant served Aluminium with several notices of termination of electricity supply, following further outstanding payments of electricity invoices. In reaction to these notices, Aluminium filed complaints with RAE, who ordered the complainant to desist from terminating the supply of electricity. In the decision

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[3] Aluminium is by far the largest electricity consumer in Greece (its consumption exceeds 5% of the total power consumption in Greece and corresponds to 40% of the total consumption of high voltage consumers) and has an almost constant consumption throughout the whole year.

[4] This settlement foresaw a write-off of EUR 25 million by the complainant and the payment of the remainder (ca EUR 82 million) through the immediate payment of EUR 20 million and the payment of the balance through monthly instalments bearing interest at the rate of 1-month EURIBOR plus 1%.

[5] Article 37 of Law 4001/2011 provides that a permanent arbitration shall be organised by RAE, in front of which disputes arising in the energy sector could be resolved, upon agreement by the parties involved in a written arbitration agreement.

[6] For example, on the basis of an alleged abuse of dominance in the meaning of Article 102 TFEU and/or Article 2 of the Greek Competition Act (Law 3959/2011, as amended), or on the basis of the applicable energy legislation (see footnotes 14 and 18 of the present Decision).

15/2013 of 31 January 2013, the latest of a series of decisions on that matter, RAE stated that the complainant could not terminate the electricity supply to Aluminium as long as the dispute was subject to arbitration. In addition, after the Arbitration Decision and following negotiations on the applicable tariff for the period after 31 December 2013, Aluminium filed a complaint with the Hellenic Competition Authority alleging that the complainant had abused its dominant position[7] by seeking to charge an excessive tariff and threatening to terminate Aluminium's electricity supply should said tariff not be paid, thereby abusing Aluminium's alleged dependence upon the complainant.

(19) According to the complainant the only economically advisable course of action to obtain payment of the outstanding debt from Aluminium and to resolve the dispute concerning the tariff was, thus, to agree to refer the matter to the Arbitration Tribunal, rather than to try to achieve a settlement with Aluminium or to take recourse to litigation in front of the ordinary courts in Greece.

2.2. The Arbitration Agreement

(20) In light of the long-lasting dispute concerning the electricity tariff and the outstanding debt of Aluminium, the complainant and Aluminium decided to refer the matter to an Arbitration Tribunal with the aim of resolving their dispute in a timely manner (under the applicable regulation the Arbitration Tribunal should take a decision within six months whereas litigation in front of ordinary courts regularly takes several years).

(21) As confirmed by the complainant, the Arbitration Tribunal consisted of experts in the field and its members were agreed upon by the parties. While the arbitration was set in the context of the permanent arbitration of RAE under Article 37 of Law 4001/2011, under the applicable regulations the arbitration is organised by RAE only in procedural terms, as regards the required secretarial support. Thus, RAE did not have any influence on the Arbitration Tribunal itself.

(22) The Arbitration Agreement entered into between the complainant and Aluminium provided that the subject matter of the arbitration was to update and adapt the pricing terms included in the Supply and Settlement Agreement of 5 October 2010, which aimed at implementing the Framework Agreement of 4 August 2010, so that they correspond to the specific consumer characteristics of Aluminium and cover at least the costs borne by the complainant. To this end the Arbitration Tribunal was to take into account the applicable Basic Principles for Pricing of Electricity to High Voltage Customers, as determined previously by RAE.[8]

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[7] According to the information available the complainant holds a market share of 98-99% as an electricity supplier and owns around 70% of power plants in Greece.

[8] See Decision No 692/6-6-2011 by RAE. The Arbitration Agreement stipulated that the Arbitration Tribunal was, furthermore, to take into account RAE's Decision No 798/30-6-2011, which, following the complainant's submission of the Draft Supply Agreement to RAE for comments, set out RAE's comments, considerations and recommendations as regards said Agreement, and a previous arbitration decision with No 80/2010. This arbitration proceeding between Aluminium and the complainant concerned the question whether in 2008 the complainant was entitled to increase the applicable tariff (then the so-called "A-150 tariff") by 10%. The decision in this arbitration proceeding (No 80/2010) confirmed that the complainant was entitled to increase the A-150 tariff as was applicable on 30/06/2008 by up to 10% following negotiations with its high-

3. ASSESSMENT

3.1. Existence of State aid

(23) According to Article 107(1) of the Treaty on the Functioning of the European Union (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.

(24) The qualification of a measure as aid within the meaning of Article 107(1) TFEU, therefore, requires the following conditions to be met: (i) there must be a transfer of State resources which must be imputable to the State; (ii) the measure must confer an advantage on an undertaking; (iii) that advantage must be selective; and (iv) the measure must distort or threaten to distort competition and must affect trade between Member States. These conditions must be cumulatively met for State aid to be present.

(25) The Commission will first assess, taking into account the specific circumstances of the present case, whether the decision to submit the dispute to arbitration confers an advantage on Aluminium as alleged by the complainant.

(26) The complainant is a State-owned undertaking[9] which supplies electricity to Aluminium. The benchmark for assessing whether a State-owned undertaking, when determining its pricing policy, has conferred an advantage on its counterpart is the market economy vendor principle,[10] which is an expression of the more general market economy operator principle ("MEOP"). In applying that principle, the Commission must assess whether a prudent private market operator, placed in a similar situation as the complainant, would have acted in the same way as the complainant did. If this is the case, then the complainant's counterpart cannot be said to have obtained an economic advantage which was not available under normal market conditions. The comparison between the complainant's and a hypothetical private operator's conduct must be made on the basis of available information and foreseeable developments at the time when the relevant decision was made,[11] here the decision to enter into the arbitration agreement.

(27) As regards the present case, the complainant's pricing policy in relation to Aluminium has been determined by the Arbitration Decision, which results from the Arbitration Agreement, into which it entered freely. The Commission therefore considers it pertinent to assess whether a prudent private market operator, in a position similar to the complainant, would have entered into such an

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voltage customers. This arbitration decision was not appealed and it led to the negotiations between Aluminium and the complainant resulting in the Framework Agreement.

9 As stated above, the Greek State holds 51% of the shares of the complainant.

10 See, e.g., Case T-274/01 *Valmont v Commission* EU:T:2004:266, para. 45; Case C-290/07 P *Commission v Scott* EU:C:2010:480, para. 68. Joined Cases T-268/08 and T-281/08 *Land Burgenland and Austria v Commission* EU:T:2012:90.

11 See, e.g., Joined Cases T-228/99 and T-233/99 *Westdeutsche Landesbank Girozentrale v Commission* EU:T:2003:57, para. 246 and the case-law cited therein.

arbitration agreement, establishing similar parameters to be taken into account by the Arbitration Tribunal with a view to updating and adapting the pricing terms included in the Supply and Settlement Agreement of 5 October 2010 for a certain period[12] and resulting in the Arbitration Decision which in turn requires the complainant to apply such pricing terms during that period.

(28) In this regard, it should be recalled that the background to the arbitration procedure was a long-lasting dispute between the complainant and Aluminium concerning the applicable electricity tariff for the electricity supplied by the former to the latter.

(29) Following the liberalisation of electricity markets, the complainant had to move away from the application of a single tariff (the A-150 tariff) to all its high-voltage (HV) customers.[13] The complainant was obliged to enter into meaningful negotiations with each HV customer, in order to agree an individually applicable tariff that would be unrelated to previous regulated tariffs. RAE was empowered to supervise the Greek electricity market in order to ensure that competition is safeguarded and that the applicable rules are complied with, especially concerning the pricing terms of dominant suppliers, which should be determined by reference to the underlying cost of the supplier's services and to the parameters that should be used for price-differentiation per category of customers.[14]

(30) The complainant was the only possible supplier in Greece for HV customers, such as Aluminium. At the level of electricity production, the complainant controlled all lignite and hydroelectric plants in Greece, which constitute the cheapest method for electricity production in Greece. The complainant owned 70% of all power plants in Greece. The complainant's competitors operated only expensive natural gas plants which were relatively new and thus with an investment cost still to be recouped, whereas the investment costs of the complainant's older lignite, hydroelectric and natural gas plants had generally been recouped. At the level of electricity supply, the complainant had virtually a monopsony (towards producers) and monopoly (towards customers) with a market share of 98-99%. At

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12 Which, according to the information available, was the period from 1 July 2010 until 31 December 2013.

13 For a transitional period, the complainant was allowed to apply the A-150 tariff with a maximum increase of 10% and following meaningful negotiations with its HV customers. See Article 14 of the Greek Code of Supply as amended by Ministerial Decision Δ5/ΗΛ/Β/Φ29/23860 (Government Gazette B' 2332/2007).

14 The main legal basis is Law 4001/2011 (Government Gazette A' 179 of 22.08.2011). Articles 34 and 35 of that Law allow the submission of complaints to RAE and provide that RAE is entitled to impose interim measures if it considers possible that Greek or Union legislation on the provision of electricity is infringed and that infringement can pose a serious threat for public security, public order, public health or the conditions of undistorted competition or it can cause serious economic or functional problems to other enterprises. Article 120(4) of that Law also empowers RAE to take regulatory measures for the well-functioning of the electricity market and the promotion of effective competition. Article 140(6) of that Law empowers RAE to take regulatory measures on the supply of electricity, especially concerning the pricing terms of such supply, in order to protect consumers from abusive behaviours and to prevent and deter practices that harm competition, in particular by suppliers who hold a significant market share and can exercise dominant influence in the market. In that context, RAE controls the pricing terms of the electricity supply by reference to the underlying cost of the supplier's services and to the parameters that should be used for price-differentiation per category of customers.

the same time, imports were not a viable alternative for a customer like Aluminium, since Aluminium requires a stable electricity supply on a long-term basis, which could not be provided through the limited imports and interconnections available in Greece. Therefore, it appears that HV customers such as Aluminium were entirely dependent on the complainant for the supply of electricity, which posed a challenge in conducting truly meaningful negotiations on the applicable pricing terms.[15]

(31) The resolution of the conflict between the complainant and Aluminium and the finding of an appropriate market price for that tariff was made even more difficult by the fact that Aluminium is a unique customer on the Greek market in the sense that it is by far the largest consumer in Greece. Aluminium's consumption exceeds 5% of the total power consumption in Greece and corresponds to 40% of the total consumption of high voltage consumers, with the second largest consumer at the time, Larco, having an almost 50% lower consumption. Aluminium also has an almost constant consumption throughout the whole year (very high load factor). As such, Aluminium could not easily be compared to any other customer on the Greek market.

(32) The complainant's dominance in the Greek markets for the production and supply of electricity combined with the unique customer characteristics of Aluminium, made the benchmarking for finding an appropriate market price especially difficult.

(33) According to RAE, the complainant did not enter into meaningful negotiations with HV customers, including Aluminium, with a view to agreeing pricing terms that would take into account each customer's consumption profile and the complainant's underlying costs, as it would have been forced to do in a competitive market and as Greek legislation required.[16] At a certain moment, the complainant proposed to RAE three possible drafts of pricing terms that it could use with its HV customers. RAE replied that the complainant should communicate those drafts to its HV customers, so that they can be used as a first basis for the negotiations, since it is those meaningful negotiations that should lead to agreements on the applicable pricing terms with each HV customer. However, the complainant did not communicate those three draft pricing terms to its HV customers.[17]

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15 See the facts described in sections IV.B, IV.Γ and IV.Δ of RAE's decision 831A/2012 of 29/10/2012 and the the facts described in sections VI.B, VI.Γ, VI.E and VI.Z of RAE's decision 346/2012 of 9/5/2012.

16 The pricing terms should be unrelated to previous regulated tariffs and should be negotiated in a manner that reflects, on the one hand, the supplier's underlying costs for the provision of the service and, on the other hand, the customer's consumption characteristics that contribute to the effective function of the system, such as its stable and high consumption (Aluminium alone justified the construction and operation of a 300MW plant) and the possibility to interrupt its consumption (demand-side management). See the facts described in sections IV.B, IV.Γ and IV.Δ of RAE's decision 831A/2012 of 29/10/2012 and the the facts described in sections VI.B, VI.Γ, VI.E and VI.Z of RAE's decision 346/2012 of 9/5/2012.

17 See the facts described in sections IV.B, IV.Γ and IV.Δ of RAE's decision 831A/2012 of 29/10/2012 and the the facts described in sections VI.B, VI.Γ, VI.E and VI.Z of RAE's decision 346/2012 of 9/5/2012.

(34) The complainant took a proactive stance in its dispute with Aluminium, trying to set the electricity tariff at as high a level as possible and to claim any outstanding payments from Aluminium. However, despite those efforts by the complainant, Aluminium refused to sign the proposed Supply and Settlement Agreement, which would have laid down in detail the contractual relationship between the two parties and would have implemented the Framework Agreement, which both parties initially had signed. As a consequence, Aluminium's outstanding debt stemming from electricity invoices not (fully) paid amounted, by October 2011, to around EUR 30 million (plus the balance of ca. EUR 82 million in debt which was subject to the out-of-court settlement set out in the Framework Agreement).

(35) In that context, negotiations between the complainant and Aluminium were not fruitful for a significant period of time, and thus there was not any written offer and approval for a proper supply contract to exist between them in accordance with legal requirements. While the applicable tariff remained disputed, each party applied in practice a significantly diverging tariff as the "correct" one from its point of view.

(36) Faced with this situation and the economically rational desire to, on the one hand, settle the dispute with its largest customer concerning the electricity tariff and, on the other hand, attempt to claim the outstanding debt described above within a reasonable timeframe, the complainant decided to refer the dispute to arbitration through the signing of the Arbitration Agreement. The Commission furthermore observes that the complainant only agreed to arbitration on condition that Aluminium would make an immediate payment of a part of its outstanding debt and that it would pay its monthly electricity invoices. Thus, by referring the dispute to arbitration, the complainant could immediately recover a material part of the outstanding debt and ensure payment by Aluminium of future invoices and, at the same time, reach a solution of the long-lasting dispute concerning the tariff within an economically reasonable timeframe.

(37) In light of the long-lasting dispute and the failure to find an agreement by way of negotiation, it was not realistic for the complainant to continue to try to reach a settlement with Aluminium. In addition, a settlement concerning the outstanding debt would not have resolved the dispute concerning the tariff applicable in the future. It was also unrealistic for the complainant to terminate the supply of electricity to Aluminium since, firstly, under that scenario the complainant could not have effectively and quickly been able to claim the outstanding debts and, secondly, as is especially clear from attempts by the complainant to terminate the electricity supply during the course of the arbitration procedure as well as after the issuing of the Arbitration Decision,[18] RAE or the Hellenic Competition

[18] After the conclusion of the Arbitration Agreement, Aluminium continued not paying what the complainant considered to be the "correct price" in its monthly invoices. The complainant reacted by requesting the outstanding payments and informed Aluminium that failing this it would take steps for the termination of its electricity supply. Aluminium then filed a complaint with RAE, which resulted in RAE's decision 346/2012 of 9/5/2012, which laid down an interim tariff (subject of the 2012 complaint) to be applied until a final determination of the tariff: (i) by RAE in the framework of its competences as energy supervisor, or (ii) by agreement between the parties, or (iii) by the Arbitration Tribunal. That interim price would be set-off in accordance with any final price determined after one of those three events would have had occurred. The complainant considered that RAE's decision 346/2012 had set the interim price for the future (until one of the abovementioned three events occurred), whereas Aluminium interpreted RAE's decision as determining retroactively the interim price. Therefore, in its payments of the invoices of the next few months Aluminium paid a reduced price, because it wanted to set-off the higher prices it had

Commission could have ordered it to desist from terminating the electricity supply. Moreover, litigation before ordinary Greek courts would have lasted several years until a final executable judgment, whereas the arbitration proceedings should have been concluded within six months, according to the applicable regulations.

(38) Thus, the Commission concludes that, given the circumstances of the present case, a prudent private market operator would also have agreed to refer the dispute to arbitration in order to achieve a timely settlement of the long-lasting dispute and recover parts of the outstanding debts.

(39) However, it is also necessary to assess whether such a prudent private market operator would have entered into a comparable Arbitration Agreement setting out comparable parameters for setting the applicable electricity tariff. It is essential to stress that a prudent private market operator would be very careful in setting said parameters to minimise the risks associated with the arbitration proceeding and to ensure that the tariff is set on the basis of objective criteria. In this regard, a prudent private market operator would agree to arbitration if it is safeguarded that the discretion of the arbitrators is limited and that said arbitrators are experts in the field.

(40) As regards the expertise of the chosen arbitrators, according to the information available there is no doubt that the arbitrators chosen were experts in the field. The parties agreed to the arbitrators, which, according to Article 37 of Law 4001/2011 needed to be chosen from a list consisting of members of RAE, members of technical chambers and bar associations, as well as professors of higher educational institutes of any level, with specialized knowledge of the disputes made subject to the arbitration. In the present case, the parties chose the following expert arbitrators: a mechanical engineer, a professor of commercial law in the University of Athens and a mechanical-electrical engineer.

(41) Moreover, as explained in recital (21), the arbitration was organised by RAE only in procedural terms, as regards the required secretarial support. Thus, RAE did not have any influence on the Arbitration Tribunal. The Arbitration Tribunal can be, thus, considered to have been established in a manner that, in principle, ensures its independence from the parties and the absence of undue influence from any third party.

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paid for the past in accordance with the (lower) interim price set by RAE's decision 346/2012. On the complainant's request, RAE clarified in a letter of 22/6/2012 that its decision 346/2012 applied only for the future. In response, Aluminium offered a guarantee by its mother company for the payment of amounts due because of the perceived set-off it had applied. The disputes between the two companies continued especially on amounts allegedly due (depending on each company's interpretations of what the "correct" price was) for the period before RAE's decision 346/2012. Therefore, the complainant served Aluminium with a notice of termination of electricity supply and Aluminium filed a complaint with RAE requesting interim measures. RAE, in its decision 831A/2012 of 29/10/2012, ordered the complainant to desist from terminating the supply for a period of two months. On 18/1/2013 the complainant served Aluminium with another notice of termination of supply. Aluminium filed again a complaint with RAE, who, by decision 15/2013 of 31/1/2013, ordered (i) Aluminium to pay (instead of simply guaranteeing) the amounts due because of the perceived set-off, and (ii) the complainant to continue supplying electricity to Aluminium on the basis of the interim tariff as long as the arbitration proceedings are pending.

(42) As regards the parameters for setting the applicable tariff, it should be recalled that the Arbitration Agreement expressly stipulated, in accordance with the applicable Basic Principles for Pricing of Electricity to High Voltage Customers previously established by RAE, that the Arbitration Tribunal must update and adjust the tariff set out in the Draft Supply and Settlement Agreement in a way that ensures that the specific consumption characteristics of Aluminium, on the one hand, and at least the costs incurred by the complainant, on the other hand, are taken into account. As such, the Arbitration Agreement stipulated that the Arbitration Tribunal had to base the tariff on the pricing principles generally applicable on the Greek market for high voltage customers while, at the same time, ensure that the specific circumstances of the case, namely the specific consumption profile of Aluminium as well as the cost structure of the complainant, are duly taken into account. Moreover, as explained in recitals (29) and (33), the two latter criteria should have been taken into account during the meaningful negotiations that were supposed to take place between the complainant and Aluminium for the determination of the applicable pricing terms. It is only logical that those criteria which the parties did not manage to translate into concrete pricing terms through negotiations are also used when that task is assigned to arbitrators. In light of these elements, the Commission is satisfied that the parameters for setting the electricity tariff enshrined in the Arbitration Agreement are based on objective criteria limiting the discretion of the arbitrators to establishing an appropriate tariff on the basis of predefined and clear criteria which are based on the characteristics of the Greek electricity market, the consumption profile of the customer and the cost structure of the supplier. Finally, the Commission observes that the parameters to be applied by the arbitrators are similar to the ones that RAE would have applied in regulatory measures concerning the pricing terms of electricity supply.[19]

(43) Thus, the Commission concludes that also a prudent private market operator, faced with a similar situation as the one faced by the complainant in the present case, would have entered into an arbitration agreement similar to the present one, which established clear and objective parameters for setting a market tariff that arbitrators being expert in the field had to follow. The Commission, therefore, concludes that the conduct of the complainant when entering into the Arbitration Agreement was in conformity with the conduct of a prudent private market operator and, hence, in line with market conditions, so that Aluminium has obtained no economic advantage within the meaning of Article 107(1) TFEU as alleged by the complainants.

(44) In reaching that conclusion, it is unnecessary for the Commission, in light of the specific circumstances of the present case, to determine whether the precise level of the tariff resulting from the Arbitration Decision is in line with market conditions. Rather, so long as the parameters agreed for setting that tariff were determined on the basis of objective market-based criteria and so long as a prudent private market operator would, on the basis of those parameters and under the given circumstances, have agreed to refer the dispute to arbitration and to be bound by the outcome of that arbitration, an advantage should be excluded for the purposes of Article 107(1) TFEU.

[19] See footnote 14 of the present Decision.

(45) The Commission recalls in this regard that the application of the MEOP requires it to make complex economic assessments.[20] Also on that basis, the Commission concludes that the parameters for determining the applicable tariff in the arbitration agreement were defined as a prudent private market operator would have done, without it being necessary to enter into every detail of the precise calculation of the that tariff by second-guessing the arbitration tribunal.[21] The final tariff set by the Arbitration Decision is in line with market conditions[22] as the logical consequence of properly defined parameters in the Arbitration Agreement.

(46) The Commission stresses in this regard that in the present case the complainant co-signed the Arbitration Agreement setting the parameters on which the Arbitration Tribunal would take its decision and did not give any indication that it did not consider them, at the time of entering into the Arbitration Agreement, in line with market conditions. Moreover, a prudent private market operator in a private dispute could not influence the outcome of such a proceeding beyond the means provided to it by the applicable legislation, which in the present case is the possibility to appeal the Arbitration Decision in front of an ordinary court.[23]

(47) Furthermore, although not required to do so in the assessment of the MEOP in the present case, the Commission notes that the net tariff of 36.6 EUR/MWh[24] that was finally determined by the Arbitration Decision is still higher than the average smelter power tariff in Europe, which in 2013 was reported to be 41 USD/MWh, equivalent to 30.87 EUR/MWh at 2013 exchange rates.[25]

(48) In light of the above, the Commission concludes that the Arbitration Agreement, by setting *ex ante* objective parameters for setting the tariff in a manner that would be acceptable also to a prudent private market operator, ensured that no advantage was granted to Aluminium.

(49) As the conditions of Article 107(1) TFEU are cumulative the Commission, therefore, concludes that no State aid in the meaning of said Article was granted to Aluminium.

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20 See, to that effect, Case C-487/06 P *British Aggregates* v *Commission* [2008] ECR I-10515, paragraph 114, and Case C-290/07 P *Commission v Scott* [2010] ECR I-7763, paragraph 66. See for the applicable standard of judicial review, case C-56/93 *Belgium v Commission* EU:C:1996:64, paras 10-11 and the case-law cited therein. In this regard the Commission's margin of discretion is similar to that in which it examines expert reports used by public authorities in determining whether a particular price is in line with market conditions.

21 In this regard the Commission's margin of discretion is similar to that in which it examines expert reports used by public authorities in determining whether a particular price is in line with market conditions.

22 Since the tariff is in line with market conditions, its application does not constitute, as alleged by the complainant, an implied State guarantee against the risk of insolvency of Aluminium.

23 Also in this regard the complainant acted in a market conform manner, as it indeed appealed the Arbitration Decision. This appeal is still pending.

24 The final tariff becomes 40.7 EUR/MWh if obligatory charges of 4.1 EUR/MWh are included.

25 CRU, *Aluminium Cost Service 2014,* table 4.2 page 4.11.

4. THE 2014 LETTER

(50) In the judgment of 31 May 2017, the Court of Justice ruled that the 2014 letter constituted a challengeable act and that the 2015 decision did not withdraw the 2014 letter, because the 2015 decision was merely confirmatory of the 2014 letter. The Court stated that *"*[i]*t could be different only if the Commission withdrew a decision to take no further action on a complaint in order to remedy illegality affecting that decision, while stating the nature of the illegality vitiating that decision"*.[26]

(51) The 2014 letter, signed at Head of Unit level, took a final position on the merits of the complaint without having been adopted as a formal decision by the College of Commissioners. This constituted a procedural error, which vitiated the 2014 letter. The Commission therefore considers that the 2014 letter must be withdrawn, as well as the confirmatory 2015 decision, and replaced by the present formal decision. Indeed, the Commission notes that, according to the Court's judgment of 31 May 2017, the 2015 decision was considered merely confirmatory of the 2014 letter. Therefore, the 2015 decision is considered not to produce any independent legal effects of its own. In any event, since it was merely confirmatory of the 2014 letter, the 2015 decision is necessarily withdrawn via the withdrawal of the 2014 letter.

5. DECISION

The Commission has accordingly decided that the measure does not constitute State aid. The Commission has also decided that, for the reasons set out in recital (51), the letter dated 12 June 2014 and the decision of 25 March 2015 are hereby withdrawn and replaced by the present decision.

If this letter contains confidential information which should not be disclosed to third parties, 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 the disclosure to third parties and to the publication of the full text of the letter in the authentic language on the Internet site: http://ec.europa.eu/competition/elojade/isef/index.cfm.

Your request should be sent electronically to the following address:

European Commission,
Directorate-General Competition
State Aid Greffe
B-1049 Brussels
Stateaidgreffe@ec.europa.eu

Yours faithfully
For the Commission

Margrethe VESTAGER
Member of the Commission

[26] Judgment in Case C-228/16P *DEI v Commission* EU:C:2017:409, para. 40.