COMMISSION DECISION

of 4 February 2014

on State aid No SA.21817 (C 3/07) (ex NN 66/06) implemented by Spain

Spanish Electricity Tariffs: consumers

(notified under document C(2013) 7741)

(Only the Spanish text is authentic)

(Text with EEA relevance)

(2014/456/EU)

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 called on interested parties to submit their comments pursuant to the provisions cited above ([1]) and having regard to their comments,

Whereas:

1. PROCEDURE

(1) By letter dated 27 April 2006, the undertakings Céntrica plc and Céntrica Energía S.L.U. (hereinafter collectively referred to as 'Céntrica') filed a complaint with the Commission regarding the system of regulated electricity tariffs implemented in Spain in 2005.

(2) By letter dated 27 July 2006, the Commission asked the Spanish authorities to provide information on the above measure. The Commission received this information by letter dated 22 August 2006.

(3) On 12 October 2006, the case was registered as non-notified aid (Case NN 66/06).

(4) By letter dated 9 November 2006, the Commission asked the Spanish authorities for additional clarifications on the measure. The Spanish authorities replied by letter dated 12 December 2006.

(5) By letter dated 24 January 2007, the Commission informed the Spanish authorities that it had decided to initiate the procedure laid down in Article 108(2) of the Treaty on the Functioning of the European Union in respect of the measure.

(6) The Commission Decision was published in the *Official Journal of the European Union* ([2]). The Commission invited interested parties to submit their comments on the measure.

(7) The Spanish authorities submitted their observations by letter dated 26 February 2007.

(8) The Commission received comments from the following interested parties: the Regional Government of Galicia (Xunta de Galicia) (letter dated 23 March 2007), Céntrica (letters dated 26 March 2007 and 3 July 2007), ACIE — Association of Independent Energy Suppliers (letter dated 26 March 2007), Government of Asturias (letter dated 27 March 2007), AEGE — Association of Energy-Intensive Users (letter dated 2 April 2007, with a supplement of 21 November 2011), Asturiana de Zinc — AZSA (letter dated 3 April 2007), Ferroatlántica — a metal producer (letter dated 3 April 2007), Alcoa (letter dated 3 April 2007), UNESA — Spanish Electricity Industry Association (letter dated 25 April 2007), ENEL Viesgo (letter dated 26 April 2007), Iberdrola (letter dated 26 April 2007), Union Fenosa Distribución (letter dated 27 April 2007), Hidrocantábrico Distribución Electrica (letter dated 27 April 2007), Endesa Distribución Electrica (letter dated 27 April 2007).

([1]) OJ C 43, 27.2.2007, p. 9.
([2]) See footnote 1.

(9) By letters dated 15 May 2007 and 6 July 2007, the Commission forwarded the interested parties' comments to the Spanish authorities, who were given the opportunity to react; their comments were received by letter dated 2 August 2007.

(10) Further information was submitted by Céntrica by letters dated 1 June 2007, 28 August 2007, 4 February 2008 and 1 March 2008, by AEGE by letter dated 21 November 2011 and by Ferroatlántica by letter dated 5 December 2011.

(11) By letters dated 30 July 2009, 19 March 2010, 6 October 2011, 12 April 2012, 31 August 2012, 4 February 2013 and 17 July 2013, the Commission asked the Spanish authorities to provide further clarifications on the measure. The authorities replied by letters dated 5 October 2009, 26 April 2010, 7 December 2011, 12 June 2012, 18 October 2012, 11 February 2013 and 4 October 2013.

(12) On 19 April 2013 the file was split into two parts: the present case, namely Case SA.21817 (C 3/07, ex NN 66/06), which concerns aid to electricity end-users, and Case SA.36559 (C3a/07, ex NN 66/06), which concerns aid to electricity distributors. The present Decision deals only with possible aid to electricity end-users included in the scope of the procedure, that is, excluding households and small businesses.

2. **DETAILED DESCRIPTION OF THE MEASURE**

THE SPANISH ELECTRICITY SYSTEM IN 2005

(13) In the legislative framework established by Law 54/1997 of 27 November 1997 (Ley del Sector Eléctrico, hereinafter 'LSE'), applicable in 2005, the supply of electricity to end-users at regulated tariffs was categorised as a regulated activity. This task was assigned by the Law to distributors.

(14) In 2005 all end-users of electricity in the Spanish market could choose whether to negotiate supply contracts with independent suppliers or be supplied at regulated tariffs set by the State. In the regulated market, every end-user who so requested had the right to be supplied by its local distributor at the integral regulated tariff (all-inclusive price) having regard to its consumption profile and consumption volume. In the free market, customers paid a network access charge, which was also regulated, in addition to which they had to meet the costs of energy supply. Since the completion of the reform of the electricity sector in 2009, distributors no longer supply electricity at integral regulated tariffs.

(15) Integral regulated tariffs and regulated network access charges were decided *ex ante* for the whole year, normally before N – 1 year-end, but could be adjusted in the course of the year ([3]). However, annual tariff increases were subject to a maximum cap ([4]). In principle, tariffs and charges were set, on the basis of forecasts, to ensure that the regulated revenues resulting from their application would suffice to cover the electricity system's total regulated costs. These regulated costs of the system included, in 2005, the costs of energy supply at integral tariffs, the costs of purchasing energy from special schemes (renewable sources, cogeneration, etc.), transport and distribution costs, demand management measures, additional electricity generation costs in the Spanish islands, support for coal, previous years' deficits, etc. There were no rules earmarking a particular category of revenues, or a proportion thereof, for a particular category of costs or proportion thereof. As a result, revenues from network access charges, for example, were not earmarked in whole or in part to finance, for example, subsidies for electricity from renewable sources or electricity produced in the Spanish islands.

(16) In 2005 there were no fewer than 25 regulated tariffs for end-users, depending on the consumption level, the consumption profile, the intended consumer and the network connection voltage. At the same time, nine other regulated network access charges were applied to end-users in the free market, also based on connection voltage and other characteristics.

(17) On 30 December 2004, the Spanish authorities set the electricity tariffs applicable in 2005 ([5]), corresponding to the following user categories:

([3]) Article 12(2) of the LSE provided that electricity tariffs were, in principle, to be set once a year but could be adjusted during the year.
([4]) Under Article 8 of Royal Decree 1432/2002, the average tariff could not increase by more than 1,40 % (year on year), whereas individual tariffs could increase only by a percentage equivalent to the increase in the average tariff: + 0,60 % (2 % in total).
([5]) Royal Decree 2392/2004 of 30 December 2004 establishing the electricity tariff for 2005. Official State Gazette No 315, p. 42766.

INTEGRAL TARIFFS

Low voltage

1.0. Power up to 770 kW

2.0. General, power not above 15 kW

3.0. General

4.0. General, long use

B.0 Public lighting

R.0 Agricultural irrigation

High voltage

General tariffs

Short use

1.1. General, not above 36 kV

1.2. General, between 36 and 72,5 kV

1.3. General, between 72,5 and 145 kV

1.4. General, above 145 kV

Medium use

2.1. Not above 36 kV

2.2. Between 36 and 72,5 kV

2.3. Between 72,5 and 145 kV

2.4. Above 145 kV

Long use

3.1. Not above 36 kV

3.2. Between 36 and 72,5 kV

3.3. Between 72,5 and 145 kV

3.4. Above 145 kV

Traction tariffs (Tarifas de tracción)

T.1 Not above 36 kV

T.2 Between 36 and 72,5 kV

T.3 Between 72,5 kV and 145 kV

Agricultural irrigation

R.1 Not above 36 kV

R.2 Between 36 and 72,5 kV

R.3 Between 72,5 and 145 kV

G. *Tariff for large consumers (G4)*

Tariffs for sales to distributors

D.1 Not above 36 kV

D.2 Between 36 and 72,5 kV

D.3 Between 72,5 and 145 kV

D.4 Above 145 kV

ACCESS TARIFFS

Low voltage

2,0 A Ordinary low-voltage access tariff

2,0 NA Simple low-voltage access tariffs with day/night discrimination

3,0 A General low-voltage access tariff

High voltage

3.1.A Access tariff for voltages not above 36 kV (power not above 450 kW)

6.1 Access tariff for voltages not above 36 kV (power above 450 kW)

6.2 Access tariff for voltages above 36 kV and not above 72,5 kV (power above 450 kW)

6.3 Access tariff for voltages above 72 kV and not above 145 kV (power above 450 kW)

6.4 Access tariff for voltages above 145 kV (power above 450 kW)

6.5 Access tariff for international exchanges

(18) Integral regulated tariffs could be split into a component designed to cover transport, distribution and general system costs (*network access charge*) and a component reflecting the cost of procuring electricity in the wholesale market (*energy component*). Additionally, a system of discounts on integral tariffs was applied to demand management services (e.g. accepted interruptions in power supply upon notice or consumption concentrated in off-peak periods). From 2005 Spain introduced changes in the system of regulated tariffs. The last of these was made in 2013, when Spain adopted a new legislative framework for the electricity sector (Law 24/13) which included, among other measures, the reform of regulation of retail market prices. Spain announced that this new law and its implementing provisions would be drawn up in 2014. Below are some of the basic integral tariffs for the lowest tariff level of the categories referred to above (i.e. not above 145 kV) applicable from 1 January 2005:

Table 1

Basic amount integral regulated tariffs 2005

	A/Power component	B/Energy component	Integral tariff (A + B)			
	EUR/kW month	EUR/kWh	EUR/MWh			
Low voltage						
1.0 Power < 770 W	0,277110	0,062287	62,67			
3.0 General	1,430269	0,083728	85,71			
4.0 General, long use	2,284634	0,076513	79,69			
High voltage						
1.4 Short use, general > 145 kV	1,759358	0,058412	60,86			
2.4 Medium use, general > 145 kV	3,632629	0,053224	58,27			

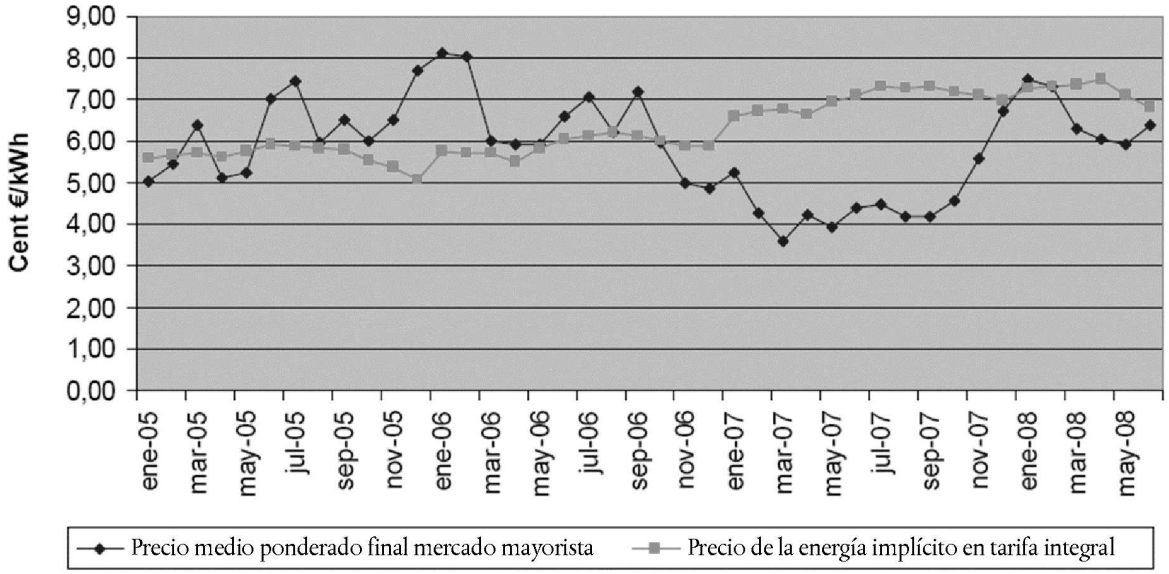
	A/Power component	B/Energy component	Integral tariff (A + B)			
	EUR/kW month	EUR/kWh	EUR/MWh			
3.4 Long use, general > 145 kV	9,511921	0,042908	56,12			
G. Large consumers G4	10,208070	0,011265	25,44			

Source: Annex I to Royal Decree 2392/2004, Commission's calculations.

(19) The Spanish National Energy Commission (*Comisión Nacional de Energía* — CNE), the Spanish regulator, has stated that, on average, integral tariffs in 2005 did not reflect all the costs of supply, in particular the cost of procuring energy in the wholesale market. In particular, as shown in the graph below, only in the five months between January and February 2005 and then again between April and June 2005 were the prices implicit in the average integral regulated tariffs below average prices in the wholesale electricity market. Conversely, between October 2006 and December 2007 the opposite occurred: during this 14-month period, average wholesale prices fell sharply below the energy prices implicit in the average integral regulated tariffs, well above the difference observed in the seven months of 2005 when wholesale prices were higher than those implicit in integral tariffs.

Graph 1

Weighted average wholesale price vs energy price implicit in integral tariff



Source: CNE — Report on development of competition in gas and electricity markets. Period 2005/2007, p. 84.

THE 2005 TARIFF DEFICIT

(20) The accounts of the electricity system, based on actual regulated revenues and costs, were settled once a year. In 2005, the level at which the regulated tariffs and the network access charges were set did not generate sufficient revenues to enable the system to recover all the regulated costs documented *ex post* for the entire year. The final settlement process for 2005, carried out by the CNE at year-end, established a deficit of EUR 3 811 million. It was not the first time that the settlement process had given rise to a deficit, although the size of the 2005 deficit was unprecedented. In 2000, 2001 and 2002 lower deficits were recorded.

(21) In particular, the government underestimated the actual costs of electricity procurement. Whereas electricity consumption by end-users in both the regulated and the free market developed in 2005 roughly as predicted in December 2004, a series of unforeseen price increases during the year set wholesale prices at EUR 62,4/MWh in 2005 compared with EUR 35,61/MWh in 2004, bringing the average wholesale price in 2005 to EUR 59,47/MWh. The causes of this increase include an unusually dry year, which reduced hydroelectric power production by 55 %, a rise in oil prices, the impact of the market price of CO_2 emission allowances received free of charge under the Emissions Trading System and an increase in the demand for energy higher than GDP growth.

(22) Another important factor which contributed to increasing the general costs of the system was the high level of aid for the production of renewable energy. In particular, renewable producers could opt for direct participation in the wholesale electricity market or 'pool'. In 2005 this option was particularly attractive and as a result, more renewable producers than expected participated in the pool, leading to higher costs for the system. In addition, direct aid to the energy costs of electricity under the special scheme (renewables, cogeneration), which were entered in the accounts as a regulated cost, amounted to EUR 2 701 million in 2005. By way of illustration, the system's transport and distribution costs amounted to EUR 4 410 million in 2005.

Mechanism adopted to pre-finance the deficit

(23) The development of the deficit did not go unnoticed. Already in March 2005, when it became clear that a tariff deficit was developing, by Article 24 of Royal Decree-Law 5/2005 ([6]) the Spanish authorities stipulated that the funds required to bridge the gap between the costs and revenues of the electricity system would be provided by Spain's five biggest 'entitled electricity utilities', which were those entitled to receive compensation for stranded costs ([7]), on the basis of the following percentages:

— Iberdrola, S.A.: 35,01 %;

— Unión Eléctrica Fenosa, S.A.: 12,84 %;

— Hidroeléctrica del Cantábrico; S.A: 6,08 %;

— Endesa, S.A.: 44,16 %;

— Elcogas, S.A.: 1,91 %

(24) Decree-Law 5/2005 laid down that the future deficit be imputed to the above five companies as a negative balance in an existing deposit account used by the CNE to pay stranded costs to these companies. This meant in practice that the utilities were required to advance the funds. The negative balance in the stranded costs account would give rise to collection rights, consisting in the right of the utilities to collect revenue from electricity consumers in the future. These rights could be securitised and sold on the market by the utilities. The collection rights assigned to these utilities yielded a minimum interest rate (3-month Euribor, calculated as the average Euribor rates for November of the previous year, without any spread).

Mechanism adopted to recover the deficit from end-users

(25) In June 2006, the Spanish authorities took a decision concerning the arrangements for recovering the 2005 deficit from electricity consumers via the regulated tariffs. By Royal Decree 809/2006 ([8]), the Spanish authorities laid down that the 2005 deficit (or, more precisely, the collection rights attributed to the utilities) would be repaid by consumers over fourteen and a half years by means of a special surcharge applied to both integral and access tariffs. The surcharge, calculated as the yearly amount required to recover linearly the net present value of the 2005 deficit over 14,5 years, was set at 1,378 % of the integral tariff, and at 3,975 % of the access tariff for 2006. The applicable interest rate was the 3-month Euribor.

([6]) Royal Decree-Law 5/2005 of 11 March 2005 on urgent reforms to promote productivity and improve public procurement. Official State Gazette 62, 14.3.2005, p. 8832.

([7]) Stranded costs are losses sustained by incumbent electricity providers as a result of non-recoverable investments carried out before liberalisation. The Commission authorised the granting of compensatory aid to cover such losses, on the basis of the criteria outlined in the Stranded Costs Methodology (Commission Communication relating to the methodology for analysing State aid linked to stranded costs), by letter SG (2001) D/290869 of 6 August 2001. By Decision SG (2001) D/290553 of 25 July 2001 in Case NN 49/99, the Commission authorised Spain to grant compensation for stranded costs until 2008 to the companies which were asked to pre-finance the 2005 deficit.

([8]) First additional provision of Royal-Decree 809/2006 of 30 June 2006 revising the electricity tariff from 1 July 2006. Official State Gazette 156, 1.7.2006.

(26) This surcharge was regarded as a 'specifically earmarked contribution' (*cuota con destino específico*). The Spanish authorities established that the revenues from the contribution to finance the 2005 deficit would accrue in the deposit account managed by the CNE. The CNE would then transfer the funds to the owners of the collection rights, i.e. the generators that financed the deficit or the entities that had subsequently purchased the collection rights from them, according to the share of the deficit financed by each of them.

Effects of the tariff deficit on the Spanish market

(27) In 2005, 37,49 % of electricity demand in Spain was procured on the free market. This quantity corresponds to a relatively small number of consumers; only 8,5 % of consumers purchased energy on the free market, whereas 91,5 % remained on regulated tariffs (down from 97 % in 2004). High-voltage customers (above all industrial customers) were the main category present on the free market; 38,9 % of them had exercised their option and their purchases accounted for 29 % of total electricity consumption in mainland Spain in 2005. The vast majority of households and small low-voltage consumers, which could opt for the free market from 2003 ([9]), were still on regulated tariffs; however, in 2005 a significant proportion of them also opted for the free market. On 31 December 2005, over 2 million consumers were in the free market (compared with 1,3 million in 2004).

(28) However, the price advantage afforded on average by the regulated tariffs in 2005 should be considered in parallel with the return of consumers to the regulated market, albeit with a certain time lag. As shown in Table 2 below, the number of consumers supplied in the free market increased throughout 2005 but declined in 2006, bringing the percentage (8,15 %) to that reached in the first half of 2005. Likewise, the decline in the amount of energy supplied to end-users in the free market that was apparent in December 2004 continued in the first quarter of 2005. Although it halted significantly between June and September 2005, it continued in December 2005 and throughout 2006.

Table 2

Share of supply sites and energy in the free market (as a percentage of the total market) 2004-2006

Electricity	2004				2005				2006			
	Mar	Jun	Sep	Dec	Mar	Jun	Sep	Dec	Mar	Jun	Sep	Dec
As a % of supply sites	1,53	2,82	4,21	5,73	7,42	9,42	10,37	10,66	10,20	9,28	8,86	8,15
As a % of energy	29,30	33,60	36,19	33,57	33,15	35,34	41,39	37,41	29,38	27,10	25,74	24,87

Source: CNE Report 'Nota Informativa sobre los suministros de electricidad y gas natural en los mercados liberalizados, actualización 31 de diciembre de 2006'.

(29) Although the impact of the losses borne by suppliers began to be felt by mid-2005, when wholesale prices started to increase considerably, supply contracts could not be terminated immediately. As a result, suppliers in the free market, particularly those which did not have generation capacity but had to procure electricity in the wholesale market, were forced to make offers under free-market conditions which matched the regulated tariff despite the possibility of incurring losses, or to charge higher prices reflecting actual procurement costs, thereby losing market share.

([9]) Spain liberalised the retail electricity market earlier than required by the 1996 and 2003 Electricity Directives, which provided for a liberalisation timetable between 1999 and 2004 for business end-users (starting with the largest) and made the liberalisation of the household segment mandatory only from 1 July 2007.

3. **DECISION TO INITIATE PROCEEDINGS UNDER ARTICLE 108(2) OF THE TFEU**

(30) The Commission decision to initiate the formal investigation compared the regulated tariffs paid by various categories of end-user with the estimated prices they would have had to pay in the free market in the absence of these tariffs. The market price estimates were calculated on the basis of the price of electricity in the wholesale market, the network access charges and an average marketing margin estimated at EUR 10/MWh, as submitted by Céntrica.

Table 3

Price comparison by consumer category

Consumer category	Regulated tariff (EUR/MWh)	Estimated market price (only wholesale price, plus access tariff) (EUR/MWh)	Estimated market price (+ EUR 10 marketing margin)
1. Large industrial consumers connected to the high-voltage network (G4 tariff)	23,9	61,17	71,17
2. Large industrial consumers with interruptible supply	27,0	73,87-76,47	83,87-86,47
3. Consumers connected to the high-voltage network	76,2	81,57	91,57
4. Households	101,2	107,75	117,75
5. Small industrial consumers or service companies connected to the low-voltage network	103,9	101,07	111,07

Source: Céntrica.

(31) This table showed a significant advantage for the first two categories (large industrial users). For the other categories of end-user, the comparison is less conclusive but a small advantage can still be observed.

(32) The decision found that this advantage had been granted selectively, since the artificially low regulated prices favoured undertakings using electricity rather than, for example, gas, as an energy source. Moreover, the existence of *de facto* and *de jure* selectivity was observed, in that the advantage was disproportionately bigger for large industrial end-users, which in certain cases benefited from all-inclusive prices that were less than half the energy component of estimated free-market prices.

(33) The opening decision indicated that, by encouraging end-users to switch back to the regulated market, the system might also have benefited distributors, who appeared to have enjoyed a guaranteed profit margin on their regulated activities.

(34) The decision also considered that the system involved a transfer of state resources, since the price surcharge used to repay the deficit constitutes a parafiscal levy, the proceeds of which transit through the Spanish Regulator CNE (a public body) before being channelled to the final beneficiaries. The decision concluded that, in the light of Court of Justice case-law on this matter, these funds should be regarded as state resources.

(35) Considering that end-users operate in markets which are generally open to competition and trade within the EU, in the opening decision the Commission came to the conclusion that all the criteria laid down in Article 107(1) were fulfilled and that the measure constituted state aid in favour of end-users.

(36) After noting that none of the derogations provided for in Article 107 TFEU seemed applicable, the opening decision assessed whether the provision of electricity at regulated tariffs could be considered a service of general economic interest (SGEI) and as such benefit from the derogation provided for in Article 106(2) TFEU. The decision stated that, in the electricity sector, Member States' margin of discretion in establishing public service obligations is limited by the provisions of Directive 2003/54/EC of the European Parliament and the Council of 26 June 2003 concerning common rules for the internal market in electricity and repealing Directive 96/92/EC ([10]) ('The Electricity Directive'). This Directive lays down an obligation for Member States to establish a universal service obligation (including notably the right to be supplied at reasonable prices) only for household consumers and small enterprises ([11]). The decision concluded that, in the light of the Electricity Directive, the provision of electricity at regulated tariffs to medium-sized or large undertakings could not be considered an SGEI in the strict sense of the term.

(37) The Commission thus expressed serious doubts as to whether the elements of aid in the regulated tariffs that were applied to undertakings other than small enterprises could be considered compatible with the internal market.

(38) The opening decision also found that it was possible that electricity distributors received state aid. This part of the case is the subject of a separate decision (case C 3a/07).

4. COMMENTS BY INTERESTED PARTIES

(39) The Commission's invitation to submit comments on the decision to open the in-depth investigation attracted numerous submissions from large industrial consumers, distributors, independent suppliers and governments of Spain's Autonomous Communities. Only observations relevant to the alleged state aid in favour of electricity end-users will be summarised here.

COMMENTS FROM INDEPENDENT SUPPLIERS

(40) Comments were received from Céntrica and ACIE, the Association of Independent Energy Suppliers. The arguments and conclusions are largely equivalent.

Comments from Céntrica and ACIE

(41) The main focus of Céntrica's submission is the alleged advantage conferred on electricity distributors. However, the figures and arguments put forward by the company also suggest the presence of state aid for electricity end-users.

(42) According to Céntrica, the coexistence between the free and regulated markets, and in particular the possibility for end-users to switch freely between the two, meant that the regulated tariffs acted as a price reference, or a *de facto* cap, on free-market prices. Suppliers could not charge prices higher than the regulated tariff, or they would fail to attract new customers and lose existing ones.

(43) Normally, in a free market, the price paid by electricity end-users consists of two components: the network access charge and a 'supply component', which results from market mechanisms and goes to the retail supplier. In retail supply, profitability depends on whether the 'supply component' paid by customers covers the supplier's costs (i.e. energy procurement costs in the wholesale market or own generation costs in the case of a vertically integrated company) and a 'marketing margin', which includes other supply costs (marketing costs, IT systems, billing, etc.) and remuneration on the capital invested. Therefore, a free-market supplier could operate profitably in a given market segment only if there was a 'positive marketing margin', in other words a difference between the general costs incurred by the supplier in serving customers and the regulated tariff.

([10]) OJ L 176, 15.7.2003, p. 37.

([11]) Article 3(3) of the Electricity Directive states: 'Member States shall ensure that all household customers, and, where Member States deem it appropriate, small enterprises, (namely enterprises with fewer than 50 occupied persons and an annual turnover or balance sheet not exceeding EUR 10 million), enjoy universal service, that is the right to be supplied with electricity of a specified quality within their territory at reasonable, easily and clearly comparable and transparent prices. To ensure the provision of universal service, Member States may appoint a supplier of last resort.'

(44) Céntrica substantiated the existence of a competitive disadvantage for free-market suppliers through calculations showing that there were no marketing margins in 2005 for any consumer category ([12]) (or that whatever margins existed at the beginning of the year were eroded during the year). This meant that the regulated tariffs were set too low for independent suppliers to compete profitably. According to Céntrica, it was not possible to compete for certain categories of end-user (notably energy-intensive users on the G4 tariff and other large industrial users) even before the emergence of a tariff deficit, since the integral tariffs never left any margin to compete. The competitive disadvantage alleged by Céntrica occurred above all in the user category comprising service undertakings and small industries connected to the low-voltage network, and in the household segment.

(45) The figures provided by Céntrica, notably the comparison between regulated tariffs and estimated market prices, are taken over in the Commission's opening decision (see recital 30 and Table 3).

(46) In Céntrica's view, the system breached the Electricity Directive, not only because of the discriminatory nature of the deficit arrangements (which compensated for the losses of distributors but not of suppliers) but also because consumers were deprived of the right to transparent prices and tariffs ([13]). Since part of the electricity price payable for 2005 was deferred to future years, the final prices charged were not transparent for consumers.

(47) Besides, Céntrica claimed that the deficit repayment mechanism was not balanced for two main reasons: firstly, the deficit would be repaid mostly by low-voltage end-users, even though the users which contributed most to its creation were large high-voltage end-users. Secondly, end-users in the free market were required to pay for a deficit to which they did not contribute.

(48) Céntrica supported the Commission's preliminary view that the Spanish deficit arrangements involved a transfer of state resources. Céntrica also held that state resources were involved in the Spanish Government's decision to allow generators to securitise their collection rights.

(49) ACIE, the Association of Independent Energy Suppliers, estimates that the energy procurement cost taken as the basis for the regulated tariffs in 2005 was 68 % below the actual cost sustained by suppliers when purchasing energy in the wholesale market. ACIE underlined the severe repercussions that the 2005 tariff deficit had on independent suppliers. According to ACIE, suppliers in the free market were subject to similar procurement costs to those of distributors. Moreover, they were *de facto* obliged to adjust to the level of the integral tariff set by the government for each customer category, since otherwise they would not have been able to attract new customers or retain existing ones. In particular, ACIE points out that, at the beginning of 2005, its members concluded contracts based on the government's forecasts of wholesale prices, and that they later had to honour such contracts even though they turned out not to be profitable. As a result, independent suppliers experienced losses. Céntrica estimates that in 2005 it suffered losses of EUR 10 million. According to ACIE, several suppliers, including Saltea Comercial, Electranorte, CYD Energia and RWE, were forced out of the market.

COMMENTS FROM ENERGY-INTENSIVE USERS

(50) Energy-intensive users took part in the procedure through their association AEGE (Asociación de Empresas con Gran Consumo de Energia). Some of them (Asturiana de Zinc, Ferroatlántica and Alcoa) also took part individually. Alcoa is an aluminium producer which operates three production facilities in Spain, located in San Ciprián, La Coruña and Avilés, which benefited from the G4 integral tariff (the interruptible tariff reserved for energy-intensive users) in 2005. Ferroatlántica is an aluminium and iron alloys producer which benefited from the 3.4 interruptible tariff. Asturiana de Zinc is a zinc producer which benefited from the G4 tariff for its plant in San Juan de Nieva.

(51) In their observations, the energy-intensive users challenge the Commission's conclusion that the industrial tariffs (G4 and other interruptible tariffs) constitute state aid, arguing that the tariffs did not confer an economic advantage, did not involve state resources and did not affect competition and trade between Member States.

([12]) Céntrica itself divided consumers into five groups. This division does not correspond to the regulated tariff structure published in the annual tariffs decree, as indicated in recital 17.

([13]) See Annex A(b) and (c) to the Electricity Directive.

No economic advantage

(52) In the opinion of energy-intensive users, the benchmark used in the opening decision to establish the presence of an advantage is incorrect. The Commission compared the industrial tariffs with the average wholesale market price (the pool price), which was considered representative of the cost these companies would have paid in the market under normal conditions. Since the industrial tariffs were found to be lower than the pool price, the opening decision concluded that the tariffs conferred an economic advantage on their beneficiaries.

(53) Energy-intensive users claim that the pool is a spot market in which electricity is traded every hour for the following day. According to the energy-intensive users, the pool suffers from certain shortcomings that affect its efficiency and competitiveness. Consequently, the pool prices do not accurately reflect marginal generation costs and therefore do not reflect a situation of perfect competition. Large end-users, which consume large volumes of electricity and have flat consumption profiles, do not purchase from the pool, but typically enter into bilateral contracts with electricity suppliers. This is confirmed by OMEL's 2005 report, which shows that only seven of eligible users, representing 5 % of traded electricity, procured electricity directly on the pool.

(54) In any event, even assuming that prices recorded on the pool could be considered a valid benchmark, it would not be correct to use the average wholesale price in 2005, as the Commission did, since this average price reflects the electricity demand of suppliers who served a varied portfolio of end-users, including households and small undertakings. According to AEGE, Ferroatlántica and Asturiana de Zinc, an appropriate benchmark would be the minimum price recorded on the pool in 2005, i.e. EUR 18,6/MWh, as this price would reflect the most competitive market conditions on the pool (where generators offer electricity at a price equivalent to their marginal costs). Large industrial consumers are not in a comparable situation to other end-users, particularly households. Therefore, the average pool price would not be the appropriate benchmark. According to Alcoa, the Commission should instead compare the contested tariffs with prices contracted bilaterally by large end-users.

(55) Alcoa provided one example of a bilateral market price and indicated that its three aluminium plants had always benefited from the G4 tariff. However, Alcoa also owns an alumina plant (Alúmina Española) for which a bilateral contract was entered into with a supplier at the end of 2004. The contract was for two years, extendible for an additional year. The three aluminium plants have the same flat consumption profile as the alumina plants. However, the latter consume considerably lower volumes of electricity (0,35 TWh as against 1,3 TWh at the Avilés and La Coruña plants, and 3,4 TWh for the San Ciprián plant). The average price agreed on the basis of this contract was EUR 34,45/MWh (including the cost of the nuclear moratorium, network access costs and other ancillary costs). This price was obtained on the basis of a competitive tender, and suppliers' bids were within EUR 5 of each other.

(56) According to Alcoa, the difference between this bilateral price (EUR 34,45/MWh) and the G4 tariff (EUR 23,9/MWh) can be explained by objective factors. In particular, users on the G4 tariff are subject to regulatory restrictions which do not apply to bilateral contracts, such as the obligation to use all the power contracted under the G4 tariff (subject to penalties), the requirement to own voltage control equipment, and the requirement to pay within 20 days (whereas bilateral contracts have better terms of payment).

(57) Alcoa thus concludes that a hypothetical market price applicable to its three aluminium plants would be well below EUR 34,45/MWh because of the higher consumption level of these plants. Furthermore, if an average marketing margin of EUR 10/MWh was considered, the net cost of supply of the alumina plant would be EUR 24,25/MWh, which is very close to the G4 integral tariff.

(58) Ferroatlántica pointed out that the opening decision misrepresented the 3,4 regulated tariff used in 2005 by wrongly including discounts in the basic tariff and comparing it with an access charge ten times higher than the one applicable (and that of very large consumers). Ferroatlántica also provided evidence that, while the monthly average market price in 2004 for forward contracts for electricity supply in 2005 was EUR 31,68/MWh, this price was EUR 31,05/MWh in December 2004. It would follow that a company would have obtained its basic electricity supply in 2005 at that price at the time when the regulated tariffs were set. After adding 'additional services' (EUR 3,92/MWh) and the relevant access tariff (EUR 1,70/MWh), an industrial user would have obtained a market price of EUR 36,67/MWh, which is below the amount of EUR 56,11/MWh of the 3,4 tariff applicable to energy-intensive users.

(59) In fact, other discounts on that tariff remunerated the capacity to provide demand management services and the acceptance of these services for the benefit of the system. In this respect, Ferroatlántica adds that the discount on the tariff reflected various services supplied, namely, hourly discrimination (with night and weekend consumption), interruptibility (acceptance of supply upon request of the network operator), seasonality (with concentration of supply in low-demand months) and management of reactive energy. It is only these discounts, which were variable and set by regulation from 1995, and not the regulated tariff level, that explain and, in the view of Ferroatlántica, justify the lower average electricity price paid in 2005.

(60) Energy-intensive users contest the statement in the opening decision that the advantage was not proportional to the volumes consumed, and tended to increase for large consumers. On this point, energy-intensive users claim, for example, that the CNE itself confirmed that the level of the G4 tariff should have been even lower. Energy-intensive users note that large consumers under the G4 or 3,4 tariff consumed several thousand times more electricity than average high-voltage consumers, while paying three times less than them.

(61) Furthermore, it would be normal for large consumers to obtain a higher unit discount on the price. On this basis, energy-intensive users claim that the conclusion that the industrial tariffs involved an advantage is debatable. They point out that in any event it is for the Commission to provide conclusive proof of the existence of such an advantage.

(62) Alcoa also indicated that the price paid by Alcoa in Spain was almost identical to the average weighted price paid by aluminium plants in the EU, and was even higher than the average weighted price paid in the EEA.

No state resources

(63) Energy-intensive users submit that it was they who paid industrial tariffs directly to distributors, without the funds coming under the control of the State, and therefore, in line with the *PreussenElektra* case law, such an arrangement did not involve state resources.

(64) Energy-intensive users argue that there was a time lapse between the setting of the tariffs, which took place at the end of 2004, and the adoption of the mechanism to recover the deficit from consumers, which did not take place until June 2006. In the opening decision, the Commission argued that state resources were involved because of the introduction of the surcharge in users' bills, which was qualified as a parafiscal charge. Energy-intensive users submit that, if this hypothesis is accepted, a measure which was not aid in 2005 would become aid (*ex-post*) in 2006. This would be contrary to fundamental principles of EU law such as legal certainty and legitimate expectation. Energy-intensive users point out that the classification of a measure as aid depends only on the circumstances existing at the time of its adoption, and cannot depend on future events, particularly when they are not reasonably predictable. They quote Advocate General Jacobs in the *Van Calster* case ([14]): 'the situation should be assessed on the date of the initial introduction of the charges, and cannot be altered retroactively'.

(65) Energy-intensive users submit that the 2005 regulated tariffs did not constitute state aid in 2005. These companies point out that, in these circumstances, the analysis of the financing mechanism is irrelevant, as the latter was introduced only in 2006. The assessment of the mode of financing would be relevant only if the measure constituted state aid from the outset. Since the tariffs did not include aid, energy-intensive users take the view that the Commission cannot rely on the surcharge to come to the opposite conclusion.

(66) Energy-intensive users further submit that, in the case of parafiscal taxes, the mode of financing of a measure is in any event only relevant to the state aid assessment where the tax is 'hypothecated to the aid', i.e. when there is a direct and immediate link between the measure and its financing ([15]). Energy-intensive users deny the existence of such a link, as the surcharge was designed to cover a deficit which arose during the settlement of regulated activities, which concerned not only the provision of electricity at regulated tariffs, but also other system costs. The surcharge was therefore not specifically allocated to cover losses arising from the supply at regulated tariffs. Secondly, there was no direct or indirect link between the level of the tariffs and the surcharge applied, since the tariff set in 2004 was unconditional (not subject to further adjustments in later years).

([14]) Advocate General's Opinion in Joined Cases C-261/01 and C-262/01 *Van Calster*, paragraph 41.
([15]) Judgment of the Court of Justice in Joined Cases C-261/01 *Van Calster*, ibid., paragraphs 49 and 50.

(67) Energy-intensive users also submit that the surcharge did not constitute a parafiscal charge or levy, because it was not of a fiscal nature under Spanish law. Fiscal measures are used to finance public expenditure, whereas in this case the aim of the surcharge was to recover a deficit that had been incurred by private operators (distributors) which carried out regulated activities within the electricity system. According to the Spanish Constitution, a new fiscal measure can only be introduced by a law (not by a Royal Decree). Furthermore, the State never owns or has discretion to dispose of the proceeds of the surcharge; these funds are transferred to a deposit account managed by the CNE, and cannot be appropriated by the State. The settlement process is fully automatic, and the CNE has no margin of discretion, autonomy or control over the destination or the amount of the funds to be settled for the various players.

(68) According to energy-intensive users, this was recognized by the Commission in its Decision on the Spanish Stranded Costs ([16]), which stated that 'the transfer of the amounts via the CNE is essentially for accounting purposes' and does not conclude that the measure involved state resources.

(69) Energy-intensive users submit that this situation is identical to the 'stranded costs' scenario, since in both cases the government introduced a surcharge aimed at compensating a permanent cost of the system. This line appeared to be confirmed also in a case involving the United Kingdom ([17]).

No impact on competition and trade

(70) Asturiana de Zinc and Alcoa contend that, due to the specific characteristics of the aluminium and zinc markets, a measure concerning the price of electricity used in the production of these metals can have no impact on EU trade, since metals are commodities and their prices are set at world level on the London Metal Exchange. In these circumstances, variations in local production costs do not translate into differences in world prices.

(71) The two companies submit that there is a growing production deficit in the EU for aluminium and zinc, while demand is increasingly being met by exports from non-EU states.

(72) If the aluminium and zinc industries disappeared in Spain, no new EU entrant would step in, as EU (aluminium) plants are already working at full capacity, and no new entrant or existing producer would have an incentive to increase capacity, given that long-term prospects are uncertain as regards future availability of affordable power. The deficit would therefore be covered by imports alone.

(73) Moreover, Alcoa claims that the interests of other European producers are not threatened by the tariffs, since they offer electricity at a price which is identical to the average price paid by other aluminium producers in EU-25.

Even if the industrial interruptible tariffs constituted aid, it would be 'existing aid'

(74) Energy-intensive users claim that the contested tariffs already existed before the accession of Spain to the EU.

(75) Even though the denomination 'G4 tariff' was formally introduced by the Ministerial Order of 6 March 1986, it existed *de facto* already before 1 January 1986, the date of Spain's accession to the EU, since it corresponds to the former 'long-use industrial tariff I' established by Ministerial Order of 14 October 1983, i.e. before Spain's accession. All electricity end-users benefiting from industrial tariff I were automatically switched to the G4 tariff, which was *de facto* the same tariff under a new name.

(76) The other interruptible tariffs are also explicitly provided for in the 1983 Ministerial Order.

(77) Furthermore, according to energy-intensive users, the measure would constitute existing aid on the basis of Article 15 of Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 108 of the Treaty on the Functioning of the European Union ([18]), owing to the expiry of the 10-year limitation period.

([16]) Commission Decision of 25 July 2001, State Aid No 49/99 — Spain. Transitional regime for the electricity market.
([17]) Commission letter to the United Kingdom of 27 February 2002 (State aid No 661/99).
([18]) OJ L 83, 27.3.1999, p. 1.

Recovery would be precluded by legitimate expectations

(78) Energy-intensive users submit that, even assuming that the tariffs could not be deemed to constitute existing aid, recovery would be precluded by the principle of legitimate expectation. Throughout 2005, the tariffs were a direct payment between private operators. Users could not have predicted that tariffs set in December 2004 would become aid by virtue of a government measure adopted in June 2006. No economic operator, however prudent, could have expected this change in its legal situation. Therefore, users had a legitimate expectation that their tariffs did not involve state aid.

COMMENTS FROM THE REGIONAL GOVERNMENTS OF GALICIA AND ASTURIAS

(79) As regards possible aid to energy-intensive users, the Regional Government of Galicia submits that the Commission was wrong to use the pool price as a substitute for the market price, since energy-intensive users normally enter into long-term contracts on considerably better terms.

(80) Given that the liberalisation of the Spanish market has not yet been completed, and given in particular the absence of bilateral contracts between producers and large consumers, the Regional Government of Galicia considers that it would make sense to use as a benchmark the actual costs paid by producers to supply these customers. An alternative would be to obtain a benchmark price based on the technical literature (Wilson, 1993 ([19]) and Castro-Rodriguez ([20]), 1999), by considering either the cost of the most efficient technology meeting the specific needs of energy-intensive users or the average cost of electricity during the different hours of the day. The gap between a benchmark price thus obtained and the regulated tariff paid in 2005 would be much lower. The Regional Government of Galicia further argues that, in any event, all Spanish users, including energy-intensive users, will, in time, repay the deficit caused by the lower tariffs applied in 2005.

(81) Furthermore, according to the Regional Government of Galicia, the tariff system as it stood in 2005 was not legally selective, since the State did not intend to confer an advantage on end-users but merely made errors in its forecasts of market trends and prices when it set the tariffs in 2004. The Regional Government of Galicia also contests the conclusion that the system had an impact on trade within the EU.

(82) The comments from the Asturias regional government are similar to those put forward by the Spanish Government, to which they refer.

OBSERVATIONS BY SPAIN

(83) Spain maintains that the regulated tariffs system in 2005 did not involve aid, either for end-users or for distributors.

No causal link between state action and the deficit, and the deficit cannot be imputed to the State

(84) Spain contends that the deficit is not imputable to the State since it was caused by unpredictable external circumstances and not by the State's deliberate intention to subsidise certain activities.

(85) Spain submits that supply at regulated tariffs set by the State was not precluded by EU law in 2005. Therefore, state regulatory intervention was legally valid, as it was the expression of national sovereignty. One of these sovereign prerogatives consists in setting the tariffs so that expected costs match expected demand.

(86) Spain submits that the 2005 deficit was caused by a discrepancy between the government's forecasts of wholesale electricity prices and the actual prices recorded on the pool. The exceptionally high prices of 2005 were driven by unpredictable causes amounting to force majeure.

([19]) Wilson, R. (1993), *Nonlinear Pricing*, Oxford University Press.
([20]) Castro Rodriguez, F. (1999), *Wright tariffs in the Spanish electricity industry, The case of residential consumption*, Utilities Policy, pp. 17-31.

(87) Since the event generating the alleged aid was a higher-than-forecast increase in wholesale prices, the alleged advantage could not be imputable to any legal act. Even assuming that this advantage had existed (which is not the case), it would have been caused by circumstances unrelated to the State's intentions. The existence of force majeure, according to Spain, breaks the causal link between the administrative decision setting the level of the tariffs and the competitive advantage giving rise to state aid. Even assuming (which is not the case) that the objective condition of the causal link was met, the subjective condition of intentionality (imputability) on the part of the State would be absent.

No state resources

(88) Spain submits that the tariffs did not involve public funds. Firstly, Spain claims in this respect that the surcharge is not a 'charge' within the meaning of the case-law of the European Court of Justice on parafiscal levies, because it is not collected by the State and does not correspond to a fiscal levy. According to Spain, the surcharge is an integral part of the tariff and is like a tariff in nature. The tariff is thus a private price.

(89) Secondly, the funds are not collected by the State and are not paid into a fund designated by the State. The tariffs are collected by distributors, not by the State, and therefore they are private prices which ensure the equitable remuneration of the players (as laid down in the LSE). They are neither taxes nor public prices. The State does not remunerate anything, since it is the system that provided remuneration by virtue of market forces for non-regulated activities and by virtue of access tariffs set by the State as regards regulated activities. Since in such a system there is no burden for the State, no state resources would be involved, according to the *Sloman Neptune* case law ([21]). Furthermore, these funds never flow into the state coffers, are not mentioned in budgetary laws, are not subject to verification by the Court of Auditors, and cannot be recovered from debtors by means of administrative recovery procedures. Debts vis-à-vis the electricity system are not subject to the interest rate applicable to debts owed to the State.

(90) Spain reiterates that these funds are handled by the Spanish Regulator, the CNE, which acts as a mere accounting intermediary. Spain points out that in its 2001 decision on the Spanish stranded costs (SA NN 49/99) the Commission had already established that 'the transit of funds through the CNE is of an essentially accounting nature. The funds transferred to the account in the name of the CNE never became the property of this body, and were immediately paid to the beneficiaries according to a pre-determined amount which the CNE is unable to modify in any way'. On the basis of this consideration, the Commission came to the conclusion that 'it [was] not in a position to determine whether the proceeds of the levy established within the framework of the Stranded Costs scheme constitute state resources'.

No advantage

(91) Spain does not share the Commission's view that regulated tariffs confer an economic advantage on end-users (or distributors).

(92) As regards end-users, after reiterating that the deficit is the result of force majeure, Spain contends that the deficit did not benefit large consumers, because it was passed on to the tariffs for the following years with interest. Therefore, the alleged economic advantage arising from a lower electricity price is only apparent, since the difference with respect to free market prices is repaid with interest by consumers.

Supply at regulated tariffs is a service of general economic interest

(93) Spain submits that in 2005 the existence of regulated tariffs was not contrary to EU law, as the deadline for opening up the market to all consumers including households was 1 July 2007.

([21]) Judgment of the ECJ of 17 March 1993 in Joined Cases C-72/91 and C-73/91, paragraph 21: 'The system at issue does not seek, through its object and general structure, to create an advantage which would constitute an additional burden for the State'.

(94) In particular, according to the Spanish authorities, electricity supply is a service of general interest, and the State must intervene to avoid abuses of dominant positions arising from the existence of a single network (natural monopoly).

(95) The parameters for setting the tariffs were set in an objective and transparent way. The complex regulatory framework for setting the tariffs and the settlement procedure demonstrate, in Spain's view, that the tariff system was based on a thorough analysis of the costs and revenues of the system, and an analysis of electricity demand.

Undertaking from Spain

(96) As noted in recitals 25 and 26, the deficit generated in 2005 is being repaid in annual instalments, which yield an interest rate set at the Euribor rate, without any spread. Without prejudice to its comments, Spain has undertaken to retrospectively raise the interest rate charged to business users with connections of more than 1 kV. The increase will be determined in proportion to the contribution to the 2005 deficit of business users which are the subject of the current proceedings, and which were supplied at integral regulated tariffs. It will result from the application of a spread of 65 basis points over the Euribor reference, thus aligning it broadly with the rate applied to the deficit in the following years.

(97) The relevant amount will be charged to business users as follows: as regards the annual instalments of the part of the 2005 deficit which has already been repaid, a one-off increase in access tariffs will be applied; as regards the amounts still to be reimbursed, the higher interest rate will be applied directly to each annual amount, again in the form of higher access tariffs.

5. **ASSESSMENT OF THE MEASURE**

PRESENCE OF STATE AID PURSUANT TO ARTICLE 107(1) OF THE TFEU

(98) A measure constitutes state aid within the meaning of Article 107(1) of the TFEU if the following conditions are met: the measure (a) confers an economic advantage on the beneficiary; (b) is granted by the State or through state resources; (c) is selective; (d) has an impact on intra-Community trade and is liable to distort competition within the EU. Since these conditions must all be met, the Commission will confine its assessment to the existence of an economic advantage conferred on the beneficiaries.

Presence of an economic advantage

(99) Undertakings are favoured within the meaning of Article 107(1) of the TFEU if they obtain an economic advantage which they could not otherwise obtain under market conditions. In the case at hand, the assessment must establish, having regard also to the repayment of the 2005 deficit of the electricity system, whether there was any positive difference between the regulated tariffs set in 2005 and the market prices that the potential beneficiaries would have had to pay for the electricity purchased and the services supplied under their tariff regime. Any advantage with respect to market conditions must be established by reference to actual market prices. Both matters, i.e. the existence of positive differences — or the absence thereof — between electricity pool prices, market prices and regulated tariffs, and the repayment of the deficit, are examined in turn below.

Comparison with electricity pool average prices

(100) The average prices of the electricity pool provide an indication of general price levels in the wholesale market. This average reference price was EUR 59,47 MWh in 2005, for the entire year. As indicated and illustrated in recital 19 (Graph 1), in seven non-consecutive months in 2005 average wholesale prices were above the electricity prices implicit in the integral regulated tariffs applied to all end-users. Therefore, the average tariff level set by Decree 2392/2004 appears to have given rise to a positive difference in favour of all the end-users which opted for regulated tariffs, at least for the majority of months in 2005.

(101) However, in monthly periods of less than a year, this difference did not arise during the five months between January and May 2005. There was therefore no advantage for the entire regulated tariff system. Furthermore, if the comparison is made between periods of more than one year, e.g. until 30 December 2007, the possible accumulated advantage from June 2005 is more than cancelled out by the decrease in average pool prices, which fell sharply to EUR 37/MWh in March 2007, while the prices implicit in the integral regulated tariffs were around EUR 68/MWh during the same period. In fact, from October 2006 the electricity prices implicit in integral tariffs were much higher than wholesale supply prices (see Graph 1). Consequently, the benefits and economic advantages to consumers which were supplied at regulated tariffs, where pool prices are higher than the implicit cost of electricity in the regulated tariffs, may be cancelled out when pool prices are lower than the implicit cost of electricity.

(102) It follows that, both in monthly periods of less than one year in 2005 and two-year periods encompassing part of 2005, the energy prices implicit in the regulated tariffs applicable in 2005 do not appear to have provided an advantage to the group of consumers supplied at regulated tariffs, when compared with the electricity pool wholesale prices. However, the fact is that revenue from access charges and regulated tariffs paid in respect of the whole electricity system were not sufficient to cover the regulated costs of the system in 2005. It must therefore be considered whether the mechanism in place is sufficient to guarantee repayment of the deficit.

Repayment of the 2005 deficit of the electricity system

(103) As described in recitals 15 and 20-22 above, the accounts of the electricity system in 2005 encompassed all the regulated costs and regulated revenues of the system without assigning specific revenues to specific costs. For instance, transport and distribution costs (EUR 4 410 million) or cogeneration and renewable energy support costs (EUR 2 701 million) were not divided between, respectively, regulated revenues from integral tariffs in the regulated market and/or revenues from regulated access charges in the free market, and were not financed differentiating between these two types of revenue. In fact, all the system users receive a profit and can be expected to cover costs of support for efficient forms of cogeneration and renewable energy, or transport and distribution services. In this system of non-cumulative costs for each tariff, it is impossible *ex post* to objectively assign the distribution of costs to free market users and users at regulated tariffs and, within the latter category, to the 25 different tariff steps applicable in 2005. It follows that it is appropriate to examine the possible advantages, or absence thereof, of the 2005 deficit for the electricity system as a whole.

(104) In this respect, Spain has put in place a mechanism for recovering the whole of the 2005 deficit. This is consistent with this universality of the accounts of the system applied during that period. The shortfall in regulated revenues of the electricity system to cover the system costs was addressed through the injection of resources collected through the 'specifically earmarked contribution' provided for by Royal Decree 809/2006. From mid-2006, recovery began through the application of a surcharge on the value of 1,378 % on integral regulated tariffs and 3,975 % on access charges and, thereafter, the surcharges needed to ensure that over 14,5 years ending in 2020, the EUR 3,8 billion plus interest is recovered (see recitals 25 and 26 above).

(105) It follows that the revenue from the special contribution earmarked for financing the 2005 deficit allows system users to pay electricity bills, with the increase needed to balance the 2005 system accounts *ex post*, with a significant time lag.

(106) Under these circumstances, the only debatable aspect of the method chosen in 2006 to repay the 2005 electricity system deficit and balance the accounts would be the low interest rate initially applied to the annual repayments, namely the Euribor reference rate without any spread. As described in more detail in recitals 96 and 97, Spain has undertaken to increase the interest rate applicable to the business users which are the subject of the present proceedings. Spain undertakes to apply a spread of 65 basis points over the reference interest rate.

(107) Application of this modification to the measure initially applied to repay the 2005 deficit, which excludes households and small businesses that have paid the highest regulated tariffs under the correction mechanism, cancels out any hypothetical advantage the companies may have obtained from the deferral of payments from 2006. In addition, the application of a surcharge on the tariff means that the total amount recovered is, for each company, directly proportional to its electricity consumption. The more electricity consumed, the higher the surcharge.

Comparison with electricity market prices

(108) Secondly, as noted by some interested parties, prices recorded in the electricity pool are not adequate benchmarks for comparing the electricity prices paid by large consumers under regulated tariffs with market prices. Indeed, based on the evidence in the 2005 report of the electricity market operator OMEL, only seven end-users accounting for 5 % of demand were sourcing electricity directly from the pool, compared with hundreds of industrial and large business users. Industrial and other large consumers, in particular energy-intensive consumers for whom energy accounts for a sizeable proportion of their production costs (typically 30-40 % for aluminium production) require and obtain predictable price and supply conditions. These conditions are established in contracts with longer terms than day-ahead. The prices quoted hourly on a day-ahead market such as the electricity pool are illustrative of average market prices for suppliers serving a varied portfolio of customers, including households. They are, however, not adequate benchmarks for determining the prices which energy-intensive users should pay in the free market under contracts with longer terms than day-ahead. Contrary to the opinion given in the opening decision, the investigation has shown that regulated tariffs lower than average pool prices do not necessarily imply an advantage over market conditions for industrial users, since the pool prices are not market prices for most of these users. This dispels the doubts raised in this connection.

(109) Moreover, in Spain, the option of switching to the free market was not irreversible in 2005. Consumers were constantly able to choose between the most attractive offers in the regulated and free markets, which led to a degree of price convergence. The reversibility of supply options tends necessarily to depress retail market prices in situations of wholesale price-hikes like those in Spain from April 2005, whereas the opposite incentive to increase free market prices to bring them closer to the highest regulated tariff levels appears when the situation is reversed.

(110) As confirmed by the association of independent suppliers (recitals 42-49), in 2005 suppliers in the free market had to honour their contracts or terminate them unilaterally, if this was possible, or else renegotiate their prices and adjust them upwards, taking the risk that their customers might switch to the regulated market. The operating losses that the free market suppliers claim to have incurred indicate that prices in the free market in 2005, especially for one-year contracts which were honoured, remained close to the respective regulated tariff levels, and, accordingly, that regulated tariffs did not *de facto* confer an economic advantage compared with actual prices in the free market.

(111) This implies, therefore, that two hypothetical competing industrial users, one operating under a free market-based one-year electricity supply contract from January to December 2005 and the other obtaining supplies at regulated tariffs in the same period faced, all other things being equal, similar electricity costs. In fact, the only effect that the level of the regulated tariffs had on prices in the free market in 2005 was to confer on free-market users the indirect benefit of limiting price increases, even assuming that these increases were contractually possible during the year or, in the longer term, in the whole of 2005. The actual or potential competition between industrial users obtaining electricity in the free and regulated markets could not distort regulated tariffs.

(112) Thirdly, in its opening decision, the Commission referred in particular to the low regulated tariff levels of EUR 23,9/MWh and EUR 27,0/MWh, applied in 2005 to large industrial consumers (G4 tariff) and to large industrial consumers with interruptible supply (e.g. 3,4 tariff), respectively, as shown in Table 3 in recital 30 above. As pointed out by certain third parties, the levels of regulated tariffs objected to in the opening decision are not tariffs but average prices after discounts. Without discounts, the basic tariff levels actually laid down in Decree 2392/2004 shown in Table 1 were, respectively, EUR 56,12/MWh (3,4 tariff) and EUR 25,44/MWh (G4 tariff).

(113) In this respect, the formal investigation provided evidence that the regulated tariffs applicable to industrial users mentioned in the opening decision were at the level of the market prices applicable for the whole period between January and December 2005, as is shown below:

(114) Firstly, evidence has been provided that there were bilateral market prices of EUR 34,45/MWh which were applied to energy-intensive users in the free market in 2005 (recitals 55-57). With a marketing margin lower than the average EUR 10 margin added in the decision opening the formal investigation, this market price shows a supply cost close to EUR 25,44/MWh of the lowest (G4) regulated tariff (EUR 23,9/MWh of average *ex-post* price). When account is taken of objective differences concerning supply under the regulated tariff, such as supply volumes 9,7 times higher, investment in control equipment and payment time limits, the fact that the regulated tariff was lower does not appear to have conferred any undue economic advantage on the beneficiaries.

(115) Secondly, the evidence available shows that in December 2004 one-year contracts on baseload supply, based on forward market prices of EUR 31,05/MWh, could be concluded for supply between January and December 2005. A final market price (with additional services and access tariff) of EUR 36,67/MWh, which is lower than the relevant basic tariff level (tariff 3,4), was available for interruptible industrial users with strong load modulation (see recitals 16, 18 and 58 above).

(116) Additional discounts available under regulated tariffs for demand management (e.g. load modulation, interruptibility) allowed for lower average prices in the regulated market for the users providing these services ([22]). These discounts, which were not specifically addressed in the opening decision, remunerated valuable demand-side services to the network, which required adjustments, investments or restrictions imposed in commercial or industrial processes. Load modulation requires energy-intensive industrial or commercial processes to be carried out in off-peak rather than peak periods in order to reduce consumption and voltage in the electricity network. In the same way, interruptibility services supplied to the network are economically useful since they consist, for the industrial user in question, in allowing the system operator to interrupt supply at short notice (from a few seconds to two hours) and for a long period (from one to 12 hours), as was the case with the relevant regulated tariffs in Spain.

(117) The benefits of these services in terms of guaranteeing continuity of electricity supply are recognised in EU legislation. Directive 2005/89/EC of the European Parliament and of the Council of 18 January 2006 concerning measures to safeguard security of electricity supply and infrastructure investment ([23]) requires Member States to take account of demand management technologies and to take measures to remove the barriers preventing the use of interruptible contracts in order to maintain the balance between supply and demand. These services supplement and may even replace other means of regulation used by the network operator to guarantee that demand for electricity from the network is in line with supply, thereby avoiding interruptions and blackouts, which are socially and economically costly and may trigger sanctions or liabilities.

(118) Specifically in the case of Spain, the absence of a significant interconnection capacity with other Member States and the significant penetration of intermittent electricity supply from renewable energy sources in 2005 make these services particularly valuable. The extent of their economic value and of the costs that may be avoided in the electricity system can be illustrated in terms of the costs borne by the Spanish network operator Red Eléctrica de España in purchasing balancing services. In 2005 Red Eléctrica de España paid, on average, EUR 65/MWh for secondary regulation services to increase energy (adding additional energy on line for between 15 seconds and 15 minutes to balance the network); for tertiary regulation of energy increase (adding additional energy on line between 15 minutes and 2 hours to restore the secondary regulation energy reserve), the average price in 2005 was EUR 78/MWh, going up to EUR 600/MWh ([24]). By flattening demand and removing it from peak times (load modulation) or providing the capacity to reduce it in critical situations (interruptible services), discounts on the relevant regulated tariffs (e.g. around EUR 32/MWh on the 3,4 tariff) appear to be economically justifiable.

(119) In the absence of such discounts for demand-management measures, regulated tariffs for users connected to the high-voltage network (1,4 and 2,4 tariffs) stood at a much higher level, between EUR 58 and 61/MWh for the basic tariff and EUR 76,2/MWh for the average actual price. When compared with forward market prices of

([22]) The main source from which the figures in the opening decision are derived is the CNE report: 'El Consumo Eléctrico en el Mercado Peninsular en el Año 2005', 25.7.2006, Section 2. For large industrial consumers (interruptible and THP), the report indicates that strong load modulation with supply in off-peak periods, which requires adjustments in production processes, allows for substantial discounts on the headline tariff.

([23]) OJ L 33, 4.2.2006, p. 22; see Articles 3(3)(c) and 5(2)(b).

([24]) *El Sistema Eléctrico Español 2005*, pp. 54 and 55, Red Eléctrica de España.

EUR 31,05/MWh available for the period between January and December 2005, it cannot be considered that the market prices are higher than the regulated tariffs applicable to the vast majority of high-consumption industrial and commercial users.

(120) It follows that, although the prices registered in the electricity pool are not an appropriate benchmark for comparison with the electricity prices paid by large industrial and commercial users, the actual market prices applicable to supplies of electricity to end-users which were supplied at regulated tariffs in 2005 were in line with the respective levels of regulated tariffs.

6. **CONCLUSIONS ON THE MEASURE**

(121) In the light of the above considerations, the Commission considers that it has been demonstrated that, firstly, the companies that received electricity at integral regulated tariffs did not obtain benefits from the level of these tariffs and, secondly, bearing in mind Spain's undertaking to amend the measure, that interest will be charged at an appropriate rate for the delay by certain companies in paying part of their electricity bills in 2005.

(122) Therefore, the measure at hand does not imply an economic advantage in favour of business users. Since the criteria of Article 107(1) TFEU are cumulative, there is no need to examine whether the other criteria are fulfilled.

(123) The Commission thus concludes that, having regard to the arrangements put in place by Spain to recover end-users' debt towards the electricity system, the system of regulated tariffs implemented in 2005 did not give rise to state aid within the meaning of Article 107(1) TFEU. This conclusion relates to the situation and time period covered by the complaint, without prejudice to any assessment that the Commission may make of measures taken by Spain after 2005,

HAS ADOPTED THIS DECISION:

Article 1

The system of regulated tariffs implemented by the Kingdom of Spain in 2005 does 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 the Kingdom of Spain.

Done at Brussels, 4 February 2014.

For the Commission
Joaquín ALMUNIA
Vice-President