COMMISSION DECISION (EU) 2015/1877

of 20 April 2015

on tariffs charged by S.C. Hidroelectrica SA of Romania to S.C. Termoelectrica SA and S.C. Electrocentrale Deva SA — SA.33475 (12/C)

(notified under document number C(2015) 2648)

(Only the English text is authentic)

(Text with EEA relevance)

THE EUROPEAN COMMISSION,

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

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

Having regard to the decision by which the Commission initiated the procedure laid down in Article 108(2) of the Treaty, in respect of the aid SA.33475 (12/C, ex 12/NN) [1],

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

Whereas:

1. PROCEDURE

(1) On 2 August 2011, the Commission received a complaint from the investment fund S.C. Fondul Proprietatea SA ('the complainant') in relation to the purchase of electricity by S.C. Hidroelectrica SA ('Hidroelectrica') from electricity suppliers at prices allegedly set above market level.

(2) On 25 April 2012, the Commission informed Romania that it had decided to initiate the procedure laid down in Article 108(2) of the Treaty in respect of the contracts whereby Termoelectrica SA ('Termoelectrica') and S.C. Electrocentrale Deva SA ('Electrocentrale Deva') supplied electricity wholesale to Hidroelectrica, hereafter referred as the 'Opening Decision'.

(3) The Opening Decision was published in the *Official Journal of the European Union* [2]. The Commission called on the Romanian authorities and interested parties to submit their comments.

(4) On 23 July 2012 the Romanian Authorities provided the Commission with their preliminary comments on the Opening Decision.

(5) The Commission received only preliminary comments from Termoelectrica, dated 11 June 2012 and from Electrocentrale Deva, dated 12 June 2012, which the Romanian Authorities forwarded to the Commission on 26 July 2012. The Romanian Authorities forwarded again the same preliminary comments to the Commission on 2 August 2012.

(6) On 12 February 2013, the Commission informed the Romanian Authorities that it had not received any comments from interested parties.

(7) On 24 March 2013, the Romanian Authorities reiterated their preliminary position in relation to this case.

(8) The Commission requested further information from the Romanian Authorities by letters dated 29 July and 11 September 2013, 3 March, 6 August and 25 September 2014 and 19 January 2015. The Romanian Authorities provided further information on 11 September 2013, 24 March, 14 May, 3 September, 22 September, 10 October and 21 October 2014 and on 20 February 2015.

[1] Commission Decision C (2012) 2552 final of 25 April 2012 concerning the case SA.33475, p. 46
[2] OJ C 395, 20.12.2012, p. 46.

(9) On 16 April 2015, Romania waived its rights under Article 342 of the Treaty in conjunction with Article 3 of Regulation No 1 ([3]) to have the decision adopted in Romanian and agreed that the decision be adopted in English.

2. DESCRIPTION OF THE AID MEASURES

(10) This section describes the contracting parties (i.e.: Hidroelectrica, Termoelectrica, and Electrocentrale Deva), other electricity generators, contracts for the purchase of electricity in the context of the Romanian electricity market and various developments and interlinks between the alleged beneficiaries.

2.1. **The contracting parties**

2.1.1. *Hidroelectrica*

(11) Hidroelectrica was established in 2000. Hidroelectrica is governed by ordinary company law. Its share capital is held by the Romanian State through the Ministry of Economy and Trade (80,06 %) and the complainant (19,94 %). The Romanian State is represented in the Shareholder Meeting's Board of Hidroelectrica. According to Hidroelectrica's Articles of Incorporation, the General Director runs and represents the company's day-to-day business and independently takes decisions on matters other than those reserved for the Shareholders' Meeting Board and the Board of Directors. In practice Hidroelectrica's Directors cumulated functions with government posts ([4]).

(12) Hidroelectrica is Romania's main electricity generator with an annual production capacity of around 17,5 TWh in a normal hydrological year. Hidroelectrica produces electricity through dams and run-of-the-river generation plants. However, this production is subject to wide variations depending on hydrological conditions: in 2009, Hidroelectrica's output was 16,4 TWh, in 2010, it was 21,3 TWh and in 2011, it was 14,7 TWh. In 2013, Hidroelectrica's market share was 28,24 %, ahead of Complexul Energetic Oltenia, a thermo-coal based electricity producer, with 20,83 % market share and Nuclearelectrica with 20,65 % market share, both state-owned companies.

(13) Hidroelectrica was placed under insolvency proceedings on 26 June 2012 ([5]) and exited them on 26 June 2013 ([6]). On 25 February 2014, Hidroelectrica was again placed under insolvency proceedings.

2.1.2. *The beneficiaries*

(14) The suppliers with which Hidroelectrica entered into the contracts under investigation are Termoelectrica and Electrocentrale Deva, two coal-based electricity producers, fully state-owned, directly or indirectly, with an annual production capacity at the date of signature of the contracts of 1,7 TW and 1,3 TW respectively and market shares of 3 % and 5 % in 2009 ([7]) and of 1,9 % and 4,1 % in 2011 ([8]). Termoelectrica and Electrocentrale Deva sold electricity produced from costly uncompetitive indigenous coal ([9]).

([3]) Regulation No 1 of 15 April 1958 determining the languages to be used by the European Economic Community (OJ 17, 6.10.1958, p. 385/58).

([4]) All members of Hidroelectrica's Board of Directors except the General Director of Hidroelectrica and the representative of Fondul Proprietatea (2010), cumulated other functions in various Ministries and were appointed through Orders issued by the Ministry of Economy and Trade, as follows: (i) in 2005-2006: the personal adviser in the Cabinet of Minister of Economy and Trade; the director of cabinet of the Minister for Small and Medium Enterprises; the pe For Electrocentrale Deva: Addendum No 1 dated rsonal adviser in the cabinet of the Minister in the Ministry of Public Finance and the personal adviser in the General Secretariat of the Government were members of Hidroelectrica's Board of Directors; (ii) in 2007-2008 — situation unknown; (iii) in 2009: the State Secretary in the Ministry of Economy and Trade was also the President of Hidroelectrica's Board of Directors (2009), while another State Secretary in the Ministry of Public Finance and two general directors in the Ministry of Economy and Trade were also members of Hidroelectrica's Board of Directors; (iv) in 2010: three personal advisers of the Ministry of Economy and Trade, a State Secretary in the Ministry of Finance and a General Director in the Ministry of Economy and Trade were members of Hidroelectrica's Board of Directors.

([5]) Decision of Tribunal of Bucharest No 22456/3/2012 dated 26 June 2012.

([6]) Decision of Tribunal of Bucharest No 6482 dated 26 June 2013.

([7]) Energy Regulator, *Annual Report 2009*, p. 15.

([8]) Energy Regulator, *Annual Report 2011*, p. 15.

([9]) For instance, coal mines supplying Termoelectrica, such as the Paroseni mine, were included in the plan for aid to the definitive closure of uncompetitive coal mines in Romania which the Commission cleared by Decision of 22 February 2012 in case SA 33 033 — National Hard Coal Company.

(15) Electrocentrale Deva was a division of Termoelectrica until the end of December 2001 when it was incorporated as a separate company, along with other state-owned divisions (CE Craiova, Electrocentrale Bucuresti, CE Rovinari, etc.). The sole shareholder of Electrocentrale Deva was Termoelectrica until 27 March 2012.

2.2. **Other market information**

(16) Electricity generation in Romania is dominated by state-controlled companies, which together hold a market share of approximately 90 % ([10]). Total net electricity generation in Romania amounted to 60,38 TWh in 2011. The generation mix consists mainly of hydro (approximately 28 % of total generation), nuclear (approximately 18 %) and fossil-fuel-based (approximately 51 %) power plants ([11]).

(17) The Romanian market is interconnected with, notably, Bulgaria, with 400 MW net transfer capacity in 2009-2010 and Hungary, with 500-800 MW net transfer capacity in 2009-2010. The net capacity of interconnection with these Member States was not fully used in that period, due to congestion. During the period 2009-2011, the flux of imports and exports of electricity into and from Romania were as follows: (i) in 2009, imports of electricity amounted to 676 GWh, while exports amounted to 3 154 GWh (approximately 4,8 % of the all the electricity produced in Romania); (ii) in 2010, imports of electricity amounted to 943 GWh, while exports amounted to 3 854 GWh (approximately 3,4 % of the all the electricity produced in Romania); (iii) in 2011, imports of electricity amounted to 1 036 GWh, while exports amounted to 2 942 GWh (approximately 2,8 % of all the electricity produced in Romania).

2.3. **The contracts**

(18) The contract with Termoelectrica was concluded on 30 July 2008 ([12]), while the contract with Electrocentrale Deva was concluded on 9 June 2009 (collectively referred to in this Decision as 'the Contracts'), for a duration of 10 years. The Contracts were terminated by Hidroelectrica's judicial administrator Euro-Insol during Hidroelectrica's insolvency procedure, at the end of August 2012 ([13]).

(19) By notes to the Romanian Ministry of Economy and Trade, Termoelectrica and Electrocentrale Deva requested approval from that Ministry for the signature of the Contracts, as set out in recitals 20 to 22:

(20) On 15 July 2008 by note number 7323, Termoelectrica stated the following: '(…) Termoelectrica SA has analysed several methods of solving this urgent problem and the only variant with any prospect of rapid success and that does not require EU approval is the following: Signature of a long-term (10 year) contract between Termoelectrica SA and Hidroelectrica SA for the purchase of the electricity produced by generation unit no 4 of CET Paroșeni. The contract price will be the price for CET Paroșeni established by ANRE on the regulated market, based on the justified costs of Termoelectrica SA; and Signature with Compania Națională a Huilei Petroșani of a long-term (approx. 10 year) contract to acquire coal. For Termoelectrica SA (SE Paroșeni) and even for the Compania Națională a Huilei ([14]), this (…) would ensure the long-term future of the two companies located in the Jiu Valley.'

(21) On 27 May 2009, by note number 10855 Electrocentrale Deva, requested the following: '(…) In order to prevent the company from going bankrupt and to create the conditions necessary for the financing and implementation of the investments needed to continue running, we ask that you give your approval for the negotiation and conclusion of a 10-year contract between Electrocentrale Deva and Hidroelectrica București for the sale to Hidroelectrica of a quantity of electricity corresponding to an average power of 150 MW in addition to the quantity delivered on the regulated market and at a price approved by ANRE that will cover the justified production costs.'

(22) The two Notes were approved by representatives of the Romanian Ministry of Economy and Trade, at the level of Minister and/or State Secretary. The Contracts state that they were concluded on the basis of those notes.

([10]) Energy Regulator, *Annual Report 2010*, p. 12
([11]) Energy Regulator, *Annual Report 2011*, p. 22.
([12]) Deliveries started in 2009.
([13]) The contract with Termoelectrica was terminated on 29 August 2012, while the contract with Electrocentrale Deva was terminated on 30 August 2012.
([14]) On 1 August 2013, Societatea Națională a Huilei, which resulted from the spin-off from Compania Nationala a Huilei allegedly competitive mines, was also incorporated into Complexul Energetic Hunedoara.

(23) In the contract with Termoelectrica, neither Hidroelectrica nor Termoelectrica had the possibility to terminate the contract. In the contract with Electrocentrale Deva, both Hidroelectrica and Electrocentrale Deva had the possibility to terminate the contract in the following circumstances: (i) loss by the other party of its quality of producer, within five working days from the date when this quality was lost; (ii) refusal of either of the parties to conclude a new contract or to amend the existing contract, in the event of a change in the economic and technical circumstances existing at the date of its conclusion; (iii) in other cases stipulated by any applicable laws or regulations ([15]).

(24) The contract with Termoelectrica had the following particulars: (i) the contractual price would be established annually by the Romanian Energy Regulatory Authority ('ANRE') based on the costs of production justified by Termoelectrica; (ii) Hidroelectrica would buy all the electricity produced by Paroseni Plant each month ([16]). From the date of its signature and until its termination by the judicial administrator, the contract was modified eight times (seven addendums consisted of price adjustments) ([17]).

(25) The contract with Electrocentrale Deva had the following particulars: (i) the contractual price would be established by ANRE based on the costs of production justified by Electocentrale Deva; (ii) if ANRE no longer regulated electricity prices, the price was to be negotiated by the parties and was not to be lower than the contractual price in the previous year; (iii) the contractual parties would not charge any penalty or any other charge in the event if the seller failed to supply the contractual quantity of electricity or the buyer failed to pay the contractual price ([18]). From the date of its signature and until its termination by the judicial administrator, the contract was modified five times ([19]) (all changes consisted of price adjustments).

(26) Despite clear provisions in both Contracts, according to which the contractual price was to be established by ANRE, as a rule, in practice the price adjustments were made upon prior approval of the Ministry of Economy and Trade, with three exceptions ([20]).

(27) For instance, through note (date illegible), Hidroelectrica sought approval from the Ministry of the Economy and Trade for the adjustment of the prices for the period 1 August 2009 — 31 December 2009, due to 'increases of the production costs'. In the same note, it is clearly mentioned that the 'purpose of the conclusion and the performance of the two contracts is to sell in the competitive market an amount of hard coal based electricity mixed with hydropower, and also to provide the two thermal power producers with a contract accepted by the financial institutions as a mortgage, in order to obtain long-term loans necessary to make the investments required to maintain the electricity generation licences'.

(28) Similarly, through another note, Hidroelectrica sought approval from the Ministry of the Economy and Trade in order to maintain the 2009 price 230 Ron/MWh for the period from 1 January 2010 until 31 March 2010 in order 'to obtain the revenue required to continue the on-going restructuring of the producer of hard coal for electricity generation and the producer of thermal power (…)'.

(29) Moreover, after conclusion of the Contracts, through note number 6547 of 2011, Hidroelectrica sought approval from the Minister of the Economy and Trade to adjust the prices for year 2011 in order to allow Termoelectrica and Electrocentrale Deva: 'to obtain long-term loans necessary to make the investments required to maintain electricity generation licences and also to obtain the revenues needed for the restructuring of the producer Compania Nationala a Huilei'.

([15]) Article 25 of the Contract with Electrocentrale Deva

([16]) Group 4 CET Paroseni — the estimative contractual quantity for the entire contractual duration is of 940 GWh per year).

([17]) Addendum 1 from 22 March 2009 sets the price at 225 RON/MWh for year 2009; Addendum 2 unknown date sets the price at 225 RON/MWh for year 2009 and stipulates that the price from 2010 onwards for the entire contractual duration shall be established by ANRE; Addendum 3 from 7 August 2009 sets the price at 230 RON/MWh for 2009; Addendum 4 from 19 February 2010 sets the price at 230 RON/MWh for the period 1 January-31 March 2010; Addendum 5 from 30 March 2010 sets the price at 230 RON/MWh for the period 1 April-31 December 2010; Addendum 6 from 31 December 2010 sets the same price as in Addendum No 5 (at 230 RON/MWh until 31 January 2011); Addendum 7 from 1 February 2011 sets the price at 235 RON/MWh for the period 1 February-31 December 2011; Addendum No 8 from 22 September 2011 replaces the initial Supplier Termoelectrica in the original contract by SC de Producere a Energieie Electrice si Termice Electrocentrale Paroseni SA.

([18]) See Article 14 of the contract with Electrocentrale Deva.

([19]) Initial contractual price is 220,56 RON/MWh. Addendum 1 from 1 August 2009 sets the price at 234 RON/MWh for year 2009; Addendum 2 from 2 January 2010 sets the price at 225,7 RON/MWh for the period 1 January-30 June 2010.; Addendum 3 from 11 February 2010 sets the price at 234 RON/MWh for the period 1 January-31 March 2010; Addendum 4 from 1 April 2010 sets the price at 234 RON/MWh for the period 1 April-31 December 2010; Addendum 5 from 1 February 2011 sets the price at 234 RON/MWh for the period 1 February-31 December 2011.

([20]) For Termoelectrica: Addendum No 1, dated 20 March 2009, stipulated the price for 2009 based on ANRE Decision; Addendum No 2 dated 1 June 2009 sets the price for 2009 and specifies that from 2010 onwards the contractual price shall be set by ANRE for Paroseni Plant.
For Electrocentrale Deva: Through Addendum No 2, dated 7 January 2009, the price was adjusted based on ANRE Decision.

(30) All those notes also clearly state that Hidroelectica was seeking approval from the Ministry of Economy and Trade 'to authorise the executive management of the three electricity producers to sign the addendums concerning the new prices'.

(31) In addition, all addendums to the Contracts relating to price adjustments refer to internal notes issued by Hidroelectrica and approved either by the Minister of the Economy and Trade or by the State Secretary in the Ministry of Economy and Trade with the three exceptions mentioned in recital 26, based on which such price adjustments were approved ([21]).

(32) The quantities of electricity purchased and average prices paid under the Contracts between 2009 and 2011 are as follows ([22]):

	2009	2010	2011
Electrocentrale DEVA			
Quantity (GWH)	499,8	308,6	146,4
Purchase price (RON/MWh)	230,2	234,0	234,0

	2009	2010	2011
Termoelectrica			
Quantity (GWH)	900,7	804,6	648,9
Purchase price (RON/MWh)	227,4	230,0	234,4

2.4. **The Romanian electricity market**

(33) Electricity trading in Romania mainly takes place on two markets: (i) the Regulated Electricity Market on which electricity is traded based on regulated tariffs and conditions; and (ii) the Competitive Electricity Market on which electricity is traded freely, including through two main types of contracts: relatively standard bilateral contracts traded on the centralised market and freely negotiated bilateral contracts, the so-called market for directly negotiated contracts.

2.4.1. *The Regulated Electricity Market*

(34) The transactions on the Regulated Electricity Market are implemented through sale-purchase framework agreements concluded between the electricity generators/producers active on the regulated market, including Hidroelectrica, and the 'suppliers of last resort', which ensure distribution of electricity to the end-user. The eligible customers buy electricity at regulated tariffs. On the regulated market, ANRE sets the prices and volumes to be delivered by the electricity generators/producers ex ante every year. By 2009-2010, when the contracts under examination started to be implemented, 56-61 % of electricity consumed in Romania was traded on the regulated market.

([21]) For Termoelectrica: Addendum No 3 dated 1 August 2009 refers to the Note No II/11096/31.7.2009 approved by the State Secretary in the Ministry of Economy and Trade sets the price for the year 2009; Addendum No 4 dated 11 February 2010 refers to the Note No II/11672/11.2.2010 approved by the Minister of Economy and Trade, sets the price for the period 1 January-31 March 2010; Addendum No 5 dated 1 April 2010 refers to the Note No II/11877/29.3.2010 approved by the Minister of Economy and Trade, sets the price for the period 1 April-31 December 2010; Addendum No 6 dated 1 January 2011 refers to the same Note No II/11877/29.3.2010 approved by the Minister of Economy and Trade and maintains the price for the period 1 January-31 December 2011; Addendum No 7 dated 1 February 2011 refers to the Note No 6547/21.1.2011 approved by the Minister of Economy and Trade and sets the price for the period 1 February-31 December 2011.
For Electrocentrale Deva: Addendum No 1 dated 1 August 2009 refers to the Note No II/11096/31.7.2009 approved by the State Secretary in the Ministry of Economy and Trade sets the price for the year 2009; Addendum No 3 dated 11 February 2010 refers to the Note No II/11674/11.2.2010 approved by the Minister of Economy and Trade sets the price for the period 1 January-31 March 2010; Addendum No 4 dated 1 April 2010 refers to the Note No II/11878/29.3.2010 approved by the Minister of Economy and Trade sets the price for the period 1 April-31 December 2010; Addendum No 5 dated 1 February 2011 refers to the Note No 6547/21.1.2011 approved by the Minister of Economy and Trade and sets the price for the period 1 February-31 December 2011.

([22]) According to Romania's submission of information dated 11 September 2013 and 20 February 2015, electricity deliveries ceased at the end of 2011 under the Contracts. Thus, no deliveries were made in 2012.

2.4.2. *The Competitive Electricity Market*

(35) Since 2005, the Competitive Electricity Market in Romania has been divided into five specific markets: (i) the centralised markets administrated by OPCOM; (ii) the market for directly negotiated contracts; (iii) the ancillary services market; (iv) the balancing market; and (v) the export market.

(36) The centralised markets are administrated by OPCOM. OPCOM was set up in 2001 pursuant to Government Decision No 627/2000, as a joint stock company and 100 % owned subsidiary of Transelectrica, the transmission system operator. By virtue of the licence granted by ANRE, OPCOM was designated as platform for trading of electricity in Romania at wholesale level. OPCOM is the only power exchange in Romania, providing a venue for trade of electricity and having a facilitator role.

(37) There are five types of market segments on OPCOM: (i) the day-ahead market; (ii) intra-day market ([23]), (iii) centralised bilateral markets that is to say, centralised market for bilateral contracts through public auction 'OPCOM-PCCB' and centralised market for bilateral contracts through continuous negotiation — CMBC-CN; (iv) the centralised market for green certificates; and (v) the trading platform for greenhouse gases emissions certificates. Transactions on OPCOM started only in 2005 and only on the day-ahead and OPCOM-PCCB market segments.

(38) The Contracts were concluded on the market for directly negotiated contracts in Romania, which is the market segment relevant for the assessment in this case.

2.4.3. *OPCOM-PCCB*

(39) On the OPCOM-PCCB market segment, OPCOM organises public auctions for the sale and purchase of electricity. Sale/purchase offers by each producer/supplier/consumer are submitted to the market operator. Each offer must specify the following: (i) either the minimum price at which the party will sell electricity or the maximum price at which it will buy electricity; and (ii) the framework agreement under which the party making the offer is planning to supply/purchase electricity. Sale and purchase offers specify supply conditions including the amount of electricity, duration (minimum one month and up to one year), as well as envisaged framework agreement. The price follows the principle of the best responding offer price. By 2009 and 2010, when the Contracts started to be implemented, sales on the OPCOM-PCCB market amounted to less than 7 % of electricity produced in Romania.

(40) After publication of the Opening Decision, the Commission adopted a Decision pursuant to Article 102 of the Treaty finding that the power exchange managed by OPCOM constitutes a relevant service market, on which OPCOM is a dominant player, separate from the directly negotiated contracts market ([24]).

2.4.4. *The market for directly negotiated contracts*

(41) The market for directly negotiated contracts is a free market which is not regulated by ANRE. Contracting parties negotiate quantities, prices and other contractual clauses bilaterally. This provides the parties with a high degree of flexibility in negotiating the terms and conditions of the sale contracts. The terms and conditions of contracts are confidential.

2.4.5. *Short description of the directly negotiated contracts contemporaneous with the Contracts*

(42) By letter dated 21 February 2014, the Commission requested the Romanian Authorities to provide it with information about bi-laterally negotiated contracts concluded on the Romanian market, other than the Contracts, with comparable durations and quantities of electricity supply. The Commission's request covered all Romanian electricity suppliers, whether State or privately owned. On 14 May 2014, the Romanian Authorities provided the requested key elements of all contracts signed by electricity buyers with an annual electricity consumption of more than 150 GWh for each of the years from 2009 to 2011 ([25]).

([23]) Administrated by OPCOM only as of July 2011.

([24]) Commission Decision of 5 March 2014, in application of Article 102 of the Treaty imposing fines pursuant to Article 7 of Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty (OJ L 1, 4.1.2003, p. 1) in case AT.39 984 'Romanian Power Exchange/OPCOM'.

([25]) The dataset included the following information: the identity of the seller and the buyer, the type of contract, date of entry into force, date of expiration, as well as the quantity, profile of supply and the weighted average price for each year from 2009 to 2011.

(43) The Romanian Authorities underlined that all the contracts concluded on the retail market under competitive conditions by non-household consumers in the relevant period of time were subject to the ad-hoc data collection requested by the Commission. In particular, 75 sets of annual data from contracts in force for one or more years during the period 2009-2011 of relevance for this case were submitted by the Romanian Authorities. The Commission understands that the Romanian Authorities submitted the relevant data regarding all the contracts fulfilling the criteria required by the Commission (comparable durations and quantities) for the relevant period 2009-2011. The Contracts accounted for approximately 17 % of the total volume of electricity subject to directly negotiated contracts concluded during the period 2009-2011 and provided by Romania.

(44) The data submitted by the Romanian Authorities reveals the level of the highest prices paid on the free market for retail sales of electricity during the period 2009-2011, as follows: for 2009: 266,5 RON/MWh; for 2010: 229,96 RON/MWh and for 2011: 232,33 RON/MWh. However, each of those contracts taken on its own amounted to lower quantities than each of the Contracts.

(45) An examination of the information regarding the contracts entered into by suppliers other than Termoelectrica and Electrocentrale Deva shows that, in 2009, when the Contracts started to be implemented, no other supplier concluded a supply contract which was sufficiently similar to these two Contracts as regards to quantities (approximately 900 GWh and 500 GWh, each) and duration (10 years). A totally meaningful comparison with the Contracts is only possible for other contracts for the same quantities, duration and/or date of entry into force. Since no such fully comparable contracts existed, an econometric analysis accounting for contract differences is required, the rationale and results of which are portrayed in recitals 77-80 and the Annex.

2.4.6. *Hidroelectrica contracts for sale of electricity*

(46) During the period 2009-2011, Hidroelectrica was also selling around 60 % of its electricity to other private buyers through long term wholesale and retail contracts, which are under investigation by the Commission ([26]). The selling prices of Hidroelectrica in those contracts were more than 40 % lower than the wholesale purchase prices paid by Hidroelectrica to Termoelectrica and Electrocentrale Deva on average. By way of illustration, the highest selling price for electricity under such contracts was 159,8 RON/MWh in 2009 and 168 RON/MWh in 2010.

(47) Hidroelectrica also concluded sale of electricity contracts with other parties ([27]), for lower quantities. The highest selling price for electricity under such retail contracts for the relevant period was 185 RON/MWh in 2009, 190 RON/MWh in 2010 and 160 RON/MWh in 2011, that is, around 13 % lower on average than the wholesale purchase prices paid by Hidroelectrica to Termoelectrica and Electrocentrale Deva.

2.5. **Developments after 2011 and interlinks between Termoelectrica, Electrocentrale Deva, Electrocentrale Paroseni and CEH**

(48) Termoelectrica's Paroseni Plant, which actually supplied the quantity of electricity purchased under the Contract with Termoelectrica, became a separate entity and was incorporated with the Romanian Trade Registry under the name Electrocentrale Paroseni, on 11 July 2011 ([28]). On 22 September 2011, Electrocentrale Paroseni took over all the rights and obligations of Termoelectrica under its Contract with Hidroelectrica. Electrocentrale Paroseni supplied electricity to Hidroelectrica in September and October 2011, although the quantities were negligible.

(49) At the date of ceasing of supply under the Contracts, Termoelectrica was still the sole shareholder of both Electrocentrale Deva and Electrocentrale Paroseni.

(50) Through Emergency Ordinance No 84/2011 ([29]), a debt to equity swap was implemented between Termoelectrica and the State. Thus, Termoelectrica transferred its shares in different companies (Electrocentrale Deva, Electrocentrale Paroseni and Electrocentrale Bucuresti) to the State, in payment of its debts to the State. This transfer of the shares was made based on the basis of evaluation reports, made by an independent evaluator.

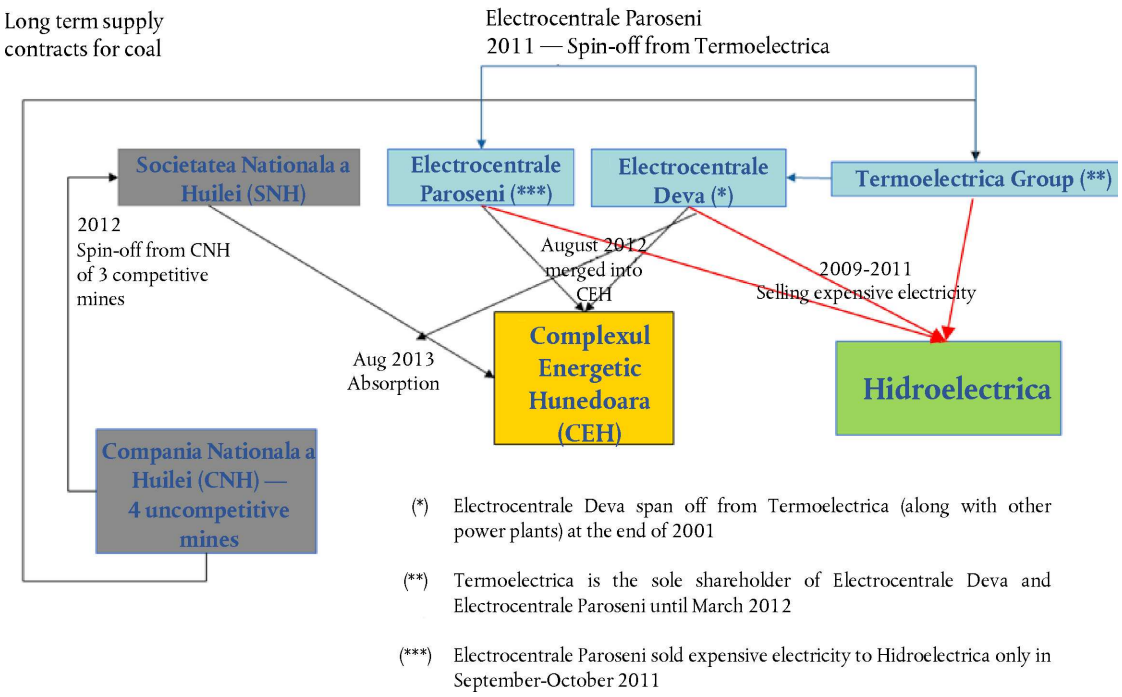
([26]) Commission Decisions of 25 April 2012 C(2012) 2516 final concerning the case SA.33623 (OJ C 189, 29.6.2012, p. 3), C(2012) 2517 final concerning the case SA.33624 (OJ C 268, 5.9.2012, p. 21), C(2012) 2542 final concerning the case SA.33451 (OJ C 395, 20.12.2012, p. 5) and C(2012) 2556 final concerning the case SA.33581 (OJ C 395, 20.12.2012, p. 34).
([27]) Romania's submission of information dated 3 September 2014.
([28]) Romania's submission of information dated 20 February 2015.
([29]) Published in the Official Gazette No 700 from 4 October 2011.

(51) Electrocentrale Parașeni and Electrocentrale Deva merged into a single legal entity named Complexul Energetic Hunedoara ('CEH'), a fully state-owned company, registered with the Romanian Trade Registry on 1 November 2012. CEH took over all the rights and obligations of Electrocentrale Paroseni and Electrocentrale Deva. On 1 August 2013, CEH also took over Societatea Nationala a Huilei, a spin-off of the mines of the state-owned Compania Nationala a Huilei which delivered coal to Termoelectrica and Electrocentrale Deva. At present, all three companies qualify as branches of CEH, without legal personality.

(52) Termoelectrica is in liquidation ([30]) and has assets with a market value of approximately EUR 80 million and a liquidation value of approximately EUR 60,5 million according to a report dated 1 October 2013. However, the debts of Electrocentrale Deva, Electrocentrale Paroseni and Electrocentrale Bucuresti remained with Termoelectrica.

(53) The developments after 2011 with regard to Termoelectrica and Electrocentrale Deva, as well as the various interlinks explained in recitals 48-52 are illustrated for ease of reference in the following graph:

Interlinks between Termoelectrica/Electrocentrale Deva/ Electrocentrale Paroseni and CEH



3. GROUNDS FOR INITIATING THE FORMAL INVESTIGATION PROCEDURE

(54) In the Opening Decision, the Commission expressed doubts as to whether the prices for the purchase of electricity under the Contracts were market conform and whether they constituted State aid. Should the latter be the case, the Commission expressed doubts whether such aid would be compatible with the Treaty.

(55) The Commission compared the prices stipulated in the Contracts with the prices at which electricity was traded on OPCOM-PCCB and noted that the prices at which Hidroelectrica purchased electricity from the alleged beneficiaries were between 40 % and 55 % higher than the prevailing price of electricity on the open electricity exchange market OPCOM-PCCB. It appeared that Hidroelectrica therefore incurred higher costs than necessary, while the alleged beneficiaries were granted an aid which increased their revenues, without being intended to achieve any specific objective of common interest. The Commission thus took the preliminary view that the alleged beneficiaries had derived an undue advantage in the form of artificially inflated electricity prices in their Contracts and successive amendments to them.

([30]) Liquidation approved through the General Assembly Decision dated 12 March 2012.

(56) The Commission reached the preliminary conclusion that the electricity tariffs under examination were selective in nature, since they applied only to certain undertakings.

(57) Furthermore, the Commission reached the preliminary conclusion that the preferential electricity tariffs could involve a transfer of State resources which would be imputable to the State since Hidroelectrica was controlled by the Romanian State (in 80,06 % of its share capital was owned by Romania). In addition, the Commission referred to the Ministerial Order No 445/2009, through which the representatives of the Ministry of Economy, Trade and Business Environment, members of the Administration Boards of the state-owned electricity companies, were obliged to ensure that as of 31 March 2010 electricity destined for the wholesale market should be traded exclusively on OPCOM.

(58) Consequently, the representatives of the Ministry of Economy and Trade had control, or at least influence, over state-owned companies' contracting practice, including Hidroelectrica's contracting practice. This could have an effect on intra-Union trade, within the meaning of Article 107(1) of the Treaty.

(59) The Commission preliminary conclusion was that if the Contracts entailed State aid then they would have been considered as aid granted in breach of the notification and stand-still obligations established in Article 108(3) of the Treaty.

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

4. **COMMENTS FROM ROMANIA**

(61) The Romanian Authorities abstained from providing any observations on whether or not the Contracts entailed State aid. On 24 March 2013, Romania provided observations on third parties' comments regarding other cases involving Hidroelectrica, which were also covered by the Commission's investigation ([31]). The Romanian Authorities again abstained from providing any views.

(62) Within the formal investigation procedure, the Romanian Authorities were requested to explain the economic rationale of concluding the Contracts. Romania did not provide any justification in this respect. Romania only argued that the Contracts allowed Hidroelectrica to better quantify a maximum value of the costs incurred when purchasing electricity, providing it protection against the volatility of the prices on the spot market.

(63) Moreover, the Romanian Authorities also clarified that the Contracts were not agreements of assistance as defined in Hidroelectrica's Judicial Administrator Report regarding the causes of Hidroelectrica's insolvency ([32]). According to that report, agreements of assistance are those contracts concluded by Hidroelectrica in order to cover discontinuities in its production. The purpose of that type of contract is to prevent the payment of any damages triggered by non-respect of a contractual commitment to supply.

(64) The Romanian Authorities clarified ([33]) why in practice, with the exception of the three instances mentioned in recital 28, ANRE did not establish the contractual prices as provided under the Contracts. It was explained that the Contracts were not concluded on the regulated market and therefore the price was not adjusted by ANRE. The Romanian Authorities also explained that: (i) initially ANRE provided the Ministry of Economy and Trade with a minimum and maximum threshold based on which the prices were established; (ii) such thresholds were established on the basis of clear technical parameters specific to thermo-electricity producers; (iii) ANRE subsequently stopped this practice and the Ministry of Economy and Trade took it over, on the basis of similar principles to those used by ANRE.

(65) As regards the Contract with Termoelectrica, the Romanian Authorities confirmed that Hidreoelectrica was the sole electricity consumer for Termoelectrica's Paroseni Plant. In addition, it was clarified that Hidroelectrica did not purchase the entire electricity quantity as initially estimated under the Contract, but instead it only purchased the quantity needed in order to cover any fluctuations in production, due to the unpredictable evolution of hydro conditions.

([31]) See footnote 27.
([32]) Available in Romanian only at http://www.euroinsol.eu/uploads/Raport%2059%20Hidro%20v11.pdf — p. 213.
([33]) Romania's submission of information dated 11 September 2013.

(66) As regards the Contract with Electrocentrale Deva, the Romanian Authorities clarified that during the relevant period 2009-2011, Electrocentrale Deva also sold electricity to clients other than Hidroelectrica. It was thus shown that in the years 2010 and 2011, Electrocentrale Deva sold large quantities of electricity (comparable or even higher quantities) to customers other than Hidroelectrica for comparable prices ([34]).

5. **COMMENTS FROM THIRD PARTIES**

(67) In their preliminary observations on the Opening Decision, both Termoelectrica and Electrocentrale Deva claimed that neither the initial contractual prices nor their subsequent changes conferred any advantage on them, arguing that such prices were established by ANRE and calculated on the basis of their production costs.

(68) In addition, Romania argued that the subsequent changes in the contractual prices were determined by the increase in the price of oil ([35]) or coal ([36]). Electrocentrale Deva also claimed that the price of electricity was approximately 70 % influenced by the price of coal.

6. **ASSESSMENT**

(69) In this decision, the Commission assesses whether Termoelectrica and Electrocentrale Deva received State aid within the meaning of Article 107(1) of the Treaty, see recital 101, and if so, whether such aid might be compatible with the internal market, see recitals 102 to 105.

6.1. **Existence of State aid**

(70) Article 107(1) of the Treaty provides that 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 and affects trade among Member States, is incompatible with the internal market.

(71) The conditions laid down in Article 107(1) of the Treaty are cumulative and thus for a measure to be qualified as State aid all the conditions must be fulfilled simultaneously.

6.1.1. *Assessment of the economic advantage*

(72) For the purpose of Article 107(1) of the Treaty, in order to determine whether an economic advantage not otherwise available at market conditions was granted to Termoelectrica and Electrocentrale Deva as a result of the conclusion and implementation of the Contracts, it is necessary to determine what prices at market conditions were in Romania in the period between 2009 and 2011, for similar transactions.

(73) In that respect, contrary to the preliminary view held in the Opening Decision, the investigation has shown that the terms and durations of electricity supply contracts concluded in OPCOM-PCCB are not sufficiently similar to those of the Contracts, notably as to duration and bespoke, bi-laterally negotiated conditions (recitals 18, 23-25, 39 and 40). In well-functioning electricity markets with adequate liquidity and forward instruments allowing predictability of prices for future deliveries, spot prices are a good indication or proxy of market prices, capable of being used as benchmarks to assess price levels in specific contracts. However, in this case, given the still relatively high proportion of demand being served at regulated tariffs in Romania in 2009, the limited liquidity of OPCOM trading platforms in the period 2009-2011, and the fact that the power exchanges managed by OPCOM were designated as a relevant antitrust market subject to abuse of dominant position (recitals 34-40), it is appropriate to rely on suitable benchmarks other than prices in OPCOM PCCB for assessing the possible presence of an economic advantage over market prices.

([34]) See Annex 1 to Romania's submission of information dated 11 September 2013.
([35]) For the Contract with Termoelectrica.
([36]) For the Contract with Electrocentrale Deva.

(74) However, in that respect, the similarity of prices with those paid by buyers other than Hidroelectrica or the cost-based justification put forward by Romania and the beneficiaries (recitals 66-68), are not valid indication that the contract conditions and prices at issue were in line with market conditions.

(75) As a matter of fact, the prices paid by Hidroelectrica to Electrocentrale Deva between 2009 and 2011 were similar to prices paid by other electricity distribution companies, State and privately owned, which were purchasing electricity from Electrocentrale Deva. However, those purchases were taking place between Electrocentrale Deva and electricity distribution companies, which were selling electricity to households and small businesses on the retail market at regulated prices and conditions (recital 34). Hidroelectrica was buying electricity on the wholesale market for retail resale on the competitive market to industrial consumers and/or traders, on which prices and quantities were not regulated and buyers could refrain from buying from expensive sellers, like Termoelectrica and Electrocentrale Deva and chose the cheapest supplier, independent of its production costs. Therefore, even if prices were similar and assuming that sales of Termoelectrica and Electrocentrale Deva on the regulated market allowed for cost-recovery, the prices paid by the electricity distribution companies to Termoelectrica and Electrocentrale Deva are not comparable with and cannot constitute a valid benchmark for the prices paid by Hidroelectrica on the competitive free market.

(76) Likewise, the cost justification adduced by Termoelectrica and Electrocentrale Deva and the Romanian authorities only explains why the prices at which Termoelectrica and Electrocentrale Deva were capable of selling without loss were high. This justification does not establish that these prices were in line with market prices determined under competitive conditions such as those under which Hidroelectrica should have concluded and implemented the Contracts, if these Contracts were to be deemed to entail no State aid.

(77) For the purposes of establishing whether the contractual prices were in line with market conditions in Romania, it is appropriate to compare them with the price conditions prevailing for other bi-laterally negotiated contracts contemporaneous with the Contracts on the free market. The Commission used the Dataset provided by the Romanian authorities, considering it the best available source of evidence to reflect the market conditions in Romania (recitals 42-45). As indicated in recital 45, no long-term contract concluded or in force in 2009 replicates the characteristics of the Contracts. Therefore, the Commission carried out an econometric analysis in order to estimate a price benchmark based on electricity contracts contemporaneous with the Contracts throughout the relevant period. A detailed technical description of the econometric analysis and its results is provided in the Annex.

(78) In the absence of a definite reference to establish the 'market conditions', in order to check whether the Contracts had prices above market level, a benchmark of market prices was estimated as a proxy, under conservative assumptions, namely, by accounting for important deviations upwards from the estimated market price. Based on this conservative approach, the Commission performed a comparison of the prices of the Contracts against the benchmark market price, yearly, between 2009 and 2011. The comparison was made yearly because the selling prices under the Contracts were increased every year.

(79) The analysis shows that, based on the benchmark prices and under conservative assumptions, the prices charged by Termoelectrica to Hydroelectric were above market prices. If due account is taken of the fact that the comparison of transactions at wholesale level for the Contracts is carried out with contracts at the retail level, by adding a 5 % retail margin charged on average by traders on the Romanian market, the difference with market prices is: 18,8 RON/MWh in 2010 and 19,8 RON/MWh in 2011 for Termoelectrica and 17,5 RON/MWh in 2010 and 13,9 RON/MWh in 2011.

(80) The econometric analysis therefore provides a first indication that the Contracts provided Termoelectrica and Electrocentrale Deva with an economic advantage over market conditions. However, the mere fact that prices under the Contracts were assessed to be above benchmark prices of similar contracts is not sufficient to establish that these contracts would not have been entered into and maintained in force by a market operator acting in lieu of Hidroelectrica. Objective reasons may still mean that high price levels alone cannot be deemed to afford an economic advantage above market conditions to electricity sellers. It is therefore necessary that additional evidence of prices above market conditions corroborates the robustness of the results of the econometric analysis.

(81) In that respect, it is appropriate to establish whether Hidroelectrica behaved in a way comparable to that of a private economy operator in a similar situation ('the market economy operator test'/'MEOP') ([37]). The Commission assessed therefore whether a private operator placed in a similar situation would have behaved in the same way as Hidroelectrica when entering into and maintaining the Contracts. In this context, the following circumstances described below in recitals 82-85 and concerning the conclusion and implementation of the Contracts are relevant.

(82) First, at the date of conclusion of the Contracts other cheaper sources of electricity were available to Hidroelectrica on the market; for example: in 2008-2009, Nuclearelectrica offered electricity for 153 RON/MWh compared to 227 RON/MWh for Termoelectrica and 230 RON/MWh for Electrocentrale Deva ([38]).

(83) Second, Hidroelectrica could only sell the electricity purchased from Termoelectrica and Electrocentrale Deva to third parties at a loss. As shown in recitals 46 and 47, Hidroelectrica's retail selling prices on the free market were significantly lower than these wholesale purchase prices and the highest price at which Hidroelectrica resold electricity on the directly negotiated contracts market was 190 RON/MWh, in 2010, compared to a purchase price of 230 RON/MWh for Termoelectrica and 234 RON/MWh for Electrocentrale Deva. It follows that, based on those prices, every single MWh purchased from Termoelectrica and Electrocentrale Deva was resold by Hidroelectrica at loss.

(84) In that respect, the investigation did not provide any explanation why Hidroelectrica agreed to purchase the entire output of Termoelectrica's Paroseni power plant (recital 24). A commitment to buy whatever output a power plant produces on 10-year long-term basis is a strong indication that Hidroelectrica did not need the contracts to honour its own supply contract obligations. This is furthermore confirmed by Romania (recital 63). On the contrary, the need to support the expensive and uncompetitive operation of the two companies and the coal mines which supplied them was put forward by the company managers of Termoelectrica (recital 20) and Electrocentrale Deva (recital 21) to the responsible Minister as the reason why Hidroelectrica should enter into the Contracts.

(85) However, when entering into commercial transactions, if public undertakings take into account considerations of support to ailing companies or sectors for social or economic policy reasons which are extraneous to their commercial interests and enter into such transactions under conditions which a normal market operator would not accept, the conditions accepted, as to purchase prices by Hidroelectrica in this case, might entail an undue economic advantage for the other party or parties, thus fulfilling one of the conditions of application of Article 107(1) of the Treaty.

(86) It follows that by entering into and maintaining the Contracts, Hidroelectrica did not behave as a market economy operator. Accordingly, this test also corroborates qualitatively the result of the econometric analysis indicating that the Contracts granted to Termoelectrica and Electrocentrale Deva an economic advantage not otherwise available under market conditions.

(87) The data provided by the Romanian authorities did not cover long term contracts with exactly the same conditions as regards the quantity and duration as the Contracts. In the absence of a definite reference to establish the 'market conditions', the Commission therefore compared, on a yearly basis, the contract prices paid by Hidroelectrica with the highest prices applied in Romania between 2009 and 2011 in long-term retail contracts provided by Romania (see recitals 42 to 45).

(88) This comparison relies on the conservative assumption that Termoelectrica and Electrocentrale Deva could have replaced their Contracts with Hidroelectrica by several contracts with other buyers on the market offering the highest prices and is very conservative: instead of taking as a market price the average, median or mode in comparable transactions, the market price is taken to be the most expensive price found in several, not fully comparable transactions. Given the lack of homogeneity of the transactions, and the existence of potential factors or anomalies that may contribute to explain the price level agreed in the highest-price transactions taken as a reference, this approach is favourable to the beneficiary, as it may potentially underestimate the advantage

([37]) See, e.g., Case C-305/89 *Italy* v *Commission* ('*Alfa Romeo*') [1991] ECR I-1603, paragraphs 18 and 19; Case T-16/96 *Cityflyer Express* v *Commission* [1998] ECR II-757, paragraph 51; Joined Cases T-129/95, T-2/96 and T-97/96 *Neue Maxhütte Stahlwerke and Lech-Stahlwerke* v *Commission* [1999] ECR II-17, paragraph 104; Joined Cases T-268/08 and T-281/08 *Land Burgenland and Austria* v *Commission* [2012] ECR II-0000, paragraph 48.

([38]) The report issued by Hidroelectrica's judicial administrator — http://www.euroinsol.eu/uploads/Raport%2059%20Hidro%20v11.pdf — available only in Romanian — p. 212.

received. The weighted average prices for the quantities of electricity effectively supplied to Hidroelectrica by Electrocentrale Deva and Termoelectrica between 2009 and 2011 (recital 32) were as follows:

(in RON/MWh)

	2009	2010	2011
A) Price Electrocentrale Deva	230,2	234,0	234,0
B) W.A. Market price	241,9	224,2	229,6
Difference A – B	< 0	9,8	4,4

(in RON/MWh)

	2009	2010	2011
A) Price Termoelectrica	227,4	230,0	234,4
B) W.A. Market price	229,0	213,4	220,1
Difference A – B	< 0	16,6	14,3

(89) Compared under these conservative assumptions, the average prices paid by Hidroelectrica to Termoelectrica and Electrocentrale Deva still turn out to be above those highest prices in 2010 and 2011, thus corroborating the findings of the econometric analysis. The prices charged by Termoelectrica to Hidroelectrica were 16,6 RON/MWh above the highest prices in 2010 and 14,3 RON/MWh in 2011, whilst the prices charged by Electrocentrale Deva to Hidroelectrica were 9,8 RON/MWh above the highest prices in 2010 and 4,4 RON MWh in 2011.

(90) In view of the above, it can be concluded that the Contracts favoured Termoelectrica and Electrocentrale Deva by affording them an economic advantage not available under market conditions.

(91) Therefore, the Commission concludes that Hidroelectrica did not act as a market economy operator would have done in the circumstances and conferred an undue economic advantage on Termoelectrica and Electrocentrale Deva.

6.1.2. *State resources and imputability*

(92) In order to be considered aid in the sense of Article 107(1) of the Treaty, a measure must be granted directly or indirectly from State resources and it must be imputable to the State.

(93) As shown in recital 11, Hidroelectrica is directly controlled by the Romanian State. It follows those resources foregone by Hidroelectrica amount to State resources foregone by Romania. The Romanian State also appoints Directors to its Board. Moreover, those Directors simultaneously exercised political responsibilities in the Ministry which controls the State's holding in Hidroelectrica.

(94) According to settled case law, the ability of the State to control the entities involved in granting the measures does not justify automatically the presumption that the entities' actions are imputable to the State. The Court of Justice of the European Union has explained the notion of imputability to the State of decisions involving the funds of public undertakings in *Stardust Marine* judgement. The resources of a public undertaking are to be considered State resources and actions concerning them are considered to be imputable to the State if the State is capable, by exercising its dominant influence over such an undertaking, to direct the use of its resources ([39]).

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

(95) The Court of Justice provided indicators for establishing imputability to the State which are: integration of the public undertaking into the structures of the public administration; the nature of its activities; the legal status of the undertaking; the intensity of the supervision exercised by the public authorities over the management of the undertaking or any other indicator showing an involvement by the public authorities in the adoption of a measure or the unlikelihood of their not being involved. Regard must also be had in this case to the compass of the Contracts, their content or the conditions which they contain.

(96) It is therefore necessary to examine whether the Romanian Authorities must be regarded as having been involved, in one way or another, in concluding and maintaining the Contracts in force and in modifying the contract prices.

(97) In this regard, the Ministry of Economy and Trade, was actively involved in the decision making process concerning the conclusion of the Contracts and the subsequent contractual price readjustments. In particular, Termoelectrica and Electrocentrale Deva received the approval of the Ministry of Economy and Trade to sign the Contracts with Hidroelectrica which *de facto* implies that it is the Romanian State which ultimately exercised the decisive influence over the latter (recitals 19-22). This is further confirmed by the fact that Hidroelectrica directly sought the approval of the Romanian Ministry of Economy and Trade for the price readjustments (recitals 26-31).

(98) This direct evidence is corroborated by the loss-making nature of Hidroelectrica's purchases and the lack of economic rationale of committing to buy the entire output of Paroseni's power plant (recitals 84-85). The Contracts appear to be motivated by the delicate financial situation of the two other state-owned generators and social considerations about coal production (recitals 20-21). Ultimately, the three state-owned electricity generators, as well as the state-owned coal mines, were owned by and under the responsibility of the State from which Termoelectrica and Electrocentrale Deva sought a means to finance their current operations.

(99) The above confirms the preliminary view expressed by the Commission in the Opening Decision that the Contracts and their execution were not rational and independent commercial decisions of Hidroelectrica but resulted from the exercise of dominant influence by the Romanian State.

(100) Therefore, the Commission concludes that there is direct evidence showing that the conclusion of the Contracts and their implementation are imputable to the Romanian State. Furthermore, considering that the conclusion and the implementation of the Contracts involve a loss of resources of Hidroelectrica, which is a public undertaking, the Commission concludes that those measures are granted through States resources.

6.1.3. *Selectivity*

(101) To be considered State aid, a measure must be specific or selective in that it favours only certain undertakings or the production of certain goods.

(102) The Contracts were concluded with two specific suppliers, Termoelectrica and Electrocentrale Deva, individually granting them undue economic advantages. No other supplier of electricity to Hidroelectrica benefitted from similar conditions to those ones provided for in the Contracts. The economic advantages stemming from the excessively high contract prices are, therefore, selective.

6.1.4. *Distortion of competition and effect on trade*

(103) When aid granted by a Member State strengthens the position of an undertaking compared to other undertakings competing in intra-Union trade, the latter must be regarded as affected by that aid. In particular, a distortion of competition within the meaning of Article 107(1) of the Treaty is assumed as soon as the State grants a financial advantage to an undertaking in a liberalised sector where there is, or could be, competition ([40]).

(104) Termoelectrica and Electrocentrale Deva operate in a market for the sale of electricity which is open to competition (recitals 35-38). Any economic benefit provided to such undertakings might provide them with an advantage over other competitors not receiving such prices under market conditions. In the case at hand, the support was intended to favour the production of electricity based on coal, which could distort competition between producers of electricity. Furthermore, the Romanian market is now (and was at the time of the facts) interconnected with and exports electricity to other Member States (recital 17).

([40]) *Alzetta*, paragraphs 141 to 147; *Altmark Trans*.

(105) In the light of the above, the Commission concludes that the Contracts might distort competition and might have an effect on trade between Member States within the meaning of Article 107(1) of the Treaty.

6.1.5. *Conclusion on the existence of State aid*

(106) On account of the arguments described above in recitals 72-105, the Commission concludes that both Contracts involve provision of State aid to Termoelectrica and Electrocentrale Deva within the meaning of Article 107(1) of the Treaty. Romania did not respect the stand-still obligation under Article 108(3) of the Treaty. The State aid is therefore unlawful.

6.2. **Compatibility of the aid**

(107) Since the measure implemented by Romania for Termoelectrica and Electrocentrale Deva constitutes State aid within the meaning of Article 107(1) of the Treaty, its compatibility must be assessed in the light of the exceptions laid down in paragraphs 2 and 3 of that Article.

(108) In this case, the aid provided the beneficiaries with current operating revenues, not specifically earmarked for any particular investment that would have been capable of improving production or distribution of electricity. The compatibility with the internal market of operating aid of this kind pursuant to Article 107(2) or (3) of the Treaty has to be restrictively assessed, under strict conditions. The recurrent and long-lasting operating aid involved during two years does not appear to be necessary, nor contribute to any clear objective of common interest of the Union. The proportionality of the aid is not established either. Furthermore and in any event, according to settled case-law of the Court of Justice, it is up to the Member State to invoke possible grounds of compatibility and to demonstrate that the conditions for such compatibility are met ([41]).

(109) The Romanian authorities did not invoke any possible grounds on which the State aid could be considered compatible with the internal market of the State aid and the Commission has not identified any possible grounds for compatibility.

(110) In the light of the above, the Commission considers the State aid channelled through the Contracts to be incompatible with the internal market.

6.3. **Recovery**

(111) According to the Treaty and the Court's established case-law, the Commission is competent to decide that the Member State concerned must abolish or alter aid when it has found that it is incompatible with the internal market. ([42]) The Court has also consistently held that the obligation on a Member State to abolish aid regarded by the Commission as being incompatible with the internal market is designed to re-establish the previously existing situation. ([43]) In this context, the Court has established that this objective is attained once the recipient has repaid the amounts granted by way of unlawful aid, thus forfeiting the advantage which it had enjoyed over its competitors on the market, and the situation prior to the payment of the aid is restored ([44]).

(112) In line with the case-law, Article 14(1) of Council Regulation (EC) No 659/1999 ([45]) stated that 'where negative decisions are taken in cases of unlawful aid, the Commission shall decide that the Member State concerned shall take all necessary measures to recover the aid from the beneficiary […]'.

(113) Thus, given that the State aid in question was not notified to the Commission, in violation of Article 108 of the Treaty and is, therefore, to be considered as unlawful and given that the aid is also incompatible with the internal market, the aid must be recovered in order to re-establish the situation that existed on the market prior to its granting. Recovery should cover the time from when the advantage accrued to the beneficiaries, that is to say when the aid was put at the disposal of the beneficiaries, until ceasing of deliveries end of 2011 ([46]), and the sums to be recovered should bear interest until effective recovery.

([41]) Case C-364/90, Italy v Commission, [1993] ECR I-2097, paragraph 20.
([42]) See Case C-70/72 *Commission* v *Germany* [1973] ECR 813, paragraph 13.
([43]) See Joined Cases C-278/92, C-279/92 and C-280/92 *Spain* v *Commission* [1994] ECR I-4103, paragraph 75.
([44]) See Case C-75/97 *Belgium* v *Commission* [1999] ECR I-030671 paragraphs 64 and 65.
([45]) Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 93 of the EC Treaty (OJ L 83, 27.3.1999, p. 1).
([46]) The electricity deliveries stopped before termination of the Contracts by Hidroelectrica's judicial administrator end of August 2012.

(114) The recovery amount would be the difference between the annual average of the price at which Hidroelectrica purchased electricity from Termoelectrica and Electrocentrale Deva as set out in recital 32 and the highest prices applied on the market each year for the total quantities supplied by them. This difference is set out in recital 89. Based on price differences applicable on 1 January 2010 and 1 January 2011 throughout the annual period, for purposes of simplification, the resulting amounts to recover are RON 3 656 675 for Electrocentrale Deva and RON 22 619 821 for Termoelectrica. Alternatively, the Romanian authorities may estimate the amounts based on intra-year (e.g. monthly, bi-monthly) actual prices charged to Hidroelectrica

(115) Interest shall be added to these amounts, whichever of the two methods to calculate them is used, based on the schedule of actual monthly deliveries of electricity to Hidroelectrica between 2009 and 2011, taking into account the difference with market prices referred to in recital 89.

(116) It is furthermore appropriate to examine, in light of the facts of this case, whether the recovery obligation should be extended to or carried out from one or more legal entities other than Termoelectrica and Electrocentrale Deva, by virtue of legal succession or economic continuity with a different undertaking than Termoelectrica and Electrocentrale Deva with which there would be economic continuity, in case they would be unable to meet the recovery obligations. In that respect, the case-law from the EU Courts has identified several criteria which the Commission may take into account, combined or in isolation, in order to determine the economic continuity between two different undertakings ([47]).

6.3.1. *Termoelectrica — economic continuity with CEH*

(117) As described in recital 52, Termoelectrica is a company in liquidation. According to well-established case-law, the fact that a company is insolvent and cannot pay back the aid is not a reason to exempt it from recovery. In such cases, the restoration of the previous situation and the elimination of the distortion of competition may, in principle, be achieved by registration of the liability relating to the repayment of the aid in the schedule of liabilities ([48]). Where the State authorities are unable to recover the full amount of aid, the registration of the liability can meet the recovery obligation only if the insolvency proceedings result the definitive cessation of the undertaking's activities ([49]). However, where the undertaking which received the unlawful aid is insolvent and a company has been created to continue some of the activities of the insolvent undertaking, the pursuit of those activities may, where the aid concerned is not recovered in its entirety, prolong the distortion of competition brought about by the competitive advantage which that company enjoyed on the market as compared with its competitors. Accordingly, such a newly created company may, if it retains that advantage, be required to repay the aid in question ([50]). This would for instance be the case if, before the liquidation of the beneficiary of the aid, the assets having benefited from the aid are transferred, as a going concern, to a daughter company created to continue the activity of the beneficiary (economic succession). Moreover, if the beneficiary undertaking is merged with another undertaking, transferring all its rights and obligation to the merged entity, the obligation to repay the aid is also transferred to the latter (legal succession).

(118) In the present case, in the absence of recovery of the full amount of aid, which benefitted the activities of Termoelectrica, it is necessary to examine whether there would be economic continuity and/or legal continuity between Termoelectrica and other companies.

(119) In respect of economic continuity, as set out in recitals (48 and 51), in September 2011 Termoelectrica created a subsidiary, Electrocentrale Paroseni, to which it transferred (within the same state-owned group) the power plant which actually delivered the purchased quantity of electricity under the Contract with Termoelectrica (recitals 48-65), including all the rights and obligations of Termoelectrica stemming from that Contract, and continued selling electricity to Hidroelectrica under this Contract until October 2011 (when it was merged in CEH). Therefore, Electrocentrale Paroseni took over and continued the activities benefiting of the aid from it mother company Termoelectrica. It should therefore be considered as the economic successor of Termoelectrica.

([47]) T-123/09 *Ryanair* v *Commission*, EU:T2012:164, points 155-156, T-415/05, T416/05 and T-423/05, *Hellenic Republic, Olimpiakes Aerogrammes AE and Olimpiaki Aeroporia AE* v *Commission*, EU:T:2010:386, point 135 and C-287/12 P, *Ryanair Ltd* v *Commission*, EU:C2013:395, points 101 to 107.

([48]) Case 277/00 *SMI* [2004] ECR I-4355, paragraph 85; Case 52/84 *Commission* v *Belgium* [1986] ECR 89, para. 14; Case C-142/87 *Tubemeuse* [1990] ECR I-959, paragraphs 60–62.

([49]) Case C-610/10 *Commission* v *Spain* ('Magefesa') (ECLI:EU:C:2012:781), paragraph 104 and the case-law cited.

([50]) Case C-610/10 *Commission* v *Spain* ('Magefesa') paragraph 106.

(120) In November 2012, Electrocentrale Paroseni was then merged with Electrocentrale Deva and Electrocentrale Paroseni in the newly created company CEH. Through that merger, CEH took over all the rights and obligations of Electrocentrale Paroseni, which disappeared as a distinct legal entity. It follows that there is legal continuity between Electrocentrale Paroseni, which took over the activities benefitting from the aid, and CEH, within which it was merged on 1 November 2012 and which took over all its rights and obligations.

(121) The obligation of recovery of the aid granted to Termoelectrica should therefore be extended to CEH.

6.3.2. *Electrocentrale Deva — economic continuity with CEH*

(122) As described in recital 51, Electrocentrale Deva, which fully benefitted from the aid as an independent legal entity, though controlled by Termoelectrica, does not exist as an independent entity anymore. However, there is legal continuity between Electrocentrale Deva as legal entity which benefitted of the aid and CEH, within which it was merged on 1 November 2012 and which took over all its rights and obligations.

(123) Furthermore, several elements show the existence of economic continuity between Electrocentrale Deva and CEH, for example: (i) further to the merger between Electrocentrale Deva and Electrocentrale Paroseni, the newly created company CEH took over starting both companies from August 2012, along with their operational assets and employees; (ii) the newly created company CEH had electricity generation as its main economic activity in 2012, as did Electrocentrale Deva; (iii) both companies are fully state-owned companies: as shown under recital 50 at the date when the deliveries of electricity under the Contracts ceased, Termoelectica, a fully state-owned enterprise, owned in turn 100 % of Electocentrale Deva and Electrocentrale Paroseni; (iv) the newly created company CEH is also 100 % owned by the state.

(124) In light of the above, the legal and economic continuity between, on the one hand, Electrocentrale Deva, Termoelectrica, via Electrocentrale Paroseni and, on the other hand, CEH is established. In that respect, the debt to equity swap based on an independent valuation of the transfer of shares, which preceded the merger of Electrocentrale Deva and Electrocentrale Paroseni within CEH (recital 50), does not interrupt the continuity between the three undertakings concerned. A share deal does not influence the identity of the beneficiary(ies) of the aid, nor the benefits retained from it and transferred irrespective of the identity of the shareholder which, furthermore, in this case happened to be ultimately the Romanian State before 2011 and after the merger with CEH. It follows that the recovery obligations vis-à-vis Electrocentrale Deva and Termoelectrica should be extended to CEH.

6.3.3. *Conclusion on the recovery*

(125) The amount of aid (without interest) to be recovered should be, in principle, RON 3 656 675 for Electrocentrale Deva and RON 22 619 821 for Termoelectrica. In light of the legal and economic continuity established between Electrocentrale Deva, Termoelectrica and CEH, the obligation to recover from both beneficiaries should be extended to CEH.

7. **CONCLUSION**

(126) The Contracts concluded by Hidroelectrica with Termoelectrica and Electrocentrale Deva contained in years 2010 and 2011 preferential electricity tariffs in favour of latter undertakings. They constituted State aid within the meaning of Article 107(1) of the Treaty. Romania unlawfully implemented that aid, in breach of Article 108(3) of the Treaty. The aid is incompatible with the internal market.

HAS ADOPTED THIS DECISION:

Article 1

The State aid amounting, in principle, to RON 3 656 675 for Electrocentrale Deva and RON 22 619 821 for Termoelectrica in the form of preferential electricity tariffs in favour of those undertakings, unlawfully granted by Romania in breach of Article 108(3) of the Treaty, is incompatible with the internal market.

Article 2

Romania shall recover the incompatible aid referred to in Article 1 from the beneficiaries. The obligation to recover the aid is extended to CE Hunedoara.

The sums to be recovered shall bear interest from the date on which they were put at the disposal of the beneficiaries until their actual recovery.

The interest shall be calculated on a compound basis in accordance with Chapter V of Commission Regulation (EC) No 794/2004 ([51]).

Article 3

Recovery of the aid referred to in Article 1 shall be immediate and effective.

Romania shall ensure that this Decision is implemented within four months following the date of its notification.

Article 4

Within two months following notification of this Decision, Romania shall submit the following information:

— the total amount (principal and recovery interests) to be recovered from each beneficiary,

— a detailed description of the measures already taken and planned to comply with this Decision, including the proof that it registered the recovery order at an appropriate ranking in the liquidation process of Termoelectrica,

— if it is impossible for by Termoelectrica to fulfil the recovery order, the order made against Termoelectrica to dissolve the company and proof that Termoelectrica definitively exits the market,

— documents demonstrating that the beneficiaries have been ordered to repay the aid.

Romania shall keep the Commission informed of the progress of the national measures taken to implement this Decision until recovery of the aid referred to in Article 1 has been completed. It shall immediately submit, on simple request by the Commission, information on the measures already taken and planned to comply with this Decision. It shall also provide detailed information concerning the amounts of aid and recovery interest already recovered from the beneficiary.

Article 5

This Decision is addressed to Romania.

Done at Brussels, 20 April 2015.

For the Commission
Margrethe VESTAGER
Member of the Commission

([51]) Commission Regulation (EC) No 794/2004 of 21 April 2004 implementing Council Regulation (EC) No 659/1999 laying down detailed rules for the application of Article 93 of the EC Treaty, OJ L 140, 30.4.2004, p. 1, with further amendments.

ANNEX

ASSESSMENT OF THE ECONOMIC ADVANTAGE — ECONOMETRIC ANALYSIS

Rationale and description of the econometric analysis

The econometric analysis undertaken by the Commission aims at creating benchmark prices for the contracts under investigation, which would result from a regression analysis carried out on contracts in the dataset, which are not under investigation, by using features of these contracts. In a first step, the regression analysis allows constructing a benchmark price as a function of the contract characteristics of the dataset ('in-sample predictions'). In a second step, the results of the regression analysis are used to predict a benchmark price for the contracts investigated taking into account their contract characteristics ('out-of-sample predictions'). In the regression analysis, the variation in prices among the contracts in the dataset is explained using the following characteristics: quantity purchased and year dummies ([1]).

The econometric analysis relies on the principle that there are a number of drivers of prices, such as quantities. It would be misleading to compare the prices across different contracts without considering these drivers. The rationale of this quantitative exercise is, therefore that, once some external factors are taken into account, the prices across different contracts become more comparable. In the absence of normalisation, only perfectly identical contracts could be meaningfully compared.

This empirical exercise does not aim at estimating a causal relationship between prices and some external factors. For example, estimating a causal relationship between some factors and the prices would require dealing with the risk of endogeneity, that is, the risk that a causal variable (e.g. the quantities) is itself influenced by the explained variable (e.g. the price), due to omitted variables or simultaneity bias. The purpose of the quantitative exercise is to 'normalise' the prices across different contracts to make them more comparable to each other. This normalisation is necessary in the absence of perfectly identical contracts and supply characteristics.

The regression analysis captures the main features of the bilateral contracts at stake:

— including the quantity variable in the regression captures that prices are in general lower when quantities purchased are higher ([2]),

— including year dummies captures the time dimension and the possible change in market conditions between different years.

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

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

Firstly, for each contract under investigation, it is calculated if and how far the actual price every year departs from its corresponding benchmark price computed using the regression and the contract characteristics;

Secondly, the most-upward-diverging contract ('MUD') is identified ([3]); this is the dataset contract with the observed price which departs the most above its own corresponding benchmark price (in absolute terms). The choice of MUD which provides a range of variation above the central estimate of benchmark price, whilst being conservative, is justified; firstly, the econometric model does not explain 100 % of the observed price in the dataset and the price benchmark single estimate is provided within an interval of confidence and a margin of error above or below the estimate; secondly, price deviations from a single possible price exist on the real market; the MUD, which stems from market-based contracts (see recitals 42 to 45) brings quantified information about the possible extent of such deviations and provides a market-based range around the calculated benchmark price;

([1]) The variables contract duration and buyer off-take profile defined in the dataset are not included since they are not statistically significant.

([2]) A preliminary treatment of the data discarded three annual data on contracts corresponding to the intra-group sales of ALRO from 2009 to 2011, as they are likely to reflect different market conditions than those prevailing in bilateral contract negotiations between a supplier and an independent buyer, which is the focus in this case.

([3]) The regression is made on 137 observations of individual contract data in the period 2009-2011.

Thirdly, the price difference from the MUD contract is used to separate observed prices above benchmark price from contracts below benchmark price:

— if a contract has an observed price above its corresponding benchmark price and if the price difference of this contract is higher than the MUD price difference ([1]), then this contract is considered *prima facie* not market conform,

— otherwise the contract should be deemed to be market conform;

The table below presents detailed results from the regression analysis on the dataset. The regression explains 36 % of the variations in the data. The coefficient estimates presented in the table below are used in a second stage to predict the 'benchmark' price for the contracts under investigation (out-of-sample predictions), assuming they would also be retail contracts, like contracts in the dataset.

Results of the econometric analysis

Table 1

Regression analysis

Source	SS	df	MS
Model	4218,7868	5	8436,95736
Residual	75057,7748	131	572,960113
Total	117242,562	136	862,077659

Number of obs	= 137
F(5,131)	= 14,73
Prob > F	= 0,0000
R-squared	= 0,3598
Adj R-squared	= 0,3354
Root MSE	= 23,937

Average price RON ~ h	Coef.	Std. Err.	t	P > |t|	[95 % Conf. Interval]	
Annual quantity GWh	– ,0114518	,0078662	– 1,46	0,148	– ,027013	,0041094
year						
2008	26,39286	6,212094	4,25	0,000	14,10385	38,68186
2009	44,00499	6,668892	6,60	0,000	30,81234	57,19765
2010	32,16928	6,525077	4,93	0,000	19,26112	45,07744
2011	49,21547	6,458884	7,62	0,000	36,43826	61,99268
_cons	153,9978	5,159037	29,85	0,000	143,792	164,2036

The following tables present the results of the empirical analysis which uses the regression analysis detailed in Table 1 when, for each year, the MUD is selected on the basis of the difference in price levels (in RON/MWh) between each contract's estimated price and its corresponding observed price. Tables 2 and 3 below present the differences between Hidroelectrica's contractual purchase prices per each of the years (i.e.: 2009-2011) vis-à-vis the simulated price benchmark for the two companies under investigation.

In 2009, the MUD contract, that is the contract in the dataset with the highest difference between the observed price and its corresponding estimated price, has a price difference estimated at 69,73 RON/MWh. None of the two contracts between Hidroelectrica and Termoelectrica and Electrocentrale Deva has an observed price above their estimated price with a price difference larger than 69,73 RON/MWh (see Table 2).

([1]) The initial MUD for year 2011 corresponds to intra-group sales of OMV Petrom. Since such intra-group sales, like Alro's (see footnote 2) are likely to reflect different market conditions than those prevailing in bilateral contract negotiations between a supplier and an independent buyer, which is the focus in this case, the following MUD is used instead.

In 2010, the MUD contract has a price difference estimated at 45,36 RON/MWh. Both contracts between Hidroelectrica and Termoelectrica and Electrocentrale Deva have an observed price above their estimated price with a price difference larger than 45,36 RON/MWh, that is a difference of 53,05 RON/MWh for the contract with Termoelectrica and 51,37 RON/MWh for the contract with Electrocentrale Deva (see Table 2).

In 2011, the MUD contract has a price difference estimated at 30,12 RON/MWh. The two contracts between Hidroelectrica and Termoelectrica and respectively between Hidroelectrica and Electrocentrale Deva have an observed price above their estimated price with a price difference larger than 30,12 RON/MWh, that is a difference of 38,62 RON/MWh for the contract with Termoelectrica and 32,64 RON/MWh for the contract with Electrocentrale Deva (see Table 2).

Table 2

Analysis of contracts in the relevant period 2009-2011

(RON/MWh)

TERMOELECTRICA	2009	2010	2011
Observed price (OP)	227,40	230,00	234,40
Predicted price (PP)	187,69	176,95	195,78
Difference (OP-PP)	39,71	53,05	38,62
MUD	69,73	45,36	30,12
Difference Observed price – Predicted price + MUD	< MUD	7,69	8,50
ELECTROCENTRALE DEVA	2009	2010	2011
Observed price (OP)	230,20	234,00	234,00
Predicted price (PP)	192,28	182,63	201,54
Difference (OP-PP)	37,92	51,37	32,46
MUD	69,73	45,36	30,12
Difference Observed price – Predicted price + MUD	< MUD	6,01	2,34

The results above show that the prices paid by Hidroelectrica to both Termoelectrica and Electrocentrale Deva in 2010 and 2011 are above a reasonable benchmark determined by the dataset contracts. However, this comparison is made between retail contracts (all contracts in the dataset) and wholesale contracts between Hidroelectrica and Electrocentrale Deva and Termoelectrica. In other words, the simulated benchmark prices include retailing costs which the two contracts did not incur and, therefore, the simulated benchmark prices are higher than corresponding wholesale prices. In order to capture this difference, it is therefore indispensable to deduce a retail margin of 5 % from the absolute value of the MUD ([1]). The results are shown in the table below and further confirm prices above a market benchmark in 2010 and 2011 for the two suppliers:

Table 3

Analysis of contracts by applying a 5 % retail margin reduction for the relevant period 2009-2011

(RON/ MWh)

TERMOELECTRICA	2009	2010	2011
Observed price (OP)	227,40	230,00	234,40
Predicted price (PP)	187,69	176,95	195,78

([1]) Based on median value of trader's margin in Romania, KPMG Report for Energy Holdings, May 2014, Appendix 3 p. 53,

(RON/ MWh)

TERMOELECTRICA	2009	2010	2011
Difference (OP-PP)	39,71	53,05	38,62
MUD	69,73	45,36	30,12
Difference Observed price – ((Predicted price + MUD) – 5 %)	< MUD	18,81	19,80
ELECTROCENTRALE DEVA	2009	2010	2011
Observed price (OP)	230,20	234,00	234,00
Predicted price (PP)	192,28	182,63	201,54
Difference (OP-PP)	37,92	51,37	32,46
MUD	69,73	45,36	30,12
Difference Observed price – ((Predicted price + MUD) – 5 %)	< MUD	17,41	13,92

In conclusion, the econometric analysis indicates contract prices for Termoelectrica and Electrocentrale Deva above market prices. However, given the wide interval of uncertainty which is not captured by the model, the conclusion of the econometric analysis needs to be complemented with additional economic information on market-conformity of Hidroelectrica's behaviour and/or other contract data.