Reports of Cases

JUDGMENT OF THE GENERAL COURT (Sixth Chamber, Extended Composition)

12 November 2025*

(State aid – Electricity supply tariff – Conclusion of an arbitration agreement in order to fix the tariff – Decision to close the complaint – Decision finding no aid – Right to be heard – Advantage – Private investor test – Complex economic assessment)

In Joined Cases T-639/14 RENV II, T-352/15 RENV and T-740/17 RENV,

Dimosia Epicheirisi Ilektrismou AE (DEI), established in Athens (Greece), represented by E. Bourtzalas, E. Salaka, C. Synodinos and H. Tagaras, lawyers,

applicant,

v

European Commission, represented by A. Bouchagiar and P.-J. Loewenthal, acting as Agents,

defendant,

supported by

Federal Republic of Germany, represented by J. Möller, acting as Agent,

and by

Metlen Energy & Metals AE, formerly Mytilinaios AE – Omilos Epicheiriseon, formerly Alouminion tis Ellados VEAE, established in Marousi (Greece), represented by V. Christianos, G. Karydis and G. Kelepouri, lawyers,

interveners,

THE GENERAL COURT (Sixth Chamber, Extended Composition),

composed, at the time of the deliberations, of M.J. Costeira, President, M. Kancheva, U. Öberg, P. Zilgalvis (Rapporteur) and E. Tichy-Fisslberger, Judges,

Registrar: S. Spyropoulos, Administrator,

having regard to the judgment of 22 February 2024, *Mytilinaios* v *DEI and Commission* and *Commission* v *DEI* (C-701/21 P and C-739/21 P, EU:C:2024:146),

* Language of the case: Greek.

having regard to the written part of the procedure, in particular the decision of 31 January 2025 joining Cases T-639/14 RENV II, T-352/15 RENV and T-740/17 RENV for the purposes of the oral part of the proceedings and the decision closing the proceedings.

further to the hearing on 25 March 2025,

gives the following

Judgment

1 By its actions under Article 263 TFEU, the applicant, Dimosia Epicheirisi Ilektrismou AE (DEI), seeks, in Case T-639/14 RENV II, the annulment of letter COMP/E3/ON/AB/ark *2014/61460 from the Commission dated 12 June 2014, informing it that no further action would be taken on its complaint ('the contested letter'), in Case T-352/15 RENV, annulment of Commission Decision C(2015) 1942 final of 25 March 2015 (Case SA.38101 (2015/NN) (ex 2013/CP) – Greece – Alleged State aid to Alouminion SA in the form of electricity tariffs below cost following an arbitration decision) ('the first contested decision') and, in Case T-740/17 RENV, annulment of Commission Decision C(2017) 5622 final of 14 August 2017 (Case SA.38101 (2015/NN) (ex 2013/CP) – Greece – Alleged State aid to Alouminion SA in the form of electricity tariffs below cost following an arbitration decision) ('the second contested decision').

I. Background to the dispute

2 The present cases concern, in essence, the question whether the arbitration agreement reached in order to fix the electricity supply tariff which the applicant, an electricity producer and supplier established in Athens (Greece) and controlled by the Greek State, concluded with its principal client, namely the intervener, Metlen Energy & Metals AE ('Metlen'), an aluminium producer, involves the grant of State aid.

3 On 4 August 2010, the applicant and Metlen signed a framework agreement concerning the electricity supply tariff ('the framework agreement') to be applied during the period from 1 July 2010 to 31 December 2013 ('the period at issue'), and also the arrangements for the amicable settlement of the debt owed by Metlen to the applicant, which had accrued during the period from 1 July 2008 to 30 June 2010. On the basis of that agreement, they negotiated the substance of a draft electricity supply contract, although without reaching agreement on the tariff Metlen was to pay to the applicant for the supply of electricity.

4 On 16 November 2011, the applicant and Metlen signed an arbitration agreement ('the arbitration agreement'), by which they voluntarily agreed to entrust the resolution of their dispute to the permanent arbitration body of the Rythmistiki Archi Energeias (Greek Energy Regulator, Greece; 'the RAE'), in accordance with Article 37 of nomos 4001/2011, gia ti leitourgia Energeiakon Agoron Ilektrismou kai Fysikou Aeriou, gia Erevna, Paragogi kai diktya metaforas Ydrogonanthrakon kai alles rythmiseis (Law 4001/2011 on the operation of the electricity and gas energy markets, research, production and hydrocarbon transport networks and other regulations) (FEK A' 179/22.8.2011; 'Law 4001/2011'). Thus, for the purposes of dispute resolution between the parties, the resolution of the dispute was entrusted to an arbitration tribunal in accordance with the arbitration agreement ('the arbitration tribunal') and the rules governing the permanent arbitration body of the RAE.

5 According to the arbitration agreement, the task with which the arbitration tribunal was entrusted consisted in determining, on the basis of negotiations which took place between the applicant and Metlen, an electricity supply tariff corresponding to the specific characteristics of Metlen and covering at least the costs borne by the applicant. In addition, the arbitration tribunal had to take account of the legislative framework specified by the parties to the agreement, namely RAE Decision No 692/2011 establishing the '[b]asic [p]rinciples for [p]ricing of [e]lectricity to [high-voltage] [c]ustomers' and RAE Decision No 798/2011 and arbitration award No 8/2010, which had been handed down in a tariff dispute between the parties to the arbitration agreement concerning a period different from the period at issue. In the meantime, Metlen continued not to pay any of the applicant's monthly bills, since the parties remained in disagreement as to the tariff to be applied. Thus, the applicant threatened to stop supplying Metlen with electricity if it did not settle the disputed bills, which led Metlen to lodge a complaint with the RAE by which it sought the adoption of interim measures.

6 Following Metlen's complaint, by Decision No 346/2012 of 9 May 2012, the RAE set, on a provisional basis, an electricity supply tariff of 42 EUR/MWh applicable to Metlen.

7 On 15 June 2012, the applicant lodged a complaint with the European Commission against that decision, registered under number SA.34991 ('the 2012 complaint'), arguing that the provisional tariff set in that decision obliged it to supply Metlen with electricity at a price below its costs and constituted unlawful State aid.

8 By Decision No 1/2013 of 31 October 2013, the arbitration tribunal set an electricity supply tariff applicable to Metlen for the period at issue at a gross amount of 40.7 EUR/MWh and a net amount of 36.6 EUR/MWh ('the arbitration award'). On 23 December 2013, the applicant lodged a complaint with the Commission against the arbitration award, registered under number SA.38101 ('the second complaint'), arguing that the tariff fixed in that award was lower than that which had been fixed provisionally by the RAE.

9 The Commission, for its part, invited the Greek authorities to submit observations on the second complaint, which they ultimately sent to the Commission on 28 April 2014. Those authorities maintained that the facts of the case did not support a finding of State aid. When it provided the applicant with a confidential version of those observations on 6 May 2014, the Commission informed the applicant that, in view of all of the information in its possession at that preliminary stage, it did not appear that any State aid had been granted by the arbitration tribunal. The Commission also invited the applicant, in the event that it wanted the Commission to continue its investigation, to produce new evidence or arguments calling that preliminary assessment into question.

10 Following a fresh exchange, the Commission confirmed its position that there was no evidence supporting a finding of State aid. By the contested letter, signed by a head of unit of the Directorate-General (DG) for Competition, the Commission informed the applicant that no further action would be taken on the second complaint, on the grounds that the arbitration award was not attributable to the Greek State and that no advantage had been conferred.

11 By application lodged at the Registry of the General Court on 22 August 2014, the applicant brought the action registered under number T-639/14 seeking annulment of the Commission's decision in Case SA.38101 and of the Commission's implicit decision in Case SA.34991, as contained in the contested letter.

12 On 25 March 2015, the Commission adopted the first contested decision by which it found, first of all, that, since the arbitration award had been applied retroactively and had replaced the provisional tariff fixed by the RAE for the period at issue, the 2012 complaint had become devoid of purpose. It accordingly limited its investigation to the second complaint. Next, as regards the examination of the conditions of Article 107(1) TFEU on the categorisation of a measure as State aid, it began by examining the advantage criterion and applied the private vendor principle to the applicant, which is a component of the general private investor principle. Thus, it found that, in view of the facts of the case, a prudent private investor also would have decided to refer the dispute with Metlen to arbitration. Consequently, in its view, no advantage within the meaning of Article 107(1) TFEU was conferred on Metlen in the present case.

13 By application lodged at the Registry of the General Court on 29 June 2015, the applicant brought the action registered under number T-352/15 for annulment of the first contested decision.

14 By order of 9 February 2016, *DEI* v *Commission* (T-639/14, not published, EU:T:2016:77), the General Court decided that there was no longer any need to adjudicate on the action in Case T-639/14 on the ground, inter alia, that the first contested decision had rescinded and formally replaced the contested letter.

15 On 22 April 2016, the applicant lodged an appeal against the order of 9 February 2016, *DEI* v *Commission* (T-639/14, not published, EU:T:2016:77) with the Court of Justice.

16 By judgment of 31 May 2017, *DEI* v *Commission* (C-228/16 P, EU:C:2017:409), the Court of Justice set aside the order of 9 February 2016, *DEI* v *Commission* (T-639/14, not published, EU:T:2016:77), referred the case back to the General Court and reserved the costs.

17 Following delivery of the judgment of 31 May 2017, *DEI* v *Commission* (C-228/16 P, EU:C:2017:409), the Commission adopted the second contested decision, whereby it once more decided, while expressly repealing and replacing both the contested letter and the first contested decision, that the arbitration award did not involve the grant of State aid within the meaning of Article 107(1) TFEU. The reasons given in support of that conclusion, based on adherence to the private investor test, are identical to those set out in the first contested decision.

18 By letters of 24 August 2017, thus following the adoption of the second contested decision, the Commission requested the General Court to make a finding that the actions in Cases T-639/14 RENV and T-352/15 had become devoid of purpose and that there was no longer any need to adjudicate on them.

19 By application lodged at the Registry of the General Court on 3 November 2017, the applicant brought an action registered under number T-740/17 for annulment of the second contested decision.

20 By orders of 14 May 2018, the General Court ordered that the examination of the procedural issue raised in Cases T-639/14 RENV and T-352/15 be reserved for the final judgment.

21 By decision of 26 February 2020, Cases T-639/14 RENV, T-352/15 and T-740/17 were joined for the purposes of the oral part of the procedure and the decision which closes the proceedings.

22 By judgment of 22 September 2021, *DEI* v *Commission* (T-639/14 RENV, T-352/15 and T-740/17, EU:T:2021:604; 'the initial judgment'), the General Court annulled the contested letter and the first and second contested decisions, ordered the Commission to bear its own costs and to pay those incurred by the applicant and ordered Metlen to bear its own costs.

23 By judgment of 22 February 2024, *Mytilinaios* v *DEI and Commission* and *Commission* v *DEI* (C-701/21 P and C-739/21 P, EU:C:2024:146; 'the judgment on appeal'), the Court set aside the initial judgment, referred Cases T-639/14 RENV, T-352/15 and T-740/17 back to the General Court for it to adjudicate on the pleas and arguments raised before it on which the Court of Justice had not given a ruling and reserved costs.

A. Initial judgment

24 In the initial judgment, the General Court held that, inasmuch as the second contested decision had closed the proceedings at the stage of the preliminary examination, it had prevented the applicant from putting forward its arguments in the formal investigation procedure. Thus, it held that the applicant qualified as an 'interested party' within the meaning of Article 1(h) of Council Regulation (EU) 2015/1589 of 13 July 2015 laying down detailed rules for the application of Article 108 of the Treaty on the Functioning of the European Union (OJ 2015 L 248, p. 9). It also rejected the Commission's argument based on the principle *nemo auditur propriam turpitudinem allegans potest*, to the effect that the applicant could not contest the outcome of the arbitration procedure to which it had freely agreed, since such a plea was based on a confusion between the Greek State and the applicant, leading to the imputation to the applicant of the alleged satisfaction of the Greek authorities with the arbitration award. As a result, it held that the applicant had standing to bring an action for annulment of the second contested decision.

25 Next, the Court considered it necessary to examine together the third to fifth pleas in law put forward in Case T-740/17, by which the applicant had challenged the Commission's refusal to open the formal investigation procedure, despite its arguments showing that the arbitration award, which fixed the tariff at issue, conferred an advantage on Metlen that departed from market conditions.

26 The Court considered that the arbitration award handed down in the present case was capable of conferring an unlawful advantage on Metlen imputable to the Greek State and, in so doing, making it possible or perpetuating the granting of unlawful aid, or even becoming the instrument for that purpose.

27 The General Court therefore annulled the contested letter and the first and second contested decisions, ordered the Commission to bear its own costs and to pay those incurred by the applicant and ordered Metlen to bear its own costs.

B. Judgment on appeal

28 The Commission and Metlen lodged appeals against the initial judgment.

29 In the judgment on appeal, the Court of Justice held that the General Court had erred in law in finding that the arbitration tribunal could be treated in the same way as an ordinary court and that the arbitration award was a State measure capable of constituting State aid.

30 Thus, in paragraph 113 of the judgment on appeal, the Court of Justice held that the Commission was fully entitled to consider, first, that the only State measure capable of constituting State aid was the applicant's decision to conclude the arbitration agreement with Metlen, given that the applicant is controlled by the Greek State, and, second, that, in order to know whether that decision had conferred an advantage on Metlen, it was necessary to ascertain whether a private operator, under normal market conditions, would have taken that decision under the same conditions.

31 As the applicant and Metlen had voluntarily referred the matter to the arbitration tribunal, the Commission was not required, in the circumstances of the case, to analyse the content of the arbitration award for the purpose of ascertaining whether the applicant's decision to conclude an arbitration agreement had procured an advantage for Metlen within the meaning of Article 107 TFEU.

32 The Court of Justice accordingly set aside the initial judgment and referred the case back to the General Court for it to adjudicate on the pleas and arguments raised before it on which the Court of Justice had not given a ruling and reserved the costs.

II. Forms of order sought by the parties after referral back

33 The applicant claims that the Court should:

– dismiss the Commission's applications for a declaration that there is no need to adjudicate in Cases T-639/14 RENV II and T-352/15 RENV;

– annul the contested letter and also the first and second contested decisions; and

– order the Commission and Metlen to pay its costs for the proceedings before the General Court and the Court of Justice in Joined Cases C-701/21 P and C-739/21 P.

34 The Commission, supported by Metlen, contends that the Court should:

– principally, declare that there is no need to adjudicate in Cases T-639/14 RENV II and T-352/15 RENV;

– automatically reject the first part of the sixth plea in law in Case T-740/17 RENV, on the basis of the Court of Justice's reasoning in the judgment on appeal;

– dismiss the action; and

– order the applicant to pay the costs.

35 The Federal Republic of Germany, intervening in support of the Commission, has not submitted written observations on the conclusions to be drawn from the judgment on appeal under Article 193(1) of the Rules of Procedure of the General Court.

III. Law

A. Preliminary observations

36 First of all, it should be recalled that, once the Court of Justice has set aside the initial judgment and referred the case back to the General Court, the latter Court is seised, pursuant to Article 191 of the Rules of Procedure, of the case by the judgment of the Court of Justice and must rule again on all the pleas in law in support of annulment raised by the applicant, apart from those elements of the operative part not set aside by the Court of Justice and the considerations on which those elements are essentially founded, as those elements have acquired the authority of *res judicata* (see judgment of 26 January 2022, *Intel Corporation* v *Commission*, T-286/09 RENV, EU:T:2022:19, paragraph 80 and the case-law cited).

37 The applicant claims that the General Court must reiterate the conclusions and assessments of the initial judgment as regards Case T-740/17, except for paragraphs 150 to 159 thereof, by which it held that the arbitration award was imputable to the Greek State. The applicant submits that the General Court should, inter alia, reiterate its conclusions and assessments in paragraph 160 et seq. of that judgment, as they have the authority of *res judicata*, since they were not in any way called into question by the Commission or Metlen by their pleas in law seeking annulment. In any event, those conclusions and assessments do not constitute a point of law on which the Court of Justice ruled for the purposes of Article 61 of the Statute of the Court of Justice of the European Union.

38 In that regard, it should be noted that point 1 of the operative part of the judgment on appeal set aside the initial judgment in its entirety and that point 2 of the operative part referred the three cases back to the General Court 'for it to adjudicate on the pleas in law and arguments raised before it on which the [Court of Justice] has not given a ruling'.

39 It follows that the applicant's line of argument to the effect that the General Court must reiterate the conclusions and assessments of the initial judgment as regards Case T-740/17, except for paragraphs 150 to 159 thereof, cannot succeed.

40 Next, it is apparent that paragraph 118 of the judgment on appeal that the Court of Justice definitively rejected the third and fourth pleas in law and also the first two parts of the fifth plea in law in Case T-740/17, by which the applicant, in essence, criticised the Commission for having infringed Article 107 TFEU, in so far as it did not examine, in the second contested decision, the tariff fixed by the arbitration award, before ruling out the existence of an advantage and confining itself to ascertaining whether, under normal market conditions, a private operator would, in the same circumstances, have entered into the arbitration agreement under the same conditions.

41 It follows that, in the context of the remittal of the present cases, the General Court must rule on all of the pleas in law and arguments put forward in support of the forms of order seeking annulment of the contested measures, except for those relating to an alleged obligation for the Commission to examine the content of the arbitration award in order to rule out the possibility that that award might have granted unlawful State aid to Metlen.

42 Thus, the General Court must henceforth rule on the other pleas in law put forward by the applicant in Case T-740/17, namely the first plea in law, alleging an error of law in the interpretation of the judgment of 31 May 2017, *DEI* v *Commission* (C-228/16 P, EU:C:2017:409); the second plea in law, alleging infringement of Article 24(2) of Regulation 2015/1589, of the applicant's right to be heard and of the Charter of Fundamental Rights of the European Union;

the fifth plea in law, alleging an error of law in the interpretation and application of Articles 107 and 108 TFEU as regards the finding that the Commission was not required to conduct complex economic assessments and an error of law and manifest error of assessment of the facts inasmuch as the Commission omitted to examine decisive questions for determining whether or not there is State aid; the sixth plea in law, alleging infringement of Article 107(1) and Article 108(2) TFEU due to manifest errors of assessment of the facts as to the applicability of the private investor test in the present case and the application of that test to the facts of the present case; and the seventh plea in law, alleging error of law in the interpretation and application of Article 107(1) TFEU, an insufficient statement of reasons and error of assessment of the facts, inasmuch as the Commission failed to take further action on the 2012 complaint, under Article 108(2) TFEU, in basing its assessment on the fact that that complaint had become devoid of purpose once the arbitration award had been handed down.

43 Lastly, it is explicitly apparent from the judgment on appeal that the General Court must henceforth rule on the applications for a declaration that there is no need to adjudicate in Cases T-639/14 RENV II and T-352/15, reiterated on a number of occasions by the Commission, supported by Metlen. Since the first plea in law in Case T-740/17 concerns the withdrawal and replacement of the measures contested in the two aforementioned cases, the applications for a declaration that there is no need to adjudicate in Cases T-639/14 RENV II and T-352/15 will be examined together with that plea.

44 The General Court considers it appropriate to begin by examining the sixth plea in law in Case T-740/17, followed by the fifth, second and seventh pleas in law in Case T-740/17 and, lastly, the first plea in law in Case T-740/17, together with the applications for a declaration that there is no need to adjudicate in Cases T-639/14 RENV and T-352/15.

B. Sixth plea in law in Case T-740/17: infringement of Article 107(1) and Article 108(2) TFEU due to manifest errors of assessment of the facts as to the applicability of the private investor test in the present case and the application of that test to the facts of the present case

45 The applicant disputes the applicability of the private investor test in the present case and, in the alternative, the application of that test to the facts giving rise to the dispute, as interpreted by the Commission in the second contested decision.

1. Preliminary observations

46 It is apparent from the case-law that the concept of 'aid' within the meaning of Article 107(1) TFEU cannot cover a measure granted to an undertaking through State resources where it could have obtained the same advantage in circumstances which correspond to normal market conditions. The assessment of the conditions under which such an advantage was granted is therefore made, in principle, by applying the market economy operator principle (see judgment of 6 March 2018, *Commission* v *FIH Holding and FIH Erhvervsbank*, C-579/16 P, EU:C:2018:159, paragraph 45 and the case-law cited).

47 In order to assess whether the same measure would have been adopted in normal market conditions by a private operator in a situation as close as possible to that of the State, only the benefits and obligations linked to the situation of the State as shareholder – to the exclusion of those linked to its situation as a public authority – are to be taken into account. It follows that

the roles of the State as shareholder of an undertaking, on the one hand, and of the State acting as a public authority, on the other, must be distinguished. In order to determine in which capacity a public entity acted in adopting a measure, account may be taken, inter alia, of the nature and subject matter of that measure, the context of which it forms a part, and the objective pursued and the rules to which that measure is subject (see, to that effect, judgment of 5 June 2012, *Commission* v *EDF*, C-124/10 P, EU:C:2012:318, paragraphs 79 and 86 and the case-law cited).

48 Where a Member State confers, in its capacity as shareholder, an economic advantage on an undertaking, the applicability of the market economy operator principle does not depend on the means used to place that undertaking at an advantage nor on the nature of the means used, which may fall within the State's public powers (see judgment of 6 March 2018, *Commission* v *FIH Holding and FIH Erhvervsbank*, C-579/16 P, EU:C:2018:159, paragraph 48 and the case-law cited). More specifically, it is the economic nature of the State intervention at issue and not the means put into effect for that purpose that renders that principle applicable (see judgment of 17 November 2022, *Volotea and easyJet* v *Commission*, C-331/20 P and C-343/20 P, EU:C:2022:886, paragraph 108 and the case-law cited).

49 The agreed benefits may include not only positive benefits such as subsidies, loans or direct investment in the capital of undertakings, but also interventions which, in various forms, mitigate the charges which are normally included in the budget of an undertaking and which therefore, without being subsidies in the strict sense of the word, are of the same character and have the same effect. The supply of goods or services on preferential terms is one of the indirect advantages which have the same effects as subsidies (see judgment of 1 July 2008, *Chronopost and La Poste* v *UFEX and Others*, C-341/06 P and C-342/06 P, EU:C:2008:375, paragraph 123 and the case-law cited).

50 It should, moreover, be borne in mind that payment facilities constitute State aid for the purposes of Article 107(1) TFEU where, taking account of the significance of the economic advantage thereby granted, the recipient undertaking would manifestly not have obtained comparable facilities from a private creditor in a situation as close as possible to that of the public creditor and seeking to recover sums due to it by a debtor. It is therefore for the Commission to carry out an overall assessment, taking into account all relevant evidence in the case enabling it to determine whether the recipient undertaking would manifestly not have obtained comparable facilities from such a private creditor (see judgment of 24 January 2013, *Frucona Košice* v *Commission*, C-73/11 P, EU:C:2013:32, paragraphs 72 and 73 and the case-law cited).

51 Moreover, when the market economy operator principle applies, the test to be employed in practice in a given case must be determined on the basis, inter alia, of the nature of the transaction envisaged by the Member State concerned. The tests that may be applied include those of the private investor and the private creditor (see, to that effect, judgment of 6 March 2018, *Commission* v *FIH Holding and FIH Erhvervsbank*, C-579/16 P, EU:C:2018:159, paragraph 52). Consequently, in order to determine whether the private investor test could be applied in the present case, it should be ascertained whether that test aimed to compare, in the most appropriate and adequate manner possible, the measure at issue, taking account in particular of its nature, with a measure that might have been adopted by a private operator in a situation that is as alike as possible and acting under normal market conditions.

52 Moreover, according to the case-law, the market economy operator principle may also refer to the private creditor test, which is applicable in the case of measures such as payment facilities for the repayment of a debt, the private debtor test, or the private vendor test, which is applicable in the

case of measures relating to the supply, directly or through public entities or private undertakings controlled by or under the influence of the State, of goods and services and the fixing of their conditions of sale, such as the price (see judgment of 17 November 2022, *Volotea and easyJet* v *Commission*, C-331/20 P and C-343/20 P, EU:C:2022:886, paragraph 110 and the case-law cited).

53 Thus, the application of the market economy operator principle itself involves the use, on a case-by-case basis, of various specific tests which each aim to compare, in the most appropriate and adequate manner possible, the State measure at issue in a given case, taking account in particular of its nature, with a measure that might have been adopted by a private operator in a situation that is as alike as possible and acting under normal market conditions (see judgment of 17 November 2022, *Volotea and easyJet* v *Commission*, C-331/20 P and C-343/20 P, EU:C:2022:886, paragraph 109 and the case-law cited).

54 Furthermore, according to settled case-law, the application of the market economy operator principle in a given case involves the Commission showing, following an overall assessment that takes into consideration all the relevant evidence in the case, that the undertaking or undertakings benefiting from the State measure at issue would manifestly not have obtained a comparable advantage from a normally prudent and diligent private operator in a situation that is as alike as possible and acting under normal market conditions. Within that overall assessment, the Commission must have regard to all the options that such an operator would reasonably have envisaged, all the information available and likely to have a significant influence on its decision, and the developments that were foreseeable at the time when the decision to confer an advantage was taken (see judgment of 17 November 2022, *Volotea and easyJet* v *Commission*, C-331/20 P and C-343/20 P, EU:C:2022:886, paragraph 113 and the case-law cited).

55 Moreover, the Commission is required to make a complex economic assessment when it examines whether particular measures can be described as State aid because the public authorities did not act in the same way as a private creditor. Therefore, in the context of the review conducted by the European Union Courts on complex economic assessments made by the Commission in the field of State aid, it is not for those courts to substitute their own economic assessment for that of the Commission (see judgment of 24 January 2013, *Frucona Košice* v *Commission*, C-73/11 P, EU:C:2013:32, paragraphs 74 and 75 and the case-law cited).

56 However, the European Union Courts must, inter alia, establish not only whether the evidence relied on is factually accurate, reliable and consistent but also whether that evidence contains all the relevant information which must be taken into account in order to assess a complex situation and whether it is capable of substantiating the conclusions drawn from it (see judgment of 24 January 2013, *Frucona Košice* v *Commission*, C-73/11 P, EU:C:2013:32, paragraph 76 and the case-law cited).

57 Lastly, it should be recalled at the outset that the question of the applicability of the private investor test in the present case, which is the subject of the first part of the sixth plea in law, must be distinguished from the question of the correct application of that test to the facts of the present case (see, to that effect and by analogy, judgment of 26 March 2020, *Larko* v *Commission*, C-244/18 P, EU:C:2020:238, paragraph 62 and the case-law cited). Although the Commission failed to assess correctly the facts of the dispute, and therefore misapplied that test to the facts of the present case, that does not automatically mean that that same test was not applicable to the present case.

58 It is in the light of those considerations that it is appropriate to examine the applicant's challenge of both the applicability of the private investor test in the present case and the application of that test to the facts of the present case.

2. The applicability of the private investor test

59 In the first place, the applicant submits that the private investor test cannot be applied to the assessment of its tariff policy for the supply of electricity, as it is not a suitable instrument for assessing State measures. That finding is confirmed by the judgment of 16 October 2014, *Alcoa Trasformazioni* v *Commission* (T-177/10, EU:T:2014:897), in which the General Court held that 'the complex economic evaluations required, for example, in order to apply the private investor in a market economy test could not be of any use'. Similarly, the applicant submits that, in Decision C 2/10 (ex NN 62/09) of 13 July 2011 on the State aid No SA.26117 implemented by Greece in favour of Aluminium of Greece SA (OJ 2012 L 166, p. 83), the Commission did not compare its electricity price with that it would have applied to a private investor, but rather with the A-150 regulated tariff ('the A-150 tariff'), which applied to high-voltage customers.

60 The applicant maintains that its position on the retail market in Greece is different from that of the other private-sector companies active on the same market. In its view, in so far as it held exclusive rights in the past, its activities and investment were aimed at fulfilling its public service mission. A company benefiting from such a position on the market cannot be compared to a 'purely' private undertaking.

61 In the second place, the applicant submits that the private investor test cannot be applied to its decision to avail itself of arbitration in order to resolve its dispute with Metlen. The conclusion of the arbitration agreement is merely a choice from among a number of alternative procedures for resolving disputes which could be envisaged under the existing legislation. They are not an economic activity. The applicant further submits that the risks for the parties to that agreement associated with the referral of a dispute to arbitration can be detected only at the end of the arbitration procedure. That risk could be avoided only if the Commission were to examine whether a private operator in a comparable situation would consider the price set by the arbitration tribunal to be advantageous and apply it.

62 Moreover, in its observations following the referral back to the General Court, the applicant submits, in essence, that the argument set out in paragraph 61 above is in no way dismissed by paragraph 113 of the judgment on appeal. The applicant submits that the conclusion of the arbitration agreement cannot be considered to constitute its tariff policy and was not decided on the basis of an assessment or evidence such as those that were necessary for it to take a decision.

63 The applicant submits, in the alternative, that the Commission was required to apply the private creditor test since, according to the second contested decision, the facts taken into consideration included Metlen's debt arising from unpaid electricity bills, and also the private electricity supplier test, given that the dispute submitted to arbitration related to the price of electricity supply to be applicable for at least a period of three and a half years.

64 The Commission disputes the applicant's line of argument. Moreover, in its observations following the referral back to the General Court, the applicant submits that the first part of the sixth plea was rejected by the judgment on appeal, as the Court of Justice stated, in paragraph 113 of that judgment, that the only measure capable of constituting State aid in the

present case was the applicant's decision to conclude the arbitration agreement with Metlen and that the examination of any advantage resulting from that measure had to be carried out on the basis of the market economy operator principle.

65 In that regard, it should be borne in mind that the question of the applicability of the private investor test in the present case was not examined in the initial judgment.

66 Moreover, it is apparent from paragraphs 121 and 122 of the judgment on appeal that the Court of Justice considered that the state of the proceedings as regards the sixth plea in law did not permit a decision by the Court of Justice because it did not have available to it all the necessary facts in that regard. Consequently, the Commission's argument put forward following the referral back to the General Court must be rejected.

67 In the first place, as regards the applicant's argument to the effect that its tariff policy cannot be scrutinised under the lens of the private investor test, the Court finds that, in fixing bilaterally tariffs charged to its high-voltage customers, it can, as an undertaking the majority of whose capital is owned by the Greek State, potentially grant an economic advantage to certain undertakings for the purposes of Article 107(1) TFEU liable to impair competition.

68 In that regard, the Court finds that, first, the applicant does not dispute the fact that it is an undertaking the majority of whose capital is owned by the Greek State.

69 Secondly, the Court notes, in relation to the applicant's argument to the effect that its position on the market is unique by reason of the public service obligations that have enabled it to enjoy exclusive rights on the electricity market, that such a fact is not capable of precluding the applicability of the private investor test. The market economy operator principle allows for an examination of whether a hypothetical, and not actual, investor would provide the same service on terms similar to those of the State (see, to that effect, judgment of 3 April 2014, *Commission* v *Netherlands and ING Groep*, C-224/12 P, EU:C:2014:213, paragraph 35).

70 In the present case, the Commission compared the applicant's behaviour with that of a hypothetical private undertaking having the same characteristics as the applicant and being in the same circumstances. In that regard, nor can the applicant rely on the judgment of 3 July 2003, *Chronopost and Others* v *UFEX and Others* (C-83/01 P, C-93/01 P and C-94/01 P, EU:C:2003:388), in which the Court of Justice held that the creation and maintenance of the French Post Office's network served an objective of general economic interest that would never have been created by a private undertaking. In that judgment, the Court had held that, in the absence of any possibility of comparing the situation of the French Post Office with that of a private group of undertakings not operating in a reserved sector, 'normal market conditions', which were necessarily hypothetical, had to be assessed by reference to the objective and verifiable elements which are available. Consequently, the fact that there is no other private undertaking comparable to the public undertaking does not suffice to preclude the application of the private investor test in the present case.

71 It follows that the fact that no private undertaking in Greece could have provided electricity on the same terms as the applicant does not call into question the applicability of the private investor test in the present case. In any event, it should be borne in mind that the period in question is subsequent to the liberalisation of the electricity market in Greece.

72 Thirdly, the applicant's argument to the effect that it did not have any tariff policy which encompassed a policy for resolving economic disputes with Metlen must also be rejected. The private investor test applies specifically to the facts of each set of legal proceedings, independently of the initial will of the parties. It is not refuted that the dispute giving rise to the litigation concerned the parties' contractual relationship and, in particular, the fixing of the tariff Metlen was to pay the applicant following the liberalisation of the electricity market in Greece.

73 Fourthly, as regards the judgment of 16 October 2014, *Alcoa Trasformazioni* v *Commission* (T-177/10, EU:T:2014:897), referred to by the applicant a number of times, the Court notes that the facts of the case that gave rise to that judgment are clearly distinguishable from the present case, inasmuch as the economic advantage had been granted by a compensatory mechanism financed by a special tax aimed at exempting companies from paying part of the charges for electricity necessary for the manufacture of products marketed by them. In any event, the fact that the application of the private investor test is not relevant in one particular case does not mean that it is not applicable in any other case in which the potential existence of State aid through preferential pricing is examined. Nor may the applicant argue that there is a relevant decision-making practice of the Commission, since the concept of 'State aid' is an objective concept which falls to be appraised on the date on which the Commission takes its decision, the test being whether a State measure confers an advantage on one or more particular undertakings (see judgment of 4 March 2009, *Associazione italiana del risparmio gestito and Fineco Asset Management* v *Commission*, T-445/05, EU:T:2009:50, paragraph 145 and the case-law cited).

74 Similarly, Decision C 2/10 of 13 July 2011 in Case SA.26117 Aluminium of Greece concerns facts which occurred before the liberalisation of the electricity market in Greece. Moreover, it is apparent from recital 27 of that decision that the Commission considered that a market economy vendor would not accept to charge a monthly reduced tariff without any specific justification. Consequently, the Commission applied the market economy operator principle in order to assess the advantage likely to be derived from the measure being examined. That example given by the applicant cannot, therefore, support its argument to the effect that the private investor test is not applicable in the present case.

75 In the second place, as regards the applicant's argument to the effect that the private investor test cannot be applied to its consent to settlement of the dispute with Metlen through arbitration, the Court notes that the Commission examined that fact in relation to the various options available to the applicant for resolving that dispute with Metlen that had been ongoing for a number of years.

76 In that regard, it should be borne in mind that, according to the case-law, the actions of a market economy private operator are, in principle, guided by prospects of profitability (see, to that effect, judgment of 10 April 2024, *Danske Slagtermestre* v *Commission*, T-486/18 RENV, EU:T:2024:217, paragraph 92 and the case-law cited).

77 In the present case, in referring the dispute for arbitration with the RAE, the applicant sought a certain level of profitability as referred to in the case-law cited in paragraph 76 above.

78 First, the applicant explains that it consented to referring the dispute for arbitration instead of, for example, continuing negotiations or initiating legal proceedings before a court of law, since the arbitration award would be given within six months and since the negotiations with Metlen seemed to be at an impasse and its mounting debts were a cause for concern. It states that it justified its decision to agree with Metlen to refer their dispute to the permanent arbitration body of the RAE by the need for it to safeguard its financial interests and the public resources it

managed as an undertaking subject to exclusive State control, by attempting to settle the dispute as quickly as possible and on the most advantageous terms possible for it. The applicant submits that, in order to take its decision, it took account of the 'total amount of [Metlen's] debt' and of the 'major financial risk that debt represented for it, in a very challenging economic and commercial environment'. It states that it was rational for it to look for the most 'profitable' solution for settling the dispute, that is to say, the solution that would enable it to recover at least part of the amounts owing by Metlen as quickly as possible. That is exactly what a private investor would have done.

79 Secondly, the Court also notes that, contrary to the applicant's assertions, the comparison of its behaviour with that of a hypothetical private operator motivated by profitability considerations cannot be made in relation to the tariff fixed in the arbitration award. As stated in paragraph 113 of the judgment on appeal, it was the choice to use arbitration that is the behaviour capable of conferring an advantage on Metlen and that had to be examined by the Commission.

80 In that regard, it should be noted that, in order for a measure to be found to be State aid, it is not the aims of the State intervention per se which are decisive, but rather its effects (see judgment of 9 June 2011, *Comitato 'Venezia vuole vivere' and Others* v *Commission*, Joined Cases C-71/09 P, C-73/09 P and C-76/09 P, EU:C:2011:368, paragraph 94 and the case-law cited). Consequently, the fact that the applicant could not have foreseen the price that would be fixed in the arbitration award does not negate the applicability of the private investor test.

81 According to the case-law, in order to examine whether or not a State undertaking has adopted the conduct of a prudent investor operating in a market economy, it is necessary to place oneself in the context of the period during which the decisions were taken in order to assess the economic rationality of that undertaking's conduct, and thus to refrain from any assessment based on a later situation (see, to that effect, judgments of 16 May 2002, *France* v *Commission*, C-482/99, EU:C:2002:294, paragraph 71, and of 5 June 2012, *Commission* v *EDF*, C-124/10 P, EU:C:2012:318, paragraphs 83 to 85 and 105).

82 It is not disputed by the parties that the applicant and Metlen freely agreed to refer their dispute to the permanent arbitration body of the RAE. The voluntary establishment of an arbitration tribunal in accordance with the arbitration agreement had also been noted by the Court of Justice, which observed, in paragraph 114 of the judgment on appeal, that the applicant had not claimed that the conclusion of the arbitration agreement with Metlen had been imposed on it, against its will, by the Greek State in order to grant Metlen State aid. It should also be noted in that regard that, in paragraph 119 of that judgment, the Court of Justice noted that, in paragraphs 9, 90 and 232 of the initial judgment, the General Court had concluded, in essence, that the applicant and Metlen had voluntarily referred the dispute to the arbitration tribunal of the RAE through their arbitration agreement and that that had not been contested in the appeal.

83 Thirdly, the applicant submits in its observations following the referral of the case back to the General Court that it did not base its decision to use arbitration on a prior economic assessment or an analysis of the evidence. However, that fact does not negate the applicability of the private investor test in the present case since, as is apparent from paragraph 78 above, the applicant believed that arbitration would probably enable it to resolve the dispute with Metlen as quickly as possible.

84 Fourthly, the applicant is incorrect in stating in its request for a hearing, in response to Metlen's observations on the further proceedings, that the case-law arising from the judgments of 3 April 2014, *Commission* v *Netherlands and ING Groep* (C-224/12 P, EU:C:2014:213), and of 17 November 2022, *Volotea and easyJet* v *Commission* (C-331/20 P and C-343/20 P, EU:C:2022:886), are not applicable in the present case, as they concern contractual transactions and not the decision to refer the dispute to arbitration. The relationship between the applicant and Metlen is clearly a contractual one, as the arbitration agreement was signed as part of the finalisation of the draft supply contract.

85 Consequently, the applicant may not claim that the Commission misconstrued the facts in regards to the applicability of the private investor test in the present case.

86 Next, as regards the applicant's argument put forward in the alternative, to the effect that the Commission was required to apply the private creditor test since, according to the second contested decision, the facts taken into consideration included Metlen's debt arising from unpaid electricity bills, and also the private electricity supplier test, given that the dispute submitted to arbitration related to the price of electricity supply to be applicable for at least a period of three and a half years, as noted in paragraph 51 above, in order to determine whether the private investor test could be applied in the present case, it should be ascertained whether that test aimed to compare, in the most appropriate and adequate manner possible, the measure at issue, taking account in particular of its nature, with a measure that might have been adopted by a private operator in a situation that is as alike as possible and acting under normal market conditions. In that regard, it is apparent from paragraph 51 above that the test to be employed in practice in a given case must be determined on the basis, inter alia, of the nature of the transaction envisaged by the Member State concerned.

87 In the present case, in opting to conclude an arbitration agreement, although the applicant was seeking to have a debt settled, it was also seeking to establish, as quickly as possible, a supply tariff in its contractual relationship with Metlen. It follows that the applicant may not claim that the private investor test is not suitable for the facts of the dispute between the parties to the arbitration agreement.

88 Moreover, the second contested decision compared the applicant's behaviour with that of a private vendor, that is to say, a private electricity supplier. Consequently, the applicant's argument put forward in the alternative, to the effect that the Commission ought to have assessed the behaviour of a prudent private creditor or a prudent private electricity supplier, does not call the well-foundedness of that decision into question.

89 In those circumstances, the first part of the sixth plea in law of Case T-740/17, by which the applicant contests the applicability of the private investor test in the present case, must be rejected.

3. The application of the private investor test to the facts of the present case

90 The applicant submits that, although the private investor test is applicable in the present case, when it applied that test to the facts of the present case, the Commission based itself on a manifestly incorrect assessment of both the facts and the appropriate framework and evidence falling to be assessed in the light of the market economy operator principle.

91 As regards the facts taken into account in the second contested decision, in the first place, the applicant submits that, contrary to what is stated in recital 29 of that decision, it was not obliged to refrain from applying the A-150 tariff to all of its high-voltage customers.

92 In the second place, the applicant submits that, contrary to what is stated in recital 29 of the second contested decision, under arbitration award No 8/2010, its obligation to conduct extensive negotiations with each high-voltage customer related only to the rate of increase of the A-150 tariff in the 0 to 10% range.

93 In the third place, according to the applicant, the Commission found, incorrectly, that Metlen was dependent on the applicant for electricity supply.

94 In the fourth place, the applicant submits that Metlen was not its only customer, as there were other, large-scale electricity consumers. In any event, such a finding is not relevant for the categorisation of the tariff in question as State aid.

95 In the fifth place, regarding the benchmarking difficulties in finding an appropriate market price, as noted in recital 32 of the second contested decision, the applicant submits that the question of any benchmarking is not relevant and that, in any event, the Commission does not state which tariff could be considered to be an appropriate market price.

96 In the sixth place, the applicant submits that the Commission was incorrect in finding that the applicant had played an active role in its dispute with Metlen in seeking to set as high an electricity tariff as possible. It submits that, at the time the arbitration agreement was concluded, it accepted Metlen's offer, only to see Metlen subsequently withdraw it.

97 In the alternative, the applicant submits that the Commission misconstrued the context in which it took its decision to resort to arbitration and, in particular, the situation of the recipient undertaking and the relevant market. In particular, it submits that, given that the conditions on the basis of which it had decided to resort to arbitration were not complied with, it could not actually withdraw from the arbitration proceedings, as the RAE's decisions obliged it to continue to supply electricity to Metlen.

98 In its observations on the further proceedings following the referral of the case back to the General Court, the applicant adds, in essence, that the Commission ought to have had serious issues or doubts as to the assessment of the substance and terms of the arbitration agreement. In particular, it disputes the Commission's finding that the tariff fixed by the arbitration award was the 'logical consequence' of 'clear and objective parameters' set out in that agreement, without defining those parameters precisely in the second contested decision or assessing them. According to the applicant, nothing was expressly provided for in that agreement about the characteristics of Metlen's consumption and DEI's costs.

99 Similarly, the applicant submits that the Commission fails to explain which characteristics of the Greek electricity market constitute clear and objective parameters. According to the applicant, the Commission fails to provide any complex economic analysis or assessment that led it to conclude with certainty that the tariff set was the consequence of the parameters fixed by the arbitration. It claims that, in view of the disagreement of the parties to the arbitration agreement on the fundamental principles of arbitration, the tariff fixed by the arbitration award cannot be considered to be the logical consequence of those parameters, especially since the method and data used went beyond the framework of RAE Decision No 692/2011, since the Commission

takes into account only costs of electricity production from lignite, which were calculated incorrectly by the arbitration tribunal and did not include the costs resulting from the supply of electricity on the mandatory wholesale market.

100 The applicant also disputes the Commission's finding that the arbitrators' discretion was limited by clear and objective parameters, since the parties to the arbitration agreement disagreed about the extent of their powers. It states that Metlen claimed that the tariff fixed by the arbitration tribunal should be applied retroactively, although it disputed that that should be done.

101 The Commission disputes the applicant's line of argument.

102 It should be borne in mind at the outset that, as is apparent from paragraph 113 of the judgment on appeal, the measure that the Commission ought to have examined in order to determine whether there was an economic advantage was the applicant's decision to refer the settlement of its dispute with Metlen to arbitration. In that regard, it must be emphasised that the market economy operator principle does not concern the outcome of the measure for the entity in question, but rather the actions undertaken. Thus, there is no need to examine whether that decision conferred an economic advantage on Metlen, but rather whether the Commission ought to have had doubts about the compatibility of that decision with State aid law.

103 In that regard, it should be borne in mind that Article 108 TFEU and Regulation 2015/1589 provide for a specific procedure for the Commission's review of State aid.

104 The purpose of the preliminary examination procedure provided for in Article 108(3) TFEU and Articles 4 and 5 of Regulation 2015/1589 is to enable the Commission to form an initial opinion on the measure it is examining.

105 According to settled case-law, where the procedure under Article 108(3) TFEU does not enable it to overcome all the difficulties involved in determining whether the measure in question is compatible with the internal market, the Commission is under a duty to initiate the procedure under Article 108(2) TFEU, without having any discretion in that regard. Thus, in accordance with the objective of Article 108(3) TFEU and its duty of sound administration, the Commission must, in an endeavour to overcome, during the preliminary examination, any difficulties encountered, employ the measures and verifications necessary to remove any doubts as to the compatibility of the measure in question with the internal market (see judgment of 5 September 2024, *Slovenia* v *Commission*, C-447/22 P, EU:C:2024:678, paragraph 49 and the case-law cited).

106 The concept of 'serious difficulties' is an objective one, and the existence of such difficulties must be sought both in the circumstances in which the contested measure was adopted and in its content, in an objective manner, comparing the grounds of the decision with the information available to the Commission when it took a decision on the compatibility of the disputed aid with the internal market (see judgment of 28 March 2012, *Ryanair* v *Commission*, T-123/09, EU:T:2012:164, paragraph 77 and the case-law cited). It follows that judicial review by the Court of the existence of serious difficulties will, by its nature, go beyond simple consideration of whether or not there has been a manifest error of assessment (see judgment of 27 September 2011, *3F* v *Commission*, T-30/03 RENV, EU:T:2011:534, paragraph 55 and the case-law cited).

107 Proof of the existence of such difficulties must be furnished by the applicant seeking the annulment of that decision, by reference to a body of consistent evidence (see judgment of 17 November 2022, *Irish Wind Farmers' Association and Others* v *Commission*, C-578/21 P, not published, EU:C:2022:898, paragraph 54 and the case-law cited).

108 Where the applicant seeks annulment of a Commission decision not to initiate the formal investigation procedure referred to in Article 108(2) TFEU, that party may invoke any plea capable of showing that the assessment of the information and evidence which the Commission had at its disposal during the preliminary examination phase of the measure notified should have raised doubts as to the compatibility of that measure with the internal market. Thus, it is for the person making an application for annulment to show that there were doubts concerning that compatibility, meaning that the Commission was required to initiate that formal investigation procedure (see judgment of 5 September 2024, *Slovenia* v *Commission*, C-447/22 P, EU:C:2024:678, paragraph 51 and the case-law cited).

109 Accordingly, it is for the EU Courts, when they have before them an application for annulment of such a decision, to determine whether the assessment of the information and evidence which the Commission had at its disposal during the preliminary investigation phase of the national measure at issue should objectively have raised doubts as to the categorisation of that measure as aid, given that such doubts must lead to the initiation of a formal investigation procedure (see judgment of 17 November 2022, *Irish Wind Farmers' Association and Others* v *Commission*, C-578/21 P, not published, EU:C:2022:898, paragraph 55 and the case-law cited).

110 In addition, the lawfulness of a decision taken at the end of the preliminary examination procedure, such as that referred to in Article 4(2) of Regulation 2015/1589, falls to be assessed by the Courts of the European Union, in the light not only of the information available to the Commission at the time when the decision was adopted, but also of the information which 'could have been available' to the Commission, which includes information which seemed relevant and which could have been obtained, upon request by the Commission, during the administrative procedure (see judgment of 17 November 2022, *Irish Wind Farmers' Association and Others* v *Commission*, C-578/21 P, not published, EU:C:2022:898, paragraph 56 and the case-law cited).

111 Accordingly, it is appropriate to ascertain, in accordance with the case-law cited in paragraphs 108 to 110 above, whether the arguments put forward by the applicant before the General Court enable the doubts as to the compatibility of its decision to conclude the arbitration agreement with the rules governing the internal market, requiring the Commission to open the formal investigation procedure, to be identified.

(a) The assessment of the prudent private investor test in the second contested decision

112 It is apparent from the second contested decision that, in order to examine whether the facts recounted in the 2012 complaint and the second complaint were capable of constituting State aid, the Commission considered it appropriate to begin by examining whether, in the circumstances of the present case, the decision to submit the dispute to arbitration conferred an advantage on Metlen, as alleged by the applicant (recital 25 of the second contested decision).

113 Thus, in recital 26 of the second contested decision, the Commission found that the comparison of the applicant's conduct with that of a hypothetical private investor had to be carried out on the basis of the available information and foreseeable consequences, in particular at the time when the decision was made to conclude the arbitration agreement.

114 According to recital 27 of the second contested decision, the Commission found that the applicant's pricing policy in relation to Metlen had been determined by the arbitration award, which was the result of the arbitration agreement, which the applicant had concluded freely. The Commission accordingly found that it was required to examine whether a prudent private investor, in a position similar to the applicant, would have concluded such an agreement, establishing the parameters to be taken into account by the arbitration tribunal with a view to updating and applying the pricing terms included in the draft supply and settlement agreement of 5 October 2010 for the certain period and resulting in the arbitration award, which in turn requires the applicant to apply those terms for the period in question.

115 The Commission also found that the arbitration proceedings were preceded by a lengthy dispute between the applicant and Metlen regarding the tariff applicable to the electricity supplied by the applicant to Metlen (recital 28 of the second contested decision).

116 Next, the Commission stated that, following the liberalisation of the Greek electricity market, the applicant was obliged to refrain from applying the A-150 tariff to its high-voltage customers and was therefore obliged to negotiate the tariff with each of its customers. It also found that the RAE was empowered to supervise the Greek electricity market in order to ensure competition and compliance with the rules in force, in particular as regards the pricing terms of dominant suppliers. Those tariffs had to be determined by reference to the underlying cost of the supplier's services and the parameters used for price differentiation (recital 29 of the second contested decision).

117 The Commission also found that the applicant was the only electricity producer in Greece capable of supplying electricity to high-voltage customers such as Metlen, since during the period in question the applicant controlled all lignite and hydroelectric plants in Greece. In all, the applicant owned 70% of all power plants in Greece. The applicant's competitors operated only more expensive and relatively new natural gas plants, the investment costs of which, unlike lignite and hydroelectric plants, had not yet been recouped. Moreover, in terms of electricity supply, the applicant had a monopsony (in relation to the producers) and a monopoly (in relation to the customers), with a market share of 98 and 99%. Nor were imports of electricity a viable option for customers like Metlen. Hence, customers such as Metlen were completely dependent on the applicant for the supply of electricity, which made negotiations about pricing terms more challenging (recital 30 of the second contested decision).

118 In recital 31 of the second contested decision, the Commission found that the fact that Metlen was a 'unique customer', given that it was the largest consumer on the Greek electricity market, had made the resolution of the dispute and the fixing of an appropriate price more difficult. It noted that Metlen's consumption exceeded 5% of the total electricity consumption in Greece and corresponded to 40% of the total consumption of high-voltage customers, whereas the consumption of the second largest consumer on that market was almost 50% lower. It also noted that Metlen's consumption was almost constant (stable) throughout the year.

119 In recital 32 of the second contested decision, the Commission found that the applicant's dominant position on the Greek electricity market, combined with Metlen's unique characteristics, made the benchmarking for finding an appropriate tariff particularly difficult.

120 In recital 33 of the second contested decision, it is stated that, according to the RAE, the applicant had not genuinely negotiated with its high-voltage customers, including Metlen, in order to arrive at pricing terms that would take into account each customer's consumption profile, as it would have had to do in a competitive market and as required by the relevant Greek legislation.

121 The Commission further found, in recital 34 of the second contested decision, that the applicant played an active role in its dispute with Metlen, as it attempted to set the tariff as high as possible and claim the outstanding payments from Metlen. Despite those efforts, however, Metlen refused to sign the draft supply and settlement agreement, which would have laid down in detail the contractual relationship between the parties to the arbitration agreement and would have implemented the framework agreement initially signed by them. Consequently, Metlen's debt was accruing and totalled around EUR 30 million in October 2011, plus the EUR 82 million agreed to by the parties to that agreement.

122 Thus, negotiations were unproductive for a fairly lengthy period and there was, therefore, no written offer and acceptance of a proper supply contract. Since the parties to the framework agreement disagreed as to the tariff to be applied, they each established different bills on the basis of what they considered to be the correct tariff (recital 35 of the second contested decision).

123 According to recital 36 of the second contested decision, faced with that situation, the applicant decided to refer the dispute to arbitration, on the condition that Metlen make an immediate payment of part of its outstanding debt and pay its monthly bills. Thus, by referring the dispute to arbitration, the applicant could recover part of the debt, ensure that Metlen would pay its bills and resolve the dispute within a reasonable time.

124 It is apparent from recital 37 of the second contested decision that the Commission considered that, in view of the circumstances of the present case, it was not realistic for the applicant to continue trying to reach a settlement with Metlen. Moreover, even an arrangement on the debt accrued by Metlen would not resolve the matter of fixing the tariff applicable in the future. The Commission further considered that the applicant could not stop supplying Metlen with electricity since, first, the applicant would not be able to claim the amounts owing and, secondly, as is apparent from its attempts to terminate Metlen's electricity supply during the proceedings before the arbitration tribunal and following the arbitration award, the RAE or the Hellenic Competition Commission could order it to continue supplying electricity to Metlen. Moreover, litigation before ordinary Greek courts would have lasted several years before there was a final, enforceable judgment, whereas arbitration proceedings, under the relevant legislation, would lead to a decision within six months.

125 Consequently, the Commission concluded, in recital 38 of the second contested decision, that in view of the circumstances of the present case, a prudent private investor would also have decided to refer the dispute to arbitration in order to settle a long-lasting dispute and obtain payment of the outstanding debts.

126 Lastly, the Commission considered that it was necessary to determine whether a prudent private investor would have concluded such an arbitration agreement setting out those parameters for fixing the applicable tariff. In that regard, it noted that such an investor would have set those parameters with particular care, so as to eliminate the risks associated with arbitration proceedings and ensure that the tariff was fixed on the basis of objective criteria. In particular, a

prudent private investor would have agreed to arbitration if it was established that the arbitrators' discretion was limited and that the arbitrators were experts in the field in question (recital 39 of the second contested decision).

127 The Commission found that, according to the information available, there was no doubt about the expertise of the arbitrators chosen in the field concerned by the dispute. According to the Commission, the applicant and Metlen had agreed on the arbitrators who, under Article 37 of Law 4001/2011, had to be selected from a list of arbitrators having specialised knowledge in the field concerned by the dispute referred for arbitration (recital 40 of the second contested decision).

128 Moreover, according to recital 41 of the second contested decision, as part of the establishment of a permanent arbitration arrangement, under the applicable legislation only the procedural aspects and required secretarial support of the arbitration were organised by the RAE. Thus, according to the Commission, it had no influence over the arbitration tribunal. The Commission accordingly found that the arbitration tribunal could be considered to have been established in a manner so as to ensure its independence from the parties to the arbitration agreement and from third parties.

129 As regards the parameters of the tariff to be applied, the Commission observed that the arbitration agreement expressly stipulated that, in accordance with the electricity pricing rules for high-voltage customers established previously by the RAE, the arbitration tribunal had to update and apply the pricing terms set out in the draft supply and settlement agreement so as to ensure that those terms reflected Metlen's consumption profile and covered at least the applicant's costs. Thus, according to the Commission, that agreement established that the arbitration tribunal had to base an appropriate price on the pricing principles applicable on the Greek market for high-voltage customers, whilst at the same time ensuring that the specific circumstances of the dispute would be taken into account. It further stated that the relevant criteria for fixing the pricing terms, namely Metlen's consumption profile and the applicant's costs, since the parties to that agreement had not managed to translate them into specific pricing terms during the negotiations, had been taken into account by the arbitrators. In those circumstances, the Commission found that the parameters for fixing the electricity tariff, defined thusly in the arbitration agreement, had been established on the basis of objective criteria that limited the arbitrators' discretion in fixing the tariff. Lastly, it observed that the parameters to be used by the arbitrators were similar to those used by the RAE in provisional measures (recital 42 of the second contested decision).

130 The Commission accordingly concluded that a prudent private investor, in circumstances similar to those faced by the applicant in the present case, would have concluded an arbitration agreement similar to the one that was concluded, which set out clear and objective parameters to be adhered to by the arbitrators in fixing the relevant tariff. As a result, it found that the applicant's conduct during the conclusion of that agreement was that of a market economy prudent private investor and that, therefore, the decision to conclude an agreement in those circumstances did not raise any doubts as to the compatibility of that decision-making with the rules governing State aid. Thus, the Commission found that Metlen had not obtained any advantage within the meaning of Article 107 TFEU (recital 43 of the second contested decision).

131 The Commission further noted that it was not required to examine whether the tariff ultimately fixed by the arbitration tribunal was in line with market conditions (recital 44 of the second contested decision).

132 In that regard, the Commission recalled that the application of the market economy operator principle requires it to carry out complex economic assessments (recital 45 of the second contested decision). It also found that, when the arbitration agreement was signed, the applicant had not disputed the parameters set out in that agreement. Moreover, a private operator would not have been able to influence the outcome of the arbitration proceeding beyond the means available to it under the legislation, namely an appeal against the arbitration award before the ordinary courts of law (recital 46 of the second contested decision).

133 The Commission also noted that, even though it was not required to examine the matter in the present case, the tariff fixed by the arbitration award was higher than the average smelter power tariff in Europe, which in 2013 was 30.87 EUR/MWh (recital 47 of the second contested decision).

134 Thus, the Commission concluded that, since the arbitration award had adhered to the objective parameters fixed previously for determining the electricity tariff that would be acceptable for a prudent private investor, no economic advantage had been conferred on Metlen (recital 48 of the second contested decision). As the four conditions laid down in Article 107 TFEU were cumulative, it did not examine the other conditions before concluding that there was no State aid.

135 It is, therefore, appropriate to examine the applicant's arguments concerning alleged errors by the Commission in the second contested decision, relating to the application of the private investor test to the facts of the present case. In accordance with the case-law cited in paragraph 108 above, the Court must consider whether those arguments demonstrate that the Commission ought to have had serious doubts about the circumstances surrounding the conclusion of the arbitration agreement at issue, by objectively examining the statement of reasons in the award together with the evidence available to the Commission when it made its findings on the compatibility of the alleged aid in question with the internal market.

136 In order to ascertain whether or not the applicant adopted the conduct of a prudent investor operating in a market economy, it is necessary to place oneself in the context of the period during which it decided to settle the dispute through RAE arbitration in order to assess the economic rationality of its conduct, including taking account of the circumstances in which the arbitration agreement was signed, and thus to refrain from any assessment based on a later situation (see, to that effect, judgment of 16 May 2002, *France* v *Commission*, C-482/99, EU:C:2002:294, paragraph 71).

(b) The facts challenged by the applicant by way of principal head of claim

(1) The tariff applied to high-voltage customers

137 In recital 29 of the second contested decision, the Commission stated that, following the liberalisation of the electricity market, the applicant was obliged to refrain from applying the A-150 tariff to its high-voltage customers and was therefore obliged to negotiate the tariff with each of its customers.

138 In that regard, the Court notes, first of all, that in footnote 13, the Commission stated in the second contested decision that, for a transitional period, the applicant had been allowed to apply the A-150 tariff with a maximum increase of 10% and following meaningful negotiations with its high-voltage customers, pursuant to Article 14 of the Kodika Promitheias se Pelates (Greek Electricity Supply Code).

139 The Ypourgiki Apofasi D5/IL/V/F29/23860/2007 FEK 2332/B'/7.12.2007 Afxisi Timologion Polisis Ilektrikis Energias « DEI AE » Dekemvriou 2007 kai Tropopoiisi Kodika Promitheias (Ministerial Decree on increases in 'DEI AE' electricity sales tariffs and amendment of the Electricity Supply Code), of 7 December 2007 (EL/B/F29/23860/2007 – FEK 2332/B'/7.12.2007), had provided that 'a price ceiling applicable to [high-voltage] customers [was] fixed by decision of the Minister for Development after hearing the RAE' and that 'at the time of the first application of those rules, the price ceiling [was] equal to the amount corresponding to the current tariffs, increased by 10%'.

140 By its Decision No 346/2012, the RAE stated that, in the event of a tariff increase, the maximum increase was 10%. Thus, according to that decision, the Greek legislature wanted, in an initial phase, to liberalise the applicant's tariffs gradually by protecting high-voltage customers from the applicant's undeniably dominant position, which could have led to abrupt pricing changes. The RAE also found that the Greek legislature had made no reference to the A-150 tariff but that, in practice, that tariff had been used as a reference, because it had been applicable to high-voltage customers until the electricity market was liberalised. Moreover, that tariff was no longer compatible with the market liberalisation and RAE Decision No 692/2011.

141 According to RAE Decision No 346/2012, the wish of the Greek legislature was that, in a second stage, subsequent tariff negotiations would take account of the actual cost, defined as the cost per customer, which takes the customer's particular characteristics into consideration, even within the same customer category, and which is not simply the applicant's logistics costs. The RAE takes the view that, in the case of the electricity market in Greece, that cost is largely due to structural problems, cross-subsidies and general distortions of the market. Consequently, only the undertaking's actual cost could constitute the lower limit on the basis of which any pricing negotiations could take place, in order that the two parties could share equally and symmetrically the resulting surplus to the benefit of all, which would occur automatically if there was healthy, effective competition on the electricity market. Thus, the liberalisation of the market required the removal of the maximum regulated tariff for high-voltage customers, as the fixing of that tariff was initially aimed at protecting the customers concerned from potential abuse of the applicant's dominant position.

142 The applicant and Metlen disagreed as to the interpretation of the term 'current tariff' and as to the increase to be applied thereto. Hence they initially referred their dispute to arbitration in July 2009.

143 It is apparent from the case file that, since 1 July 2008, the applicant was required to negotiate with Metlen the tariff that would be applicable to it, whilst observing the principles of good faith and loyalty so as to maintain the conditions for development of competition and consumer protection. Nevertheless, the applicant was proposing a 10% increase for the A-150 tariff which was generally applicable to high-voltage customers in the past, whereas Metlen had benefited from a preferential tariff since the 1960s. Accordingly, Metlen did not accept the applicant's pricing of the regulated tariff which, in any event, had to remain exceptional even for those customers for whom it had previously been applicable. That said, even if the applicant had initially applied that tariff correctly to Metlen, being unable to apply the preferential tariff to it, it was indisputably required subsequently to negotiate with Metlen to fix a tariff adapted to its consumption profile.

144 Consequently, the Commission was correct in finding that the applicant had to depart from the regulated tariff for high-voltage customers and offer tariffs adapted to each customer concerned according to their consumption profile.

145 Moreover, the fact that the liberalised tariff resulting from the arbitration award was lower than the A-150 tariff is not such as to call that assessment into question, since the circumstances forming the basis for that tariff were different. However, in 2012, it was no longer legitimate in Greece to impose a State-regulated tariff on high-voltage customers. That is why, as acknowledged by the applicant itself, no legislative measure was adopted after the abovementioned provision of the Electricity Supply Code imposing a generalised tariff on those customers.

146 Next, the Court finds that, in recital 29 of the second contested decision, the Commission merely found that the applicant had to refrain from applying the regulated tariff, without going into further detail as to whether the new tariff had to be higher or lower than it. It follows that the applicant may not claim that it could have continued applying the regulated tariff over the long term.

147 Lastly, the fact that Metlen proposed to the applicant that it apply the tariff in question for off-peak demand periods as provided for in the framework agreement is irrelevant, as the parties to that agreement did not reach an agreement on the fixing of a generalised tariff to be paid by Metlen.

148 In those circumstances, the Court finds that the applicant has failed to prove, for the purposes of the case-law cited in paragraph 108 above, that the Commission ought to have had doubts as to the interpretation of the legal framework applicable to the liberalisation of the Greek electricity market for high-voltage customers.

(2) The obligation to negotiate the tariff with high-voltage customers

149 The applicant contests recital 29 of the second contested decision finding that it was under an obligation to enter into meaningful negotiations for the application of individual tariffs for high-voltage customers that would be unrelated to previous regulated tariffs, as negotiations would concern only the rate of increase of the A-150 tariff in the 0 to 10% range.

150 The applicant's claim that negotiations would concern only the rate of increase of the A-150 tariff in the 0 to 10% range can be refuted by the RAE decisions which the applicant itself provided to the Commission.

151 It is apparent inter alia from RAE Decision No 346/2012 that, by letter of 25 August 2010, the RAE requested the applicant not to apply the same tariffs to high-voltage customers, as that would lead to inequality between customers having the same characteristics. Thus, the applicant was required to offer adapted tariffs that took account of the consumption profile of the customers in question. It is apparent from paragraphs 14 and 15 of that decision that the applicant's pricing for supplying electricity to those customers in the past was identical for all those customers and included all charges for use of the system, services of general interest and competitive tariffs for the electricity supplied. However, due to the imposition of the maximum annual pricing for the use of services of general interest per customer, but also the billing for use of the network, the application of which

entails a different average charge depending on the power to be billed to each customer, minus the tariff for global uniform supply, a differentiation arises per customer in the average charge for the competitive part of the tariff.

152 In its recommendations in paragraph 20 of its Decision No 346/2012, the RAE suggested avoiding any reference to 'older regulated tariffs (such as, for example, the A-150 tariff for high-voltage customers)' and establishing new relevant parameters for any new tariff proposed. Thus, it suggested that the applicant engage in meaningful dialogue with those customers, finding that the applicant had not done so in accordance with the principles set out in its Decision No 692/2011.

153 In any event, as the market had to be liberalised, the applicant may not claim that it could continue applying the tariff fixed previously by the State without the agreement of the customers concerned.

154 Consequently, the applicant's assertion that it was not required to negotiate with high-voltage customers concerning the tariffs to be applied to them must be rejected. It has accordingly failed to demonstrate that the Commission ought to have had doubts when it examined the circumstances surrounding the adoption of the arbitration agreement in question.

(3) Metlen's dependence on the applicant for electricity supply

155 The applicant takes the view that, in stating in recital 30 of the second contested decision that customers such as Metlen were completely dependent on it for electricity supply, the Commission merely adopted the statement of reasons from the arbitration award and RAE Decision No 346/2012, even though the applicant had provided the Commission with a report from an auditing firm that ought to have raised doubts about that finding.

156 In that regard, the Court notes that, first, in order to contest that statement, the applicant merely refers to a footnote to its observations of 12 June 2013 concerning the Commission's preliminary analysis, in which reference is made to that report. However, a general reference to other documents, even those annexed to the application, cannot make up for the absence of the essential arguments in law which must appear in the application (see, to that effect, judgment of 11 September 2014, *MasterCard and Others* v *Commission*, C-382/12 P, EU:C:2014:2201, paragraph 40 and the case-law cited). It follows that, in so far as by its reference to its observations submitted to the Commission the applicant wishes to dispute Metlen's dependence on it for electricity supply, that argument is inadmissible.

157 In any event, first of all, it is apparent from those observations that the applicant requested the report annexed to the application from an auditing firm in support of its line of argument put forward before the arbitration tribunal, and that that firm did not agree with the applicant's basic costs analysis conducted by the RAE.

158 However, that report is not evidence liable to call into question the Commission's finding that the imports were not a genuine solution for customers such as Metlen and that the applicant had a quasi-monopoly on the Greek market and the less costly plants for which costs had already been recouped. Given the applicant's monopoly on electricity supply in Greece, its argument disputing the dependence of the largest consumer on the Greek electricity market cannot succeed.

159 Secondly, the applicant may not claim that, in its written pleadings, the Commission acknowledged that it had never examined the report in question submitted to it by the applicant, as that is not apparent from the paragraphs to which it refers. Moreover, the Court finds that that report, annexed by the applicant to its written pleadings, is subsequent to the conclusion of the arbitration agreement and that it calls into question the fundamental pricing principles as reflected in RAE Decision No 692/2011. However, as is apparent from the case-law cited in paragraph 136 above, facts subsequent to the conduct examined by the Commission may not be used to call into question the well-foundedness of its assessment. Moreover, as is apparent from paragraph 5 above, that decision by the RAE was part of the regulatory framework that the arbitration tribunal had to take into account, as decided by the parties to that agreement. It follows that the applicant may not claim that the Commission had to consider that report in the examination of the conditions in which those parties concluded that agreement and the compliance of the terms thereof with the market economy operator principle.

160 Thirdly, it is also apparent from RAE Decision No 346/2012 that, due to the structure of the Greek electricity market and the applicant's monopoly, Metlen was not really able to procure its electricity supply elsewhere or import electricity from neighbouring countries.

161 It follows that the applicant has not adduced evidence, as contemplated in the case-law cited in paragraph 108 above, liable to demonstrate that the Commission ought to have had doubts as to Metlen's dependence on it for its electricity supply at the time of the facts in question.

(4) Metlen as a 'unique customer'

162 The applicant disputes recital 31 of the second contested decision, arguing that there are other large-scale consumers on the Greek electricity market and that that is, in any event, irrelevant for ascertaining whether the tariff to be paid by Metlen constitutes State aid.

163 In that regard, the Court notes that, by recital 31 of the second contested decision, the Commission merely finds that Metlen's consumption exceeded 5% of the total power consumption in Greece and corresponded to 40% of the total consumption of high-voltage consumers, a point not disputed by the applicant.

164 Moreover, it is apparent from the case file that Metlen was a unique customer not only because of its large share of the total power consumption in Greece, but also because of its constant consumption throughout the day and year, given that it was obliged to ensure an uninterrupted production cycle. Thus, since Metlen's requirements were fixed, the applicant could keep its plants active even during off-peak periods.

165 In that regard, as submitted by the Commission, the applicant's argument put forward to contest Metlen's status as a 'unique customer', based on Commission Decision of 16 October 2002 in Case N 133/01 concerning the scheme to offset stranded costs (OJ 2003 C 9, p. 6), in which the Commission had found that there was an economic advantage for Metlen arising from the preferential tariff granted to it, must also be rejected, in that the decision in question concerned the tariff from the 1960 contract and it had been taken in 2002, when the Greek electricity market had not yet been liberalised.

166 It follows that the applicant's questioning of Metlen's status as a 'unique customer' is unfounded. It has accordingly failed to demonstrate that the Commission ought to have had doubts in that regard when it examined the circumstances surrounding the adoption of the arbitration agreement in question.

(5) The comparative assessment

167 The applicant disputes the finding in recital 32 of the second contested decision, to the effect that the applicant's dominant position on the Greek electricity market, combined with Metlen's unique customer characteristics, made the benchmarking for finding an appropriate tariff particularly difficult.

168 The Court notes at the outset that, by its line of argument, the applicant is not criticising the Commission for not having carried out a comparative assessment; rather, it merely criticises the finding that such an assessment was not an obvious one to carry out in the present case. In that regard, the applicant continues to refer to the A-150 tariff which, clearly, it could not apply. It also refers to Commission Decision of 13 July 2011 on the State aid No SA.26117 – C 2/10 (ex NN 62/09) implemented by Greece in favour of Aluminium of Greece, by which the Commission had observed that the tariff paid by Metlen was 'lower than the standard tariff paid by other large industrial consumers'. That decision concerned a period prior to the dispute and the liberalisation of the Greek electricity market, during which all high-voltage customers paid that tariff, fixed by ministerial decree.

169 Moreover, as argued by the Commission, the market price cannot be predefined as a price suitable in all circumstances.

170 Thus, the applicant has not provided relevant and consistent indicia which might be able to call into question the Commission's finding that a comparative assessment was not an obvious one to carry out in the present case. It has accordingly failed to demonstrate that the Commission ought to have had doubts when it examined the circumstances surrounding the adoption of the arbitration agreement in question.

(6) The applicant's contribution to the exacerbation of the dispute

171 The applicant criticises the Commission for having found in the second contested decision that it had played an active role in its dispute with Metlen.

172 In that regard, the Court observes that, although the applicant explains that it sought to impose the highest tariff, that meets the private investor test the application of which to the facts of the present case it disputes. As regards the three tariff proposals it put forward to high-voltage customers, it is apparent from RAE Decision No 346/2012 that those tariffs were still generalised tariffs and, therefore, not tailored to each high-voltage customer's consumption, as required by the Greek legislation. Accordingly, those proposals were not capable of providing a genuine solution for resolving the dispute between the applicant and Metlen. Moreover, it is also apparent from that same decision that the applicant proposed those tariffs only before the RAE, which explained to it that it had to propose the tariffs to the customers concerned, which tariffs had to serve merely as a basis for the negotiations it was obliged to undertake with the customers in question.

173 In any event, in the second contested decision, the Commission did not state that the impasse in which the parties to the arbitration agreement found themselves was linked to the applicant's contribution to the exacerbation of the dispute.

174 Therefore, in view of the foregoing considerations, the Court finds that the applicant has not provided indicia which might be able to call into question the Commission's assessment of the facts giving rise to the dispute and of the circumstances in which the dispute was brought before the arbitration tribunal, as described in the second contested decision. The applicant has accordingly failed to demonstrate that the Commission ought to have had doubts when it examined the circumstances surrounding the adoption of the arbitration agreement in question.

(c) The facts challenged by the applicant by way of alternative head of claim

175 The applicant submits that the Commission misconstrued the context in which it took its decision to resort to arbitration and, in particular, the situation of the recipient undertaking and the relevant market. In support of that line of argument, it merely refers back to a series of facts that preceded the arbitration award in order to explain that it did not actually have the option of withdrawing from the arbitration proceedings.

176 In accordance with the case-law cited in paragraph 108 above, it is appropriate to examine whether, by that line of argument, the applicant made out proof that the Commission ought to have had doubts in the second contested decision as to the context in which it decided to conclude an arbitration agreement with Metlen and the terms laid down in that agreement.

177 In the first place, it should be borne in mind that, in the application of the private investor test, the Commission took account of aspects of the 'context' which showed that arbitration was a reasonable solution for the applicant, in view of the particularities of its dispute with Metlen, for which a hypothetical private operator in a situation that is as alike as possible and acting under normal market conditions could have opted.

178 In that regard, the applicant explained that it had opted to refer the dispute to arbitration since, first, it was faster than proceedings before the ordinary courts of law; second, Metlen had accumulated a substantial amount of debt in a particularly difficult economic and social context; and, third, several attempts by the parties to the arbitration agreement had clearly been unsuccessful, with the result that it did not really have other options available to it for resolving the dispute, apart from bringing proceedings before the ordinary courts of law.

179 Moreover, the applicant explains that that solution was preferable in view of the circumstances surrounding its dispute with Metlen, particularly in view of the conditions it had imposed, consisting in the immediate recovery of part of the debt accumulated by Metlen and recovery of the monthly electricity bills within the time limits prescribed whilst the arbitration proceedings were ongoing. It is also apparent from the second complaint that, even though Metlen ultimately did not honour those terms, the applicant did not withdraw from the arbitration proceedings, because that would not have improved its position in relation to the exacerbation of the dispute.

180 Clearly, a private operator would have sought to obtain payment of amounts due to it by its debtor as quickly as possible. That finding is, moreover, supported by the case-law, according to which, in its assessment of the private creditor test in relation to a debtor, the choice of dispute resolution

method may take into account the duration of the procedure chosen for that resolution (see, to that effect and by analogy, judgment of 24 January 2013, *Frucona Košice* v *Commission*, C-73/11 P, EU:C:2013:32, paragraph 103).

181 It follows that the conclusion of the arbitration agreement, in the circumstances described above, meets the 'profitability' test that a hypothetical prudent private investor would have sought in the applicant's situation acting in normal market conditions. Nor does the applicant argue that the ordinary courts of law would have taken a different approach than that taken by the arbitration tribunal. Furthermore, it is apparent from the case file that the applicant brought proceedings before a number of authorities capable of ruling on the matter of fixing the tariff, namely the RAE, the ordinary courts of law in Greece, the Commission and the European Union Courts, both before and after delivery of the arbitration award. The applicant thus availed itself of all options available to it in order to fix a higher tariff, consistent with economic logic that such an investor would have applied.

182 Moreover, the applicant's assertion that the 'circumstances' taken into account by the Commission do not reflect the perception it had or could have had of the circumstances with which it was faced at the time the arbitration agreement was concluded or the significance attributed to them by it cannot be upheld, as that does not prove that the Commission made a manifest error of assessment of the facts relating to the context in which it took the decision to make use of arbitration.

183 Contrary to what the applicant suggests, the examination of the private investor test does not mean that the price of 36.6 EUR/MWh fixed in the arbitration award was foreseeable in view of the terms laid down in the arbitration agreement, or that a prudent private operator would not have been unhappy with the outcome of the settlement of its dispute with its co-contracting party. In reality, if the tariff fixed by that award was explicitly foreseeable, that means that there was not really disagreement between the parties to that agreement as to the calculation of that tariff at the time of conclusion of that agreement and that arbitration was not necessary. In other words, by concluding the arbitration agreement, each party accepted to take a certain risk as to the outcome ultimately decided on by the arbitration tribunal.

184 In the second place, the applicant relies on case-law according to which the fact that the transaction is reasonable for public authorities or the public undertaking granting the aid does not relieve the Commission of the obligation to ascertain whether an economic advantage within the meaning of Article 107 TFEU was conferred on the undertaking in receipt of a measure (see, to that effect, judgment of 13 September 2010, *Greece and Others* v *Commission*, T-415/05, T-416/05 and T-423/05, EU:T:2010:386, paragraph 213 and the case-law cited). Thus, according to the applicant, even if the Commission's assertion that the price fixed by the arbitration award corresponded to the market price is well founded, that does not relieve the Commission of the obligation to ascertain that that assertion is correct (see, to that effect, judgment of 13 September 2010, *Greece and Others* v *Commission*, T-415/05, T-416/05 and T-423/05, EU:T:2010:386, paragraphs 221 to 223).

185 However, as is apparent from paragraph 113 of the judgment on appeal, the Commission was not required to verify the tariff fixed by the arbitration award but rather, first, to examine the circumstances in which the applicant had taken the decision to make use of arbitration and, second, to ascertain whether a private operator, under normal market conditions, would have taken that decision under the same conditions.

186 In that regard, the Court notes that the second contested decision is not limited to dismissing the existence of an economic advantage by relying on the willingness of the parties to the arbitration agreement to refer their dispute to arbitration, but refers to the use of that arbitration in the specific circumstances of the dispute between those parties.

187 The Commission found that the parties to the arbitration agreement had set the terms in that agreement, namely that the tariff fixed had to take into account Metlen's consumption profile and the applicant's costs for supplying Metlen with electricity.

188 It is apparent from the case file that the disagreement of the parties to the arbitration agreement concerned essentially the determination of the applicant's costs that had to be taken into account for calculating the tariff. Although the arbitration award considered the costs of the applicant qua legal entity, that is to say as a vertically integrated undertaking as a whole for the supply of electricity to Metlen for the period in question, the applicant maintained that only the costs as electricity provider had to be taken into account.

189 It is, therefore, appropriate to ask whether, like the applicant, a hypothetical private operator in a situation that is as alike as possible and acting under normal market conditions would have accepted Metlen's arbitration proposal.

190 First, it must be reiterated that the parties to the arbitration agreement had held protracted negotiations to fix the tariff in question, without managing to reach agreement on pricing. Moreover, Metlen had stopped paying any of the bills issued by the applicant because it disagreed with the tariff stated therein and the applicant was obliged, by the Elliniki Epitropi Antagonismou (Greek Competition Commission) and the RAE, to continue supplying it with electricity, despite the dispute between the parties. Since arbitration seemed to offer the possibility of resolving that dispute within a relatively short time, the Court finds that a hypothetical private operator in the position of having to provide electricity without compensation would have sought to establish an appropriate price as quickly as possible.

191 Secondly, it is also apparent from the case file that the conclusion of the arbitration agreement was necessary to bring the proceedings before the arbitration tribunal under Article 37 of Law 4001/2011, as that agreement must lay down the rules that that tribunal must take into account in accordance with the wishes of the parties to that agreement. A prudent economic operator would have also complied with the legislative framework governing the referral of its dispute to arbitration and established the regulatory framework on the basis of which the arbitrators were to render their decision.

192 Thirdly, the arbitrators were selected according to a list established by the RAE and were, therefore, persons having undeniable experience in the energy field. Moreover, the disagreement of the parties to the arbitration agreement as to the scope of the arbitrators' powers, relied on by the applicant in its observations following the referral back to the General Court, did not concern the choice of the arbitrators in question, but rather the question whether or not the tariff fixed by the arbitration award was to be applied retroactively. That factor is not liable to call into question the application of the private investor test to the facts of the present case since, as the applicant acknowledges, the arbitrators were required to apply the legislation in force, including public policy provisions. There is accordingly nothing to suggest that an investor would have acted differently from the applicant in the choice of arbitrators.

193 Fourthly, as is apparent from paragraph 5 above, the parties to the arbitration agreement specified in that agreement the decisions that had to be taken into account in the arbitration proceedings. They also requested that the pricing terms contained in their draft contract of 5 October 2010 be updated and adapted, so that those terms reflected the characteristics of Metlen's consumption and the applicant's costs. Thus, the establishment of a specific regulatory framework adhered to an economic rationality criterion in the conduct of a hypothetical private operator.

194 Furthermore, the pricing terms reflect terms used by the RAE on which the parties to the arbitration agreement did not agree. In view of the circumstances surrounding the signing of that agreement, as is apparent from the file submitted to the General Court, Metlen probably would not have accepted such an agreement if that balance had not been ensured or if the applicant had insisted more strongly on having a precise calculation of its costs to be taken into account by the arbitration tribunal. Accordingly, either because the applicant did not realise the importance of determining its costs in that agreement or because it knew it could not insist more strongly on the establishment of a calculation method, it may not claim that the Commission made an error of assessment in finding that the terms of that agreement ensured a certain equality in the risk-taking by each party. Those parameters are apparent from the RAE decisions requiring the applicant to negotiate its tariffs with high-voltage customers. The applicant has not submitted anything showing that a hypothetical private operator in a situation that is as alike as possible as that of the applicant and acting under normal market conditions would have acted any differently.

195 Even if the applicant ought to have been more prudent in laying down criteria in the arbitration agreement and, in particular, in regards to the assessment of its costs, it should be borne in mind that the applicant itself was also dependent on Metlen, inasmuch as Metlen's existence and consumption enabled it to limit its costs. In that regard, it is apparent from RAE Decision No 798/2011, taken into account by the arbitration tribunal in accordance with the conditions fixed by the parties to that agreement, that Metlen's consumption justified the construction and cost-effective operation of a 300 MW electricity generation plant, taking into account the combination of Metlen's large size and high load factor and the fact that a consumer the size of Metlen had a decisive influence on both the applicant's business plan and on the Greek electricity market as a whole. Moreover, as Metlen's consumption was stable, the applicant, in the calculation of the low-rate hours, could save costs by reason of Metlen's high consumption, without which a base unit would have had to be powered down. Therefore, it was in the economic interest of a prudent private operator to resolve the dispute as quickly as possible (see, to that effect and by analogy, judgment of 16 March 2016, *Frucona Košice* v *Commission*, T-103/14, EU:T:2016:152, paragraph 280).

196 Thus, in the light of the foregoing considerations, and in accordance with the case-law cited in paragraph 108 above, the Court finds that the applicant has not adduced any evidence showing that the Commission ought to have had doubts as to the use of arbitration by a normally prudent and diligent private operator in the same situation as the applicant, that is to say, an operator obliged by the national competition authority to continue supplying its largest customer with electricity, even though the latter has stopped paying its bills and has accumulated considerable debt, in a particularly unstable national economic environment.

197 In the third place, as regards the Commission's duty to carry out complex economic and technical assessments to determine whether there is an advantage within the meaning of Article 107 TFEU, relied on by the applicant in its observations lodged following the referral of the case back to the General Court, the Court finds that the applicant's argument to the effect that the Commission was required to examine further what was meant by the expression '[applicant's] costs', amounts

to requiring the Commission to review the tariff ultimately fixed by the arbitration tribunal, which was explicitly rejected by the judgment on appeal. Thus, any advantage must not be examined in relation to the specific tariff fixed by the arbitration award, but rather in relation to the establishment of the pricing terms in the arbitration agreement which the arbitration tribunal had to take into consideration.

198 Given that, in accordance with the case-law cited in paragraph 69 above, the Commission is required to compare the applicant's conduct with that of a hypothetical private operator, the examination of the private investor test does not mean that the Commission is required to prove that a private operator would have taken exactly the same decision as the public operator in the present case, but rather that the latter's decision is reasonable in a market economy in the light of the circumstances in which it was taken.

199 Consequently, the applicant has not put forward any argument rendering implausible the Commission's assessment of the facts in the second contested decision forming part of the assessment of the private operator test. It follows that the applicant has failed to demonstrate, in accordance with the case-law cited in paragraph 108 above, that the Commission ought to have had doubts as to the compatibility of its decision to conclude the arbitration agreement with the internal market.

200 Having regard to all of the foregoing considerations, the sixth plea in law in Case T-740/17 must be rejected in its entirety.

C. Fifth plea in law in Case T-740/17: error of law in the interpretation and application of Articles 107 and 108 TFEU with respect to the finding that the Commission was not required to carry out complex economic assessments and manifest error of assessment of the facts inasmuch as the Commission failed to examine decisive questions in order to find whether or not there was State aid

201 It is apparent from paragraph 118 of the judgment on appeal that the Court of Justice rejected the first and second parts of the fifth plea in law, inasmuch as, by that plea, the applicant criticised the Commission for not having examined the tariff fixed by the arbitration award, since the Commission was not required, in the circumstances of the present case, to analyse the content of that award in order to ascertain whether the applicant's decision to conclude the arbitration agreement had conferred an advantage on Metlen within the meaning of Article 107 TFEU.

202 The parties disagree as to the inferences to be drawn from the judgment on appeal as it relates to the present plea in law.

1. The scope of the referral of Case T-741/17 back to the General Court as it relates to the fifth plea in law

203 In its observations lodged following the referral of Case T-740/11 back to the General Court, the Commission submits that the Court of Justice made an error in stating, in paragraph 121 of the judgment on appeal, that the General Court had failed to examine the 'other parts of [the] fifth plea in law', as that plea comprised only two parts, which were definitively rejected by the Court of Justice in paragraph 120. That error results from the fact that, in paragraph 118 of the initial judgment, the General Court had held that 'the third to fifth pleas in law must be examined

together' in order to determine whether the arbitration award had granted State aid. The Commission observes that, in paragraph 109 of the initial judgment, the General Court had also noted that the fifth plea in law comprised only two parts.

204 The applicant, however, submits, in essence, that the Court of Justice rejected the arguments put forward in paragraphs 133 to 143 of the application, by which it argued that the Commission was required to verify whether the electricity tariff fixed by the arbitration tribunal was in line with market conditions and to substitute its own assessment for that of the arbitration tribunal in order to determine whether State aid had been granted. According to the applicant, the General Court still has to rule on the other parts of the fifth plea in law, including the third part, alleging error of law in the interpretation and application of Articles 107 and 108 TFEU as regards the ruling that the Commission was not required to carry out complex economic assessments and manifest error of assessment as regards the Commission's finding that the present case fell within a specific category of cases not subject to State aid control; the fourth part, alleging infringement of the obligation to examine the regulatory framework in force, the organisation and functioning of the market, the importance of the characteristics of Metlen's consumption and its cost components as well as the method for determining those costs; the fifth part, alleging error of law and manifest error of assessment in that the Commission failed to examine the errors made in the calculation of the tariff of 36.6 EUR/MWh; and the sixth part, alleging error of law and manifest error of assessment in that the Commission found that electricity prices in other countries were of paramount importance. The applicant states that that plea is, in reality, made up of six parts, only the first and second of which were rejected by the Court of Justice.

205 It is apparent from the manner in which the application is presented that the fifth plea in law is, formally speaking, divided into two 'parts', each of which is divided into three 'sub-parts', the titles of which correspond to those of the six parts referred to by the applicant in its observations lodged following the referral of Case T-740/17 back to the General Court.

206 However, irrespective of the question of how the arguments put forward in support of the fifth plea in law were presented in the application, the Court finds, having regard to the judgment on appeal, that the Court of Justice rejected the first two parts of that plea, by which, in essence, the applicant criticised the Commission for having infringed Articles 107 and 108 TFEU, in so far as it did not examine, in the second contested decision, the tariff in question, as follows from the arbitration award, before ruling out the existence of an advantage and confining itself to ascertaining whether, under normal market conditions, a private operator would, in the same circumstances, have entered into the arbitration agreement under the same conditions.

207 The General Court need therefore examine only those arguments put forward in support of the fifth plea in law, which are unrelated to the question whether the Commission was required to ascertain whether the tariff fixed by the arbitration award was in line with market conditions and could be limited to ascertaining whether, under normal market conditions, a private operator would, in the same circumstances, have concluded the arbitration agreement under the same conditions.

2. The arguments put forward in support of the fifth plea in law in the application

208 By its first two arguments put forward in support of the fifth plea in law, the applicant, in essence, criticises the Commission for having infringed Articles 107 and 108 TFEU, in so far as it did not examine, in the second contested decision, the tariff in question, as follows from the arbitration award, before ruling out the existence of an advantage and confining itself to ascertaining

whether, under normal market conditions, a private operator would, in the same circumstances, have entered into the arbitration agreement under the same conditions. It follows from paragraph 118 of the judgment on appeal that it is not for the General Court to examine those arguments in the context of the present judgment.

209 By the third argument put forward in support of the fifth plea in law, the applicant disputes footnote 23 to the second contested decision, by which the Commission found, as part of the analysis of the application of the private investor test, that, in disputes between public and private undertakings, it was not required to reexamine all calculations each time the public undertaking lost before the tribunal and subsequently lodged a complaint with the Commission. Yet, as observed by the Commission, that footnote is not in that decision, but rather the first contested decision. As a result, the applicant's argument is ineffective and must be rejected.

210 By the fourth argument put forward in support of the fifth plea in law, the applicant submits, in essence, that the Commission was required to examine the price fixed by the arbitration award by scrutinising the functioning of the Greek electricity market, the characteristics of Metlen's consumption and the method for determining the applicant's costs. It follows from paragraph 118 of the judgment on appeal that it is not for the General Court to examine those arguments in the context of the present judgment.

211 By the fifth argument put forward in support of the fifth plea in law, the applicant submits, in essence, that the Commission was required to examine the alleged errors made by the arbitration tribunal in the calculation of the tariff of 36.6 EUR/MWh. It follows from paragraph 118 of the judgment on appeal that it is not for the General Court to examine that argument in the context of the present judgment.

212 By the sixth argument put forward in support of the fifth plea in law, the applicant submits that the Commission erred in law and made a manifest error of assessment in recital 47 of the second contested decision in finding that electricity prices in other countries were of paramount importance for determining whether an economic advantage had been conferred on Metlen.

213 In recital 47 of the second contested decision, the Commission found that, although it is not required to do so in the present case as part of the application of the private investor test, the tariff fixed by the arbitration award, namely 36.6 EUR/MWh, was higher than the average smelter power tariff in Europe in 2013, which was 30.87 EUR/MWh.

214 Thus, contrary to what the applicant alleges, the Commission did not consider that the prices in other European countries were of paramount importance for the assessment of the tariff in question. That comparison seems to be incidental in the second contested decision, which itself states that electricity prices in other countries are not relevant for the application of the private investor test in the present case.

215 Consequently, as none of the arguments put forward in support of the fifth plea in law in Case T-740/17 has been successful, the plea must be rejected in its entirety.

D. Second plea in law in Case T-740/17: infringement of Article 24(2) of Regulation 2015/1589, of the applicant's right to be heard and of the Charter of Fundamental Rights

216 The applicant submits that the Commission adopted the second contested decision without carrying out the 'prima facie examination', provided for in Article 24(2) of Regulation 2015/1589, of the existence of unlawful State aid. The applicant submits that the 2012 complaint and the second complaint were examined by the Commission between 2012 and 2014, on the basis of 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 1999 L 83, p. 1), which was applicable at the time prior to the adoption of the contested letter. It observes that the Commission nevertheless closed those complaints for entirely different reasons in that decision.

217 The applicant considers that that the Commission was required to assume the procedural obligations resulting from the withdrawal of the contested letter, in particular the obligation to rerun the procedure for examining State aid complaints. In that regard, it submits that the case-law according to which the Commission is not obliged to start the procedure all over again in the event of annulment of a measure by a court is not transferable to a case where a measure is withdrawn, which results from an initiative taken by the Commission and must comply with certain conditions.

218 Thus, the scope of the obligation to rerun the procedure for examining State aid complaints in the event of withdrawal of a decision to close those complaints should not be limited to the time when the error of law forming the basis of the withdrawal occurred, but should go back to an earlier time so as to ensure compliance with State aid law and guarantee for the parties concerned that the court's subsequent decision on the matter is definitive. That assessment should be done on a case-by-case basis and should take account of the time lag between the measure withdrawn and the new measure adopted, in particular because of the new information that may be brought to the Commission's attention.

219 The Commission is also required to rerun the procedure for examining State aid complaints in the event of changes to the applicable legal framework. Thus, Article 24(2) of Regulation 2015/1589 grants the plaintiff the right to be heard in cases where the Commission informs it of the dismissal of the complaint. That right should be exercised in such a way as to influence the decision of the public authority and to allow the citizen to express his or her view in a timely manner. However, the second contested decision was adopted in complete disregard of that right, as it dismisses the 2012 complaint and the second complaint without the applicant having been able to express its views on the characteristics of arbitration and on the question whether it could have given rise to State aid. The applicant further submits that it is obvious that the outcome of the case could have been different if it had been heard correctly. Thus, it submits that, by failing to invite the complainant to express its views on the reasons on the basis of which the Commission intended to dismiss the complaint, the Commission manifestly failed to fulfil its obligation to examine those complaints thoroughly.

220 Non-observance of the right to be heard also constitutes an infringement of Article 41(2)(a) of the Charter of Fundamental Rights.

221 The Commission disputes the applicant's line of argument.

222 The Court notes at the outset the manifestly contradictory nature of the applicant's line of argument, inasmuch as under the present plea it submits that the second contested decision must be considered valid by reason of the presumption of lawfulness of acts of the Union and the disappearance of the contested letter from the EU legal order, whereas in all of its written pleadings in the present proceedings it disputed the Commission's power to withdraw and replace the preceding acts and, in particular, the contested letter, as the latter is based on a different set of reasons.

223 Moreover, the applicant's disputing the fact that the Commission did not start the preliminary investigation phase all over again when it decided to withdraw the preceding acts dismissing the complaints is also contradictory. In any event, it is apparent from the case-law that the Commission could not pick up the procedure at an earlier stage (see, to that effect, judgment of 16 December 2010, *Athinaïki Techniki* v *Commission*, C-362/09 P, EU:C:2010:783, paragraph 70).

224 Nor is that argument of the applicant's supported by the judgment of 6 July 2017, *SNCM* v *Commission* (T-1/15, not published, EU:T:2017:470), referred to by it, in which the General Court held that, depending on the circumstances of the case, the Commission could be required to take account of facts subsequent to the decision replaced following the annulment of the first decision by the General Court, under the obligations deriving from Article 266 TFEU, in order to determine whether the formal investigation procedure should be reopened (judgment of 6 July 2017, *SNCM* v *Commission*, T-1/15, not published, EU:T:2017:470, paragraph 70). The case that gave rise to that judgment must be distinguished from the present case since, first, the European Union Courts had not ruled on the lawfulness of the Commission's reasoning in the contested letter; secondly, there are differences between the preliminary examination and the formal investigation procedure, the parameters of which are set out in the notice of opening of an investigation; and, thirdly, the applicant has not in any way shown why, if the Commission did reopen the preliminary examination stage, it would adopt a different position.

225 As a result, the applicant's argument to the effect that the lapse of time between the adoption of the contested letter and that of the second contested decision required the Commission to ascertain whether new information about the contested measure was available is hypothetical and cannot be upheld. The applicant has not put forward any new evidence subsequent to the adoption of the contested letter which the Commission was required to take into account in the challenge to the tariff fixed by the arbitration award.

226 It follows that the applicant's argument to the effect that the Commission was required to start the entire procedure over again prior to the adoption of the second contested decision must be rejected.

227 Moreover, as regards the alleged modification of the applicable legal framework, the Court finds that Article 24(2) of Regulation 2015/1589 enshrines the right of any interested party to submit a complaint to inform the Commission of any alleged unlawful aid or any alleged misuse of aid. The interested party must duly complete a form. Where the Commission considers that the facts and points of law put forward by the interested party do not provide sufficient grounds to show, on the basis of a prima facie examination, the existence of unlawful State aid or misuse of aid, it must inform the interested party thereof and call upon it to submit comments within a prescribed period which normally does not exceed one month. It must also send a copy of the decision on a case concerning the subject matter of the complaint to the complainant.

228 Under the initial version of Regulation No 659/1999, the Commission could confine itself to informing the interested party that the information provided was insufficient for it to rule on the case. It was also required to send its decision to the interested party, as it had been adopted on a case that concerned the content of the information provided (judgment of 14 May 2019, *Marinvest and Porting* v *Commission*, T-728/17, not published, EU:T:2019:325, paragraph 39).

229 In view of the provisions of Regulation 2015/1589, it appears that, during the administrative procedure preceding any opening of a formal investigation procedure, the parties' rights changed on two points. First, the information sent by them to the Commission in a pre-set format is henceforth categorised as a complaint. Second, the interested parties are invited to submit their observations if, upon completion of a prima facie examination, the Commission informs them that it intends to dismiss the complaint (judgment of 14 May 2019, *Marinvest and Porting* v *Commission*, T-728/17, not published, EU:T:2019:325, paragraph 40).

230 Although that progression enables the interested parties to put forward their point of view in a more complete and detailed manner when the intention is to reject a complaint, by instituting a certain form of dialogue between them and the Commission, that does not however entail a fundamental change in the nature of the procedure for the interested parties (judgment of 14 May 2019, *Marinvest and Porting* v *Commission*, T-728/17, not published, EU:T:2019:325, paragraph 41). Nor, moreover, does the applicant argue that the essential content of Article 24(2) of Regulation 2015/1589 was not applicable as from 2013, but rather explains that that does not mean that the Commission applied it.

231 However, according to settled case-law, the procedure for reviewing State aid provided for in Article 108 TFEU is a procedure opened only against the Member State responsible for granting the aid. Only the Member State concerned, as the addressee of the future Commission decision, may therefore rely on actual rights of the defence (see judgment of 29 September 2021, *Ryanair and Others* v *Commission*, T-448/18, not published, EU:T:2021:626, paragraph 100 and the case-law cited).

232 In the context of the procedure for reviewing State aid provided for in Article 108 TFEU, the preliminary stage of the procedure for reviewing aid under Article 108(3) TFEU is intended to allow the Commission to form a prima facie opinion on the partial or complete conformity of the aid in question. It must be distinguished from the formal investigation procedure under Article 108(2) TFEU. It is only under the latter provision, which is designed to enable the Commission to be fully informed of all the facts of the case, that the FEU Treaty imposes an obligation on the Commission to give the interested parties notice to submit their comments (see judgment of 19 October 2022, *Ighoga Region 10 and Others* v *Commission*, T-582/20, not published, EU:T:2022:648, paragraph 25 and the case-law cited).

233 It has also been held in the case-law that the Charter of Fundamental Rights was not intended to alter the nature of the review of State aid established by the FEU Treaty or to confer on third parties a right of scrutiny which Article 108 TFEU did not provide (see judgment of 29 September 2021, *Ryanair and Others* v *Commission*, T-448/18, not published, EU:T:2021:626, paragraph 108 and the case-law cited). It follows that the applicant's line of argument pertaining to the citizen's right to be heard deriving from other areas of EU law must be rejected.

234 In any event, even if the applicant could rely on the right to be heard as part of the procedure for adopting the second contested decision, it should be borne in mind that, when faced with an irregularity affecting the rights of the defence, of which the right to be heard forms an integral

part, it is for the European Union Courts to ascertain whether, in the light of the specific factual and legal circumstances of the case, the procedure at issue could have led to a different result in so far as the applicant could have defended himself or herself better in the absence of that irregularity (see, to that effect, judgment of 7 September 2022, *DD* v *FRA*, T-470/20, not published, EU:T:2022:511, paragraph 141 and the case-law cited). In that regard, the burden of proving the possible consequences of the infringement fall on the applicant (see, to that effect, judgment of 4 September 2009, *Italy* v *Commission*, T-211/05, EU:T:2009:304, paragraph 45 and the case-law cited).

235 In the present case, the Commission informed the applicant, by letter of 6 May 2014, of the negative preliminary assessment of the second complaint and invited it to submit observations. Moreover, by its action in Case T-352/15, the applicant sought annulment of the first contested decision, the statement of reasons for which was, essentially, identical to that of the second contested decision, with the result that, at the time the latter decision was adopted, the Commission had all the information which, in the applicant's submission, ought to have led it to open the formal investigation procedure.

236 In those circumstances, the Court finds that the applicant has failed to demonstrate how the possibility of lodging further observations could have enlightened the Commission before the adoption of the second contested decision and how that enlightenment could have led to a different outcome.

237 Thus, the applicant's argument alleging infringement of the right to be heard due to changes in the applicable legal framework and the adoption of a new decision on categorisation of its complaint must be rejected.

238 Therefore, the second plea in law in Case T-740/17 must be rejected.

E. Seventh plea in law in Case T-740/17: error of law in the interpretation and application of Article 107(1) TFEU, insufficient statement of reasons and error of assessment of the facts, as the Commission did not further investigate the 2012 complaint, pursuant to Article 108(2) TFEU, on the basis of its finding that that complaint 'had become devoid of purpose' following the arbitration award

239 The applicant disagrees with the Commission's decision not to investigate the 2012 complaint further, inasmuch as RAE Decision No 346/2012 institutes State aid. According to the applicant, that decision required it to apply prices that did not cover all of the costs borne by it for supplying electricity to Metlen.

240 In the first place, the applicant submits that the closure of the 2012 complaint was vitiated by a failure to provide a proper statement of reasons.

241 Moreover, at the stage of the reply, the applicant disputes what it views as an ex post statement of reasons, consisting in the Commission's allegation in the defence to the effect that the 2012 complaint had no 'distinct' purpose 'not covered by the Commission's assessment of the [second complaint]'.

242 In the second place, the applicant submits that, first, in essence, RAE Decision No 346/2012 had to be assessed as a decision instituting unlawful State aid. It submits that the 2012 complaint did not concern only the tariff imposed by that decision, since the RAE did not provide any explanation

for the calculation of the tariff fixed, that means that, irrespective of the question whether that price was fair or lawful, the nature and legal scope of that decision was not limited to the provisional determination of that price. It states that, in that decision however, the RAE definitively accepted Metlen's arguments to the effect that its tariff had to be calculated on the basis of the variable costs of electricity generated by the most profitable lignite hydroelectric plant. In its submission, although the decision in question relates to provisional measures, on the basis of the reasons set out above, such a decision is in the nature of a definitive quasi-regulatory RAE act, inasmuch as such a decision does not take account of any other factor for the method for calculating the electricity price applied by it. It states that the decision in question is based on three incorrect findings, set out previously in that complaint, where it explained, first of all, that it is not in any event obliged to supply at a price that covers only its variable costs; next, that it is required to recoup all of its costs, including its fixed costs, variable costs and capital costs; and, lastly, that the 'least variable cost theory' is based on an incorrect economic analysis. It states that, according to that theory, with which it disagrees, it had to take account of the economies of scale from which it benefited due to the fact that Metlen's electricity demand was continuous. It states that that theory is based on the incorrect assumption that it was obliged to halt the operation of the 'marginal' lignite hydroelectric plant in the event of a disruption in Metlen's supply.

243 Secondly, the applicant submits that the Commission made a manifest error of assessment in finding that RAE Decision No 346/2012 had been replaced retroactively by the arbitration award. Although the arbitration tribunal is not legally bound by that decision, in reality it aligned itself with the reasons set out therein. Thus, the applicant takes the view that the Commission ought to have had serious doubts as to the nature and compatibility of the statement of reasons in that decision with Article 107(1) TFEU and, therefore, ought to have opened the procedure provided for in Article 108(2) TFEU.

244 The Commission disputes the applicant's line of argument.

245 As a preliminary point, it should be noted that, in recital 12 of the second contested decision, the Commission found that the 2012 complaint, by which the applicant had disputed the tariff fixed provisionally by RAE Decision No 346/2012 had become devoid of purpose, inasmuch as the tariff fixed by the arbitration award had retroactively replaced the provisional tariff.

246 Similarly, it is clear from RAE Decision No 346/2012 that the RAE fixed only a provisional electricity supply tariff for the two parties to the arbitration agreement. Point 3 of the operative part of that decision explicitly states that the tariff fixed is to apply until the RAE decision on Metlen's complaint, that is to say, either until the delivery of the arbitration award, or earlier if the parties' negotiations are successful and that, in any event, the electricity to be supplied by the applicant to Metlen at the price stated will be dealt with in a subsequent final account balance. Similarly, that sentence stated that the tariff fixed by it replaced the provisional tariff retroactively, as it had been applied as from 1 July 2010. Moreover, the applicant has not adduced any evidence in support of its allegation that the interpretation resulting from that decision is regulatory in nature and therefore applies above and beyond its dispute with Metlen, with the result that it is necessary to determine whether that decision was capable of instituting an unlawful State aid scheme. As argued by the Commission, the 'evidence' submitted by the applicant consists merely in references to its allegations in the 2012 complaint and does not in any way relate to evidence of general application of the decision in question.

247 Therefore, the Commission could validly find that the 2012 complaint had become devoid of purpose following the delivery of the arbitration award and, in particular, at the time the second contested decision was adopted. Therefore, the seventh plea in law in Case T-740/17 must be rejected.

F. First plea in law in Case T-470/17: error of law in the interpretation of the judgment of 31 May 2017, DEI v Commission (C-228/16 P, EU:C:2017:409)

248 The applicant submits, in essence, that the Commission misinterpreted the conditions laid down by the Court of Justice in its judgment of 31 May 2017, *DEI* v *Commission* (C-228/16 P, EU:C:2017:409), on the question of replacement of the contested letter and the first contested decision.

249 The Commission applied to the General Court for a declaration, pursuant to Article 130 of the Rules of Procedure of the General Court, that the actions in Cases T-639/14 RENV II and T-352/15 RENV had become devoid of purpose and that there was no longer any need to adjudicate on them.

250 In that regard, in the first place, the Court finds that, by the contested letter, the first contested decision and the second contested decision, the Commission sought to put an end to the preliminary examination procedure under Article 4(2) of Regulation 2015/1589 both for the 2012 complaint and for the second complaint, as the investigation that had been commenced did not enable a finding of State aid within the meaning of Article 107 TFEU, as a result of which it refused to open the formal investigation procedure.

251 Although it is patently obvious that the contested letter does not comply with the conditions laid down in Article 4(2) of Regulation 659/1999 applicable at the time of the facts, the formal irregularity relating to the competence of the author of the act was remedied by two subsequent acts.

252 In the second place, it should be borne in mind that the case-law has recognised that an institution which finds that one of its measures is vitiated by illegality may withdraw it within a reasonable period, with retroactive effect, but in accordance with the restrictions imposed by the principle of the protection of the legitimate expectations of the beneficiary of the measure who has been led to rely on the lawfulness thereof (see, to that effect, judgments of 3 March 1982, *Alpha Steel* v *Commission*, 14/81, EU:C:1982:76, paragraph 10, and of 17 April 1997, *de Compte* v *Parliament*, C-90/95 P, EU:C:1997:198, paragraph 35).

253 However, the possibility of retroactive withdrawal of a decision to close a complaint concerning alleged State aid is not absolute. If the Commission had an unfettered right to withdraw such a decision, it would be sufficient for it to decide to take no further action on a complaint lodged by an interested party and then, after that party brought an action, to reopen the preliminary examination stage and repeat those operations as many times as are necessary in order to avoid any judicial review of its actions (judgment of 16 December 2010, *Athinaïki Techniki* v *Commission*, C-362/09 P, EU:C:2010:783, paragraph 68).

254 Moreover, it is apparent from the case-law that the adoption of a purely confirmatory decision cannot be considered to be such a withdrawal without impeding the right to an effective judicial remedy (see, to that effect, judgment of 16 December 2010, *Athinaïki Techniki* v *Commission*, C-362/09 P, EU:C:2010:783, paragraph 70). A measure is purely confirmatory of an existing

measure if it contains no new factors as compared with the existing measure. It could be different only if the Commission withdrew a decision to take no further action on a complaint in order to remedy illegality affecting that decision, while stating the nature of the illegality vitiating that decision (judgment of 31 May 2017, *DEI* v *Commission*, C-228/16 P, EU:C:2017:409, paragraphs 33 and 40).

255 In the present case, as is apparent from paragraph 30 of the judgment of 31 May 2017, *DEI* v *Commission* (C-228/16 P, EU:C:2017:409), by the contested letter, the Commission closed the file, deciding to close the preliminary examination procedure triggered by the 2012 complaint, found that in the investigation opened it was not possible to conclude that there had been aid within the meaning of Article 107 TFEU and, accordingly, refused to open the formal investigation procedure provided for under Article 108(2) TFEU. In so doing, the Commission adopted a definitive position on the applicant's request for a finding of infringement of those articles. Moreover, as that letter prevented the applicant from submitting its observations in a formal investigation procedure, it produced binding legal effects capable of affecting the applicant's interests.

256 Furthermore, the Court of Justice considered the first contested decision to be 'purely confirmatory' of the contested letter and held that it should not be construed as a withdrawal of that letter. It would have been different only if, by the adoption of that decision, the Commission had intended to withdraw the contested letter in order to remedy illegality vitiating that letter, which that decision did not in any way state (see, to that effect, judgment of 31 May 2017, *DEI* v *Commission*, C-228/16 P, EU:C:2017:409, paragraphs 40 and 41).

257 After the applicant brought the first action against the contested letter, the Commission adopted the first contested decision on its own initiative. However, that decision withdrew that letter, without going into further detail as to the reasons why that withdrawal was necessary.

258 Moreover, as that solution was not consistent with the judgment of 31 May 2017, *DEI* v *Commission* (C-228/16 P, EU:C:2017:409), the Commission subsequently adopted the second contested decision which, unlike the first contested decision, specified the illegality affecting the acts it wished to replace. Therefore, by the second contested decision, the Commission not only withdrew the contested letter and the first contested decision, it also specified, in recital 51, the illegality it wished to remedy.

259 It follows that, contrary to the applicant's assertions, the second contested decision withdrew and replaced the contested letter and the first contested decision, in accordance with the requirements laid down in the judgment of 31 May 2017, *DEI* v *Commission* (C-228/16 P, EU:C:2017:409).

260 In those circumstances, the first plea in law in Case T-740/17 must be rejected, as must therefore the action in that case in its entirety.

261 Consequently, the Court finds that nor is it necessary to adjudicate on the actions in Cases T-639/14 RENV II and T-352/15 RENV.

IV. Costs

262 Under Article 195 of the Rules of Procedure of the General Court, in decisions of the General Court given after its decision has been set aside and the case referred back to it, it is to decide on the costs relating to the proceedings instituted before it and to the proceedings on the appeal before the Court of Justice.

263 Under Article 134(1) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings.

264 Moreover, under Article 137 of the Rules of Procedure, where a case does not proceed to judgment, the costs are to be in the discretion of the Court.

265 Lastly, under Article 138(1) of the Rules of Procedure, Member States and institutions which have intervened in the proceedings are to bear their own costs.

266 Since the applicant has been unsuccessful in Case T-740/17 RENV and there is no longer any need to adjudicate in Cases T-639/14 RENV II and T-352/15 RENV, each party is to bear its own costs in Cases T-639/14, T-639/14 RENV, T-639/14 RENV II, T-352/15, T-352/15 RENV, T-740/17 and T-740/17 RENV and also in Cases C-228/16 P, C-701/21 P and C-739/21 P.

On those grounds,

THE GENERAL COURT (Sixth Chamber, Extended Composition)

hereby:

1. **Dismisses the action in Case T-740/17 RENV;**

2. **Declares that there is no longer any need to adjudicate in Cases T-639/14 RENV II and T-352/15 RENV;**

3. **Orders each party to bear its own costs in Cases T-639/14, T-639/14 RENV, T-639/14 RENV II, T-352/15, T-352/15 RENV, T-740/17 and T-740/17 RENV and also in Cases C-228/16 P, C-701/21 P and C-739/21 P;**

4. **Orders the Federal Republic of Germany to bear its own costs.**

Costeira   Kancheva   Öberg

Zilgalvis   Tichy-Fisslberger

Delivered in open court in Luxembourg on 12 November 2025.

[Signatures]