

Brussels, 10 September 2019
Case No: 83877
Document No: 1082048
Decision No 064/19/COL

Icelandic Ministry of Finance and Economic Affairs
Lindargata 7
101 Reykjavík
Iceland

[Non-confidential version]*

Subject: Arbitral award between Landsvirkjun and Elkem

1 Summary

- (1) The EFTA Surveillance Authority (“the Authority”) wishes to inform the Icelandic authorities that, having assessed the arbitral award, dated 16 May 2019, related to the Power Contract between Landsvirkjun sf. and Elkem Island ehf. (“the measure”), it considers that it does not constitute state aid within the meaning of Article 61(1) of the EEA Agreement.¹
- (2) The Authority has based its decision on the following considerations.

2 Procedure

- (3) The Icelandic authorities submitted a notification by letter of 3 July 2019.² The notification was subsequently discussed at a meeting in Brussels on 15 July 2019 between representatives of the Icelandic authorities, Landsvirkjun and the Authority. Following the meeting, Landsvirkjun submitted further clarifications and documents by email of 22 July 2019.³
- (4) The notification was submitted for legal certainty, as the Icelandic authorities consider the measure not to constitute state aid. Since the notification concerns a measure that has already been implemented, the two-month deadline set out in Article 4(5) of Part II of Protocol 3 to the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice does not apply.⁴

*The information in square brackets is covered by the obligation of professional secrecy. Corrections have been made in paragraphs 36, 45 and 58.

¹ Reference is made to Article 4(2) of the Part II of Protocol 3 to the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice.

² Document Nos 1079124 to 1079137.

³ Document No 1081827 (with 10 attachments, Documents Nos 1081816 to 1081825).

⁴ Reference is made to Article 13(2) of Part II of Protocol 3 to the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice.

3 Description of the measure

3.1 The contracting parties

3.1.1 *Elkem Ísland ehf.*

- (5) Elkem Ísland ehf. is a private limited liability company, fully owned by Elkem ASA in Norway (hereafter collectively referred to as “Elkem”), which is majority owned by Bluestar Elkem International Co. Ltd. SA, in Luxemburg, which is in turn fully owned by Bluestar Investment Co. Ltd. (Hong Kong), which is fully owned by China National Blue Star (Group) Co. Ltd. in China, which is majority-owned by China National Chemical Corporation in China, which is finally fully owned by the Chinese State.
- (6) Elkem is a producer of ferrosilicon, which is one of the elementary raw materials for the steel industry. Ferrosilicon is used either for the refining of steel or as an ingredient to reach predetermined qualities. Elkem operates a production plant with three furnaces in Grundartangi, Akranes, north of Reykjavik, and is the second largest producer of ferrosilicon in the world.

3.1.2 *Landsvirkjun sf.*

- (7) Landsvirkjun is a public partnership company regulated by Act No 42/1983 on Landsvirkjun, as amended (“the Landsvirkjun Act”).⁵
- (8) Pursuant to Article 2 of the Landsvirkjun Act, the main objective of Landsvirkjun is to engage in operations in the energy sector. Moreover, Landsvirkjun is the owner of electric power plants, other facilities, water rights and equipment acquired by the company prior to the adoption of the Act or by special laws or by contract, as provided in Article 3 of the Landsvirkjun Act.
- (9) The introduction of competitive power markets in Iceland in 2003 led Landsvirkjun to develop a corporate strategy to maximise the potential yield and value of natural resources it has been entrusted with in a sustainable, responsible and efficient manner. Concurrently, Landsvirkjun’s emphasis moved away from the construction of new power plants to focusing on marketing and operations.
- (10) As of 1 January 2007, the State Treasury took over the full ownership of Landsvirkjun. The company remained a partnership company with joint liability of the owners. Landsvirkjun is currently jointly owned by the State Treasury (99.9%) and Eignarhlutir ehf. (0.1%). The latter is a limited liability company wholly owned by the State Treasury. Article 1 of the Landsvirkjun Act provides that the Company is an independent legal entity with independent finances and accounts and is an independent taxable entity.

3.2 The Power Contract

3.2.1 *The establishment and operations of Icelandic Alloys Ltd.*

- (11) On 28 April 1975, Íslenska járnblendifélagið hf. (“Icelandic Alloys Ltd.”) was formed with the participation of the State of Iceland (55% share) and Union Carbide Corporation in the United States of America (45% share). The objectives of the company were to construct and operate an industrial plant at Grundartangi in

⁵ Available online at: <https://www.althingi.is/lagas/nuna/1983042.html>.

Hvalfjörður, to produce ferrosilicon and to carry out such production and related activities.

- (12) A Master Agreement between the Government of Iceland and Elkem Spigerverket A/S in Norway on the operation of the ferrosilicon plant was signed on 28 April 1975, based on Act No 10/1975 on a Ferroalloys Production Plant at Hvalfjörður.⁶ On 30 June 1976, Union Carbide divested itself of Icelandic Alloys Ltd. and Elkem Spigerverket A/S in Oslo took over Union Carbide's shares. The original Master Agreement was replaced by a new agreement entered into by the Government of Iceland and Elkem Spigerverket A/S on 8 December 1976, based on Act No 18/1977 on a Ferroalloys Production Plant at Hvalfjörður.⁷
- (13) Icelandic Alloys Ltd. was listed on the Main List of the Iceland Stock Exchange on 18 May 1998 and in March 2003 delisted from the Main List, by which time Elkem ASA had acquired over 90% of the shares in the company. Elkem ASA purchased the shares of the remaining shareholders later that year and has been the sole owner of the company since 2003 under the name of Elkem Ísland ehf.

3.2.2 Background to the power contract

- (14) The Power Contract with Icelandic Alloys Ltd. was signed on 28 May 1975. The Power Contract has been amended six times, on 30 June 1976 (First Amendment), on 13 September 1984 (Second Amendment), on 9 December 1993 (Third Amendment), on 30 January 1997 (Fourth Amendment), on 26 April 2007 (Fifth Amendment) and on 23 July 2009 (Sixth Amendment) (all together referred to as "the Power Contract"). The contract period of the Power Contract was for 40 years from the first Permanent Delivery Date until 31 March 2019.
- (15) According to the Power Contract, a ferrosilicon plant was to be constructed at Grundartangi with two furnaces with an approximate rated capacity of 60 MW per hour. The contract power amounted to a total of 68 MW per hour and thus 550 GWh per year. The contract provided for delivery of electricity for the first furnace beginning during the period of 1 December 1978 to 1 April 1979. The actual start-up of the first furnace was on 27 April 1979. Delivery for the second furnace was scheduled for 1 July 1980. Elkem is currently operating three furnaces at the plant and operates the plant at full capacity, thereby using virtually all contract power.

3.2.3 Main terms and conditions

3.2.3.1 The contract power

- (16) According to Article 2(1) of the Power Contract, as amended in July 2009, Landsvirkjun undertakes to supply Elkem with 1035 GWh per calendar year.

3.2.3.1 Pricing arrangements

- (17) In the original Power Contract, the average price of electricity was fixed from the start of delivery to 30 June 1982 at [2.5 - 5] Norwegian øre per kWh. As of 1 July 1982, and during the next five years thereafter, the price was to be fixed to begin with based on an equation set out in Article 4 of the Second Amendment to the Power Contract and then adjusted to the Norwegian [...] index.⁸

⁶ Available online at: <https://www.althingi.is/alttext/96/s/pdf/0531.pdf>.

⁷ Available online at: <https://www.althingi.is/lagas/149b/1977018.html>.

⁸ See [...].

- (18) With the Fourth Amendment in 1997 it was agreed that the price of electricity would be adjusted annually with [...] indices consisting of one third the change in the [...]⁹ and two thirds the change in the [...].
- (19) The graph below shows the development of the power price paid by Elkem including transmission cost from 2007 to 2019. The power price from the arbitral award¹⁰ is also shown. All figures are at a 2017 price level.¹¹

[...]

3.2.3.2 Transmission costs

- (20) The Power Contract between Landsvirkjun and Elkem was signed prior to the unbundling of transmission system operation and electricity production introduced in the EEA with the Energy Packages, which was implemented in Iceland with the Electricity Act No 53/2003 (“the Electricity Act”).¹² This is the reason why there is no specific provision in the Power Contract regulating the payment of transmission costs.
- (21) On 1 January 2005, Landsnet hf. (the Transmission System Operator or “TSO”) launched operations as the company responsible for transmission of electricity in Iceland. At the same time, Landsvirkjun’s transmission system was separated from Landsvirkjun and merged with other transmission assets in Landsnet. Landsnet has since then published a specific transmission tariff for the transmission of power to power intensive industries in Iceland and Landsvirkjun is [...] for the power Elkem consumes.
- (22) There is no agreement in place between Elkem and Landsnet hf. on the transmission of power. For this reason and because the Power Contract specifies Landsvirkjun as being responsible for the transmission, [...].
- (23) The payments due for the transmission of power are set by Landsnet, according to law and the existing Tariff for the Transmission of Electricity and Ancillary Services, issued by the TSO and approved by the National Energy Authority of Iceland.

3.2.3.3 Balance power

- (24) Power contracts with power intensive users normally address the issue of “balance power”. Since its establishment, the TSO is entrusted with the role of maintaining stability in the overall system. Any fluctuation and discrepancies between real demand and supply is settled through acquisition of power by Landsnet on a “regulation power market”. Landsnet requires a “balance responsible party” to settle balance costs according to Landsnet’s tariffs.
- (25) The balance power market is operated by the TSO pursuant to the Electricity Act.
- (26) Elkem is one of the [...] power intensive industry customers of Landsvirkjun that have not signed a service contract with Landsvirkjun, despite Landsvirkjun being its

⁹ See [...].

¹⁰ The arbitral award is mentioned below in paragraphs 36 *et seq.*

¹¹ The power price was established in NOK before and there have been currency rate conversion fluctuations between NOK and USD.

¹² Available online at: <https://www.althingi.is/lagas/nuna/2003065.html>.

balance responsible party. All other power intensive industry customers purchasing power from Landsvirkjun have signed such a service contract and agreed to participate in the payment for balance power.

- (27) Landsvirkjun calculates the balancing costs it carries for balancing the Elkem plant operation at approximately USD [1 - 2] per MWh. The cost of this balancing falls on Landsvirkjun for the customers who fall under what is known as Landsvirkjun's balancing group. The power load of the Elkem plant is one of the most unpredictable in the power system, due to the nature of the operations of the plant. Therefore, the planning of the operations and ordering of power for the operations is at times very much out of balance, resulting in this high balancing cost.

3.2.4 The 2007 PC Amendment – the arbitration clause

- (28) The Fifth Amendment to the Power Contract was signed on 26 April 2007. According to the Fifth Amendment, it was foreseen that the parties to the agreement should, upon the written request of Elkem, enter into good faith discussions regarding the possibility of extending or renewing the Agreement for an additional ten-year period. Those discussions should begin no later than 31 March 2014. Article 21(4) of the Power Contract provides that:

“In the event the Parties are unable to reach an agreement on the Contract Price for the ten year extended period, then the Subscriber has the right, but not the obligation, to effectuate the ten year extended period by submitting the matter of determining the Contract Price to arbitration pursuant to Article 22 of this agreement no later than eighteen months before the Contract Period expires. [...] Such price determination shall be final and binding upon the Parties.”

- (29) Additionally, the provision sets out that *“the arbitrators shall be independent of the parties and their affiliates and be experts on the ferrosilicon industry and the provision of hydroelectric and geothermal power thereto”*.
- (30) Article 21(5) and (6) of the amended Power Contract further sets out:

“The arbitration tribunal pursuant to paragraph (4) shall determine the Contract Price for the ten year extended period with a view to establishing a price per kWh appropriate to the Power Contract similar to the power price agreed to be paid over the ten year extension period by other power intensive companies operating metal production plants in Iceland, taking into account the Parties evidence and considerations subject to Paragraph (6).

During the arbitration proceeding pursuant to Paragraph (4), Paragraph (5) and Article 22 of this Agreement, either Party shall, subject to mutual confidentiality undertakings, present evidence regarding any facts the arbitration tribunal deems relevant to determining what the Contract Price for the additional ten year period beyond the fortieth anniversary of the Permanent Delivery Date should be.”

- (31) Thus, the arbitrators had the mandate to determine the price with some discretion without taking the price originally foreseen in the contract into consideration. Moreover, according to the wording of Article 21 of the amended Power Contract, the arbitrators were obliged to take into consideration the price of electricity sold to other power intensive companies operating metal production plants in Iceland.

3.3 Negotiations between Landsvirkjun and Elkem

- (32) On 27 March 2014, Elkem asked Landsvirkjun to enter into negotiations concerning the extension of the duration of the Power Contract beyond 31 March 2019.
- (33) The first tentative negotiation meeting took place in January 2015. In February 2015, serious negotiations commenced and Landsvirkjun presented all its principal expectations regarding the power price during an extended Power Contract with Elkem. Landsvirkjun made it clear that they could not accept the current power price, since the power price in new and extended power contracts with the power intensive industry in Iceland had risen considerably since the power price in the Elkem Power Contract was last negotiated in 1997, and the full cost of transmission had not been included in the power price after the deregulation of the power market in Iceland.
- (34) From January 2015 until 14 June 2017, the parties had several meetings (in total 21) and exchanged proposals for either a long-term (ten years) or a short-term extension of the Power Contract. These proposals involved either a fixed energy price (price-indexed) or linking the energy price to the Nordpool Elspot price. However, the parties did not manage to reach an agreement concerning the contract price for the extension of the Power Contract.
- (35) On 29 September 2017, following unsuccessful negotiations, Elkem decided formally and unilaterally to extend the Power Contract for ten years, as permitted pursuant to Article 21(4) of the Power Contract, and requested an arbitration ruling on the power price, during the ten-year extension period of the Power Contract.

3.4 The arbitral award

3.4.1 *The Arbitration Tribunal*

- (36) The Arbitration Tribunal consisted of three arbitrators, two of which were appointed by the parties and the third (the presiding arbitrator) was appointed by an agreement of the two parties. Elkem's nominee is a solicitor from the Arbitration Chambers Hong Kong and London, Landsvirkjun's nominee is an Assistant Professor at the Reykjavík University School of Law, who specialises in natural resources law and international and European energy law and the presiding arbitrator is a judge at the District Court of Reykjavík and former Dean of the Reykjavík University School of Law.
- (37) The Arbitration Tribunal was constituted on 26 February 2018 and on 26 March 2018 it convened a preparatory meeting in Reykjavík with the parties' counsel to discuss and agree on procedural directions and a timetable. Having received written statements and numerous documents from both parties, a hearing was held in Reykjavík from 4 to 9 February 2019. At the hearing the parties presented their arguments, legal experts as well as energy, financial, economic and accounting experts were examined by the parties, and witnesses gave their statements. Following the hearing, the parties agreed that the evidentiary record would be closed, and subsequently filed their post-hearing memorials and cost submissions. On 16 May 2019, the Arbitration Tribunal rendered its final award. The arbitral award determined the pricing of electricity to be sold by Landsvirkjun to Elkem with effect from 1 April 2019 until 31 March 2029.

3.4.2 *The main terms of the arbitral award*

- (38) In line with its mandate under Article 21(2) of the Power Contract, which stipulates that except for the price all other terms and conditions of the Power Contract will continue unchanged unless otherwise agreed by the Parties, the Arbitration Tribunal considered the following issues in its determination of the Contract Price for the 10-year extension period:
- 1) The relevant pool of contracts to establish a similar and appropriate Contract Price.
 - 2) Transmission costs.
 - 3) The [...] discount.
 - 4) The minimum price and its compliance with rules on state aid.

3.4.3 *The relevant pool of contracts*

- (39) Following the analysis of the examination of witnesses and experts at the arbitration hearing and of the contracts themselves, the Arbitration Tribunal considered that the following power contracts were to be considered “Relevant Contracts”, in line with Article 21(5) of the Power Contract, for the purposes of determining the Contract Price for the extension period:
- 1) Alcoa Fjarðaál sf. 2003 and 2008.
 - 2) PCC Bakki-Silicon hf. 2015.
 - 3) Norðurál Grundartangi ehf. 1997 (as amended in 2009 and 2016).
 - 4) Rio Tinto Iceland hf. 2010.

3.4.4 *Similar price*

- (40) Having determined the relevant pool of contracts, the Arbitration Tribunal went on to determine the “similar price”.
- (41) Taking into account the findings contained in the joint expert report by Summa and KPMG of 6 December 2018, concerning “similar price of electricity”, as well as the provisions of the Power Contract with Elkem, the Arbitration Tribunal considered that an appropriate contract price, similar to the price paid under the Relevant Contracts before considering the issues of transmission costs and the question of a [...] discount, referred to as the “base price”, should be set USD [...] per MWh.

3.4.5 *Transmission costs*

- (42) The Arbitration Tribunal considered that since Article 6 of the Power Contract had not been affected by the past four amendments to the Power Contract between Landsvirkjun and Elkem, Article 6 remained in force.
- (43) On that basis, the Arbitration Tribunal considered that the transmission costs of electricity [...].
- (44) The Arbitration Tribunal did not consider it appropriate or merited by the language used in Article 6 of the Power Contract to add any margin or charges or other amounts to the actual transmission costs and concluded that the transmission costs amount to USD [...] per MWh, which was to be [...] for the Extension Period.

3.4.6 [...] discount

- (45) The Arbitration Tribunal considered, on the basis of Article 11(3) of the Power Contract, and given the fact that such rights granted by Landsvirkjun were not subsequently amended, that it should not interfere in the commercial bargain struck between the Parties to the contract. The Arbitration Tribunal concluded that the contract price must therefore include the [...] rights deduction.
- (46) Having determined the base price of USD [...] per MWh and having applied the [...] discount to that figure (USD [...] per MWh), the Arbitration Tribunal was able to determine the Contract Price amounting to USD [...] per MWh before indexation.

4 Comments by the Icelandic authorities

- (47) The Icelandic authorities and Landsvirkjun are of the view that the notified measure does not entail state aid.
- (48) The Icelandic authorities note that this notification relates to a very specific situation as it concerns an arbitral award. Two undertakings, one of which, Landsvirkjun, is state-owned, contractually agreed to have, under certain conditions, the price for the sale/purchase of electricity determined by an arbitration tribunal. Since it is an arbitration tribunal which decides on the final power price (and not the State, the state-owned company, or the regular courts) it is questionable whether the measure is imputable to the Icelandic authorities.
- (49) Moreover, the Icelandic authorities note that Landsvirkjun has included arbitration clauses in several of the power contracts it has entered into in the last two decades. Those include the [...], the [...], the [...], the [...] and the [...]. These arbitration clauses bear many similarities to the arbitration clause in the Elkem power contract, such as the composition of the arbitration tribunal, agreeing that the governing law is Icelandic law and that prior to arbitration the parties should engage in good faith negotiations.
- (50) Finally, the Icelandic authorities highlight that the Arbitration Tribunal acknowledged that it was obliged in its decision on the power price to take into account the state aid rules and relevant Icelandic law, so that the final award would not be considered illegal and of no meaning. The Arbitration Tribunal considered that compliance with the state aid rules had to be assessed with respect to the question of whether a private market operator would have entered into a similar arbitration clause, providing for the determination of the contract price for the extension period by a tribunal in the absence of an agreement between the Parties. Having assessed this question in light of case law from the EFTA Court and European Commission decisional practice, and considering legal expert reports and testimony the Arbitration Tribunal concluded that a private party would have entered into a contract containing a similar arbitration provision.

5 Presence of state aid

5.1 Introduction

- (51) Article 61(1) of the EEA Agreement reads as follows:

"[...] any aid granted by EC Member States, EFTA States or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far

as it affects trade between Contracting Parties, be incompatible with the functioning of this Agreement.”

- (52) The qualification of a measure as aid within the meaning of this provision therefore requires the following cumulative conditions to be met: (i) the measure must be granted by the state or through state resources; (ii) it must confer an advantage on an undertaking; (iii) favour certain undertakings (selectivity); and (iv) threaten to distort competition and affect trade.

5.2 Advantage

- (53) Landsvirkjun’s electricity price for Elkem has been determined by the arbitral award, which results from the arbitration clause in the Fifth Amendment to the Power Contract, into which Landsvirkjun freely entered. Accordingly, the Authority will first assess, taking into account the specific circumstances of this case, whether the arbitration clause set out in the Fifth Amendment to the Power Contract in 2007 confers an advantage on Elkem.
- (54) An advantage, within the meaning of Article 61(1) of the EEA Agreement, is any economic benefit that an undertaking could not have obtained under normal market conditions.¹³
- (55) The benchmark for assessing whether a state-owned undertaking, when conducting transactions, has conferred an advantage on its counterpart is the market economy vendor principle, which is an expression of the more general market economy operator (“MEO”) test.¹⁴ In applying that principle, the Authority must assess whether a prudent private market operator, placed in a similar situation as Landsvirkjun, would have acted in the same way as Landsvirkjun did. If this is the case, then Landsvirkjun’s counterpart cannot be said to have obtained an economic advantage, which was not available under normal market conditions. The comparison between Landsvirkjun’s and a hypothetical private operator’s conduct must be made on the basis of available information and foreseeable developments at the time when the relevant decision was made,¹⁵ here the decision to include the arbitration clause in the Fifth Amendment to the Power Contract.
- (56) The question is thus whether a prudent private market operator, in a position similar to Landsvirkjun, would have agreed to such an arbitration clause, establishing similar parameters to be taken into account by the Arbitration Tribunal with a view to updating and adapting the pricing terms included in the Power Contract for a ten year extension.
- (57) A prudent private market operator would be careful in setting said parameters to minimise the risks associated with the arbitration proceedings and to ensure that the tariff is set on the basis of objective criteria. In this regard, a prudent private market operator would agree to be bound by arbitration if it is safeguarded that the

¹³ The Authority’s Guidelines on the notion of state aid (“NoA”), [OJ L 342, 21.12.2017, p. 35](#) and EEA Supplement No 82, 21.12.2017, p. 1, paragraph 66.

¹⁴ NoA, paragraph 76.

¹⁵ Judgment in *Westdeutsche Landesbank Girozentrale v Commission*, Joined Cases T-228/99 and T-233/99, EU:T:2003:57, para. 246.

discretion of the arbitrators is limited, and that they are fully independent and experts in the field.¹⁶

- (58) As regards the expertise of the chosen arbitrators, according to the information available, the arbitrators chosen were experts in the field. The parties agreed to the arbitrators, which, according to Article 21(4) of the Power Contract needed to be independent of the Parties and their Affiliates and be experts on the ferrosilicon industry and the provision of hydroelectric and geothermal power thereto. The parties chose: (i) a solicitor from the Arbitration Chambers Hong Kong and London, and (ii) an Assistant Professor at the Reykjavík University School of Law who specialises in natural resources law and international and European energy law. The two parties appointed a judge at the District Court of Reykjavík and former Dean of the Reykjavík University School of Law as the presiding arbitrator. Although it was prescribed in Article 21(4) of the Power Contract that the arbitrators should be persons with extensive industry knowledge, the parties decided to appoint arbitrators with a legal background to sit as members of the Tribunal. Given that the parties agreed to these appointments, and considering the fact that the dispute was predominantly of a legal nature, the Authority has no reason to call in to question the relevant expertise or competence of the Tribunal to settle the dispute. The Arbitration Tribunal can also be considered to have been established in a manner which, in principle, ensures its independence from the parties and the absence of undue influence from any third party.
- (59) As regards the parameters for setting the applicable tariff, Article 21(5) of the Power Contract expressly stipulated that the Arbitration Tribunal; “*shall determine the Contract Price for the ten year extended period with a view to establishing a price per kWh appropriate to the Power Contract similar to the power price agreed to be paid over the ten year extension period by other power intensive companies operating metal production plants in Iceland, taking into account the Parties evidence and considerations [...]*”. As such, the Arbitration Agreement stipulated that the Arbitration Tribunal had to base the power price on the pricing principles generally applicable on the Icelandic market for power intensive customers over the extension period while, at the same time, ensuring that the Parties’ evidence and considerations were duly taken into account.
- (60) As noted in a legal expert report cited by the Tribunal, Article 21(5) of the Power Contract; “[...] *is broadly drafted, as one would expect where the intention is clearly to have (a) a price that fits within the bounds of the relevant market, and sets out to do this by (b) seeking a form of ‘like-for-like’ comparison.*”¹⁷ Moreover, the Authority concurs with the Tribunal’s assertion that the guiding terms “similar” and “appropriate” provide flexibility and a certain level of discretion on the part of the Tribunal, which according to expert testimony relied on by the Tribunal is common in price review cases in the energy sector. As noted by the Tribunal, such concepts are often employed given that the eventualities and uncertainty about the future entail that a more limited discretion is considered inappropriate for the purposes of the arbitration clause.

¹⁶ Commission decision in SA.38101 (Greece) *Alleged State Aid to Aluminium S.A. in the form of electricity tariffs below cost following Arbitration Decision*, [OJ C 291, 1.9.2017, p. 1](#), para. 39, currently on appeal before the General Court (see Case [T-740/17](#)).

¹⁷ Document No 1079124, paragraph 272.

- (61) In light of the above considerations, the Authority is satisfied that the parameters for setting the power price enshrined in the arbitration clause of the Fifth Amendment to the Power Contract are based on objective criteria limiting the discretion of the arbitrators to establish an appropriate price relying on predefined and clear criteria based on the characteristics of the Icelandic electricity market and prices for other power intensive companies operating in the same field.
- (62) Thus, also a prudent private market operator, faced with a similar situation as the one faced by Landsvirkjun in the present case, would have concluded an arbitration clause similar to the present one, which established clear and objective parameters for determining a power price that arbitrators, being expert in the field, had to follow. The conduct of Landsvirkjun, when concluding the Fifth Amendment to the Power Contract, was therefore in conformity with the conduct of a prudent private market operator and, hence, in line with market conditions, so that Elkem has obtained no economic advantage within the meaning of Article 61(1) of the EEA Agreement.
- (63) In reaching that conclusion, it is not necessary, in light of the specific circumstances of the present case, to determine whether the precise level of the power price resulting from the arbitral award is in line with current market conditions. Rather, so long as the parameters agreed for setting the power price were determined on the basis of objective market-based criteria and so long as a prudent private market operator would, on the basis of those parameters and under the given circumstances, have agreed to refer the dispute to arbitration and to be bound by the outcome of that arbitration, an advantage should be excluded for the purposes of Article 61(1) of the EEA Agreement.¹⁸
- (64) In any event, the Authority notes that the Arbitration Tribunal did, based on expert reports submitted by the parties, estimate that the minimum price was within the bracket of USD [...] - [...] per MWh including transmission costs. Therefore, the base price arrived at by the Tribunal of USD [...] per MWh (before [...] discount) and the Contract Price USD [...] per MWh (including the [...] discount) was in any event above the estimated minimum price threshold. The Authority has seen no evidence suggesting that the Tribunal's conclusions are invalid or that indicate that there is a manifest error in the Tribunal's reasoning.
- (65) In light of the above, the Authority concludes that the arbitration clause in the Fifth Amendment to the Power Contract, by setting *ex ante* objective parameters for establishing the power price in a manner that would be acceptable also to a prudent private market operator, ensured that no advantage was granted to Elkem.
- (66) Since the criteria in Article 61(1) of the EEA Agreement are cumulative,¹⁹ there is no need to establish whether the other criteria of the notion of state aid are met in the case at hand. However, the Authority notes that the process leading to the arbitral award, its final adoption by an independent arbitration tribunal and its binding effect on the parties, do not suggest that it has been exposed to any State influence. Hence, the measure, i.e. the arbitral award dated 16 May 2019, related to the Power Contract between Landsvirkjun and Elkem, is also not imputable to the State, under the circumstances of the case at hand. The Authority therefore

¹⁸ Commission decision in SA.38101 (Greece) *Alleged State Aid to Aluminium S.A. in the form of electricity tariffs below cost following Arbitration Decision*, OJ C 291, 1.9.2017, p. 1, paragraph 44.

¹⁹ Judgment in *Belgium v Commission* ("Tubemeuse"), C-142/871, EU:C:1990:125, paragraph 25.

concludes that no state aid in the meaning of Article 61(1) of the EEA Agreement was granted to Elkem.

6 Conclusion

- (67) On the basis of the foregoing assessment, the Authority considers that the measure does not constitute state aid within the meaning of Article 61(1) of the EEA Agreement.
- (68) If this letter contains confidential information which should not be disclosed to third parties, please inform the Authority **by 1 October 2019**, identifying the confidential elements and the reasons why the information is considered to be confidential. In doing so, please consult the Authority's Guidelines on Professional Secrecy in State Aid Decisions.²⁰ If the Authority does not receive a reasoned request by that deadline, you will be deemed to agree to the disclosure to third parties and to the publication of the full text of the letter on the Authority's website: <http://www.eftasurv.int/state-aid/state-aid-register/>.

For the EFTA Surveillance Authority, acting under [Delegation Decision No 068/17/COL](#),

Yours faithfully,

Bente Angell-Hansen
President
Responsible College Member

Carsten Zatschler
Countersigning as Director,
Legal and Executive Affairs

Placeholder for electronic authentication, please do not delete

²⁰ [OJ L 154, 8.6.2006, p. 27](#) and EEA Supplement No 29, 8.6.2006, p. 1.