

COMMISSION DECISION (EU) 2017/1592**of 15 May 2017****on the measure SA.35429 — 2017/C (ex 2013/NN) implemented by Portugal for the extension of use of public water resources for hydro-electricity generation***(notified under document C(2017) 3110)***(Only the Portuguese text is authentic)****(Text with EEA relevance)**

THE EUROPEAN COMMISSION,

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

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

Having called on interested parties to submit their comments pursuant to Article 108(2) of the Treaty on the Functioning of the European Union and having regard to their comments,

Whereas:

1. PROCEDURE

- (1) On 18 September 2012, the Commission received a complaint filed by private citizens against alleged illegal State aid granted by Portugal to EDP — Energias de Portugal, S.A. ⁽¹⁾ ('EDP') regarding both stranded costs in Portugal and the extension of use of public water resources for hydro electricity generation.
- (2) On 30 October 2012, the Commission forwarded the complaint to Portugal and also requested additional information, which Portugal supplied by letter dated 8 January 2013. A meeting with the Portuguese authorities took place on 25 January 2013. Portugal supplied further information on 7 March 2013.
- (3) On 18 September 2013, the European Commission sent a letter to Portugal to notify its decision to initiate the formal investigation procedure, following the procedure of Article 108(2) of the Treaty on the Functioning of the European Union (TFEU) regarding only the extension of use of public water resources for hydro electricity generation.
- (4) The Commission received comments from Portugal on 21 October 2013 and a corrigendum was adopted accordingly on 29 January 2014.
- (5) The Commission's decision to initiate the formal investigation procedure ⁽²⁾ ('the opening decision') was published in the *Official Journal of the European Union* on 16 April 2014.
- (6) In May 2014, the Commission received observations from third parties.
- (7) Portugal sent its reply to the observations sent by third parties on 3 July 2014.
- (8) The Commission requested additional information by letter of 15 April 2016. Portugal sent its reply on 19 August 2016.
- (9) The present decision closes the formal investigation procedure, which was opened under Article 108 TFEU. It does not address compliance of the measure with other provisions of EU law, such as EU public procurement rules and antitrust rules based on Articles 106 and 102 TFEU.

⁽¹⁾ Formerly 'Electricidade de Portugal' until 2004.

⁽²⁾ State aid SA.35429 (2013/C) (ex 2012/CP) — Extension of use of public water resources for hydro electricity generation — Invitation to submit comments pursuant to Article 108(2) of the Treaty on the Functioning of the European Union (OJ C 117, 16.4.2014, p. 113).

2. DESCRIPTION OF THE MEASURE

2.1. The energy market in Portugal

- (10) Before the liberalisation of the Portuguese electricity market in 2007, the electricity produced in Portugal was not sold directly on the market but acquired by the public operator of the electricity network, Rede Eléctrica Nacional, S.A. ('REN'), based on long-term Power Purchase Agreements ('PPAs'). According to those PPAs, REN was obliged to buy a guaranteed amount of electricity from authorised producers, at a guaranteed price covering precisely identified cost items, and for a guaranteed period of time, namely until 2027.

2.2. The decision on stranded costs

- (11) Following the implementation of Directive 2003/54/EC of the European Parliament and of the Council ⁽¹⁾, Portugal decided to proceed with the early termination of the PPAs and their replacement by the payment of a compensation relating to stranded costs (the costs of maintenance of contractual equilibrium ('CMEC') mechanism). Decree-Law No 240/2004, of 27 December 2004, sets the parameters and the methodology for calculating the CMEC.
- (12) Portugal notified the measure for compensation for stranded costs on 1 April 2004, on the basis of the Communication from the Commission relating to the methodology for analysing State aid linked to stranded costs ⁽²⁾. These stranded costs were to be paid for early termination of the PPAs between EDP and REN for 34 power plants, of which 27 were hydro power plants, in consideration of the expected burden of past investments in a liberalised market. The decision on stranded costs also refers to Tejo Energia and Turbogas. Portugal notified its intention to also grant stranded costs to Tejo Energia and Turbogas. The measure was planned to be financed through revenue resulting from a levy imposed on final electricity consumers, based on subscribed power.
- (13) The Commission approved the measure in 2004 to cover the potential losses made by three undertakings including the incumbent ⁽³⁾ in the Decision concerning State aid N161/2004 — Stranded costs in Portugal ⁽⁴⁾.
- (14) As laid down in that Commission Decision, the CMEC compensation paid to EDP each year since July 2007 consists of two elements, namely a fixed component which is a share of the *ex ante* computed maximum annual amount and an adjustment component that takes into account the real value of the difference between the actual revenues and the costs of the plants concerned, computed at the level of the consolidated company group, EDP in this case. A final adjustment of the CMEC amount will be calculated at the beginning of 2018, which will be the 11th year following the early termination of the PPA. This final adjustment will be calculated on the basis of the forecasted income up to the end of 2027, which is the end of the implementation of the CMEC mechanism, following the Commission Decision.

2.3. Extension of the concession period

- (15) The termination agreement for EDP's PPAs in relation to hydro power plants were concluded in February 2005 after the adoption of Decree-Law No 240/2004. The PPAs termination agreement contains a clause with suspensive effect on the agreed termination. That clause makes PPA termination conditional upon the right to use public water resources for a period not less than the end life of the equipment and civil engineering works. In any case, the right to use public water resources were to be granted to the energy producer, namely EDP, for the same period.
- (16) Pursuant to the Portuguese Water Act No 58/2005, of 29 December 2005, and Decree-Law No 226-A/2007, of 31 May 2007, concerning the regime of use of water resources, the use of public water resources for energy

⁽¹⁾ Directive 2003/54/EC of the European Parliament and of the Council of 26 June 2003 concerning common rules for the internal market in electricity and repealing Directive 96/92/EC (OJ L 176, 15.7.2003, p. 37).

⁽²⁾ Adopted by the Commission on 26 July 2001 and communicated to Member States by letter SG(2001) D/290869 of 6 August 2001.

⁽³⁾ Namely EDP, Tejo Energia and Turbogas.

⁽⁴⁾ Commission Decision C(2004)3468 of 22 September 2004 concerning State aid N 161/2004, *Stranded costs in Portugal* (OJ C 250, 8.10.2005, p. 9).

production is subject to a concession. The choice of the entity receiving the concession had to be made through one of the specific procedures determined by law. Pursuant to Decree-Law No 240/2004 and Decree-Law No 226-A/2007, at the end of the concession, the assets pertaining to the activity subject to the concession revert free of charge to the State. If, however, the entity receiving the concession made investments authorised by the grantor that were not and could not be amortised, the State could either repay the residual value or extend the terms of the concession for the remaining time for the assets to be depreciated, but in no event exceeding 75 years ⁽¹⁾.

2.4. Value of the extension of hydro concessions

- (17) Portugal carried out three studies which detail the calculation of the possible economic value resulting from the extension in 2007. The main results of the studies were as follows:
- (a) REN estimates the value of the extension of the concession to EUR 1 672 million, based on a single discount rate of 6,6 % corresponding to EDP's self-reported value of weighted average cost of capital ("WACC").
 - (b) Caixa Banco de Investimento estimates a value between EUR 650 million and EUR 750 million, based on the use of two discount rates: the residual value of the PPAs discounted at 4,57 %, resulting from a spread of 50 basis points over the 4,05 % yield of 15-year Government bonds; and the free cash flows discounted with a WACC of 7,72 % based on a capital asset pricing model supplied with data indirectly derived from similar European utilities' equity and risk cost estimates.
 - (c) Credit Suisse First Boston ("CSFB") estimates a value of EUR 704 million depending on an assumed electricity price of 50 EUR/MWh, based on a set of discount rates of 7,89 % for WACC and 4,55 % for the residual value, respectively. The WACC rate is, like for Caixa Banco de Investimento, based on a capital asset pricing model fed with data indirectly derived from similar European utilities' equity and risk cost estimates.
- (18) Decree-Law No 226-A/2007 gave legal support to the suspensive clauses of PPAs by extending the term of the rights to use the public water resources held by hydro power plants operated by EDP whose PPA had been terminated by Decree Law No 240/2004.
- (19) Pursuant to Article 91(6) of Decree-Law No 226-A/2007, the transmission of rights to electricity producers (*de facto* EDP) was subject to payment of an amount reflecting an economic and financial balance. As defined in Article 92(1) of Decree Law No 226-A/2007, this amount corresponded, for each power plant, to the difference between the market value of operation until the end of the extended term expressed in cash flows and the residual value of the investment, as set out in the PPA and discounted at appropriate discount rates for each of those two components of the price. That provision allowed the transaction not to be treated as one single investment in financial terms, since different interest rates are used to discount the following:
- (a) the residual value (to be paid to EDP);
 - (b) the financial free cash flows accruing to EDP from subsequent sales of electricity generated by those hydro plants (to be paid to Portugal by EDP and eventually the consumers).
- (20) In accordance with the provisions of Decree-Law No 226-A/2007, EDP paid to the Portuguese State the sum of EUR 759 million in consideration for the economic and financial balance of the extension of all 27 hydro power plants concessions. This figure includes the amount of EUR 55 million corresponding to the water resource tax rate. It follows that the net amount of that consideration paid by EDP was EUR 704 million.

2.5. The complaint

- (21) In the complaint received in September 2012, it was alleged that Portugal had granted unlawful State aid, incompatible with the internal market, to EDP, which resulted from two distinct measures as follows:
- (a) the compensation for stranded costs to EDP pre-dating the liberalisation of electricity markets, which the Commission approved in its Decision concerning State aid N 161/2004 — Stranded costs in Portugal

⁽¹⁾ The Portuguese authorities explained that the principle that non-amortised investments are compensated when the relevant assets revert to the State at the end of a concession was already provided for before the liberalisation of the sector under Portuguese law.

(as referred to in recital 12 ⁽¹⁾): the complainant argues that, due to changes in circumstances since the adoption of the Commission Decision, and the inconsistency with the terms of the Communication from the Commission relating to the methodology for analysing State aid linked to stranded costs ⁽²⁾, the aid approved in 2004 would no longer be compatible with Union State aid rules;

- (b) the low price that EDP paid to Portugal in 2007 for the extension without public tender of the duration of concessions for the right of using public water resources for hydropower generation, thereby foregoing State income to the advantage of EDP.

2.6. The opening decision

- (22) In the opening decision, the Commission rebutted the part of the complaint related to stranded cost compensation and concluded that there were no reasons to declare that the aid was no longer compatible with the internal market.
- (23) However, the Commission raised doubts on the possible State aid to EDP in the implementation of the regime of use of water resources. The Commission preliminarily concluded in its opening decision that the possibly low amount paid by EDP for the extension of the right to use public water resources in implementation of Decree-Law No 226-A/2007, if confirmed, would appear as having entailed a selective economic advantage to EDP.
- (24) On compatibility, the Commission did not discern, at that stage, any appropriate legal basis for the compatibility with the internal market of the possible State aid to EDP.

2.6.1. Absence of tender

- (25) Firstly, the Commission noted that the award of use of public water resources under concession for the purpose of operation of a service supplied on a market may not involve an economic advantage to the beneficiary where the concession is awarded as a result of an open and non-discriminatory tender procedure gathering a sufficient number of interested operators. However, in the case at hand, the PPA termination agreements *de facto* prolonged by around 25 years on average the exclusive right of EDP to operate the power plants concerned without any tender procedure. Indeed, the organisation of a tender had been pre-empted by the suspensive clauses of the 27 PPA termination agreements between REN and EDP.
- (26) Considering the significant share of the Portuguese market accounted for by the power plants (27 %), the position of EDP on the Portuguese electricity generation and wholesale supply market (55 %) and the specific interest of hydro plants in an electricity generation portfolio, the Commission considered that such suspension clauses may have triggered a foreclosure effect on a lasting basis for market entry of prospective competitors which could have bid in an open tender. Therefore, an economic advantage unduly benefitting EDP could be established in case the tender had resulted in a higher price than the price paid by EDP, net of the residual value owed to this undertaking.

2.6.2. Supporting economic studies used to estimate the transaction price

- (27) Secondly, in its opening decision, the Commission considered that a second best solution in the absence of tender could have been an arm's length negotiation between the Portuguese authorities and EDP. Portugal acting as market operator would have aimed at obtaining a highest return on the public goods put to concession. With this approach, the negotiation with EDP would have been backed by the valuation carried out in 2007 ⁽³⁾ proving to be the most beneficial to Portugal, i.e. the valuation proposed by REN.
- (28) As referred to in recital 44 of the opening decision, Portugal had consented to a final price amounting to nearly half of the price evaluated by REN. Should the valuation proposed by REN proved the most accurate, it seems implausible that the State would have acted as a market operator in negotiating with EDP.

⁽¹⁾ Commission Decision C(2004)3468 of 22 September 2004 concerning State aid N 161/2004, *Stranded costs in Portugal* (OJ C 250, 8.10.2005, p. 9).

⁽²⁾ Adopted by the Commission on 26 July 2001 and communicated to Member States by letter SG(2001) D/290869 of 6 August 2001.

⁽³⁾ See recital 16 of the opening decision.

2.6.3. Financial methodology used to determine the transaction price

- (29) Thirdly, additional doubts were raised regarding the methodology used to determine the transaction price. The method determined in Decree Law No 226-A/2007 closely follows the approach presented by Caixa Banco da Investimento which uses two discount rates ⁽¹⁾.
- (30) The Commission expressed its doubts that an absence of use of the same discount rate, based solely on the cost of capital of EDP, as proposed by REN, could entail an economic advantage to EDP. The Commission noted that if the rate used to discount the residual value and the free cash flows had been a single WACC rate based on the typical cost of capital of a European electricity generator (7,55 %), EDP should have paid EUR 1 340 million, that is, EUR 581 million more than the amount actually paid by EDP.
- (31) The Commission considered therefore in its opening decision that, taking into account the choice made by the Portuguese authorities of extending the concessions to the exclusive benefit of EDP rather than via a tender procedure opened to other competitors, it could have been more appropriate to use a discount rate based on EDP's actual WACC to reflect its own and true cost of capital. REN reported that EDP's actual WACC in 2007 was 6,6 % and therefore it could be appropriate to use this value rather than 7,55 %. Thus, the Commission concluded that an economic advantage unduly benefiting EDP could be established.

3. COMMENTS FROM INTERESTED PARTIES

- (32) During the formal investigation, the Commission received observations from the complainants and EDP.
- (33) The complainants considered that through the extension of the concessions, EDP received State aid. According to them, the measure constitutes a compensation for lost revenue.
- (34) In its answer dated 19 May 2014, EDP considered conversely that the measure does not constitute State aid. Firstly, EDP argues that it did not gain any economic advantage from the recognition in 2007 of the right to use public water resources until the end of the useful life of the equipment in the 27 hydroelectric power plants with PPAs, considering that that right was granted under normal market conditions.
- (35) According to EDP, the presence of an economic advantage can be excluded if the State acts as a private vendor in an arm's length transaction on the open market and seeks to obtain the best price for the asset.
- (36) EDP claims that it is entitled to receive the residual value of the hydroelectric power plants if the PPAs terminate prior to the end of the useful life of the plants. Therefore, it was not economically viable for the State to open a public tender in 2007 to award new water resource concessions.
- (37) EDP considers that if the State had sought to obtain a higher value than the one arising from the independent studies, EDP would have opted not to extend the right to use the water resources and to receive the residual value of the power plants immediately, as it was entitled to do.
- (38) Moreover, EDP considers that the REN study on the economic value of the extension of the concessions contains inappropriate economic and financial assumptions which significantly reduce the value of the rights, which means that EDP would never have accepted the findings of that study for the purpose of a 'bilateral negotiation'.
- (39) Therefore, EDP argues that the unilateral setting of the value of the extension of the concessions, on the basis of an objective valuation methodology, is sufficient to avoid the existence of an economic advantage.
- (40) Secondly, EDP argues that the methodology established in Decree-Law No 226-A/2007 is objective and is based on generally accepted principles of economic calculation. Its application enables coherent, justifiable and non-arbitrary compensation calculation.

⁽¹⁾ See recital 16 of the opening decision.

- (41) Regarding the appropriate discount rates that must be used for the financial flows of each plant, both Caixa Banco de Investimento and CSFB concludes that the discount rate of the residual value of the plants should reflect the contractual risk inherent in that value. EDP points out that, since they came into force in 1995, all the PPAs already entitled EDP to receive from REN the residual value of the plant if the contracts were to cease prior to their expiry date. If EDP was not interested in extending its right to use public water resources, it would therefore have received the residual value from REN on the expiry date of each PPA.
- (42) Moreover, EDP explains that the residual value of the hydro power plants it is entitled to recoup is in fact a credit held by EDP over the State, through REN, from the entry into force of the PPAs in 1995. REN is an undertaking controlled by the Portuguese State. The risk of failure to meet its obligations is therefore to be associated to the State's debt risk. EDP concludes that the relevant discount rate for updating that value should thus only take into account the risk associated to REN's failure to comply with that obligation.

4. COMMENTS AND ANSWERS FROM PORTUGAL

- (43) Portugal sent a reply to the comments of the interested parties, but focused on the issue of stranded costs on which the Commission did not raise any doubts.
- (44) In April 2016, the Commission requested additional information from Portugal. Portugal replied on 16 April 2016 and provided legal clarifications on the provisions of Decree-Law No 240/2004 and annexes to the concession contracts.

5. ASSESSMENT OF THE MEASURE

5.1. Existence of aid

- (45) Article 107(1) TFEU provides that any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between Member States, be incompatible with the internal market.
- (46) In order to conclude whether State aid is present, the Commission must assess whether the cumulative criteria of Article 107(1) TFEU (i.e. transfer of State resources and imputability to the State, selective advantage, potential distortion of competition and affectation of intra-Union trade) are met for the measure under assessment.

5.1.1. Imputability

- (47) Regarding imputability, in cases where a public authority grants an advantage to a beneficiary, the measure is by definition imputable to the State.
- (48) The extension of the right to use public water resources for the purpose of hydropower generation to the benefit of EDP acting as a subentity receiving the concession of REN results from the implementation of Decree-Law No 226-A/2007 concerning the regime of use of water resources. The provisions of this Decree-Law also set out the rules to be followed by the State for the determination of the payment made by EDP in consideration of the economic benefits of the extension. Decree-Law No 226-A/2007 is a public act adopted and enacted by the Portuguese authorities. It follows that aid measures possibly contained therein would be imputable to the Portuguese Republic.

5.1.2. State resources

- (49) Regarding the qualification of State resources, granting access to a public domain or natural resources, or granting special or exclusive rights without adequate remuneration in line with market rates, can constitute a foregoing of State revenues ⁽¹⁾.

⁽¹⁾ See Communication from the Commission on the application of the European Union State aid rules to compensation granted for the provision of services of general economic interest (OJ C 8, 11.1.2012, p. 4), paragraph 33, where reference is made to the judgment of the Court of Justice of 22 May 2003, *Connect Austria Gesellschaft für Telekommunikation GmbH v Telekom-Control-Kommission, and Mobilkom Austria AG*, C-462/99, ECLI:EU:C:2003:297, paragraphs 92 and 93; and to the judgment of the Court of First Instance of 4 July 2007, *Bouygues and Bouygues Télécom SA v Commission*, T 475/04, ECLI:EU:T:2007:196, paragraphs 101, 104, 105 and 111.

- (50) Pursuant to the Portuguese Water Act No 58/2005 and Decree-Law No 226-A/2007, water resources within the Portuguese territory belong to the Portuguese State and cannot be privately appropriated and owned by natural or legal persons. It follows that, in principle, economic benefits derived from the utilisation of public water resources are provided through State resources within the meaning of Article 107(1) TFEU.
- (51) Natural resources with intangible values such as water or air may be necessary and sometimes essential for citizens. However, if their exploitation is non-marketable and/or no economic value is attributed to their use, such resources may not necessarily constitute a vehicle for the attribution of economic benefits of the kind that Article 107(1) TFEU captures, and escape the qualification of State resource. In this case the measure consists of the granting of an entitlement to use water resources which are part of the public domain. The existence of a transaction price shows that this entitlement is ascribed an economic value. Therefore, the Commission concludes that the measure entails State resources.
- (52) Article 9 of Directive 2000/60/EC of the European Parliament and of the Council ⁽¹⁾ lays down the principle of cost recovery for water services, adequate incentives in water pricing policies for the efficient use of water resources and adequate contribution from, inter alia, industry. These provisions of Union law recognise an economic value to different water uses. Moreover, in any event, in the case of Portugal, the provisions of Article 91 of Decree-Law No 226-A/2007 further determines that the use of public water resources for the purposes of electricity generation entails an economic, quantifiable and marketable value under Portuguese law.
- (53) It follows that the extension of the right to use water resources for the purpose of hydropower generation to the benefit of EDP, acting as a subentity receiving the concession of REN as set out in Decree-Law No 226-A/2007, appears to involve State resources within the meaning of Article 107(1) TFEU.

5.1.3. Absence of advantage

- (54) Whether a transaction is in line with market conditions can be established on the basis of a generally-accepted, standard assessment methodology ⁽²⁾. Such a methodology must be based on the available objective, verifiable and reliable data ⁽³⁾, which should be sufficiently detailed and should reflect the economic situation at the time at which the transaction was decided, taking into account the level of risk and future expectations ⁽⁴⁾.
- (55) In its opening decision, the Commission raised doubts whether the economic valuation of the extension of the concessions, valued in 2007, was underestimated due to the use of different discount rates applied to its two components, the residual value of unamortised assets and the free cash flows generated from the operation of the hydro plants.
- (56) The prolongation price estimated in 2007 is EUR 704 million (net of a tax withdrawal amounting to EUR 55 million) and has two components. Firstly, it is composed of the discounted free cash flows incurred by the operation of the hydro plants over the period 2020-2044 ⁽⁵⁾ (EUR 2 115 million discounted at 2007). Secondly, it is composed of the net present value, at 2007, of the residual value (EUR 1 356 million discounted at 2007). It should be noted that EDP would have been entitled to recover the value of these assets, had Portugal decided not to grant the extension of the concession to EDP.
- (57) The Commission questioned to what extent the application of a lower discount factor to the residual value of the unamortised assets was acceptable from a methodological point of view ⁽⁶⁾.
- (58) In order to reflect the fact that the value of these unamortised assets used to operate the plant will be known in 2020 and therefore less uncertain, as they are contracted with entities controlled by the Portuguese State,

⁽¹⁾ Directive 2000/60/EC of the European Parliament and of the Council of 23 October 2000 establishing a framework for Community action in the field of water policy (OJ L 327, 22.12.2000, p. 1).

⁽²⁾ See judgment of the General Court of 29 March 2007, *Scott v Commission*, T-366/00, ECLI:EU:T:2007:99, paragraph 134; and judgment of the Court of Justice of 16 December 2010, *Seydaland Vereinigte Agrarbetriebe*, C-239/09, ECLI:EU:C:2010:778, paragraph 39.

⁽³⁾ See judgment of the General Court of 16 September 2004, *Valmont Nederland BV v Commission*, T-274/01, ECLI:EU:T:2004:266, paragraph 71.

⁽⁴⁾ See judgment of the General Court of 29 March 2007, *Scott v Commission*, T-366/00, ECLI:EU:T:2007:99, paragraph 158.

⁽⁵⁾ 2020 corresponds to the average end year of the PPAs and the stranded costs compensation period, for the 27 hydro power plants involved in the transaction. 2044 corresponds to the average date of the end of the extension period of the concessions for the 27 hydro power plants.

⁽⁶⁾ See recital 51 of the opening decision.

the banks used a lower discount rate than the WACC applied to the cash flows, in other words, the risk free rate plus a 50-80 bps spread (ca. 4,6 % v 7,8 % for the WACC). The application of a lower discount rate increases the net present value of the residual value and decreases the prolongation price. Considering that the residual value is not affected by the same economic uncertainties than the free cash flows, it can be concluded that the application of the risk free rate is justified.

- (59) On the other hand, the use of the WACC to estimate the net present value of the free cash flows (generated from 2020 to 2044 on average) corresponds to market practice. It is justified by the higher operational risk in a context of a liberalised market, the realisation of the Iberian electricity market ⁽¹⁾, the development of a more integrated energy market at European level, which entails overall more uncertainties on the cash generation. Therefore, the application of the WACC to the discounted cash flows is justified.
- (60) The evaluation of the WACC was made by Caixa Banco de Investimento and CSFB using a combination of a benchmarking approach (WACC of similar players in similar sectors) with a bottom up approach (recalculation of the WACC using public data obtained from Bloomberg). The WACC was estimated at 7,72 % and 7,88 % for Caixa Banco de Investimento and CSFB, respectively. This approach reflects market practice and is compliant with similar approaches already validated by the Commission in other cases ⁽²⁾.
- (61) The Commission also raised doubts on whether the methodology used by REN, the transmission system operator, to assess the prolongation price, resulting in a higher price (EUR 1 672 million) could not be seen as a more satisfactory approach than the valuations performed by the two financial institutions ⁽³⁾.
- (62) However, the methodology proposed by REN does not represent market practice. The proposed prolongation price cannot be retained for the following reasons:
- (a) REN applied one single discount rate to both the residual value and the free cash flows. This discount rate assumes the WACC is given by EDP's WACC (6,6 %). The WACC must however reflect the profitability required by a panel of investors of a given sector in a given country, for a certain type of project. WACCs are generally calculated based on both a benchmarking approach (WACC of comparable market players) and a bottom-up approach, involving a specific estimate of each component of the WACC (beta, market risk premium), which was not performed in the study. Therefore REN's method does not seem to apply the standard methodology generally applied by the market.
- (b) In addition, REN's evaluation could not be used by the Portuguese authorities due to its lack of independence. According to the Portuguese legal framework, the value of the concession was to be determined based on the evaluations performed by two independent institutions, CSFB and Caixa Banco de Investimento in the case at hand, and their valuations were used to establish the value of the prolongation price. As shown above, the evaluations provided by CSFB and Caixa Banco de Investimento used an appropriate methodology. The Commission finds no ground to consider these evaluations inappropriate to establish the market value of the extension period of the concessions.
- (63) As a conclusion, after due analysis, the methodology used by Portugal to assess the prolongation price can be considered to be satisfactory.
- (64) In the event of a tender, Portugal would have had to pay EDP for the amount of the unamortised assets at the end of the PPA concession period (2020). Secondly, the prolongation price is based on an assumption of electricity prices of 50 EUR/MWh. It should be pointed out that the compensation for stranded costs assessed at the same period was based on an estimate of 36 EUR/MWh. Should this assumption be retained for the calculation of the prolongation price, Portugal would have supported a negative price (EUR – 15,4 million of Net Present Value). Therefore, the price assumptions compared with assumptions used in the stranded cost decision are certainly more favourable to the Portuguese State, and reflect a conservative approach retained by both financial institutions in their valuation of the prolongation price.

⁽¹⁾ The Iberian electricity market, or MIBEL, was defined in the International Agreement between the Portuguese Republic and the Kingdom of Spain for the Constitution of an Iberian Electricity Market. MIBEL was implemented through a series of laws adopted in Spain (for example, Order ITC/2129/2006, of 30 June 2006) and in Portugal (for example, Portaria 643/2006, of 26 June 2006).

⁽²⁾ See, for example, State aid — Hungary — SA. 38454 (2015/C)(ex 2015/N) — Possible aid to the Paks nuclear power station — Invitation to submit comments pursuant to Article 108(2) of the Treaty on the Functioning of the European Union (OJ C 8, 12.1.2016, p. 2), and T-319/12 and T-321/12 — *Spain and Ciudad de la Luz v Commission*, ECLI:EU:T:2014:604, paragraph 40, T-233/99 and T-228/99 — *Landes Nordrhein-Westfalen v Commission*, ECLI:EU:T:2003:57, paragraph 245.

⁽³⁾ See recitals 48 to 51 of the opening decision.

6. CONCLUSION

- (65) The Commission therefore concludes that the measure entitling EDP to operate hydro power plants for an extended period against the payment of a price of EUR 704 million does not meet all the cumulative conditions of Article 107(1) TFEU, and therefore it does not constitute State aid,

HAS ADOPTED THIS DECISION:

Article 1

The measure which Portugal has implemented for EDP — Energias de Portugal, S.A. regarding the extension of use of public water resources for hydro electricity generation, does not constitute State aid within the meaning of Article 107(1) of the Treaty on the Functioning of the European Union.

Article 2

This Decision is addressed to the Portuguese Republic.

Done at Brussels, 15 May 2017.

For the Commission
Margrethe VESTAGER
Member of the Commission
