



EUROPEAN COMMISSION

Brussels,
SG (2006) D/

Subject: NN 38/06 – Preferential Electricity Tariff to Energy Intensive Industries in Italy- Italy

Dear Sirs,

The Commission wishes to inform Italy that, having examined the information supplied by your authorities on the aid referred to above, it has decided to initiate the procedure laid down in Article 88(2) of the EC Treaty.

1. PROCEDURE

- (1) Within the framework of case N 587/05 Preferential Electricity Tariff to Energy Intensive Industries in Sardinia, the Commission became aware of Article 11.11 of the law-decree of 14 March 2005, n. 35, converted into law of 14 May 2005, n.80 (the law-decree). Such article provides for an extension until 31 December 2010 of two measures of preferential electricity tariff for energy intensive industries. Italy has put this extension into force already and Italian authorities have not notified this extension.
- (2) The Commission requested information to Italian authorities on the 23 December 2005. On 24 February 2006 the Italian authorities responded to the request for information. The Italian authorities submitted further information concerning this measure on 2 March 2006 and on 27 April 2006.

2. DESCRIPTION OF THE MEASURE

- (3) Article 11.11 of the law-decree provides for the extension until 31 December 2010 of two schemes of preferential electricity tariff that were already in force, when the law-decree entered into force.
- (4) One measure concerns the preferential tariff for Alcoa, the aluminium producer. The other measure is the so-called Terni scheme, affecting a group of companies that resulted from splitting the former Società Terni: ThyssenKrupp Acciai Specialy Terni (ThyssenKrupp), the steel producer, Cementir, the cement producer, and Nova Terni Industria Chimica, the chemicals producer.
- (5) Decision 148/04 of the Energy Authority charged Cassa Conguaglio, a State-owned fund, with the administration of the preferential tariff. Cassa Conguaglio, compensates directly to the beneficiaries for the costs of electricity. Funding for the preferential tariff comes from the component A4 of the electricity tariff.

Component A4 is collected by Cassa Conguaglio from all electricity consumers of the regulated and liberalised markets in Italy, in the form of a para-fiscal levy.

- (6) The law-decree provides that the conditions for the provision of the preferential tariff will be those enjoyed by the beneficiaries at the end of 2004. It also states that the preferential tariff will be updated annually by the Autorità per l'Energia Elettrica e il Gas (the Energy Authority) taking into account the prices paid for the supply of electricity by manufacturers of the same industrial sectors in Europe.
- (7) In 2005, the Energy Authority decided that the preferential tariff would increase annually by a maximum of 4% only when the annual reference prices in the Frankfurt and Amsterdam power exchanges have also increased¹.
- (8) Decision 217/05 of the Energy Authority implements Article 11.11 and Article 11.13 of the law-decree. This decision states that Alcoa and the beneficiaries of the Terni scheme will enjoy for the whole year 2005 the same preferential tariffs that would have been in force in December 2004 if Decision 217/05 had not been put into force.

2.1. The Terni scheme

- (8) Società Terni was a State-owned electricity producer and a manufacturer of steel, cement, and chemicals. Most of the electricity produced was used for self-consumption of the manufacturing plants. In 1962² Italy transferred Società Terni's electricity assets to ENEL, the State-owned electricity company.
- (9) In 1963, the Italian government granted a preferential electricity tariff to Società Terni for the period 1963-1992³. The basis for the preferential tariff was to compensate Società Terni for the loss of the electricity assets. The electricity was supplied at a cost equivalent to what Società Terni would have paid if it had kept the ownership of its electricity assets.
- (10) In 1964, the Italian government split Società Terni into three different companies: Nuova Terni Industria Chimica, Cementir and Acciai Terni, a steel producer.
- (11) In 1991, Italy extended the preferential tariff for these beneficiaries until 31 December 2007⁴. Among the conditions of the extension of the scheme, the law provided for a progressive reduction of the amount of electricity furnished in the last six years. The reduction was taking place as follows:

Year	GWh	MW
2001	1620	270
2002	1389	231
2003	1157	193

¹ Decision 217/05 of the Energy Authority, available at <http://www.autorita.energia.it/docs/05/217-05.htm>

² Law of 6 December 1962, n. 1643

³ Decree of the President of the Republic of 21 August 1963, n- 1185

⁴ Law of 9 January 1991, n. 9

2004	926	154
2005	694	116
2006	463	77
2007	231	39

- (12) Between 1992 and 1994, Italy privatised Nuova Terni Industria Chimica to Norsk Hydro, Cemetir to Caltagirone and Acciai Terni to ThyssenKrupp.
- (13) Currently the electricity furnished under the Terni scheme is shared as follows: Thyssen Krupp 86%, Nuova Terni Industrie Chimiche 10% and Cemetir 4%.
- (14) By article 11.11 of the law-decree, Italy extended until 2010 the preferential tariff of the Terni scheme, keeping the conditions that were in force in 2004. This extension is the measure concerned by this decision.

2.2. Preferential tariff for Alcoa

- (15) The European Commission approved the preferential electricity tariff for Alcoa in its decision C 38/92⁵. The decision was valid only until 31 December 2005.
- (16) The preferential tariff for Alcoa was composed of two parts:
- a fixed part, including a component linked to the amount of power engaged and a component linked to the amount consumed and time slot
 - a variable surcharge, which was initially restrictively applied, and it is updated and linked to the price of fuel.
- (17) The law-decree has changed the updating system of preferential tariff to Alcoa. Since 1 January 2006, the preferential tariff is increased annually up to a maximum of 4% when the reference prices in the Amsterdam and Frankfurt power exchanges also increase.
- (18) According to the Italian authorities, the preferential tariff to Alcoa is covering the equivalent to the variable costs of generation of electricity from coal and partly covers the fixed costs.
- (19) By the same measure as with the Terni scheme, Italy extended the preferential tariff for Alcoa until 31 December 2010. This is the measure concerned by this decision. This extension has not been notified and it is not covered by decision C 38/92 because the validity of decision C 38/92 expired in 31 December 2005.
- (20) Currently Alcoa has two establishments benefiting of the preferential tariff: one in Fusina (Venice) and another in Sardinia.

3. PRELIMINARY ASSESSMENT OF THE MEASURE

3.1. The Terni scheme

The indemnity nature of the tariff

⁵ OJ C 288, 1 November 1996

- (21) The Italian authorities have argued that the preferential tariff for the Terni scheme is an indemnity for the transfer of its electricity assets to ENEL in 1962. Accordingly, Società Terni was granted a preferential tariff until 1992.
- (22) The Commission has doubts about the arguments held by the Italian authorities that the preferential tariff was an indemnity for the transfer of the electricity assets.
- (23) It would be difficult to accept that the transfer of the electricity assets were an expropriation, because at the time the State was the owner of Società Terni, and the State cannot expropriate itself. It would also be difficult to accept that the preferential tariff was the result of damages as the Italian authorities have argued, because the State acted within the law⁶. Instead, the Commission has doubts whether it could be possible to consider that the transfer of the assets was a case of reorganisation of the State's financial assets, and therefore that the nature of the preferential tariff would not be an indemnity.
- (24) In any case, even following the arguments of the Italian authorities, it is not clear that the Terni scheme is not prone to overcompensation. It could be expected that 30 years would represent a reasonable delay for the companies of the Terni scheme to get compensated in full for the lost of the electricity assets. Nevertheless, in 1991 the Italian authorities decided to extend the preferential tariff until 2007. A second extension, this time until 2010, has taken place by article 11.11 of the law-decree.
- (25) The Italian authorities have not provided to the Commission with information indicating why the beneficiaries would be entitled to further compensation, in particular why as of 2005 the electricity assets that were transferred to ENEL would not have been paid in full yet. The Commission has doubts that further payments are required 44 years after the transfer of the electricity assets to ENEL.
- (26) Moreover, the nature of the preferential tariff changed in 2004, when ENEL stopped administering the scheme and the State, through Cassa Conguaglio⁷, who does not benefit from the transfer of the electricity assets, took the administration of the preferential tariff. In support of this approach are the rulings by the national courts that deal with the period when ENEL administered the scheme and recognised the obligation by ENEL to pay the preferential tariff⁸.

⁶ The Italian authorities have argued case C 106-120/87 where the Court stated that “damages which the national authorities may be ordered to pay to individuals in compensation for damage they have caused to those individuals do not constitute aid within the meaning of Articles 92 and 93 of the EEC Treaty”. The Commission has doubts that this case is relevant to the situation as the National Courts have never agreed damages to the beneficiaries of the Terni scheme. The Italian authorities have also argued case C 240/83 in support of their views, where the Court held that “the indemnities do not constitute aid within the meaning of articles 92 et seq of the EEC Treaty , but rather consideration for the services performed by the collection or disposal undertakings”. However, this does not seem applicable to the Terni scheme because it concerns a compensation for the provision of services.

⁷ Decision 148/04 of the Energy Authority

⁸ Cassazione, 21 November 2003, n. 17686 and Consiglio di Stato, sez. VI, 21 April 2005, n. 605. These cases deal with period when ENEL was still administering the scheme.

- (27) In favour of considering the preferential tariff of the Terni scheme as State aid is Commission Decision 83/396/ECSC, which expressly excluded the beneficiaries of the Terni scheme from the approval. This exclusion was the subject of the Judgement of the Court in case C 99/92 of 24 February 1994 where the Court confirmed that the Terni scheme could not benefit from the approval of decision 83/396/ECSC and confirmed the former decisions by Cassa Conguaglio not to grant the preferential tariff
- (28) According to article 6 of Council Regulation 659/1999 of 22 March 1999 laying down detailed rules for the application of article 93 of the EC Treaty⁹, the decision to initiate the formal investigation procedure shall summarise the relevant issues of fact and law, shall include a preliminary assessment of the Commission as to the aid character of the proposed measure, and shall set out the doubts as to its compatibility with the common market.

Existence of aid under article 87.1 of the EC Treaty

- (29) Under article 87.1 of the EC Treaty, “*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, insofar as it affects trade between Member States, be incompatible with the common market.*”
- (30) The first element of Article 87.1 that the Commission must assess is whether the measure provides a selective advantage. A reduction on the electricity tariff constitutes an economic advantage insofar as the production costs of the recipients are reduced. Moreover, the preferential tariffs of the Terni scheme benefit only to a group of beneficiaries, namely three: Cementir, Nuova Terni Industria Chimica and Thyssen-Krupp.
- (31) The second condition, for the measure to be qualified as State aid, it has to be granted directly or indirectly from State resources and be attributable to the State. In this case, the decision on the tariff reduction is taken unilaterally by the Italian authorities. It is financed by a para-fiscal levy paid by all consumers of electricity in Italy to Cassa Conguaglio, a fund owned and administered by the State. Therefore, the aid is financed by State resources.
- (32) Under the terms of the third and fourth conditions of Art 87.1 of the EC Treaty, aid has to distort or threaten to distort competition and to affect or be likely to affect the exchanges between the Member States. In the present case, these measures threaten to distort competition, because they strengthen the financial position of the companies, which would benefit from a costs reduction in relation to their competitors, who do not benefit from the aid. Moreover, since the products of the companies in question (cement, chemicals and steel) are marketed in the world markets, the measures in question are likely to affect intra-Community trade.
- (33) For the above reasons, the preferential tariff of the Terni scheme described in Article 11.11 of the law-decree is prohibited by Art. 87.1 of the EC Treaty and can be considered compatible with the Common Market only if it can benefit from the exemptions provided for in the Treaty.

⁹ OJ, 27.3.1999, L 83, p. 1.

- (34) Since article 11.11 of the law-decree has not been notified to the Commission, the aid should be considered illegal aid within the meaning of Article 1(f) of the aforementioned Regulation 659/1999.

Compatibility

- (35) A reduction in the electricity tariff constitutes an operating aid and it is normally prohibited. In exceptional cases operating aid can be granted in regions eligible under the derogation of article. 87.3(a) of the Treaty.
- (36) The beneficiaries of this scheme are all in Umbria, which is not eligible for aid under article 87.3(a) in the current regional aid map. Therefore, the aid cannot be justified under the Guidelines on National Regional Aid (regional aid guidelines)¹⁰. Since Italy has failed to identify any other justification for extension of this scheme, the Commission has doubts that the measure could be considered compatible.

Deggendorf Jurisprudence

- (37) According to the Italian authorities, one of the beneficiaries of the Terni scheme, ThyssenKrupp, benefited from aid declared illegal and incompatible by the Commission in case C 49/98 on 29 November 2000¹¹. The Commission is not aware that ThyssenKrupp has repaid the aid and the Commission is not in a situation to assess the effects of the accumulation of aid. Accordingly, the Commission believes that this company cannot receive further aid until the incompatible earlier aid is recovered by Italy.

Choice of the least distortive instrument

- (38) The Commission doubts that paying an indemnity through the electricity tariff is the least distortive and more transparent instrument to make the such payment.

3.2. Preferential tariff for Alcoa

Existence of aid under article 87.1 of the EC Treaty

- (39) The Italian authorities have argued that the extension of the preferential tariff to Alcoa is not State aid.
- (40) In its case C 38/92, the Commission decided that the preferential tariff for Alcoa was not State aid. However, the regulatory framework and market conditions at the time were very different from those prevailing in 2006. Among other things, the electricity market is now liberalised and Cassa Conguaglio is the administrator of the Terni scheme.
- (41) Since the conditions that existed at the time of decision C 38/92 no longer exist, the Commission must re-examine the existence of State aid in the preferential tariff to Alcoa in the light of current circumstances.

¹⁰ OJ C 74, 10.03.1998, p. 4

¹¹ OJ L 43, 15 February 2000, p. 1

- (42) The reduction on the electricity tariff constitutes a substantial economic advantage insofar as the biggest part of the production costs in manufacturing aluminium is energy¹².
- (43) The decision on the tariff reduction is taken unilaterally by the Italian authorities. It is financed by a para-fiscal levy paid by all consumers of electricity in Italy to Cassa Conguaglio, a fund owned and administered by the State. Therefore, the measure is financed by State resources.
- (44) The measure threaten to distort competition, because they strengthen the financial position of Alcoa, which is benefiting from the costs reduction in relation to their competitors, who did not benefit from the aid. Moreover, since aluminium is traded in the world markets, the preferential tariff is likely to affect intra-Community trade.
- (45) For the above reasons, the Commission considers that the preferential tariff to Alcoa described in Article 11.11 of the law-decree is captured by Art. 87.1 of the EC Treaty and can be considered compatible with the Common Market only if it can benefit from the exemptions provided for in the Treaty.
- (46) Article 11.11 of the law-decree has not been notified to the Commission. Therefore, the measure should be considered illegal aid within the meaning of Article 1(f) of Regulation 659/1999. The previous finding by the Commission, in case C-38/92, that the preferential tariff for Alcoa did not constitute existing aid, does not render it existing aid. The approval by the Commission was limited in time, precisely because it was based on the economic assessment of the circumstances prevailing in that moment. Therefore, it cannot be invoked to cover the extension of the measure provided for by the law-decree.

Compatibility

3.2.1. The factory in Fusina

- (47) As explained before, a reduction in the electricity tariff constitutes an operating aid and as such it is normally prohibited. In exceptional cases, operating aid can be granted in regions eligible under the derogation of Art. 87.3(a) of the EC Treaty.
- (48) Fusina, in the current regional aid map, is not eligible for aid under Article 87.3(a). Therefore, the aid cannot be justified under the regional aid guidelines. Since Italy has failed to identify any other justification for extension of this scheme, the Commission has doubts that the measure could be considered compatible.

3.2.2. The factory in Sardinia

- (49) In their responses, the Italian authorities have argued that should the preferential tariff to Alcoa be considered as State aid, the measure would be compatible with the regional aid guidelines.

¹² Energy consumption constitutes an average of 45% of the costs of transforming alumina in liquid metal according to *Aluminium Smelter Power Tariffs*, is available from CRU at http://www.aluminium.crugroup.com/smelter_tariffs.htm (Data provided by the Italian authorities).

- (50) As already explained, a reduction in the electricity tariff constitutes an operating aid, which is one of the most distortive forms of aid, and as such it is normally prohibited. In exceptional cases operating aid can be granted when investment aid may not be enough to trigger a process of regional development, if the structural handicaps of the region are too great. Operating aid could be granted in regions eligible under the derogation of Art. 87.3(a) under the conditions of point 4.15 of regional aid guidelines. Sardinia, in the current regional aid map, is eligible for aid under Article 87.3(a).

Doubts as the regional objective of the aid

- (51) First of all, the Commission recalls that according to the general principles of law, an exception should be interpreted in a restrictive manner. For operating aid to be granted point 4.15 of the Regional Aid Guidelines requires the Member State to demonstrate the existence of handicaps and gauge their importance.
- (52) The Italian authorities insist that the high electricity prices in Sardinia are a handicap for the development of the island of Sardinia. However, when it comes to the average prices of electricity quoted in the Italian Power Exchange (Iplex), it seems that the average prices of electricity in Sardinia are lower than in many regions of Italy¹³.
- (53) The Italian authorities insist that the prices quoted in the Iplex cannot be used as reference for the difference in the electricity prices between Sardinia and other regions of Italy. However, in a joint document both the Italian competition authority and the Energy Authority have stated in its energy enquiry of 2005¹⁴ that “since the good, exchanged in the organized market and by bilateral contracts, is homogeneous, both bilateral contract prices and the stock exchange prices are connected (related to each other). First of all, as the clients can buy the good also in the organized market, the prices of the bilateral contracts are fixed on the forward curve of prices; moreover, as the bilateral contracts allows the client to stabilize the prices over specified temporal horizon, thanks to the bilateral contract, the energy increase in value cover also the risk linked to the volatility of the price”.
- (54) Furthermore, it would make economic sense that if the main reason for the difference in prices between Sardinia and the rest of Italy is the lack of major energy connections, that such a difference would show both in the Iplex and in the market of bilateral contracts over the counter (OTC). Therefore, the Commission believes that using the Iplex to assess the difference in the electricity prices between Sardinia and other regions of Italy makes economic sense.
- (55) When it comes to the specific average prices for energy intensive industries, the Italian authorities have explained that these prices are negotiated bilaterally

¹³ The average Day-ahead market prices of the Iplex are available at: <http://www.mercatoelettrico.org/GmeWebInglese/Default.aspx>

¹⁴ Indagine conoscitiva sullo statu della liberalizzazione dei settori dell'energia elettrica e del gas naturale. Autorità Garante della Concorrenza e del Mercato. Autorità per l'Energia Elettrica e il Gas. Page 137. Available at: <http://www.autorita.energia.it/pubblicazioni/IC22.pdf>

between the manufacturers and the distributors of electricity and that they are not quoted publicly. Therefore, the Italian authorities say that they cannot provide the prices of the electricity paid by energy intensive consumers that are based in other Italian regions.

- (56) In the absence of such information, the Commission cannot assess if Alcoa in Sardinia is paying higher prices than those paid by the energy intensive industries based in the rest of Italy.
- (57) Instead, the Italian authorities insist on comparing the prices paid by Alcoa under the preferential tariff with the prices paid by the European competitors according to prices found in the *Aluminium Smelter Power Tariffs* by CRU¹⁵.
- (58) First, such a comparison should have been done by comparing the market price that Alcoa should pay against the weighted average price paid by the European aluminium producers. Instead, the Italian authorities say that they have compared the preferential tariff with the medium price paid by European aluminium producers¹⁶. Moreover, should the aim of the aid be to tackle a regional handicap, the comparison should have been also regional, therefore between prices in Sardinia and the rest of Italy.
- (59) The information available to the Commission seems to support that the prices of electricity in Sardinia for the energy intensive industries, and among them for Alcoa, are similar or even lower than those in the rest of Italy.
- (60) From the information available to the Commission, the current situation in Sardinia is not only of overcapacity, but also of surplus of electricity generation. In 2004, 5.4% of the electricity produced in Sardinia did not find a Sardinian consumer wanting to pay for it¹⁷. The excess in the production of electricity is partly provoked by the new generators being installed like the integrated gasification combined cycle power plant using oil waste in Sarroc. The construction of the new power plant using gasified Sulcis coal, will only increase the overcapacity and production surplus. Such overcapacity will only find a solution when the electricity generators are allowed to export their electricity through the new interconnection ("SAPEI" - 1000 MW - direct from Sardinia to continental Italy) in 2010.
- (61) The overcapacity and excess of production of electricity can only act as an incentive for the generators to sell electricity at the lowest price available until 2010. Taking into account the strong bargaining power of Alcoa, who consumes

¹⁵ *Aluminium Smelter Power Tariffs*, op. cit.

¹⁶ The approach explained by the Italian authorities in their response, is also explained in the document for consultation: "Formazione di provvedimenti in materia di tariffe speciali dell'energia elettrica in attuazione delle disposizioni di cui all'articolo 11 del decreto legge 14 marzo 2005, n. 35, convertito con modificazioni nella legge 14 maggio 2005, n. 80", page 7. Available at: www.autorita.energia.it/docs/dc/dc_050919.pdf.

¹⁷ Studio di Fiabilità Progetto Integrato Miniera Centrale, part III, Annex 3.4.4.by Sotacarbo, page 1. Available at: http://www.regione.sardegna.it/documenti/1_46_20051130103748.pdf. Same data can be found at Piano Energetico Ambientale Regionale, page 14.

20% of the electricity produced in Sardinia¹⁸, it can be expected that the electricity provided to Alcoa should come from some of the most efficient generators in Sardinia¹⁹ and that the market price that Alcoa should have paid would be cheaper than in other places of Italy.

- (662) Moreover, even if the prices of electricity in Sardinia were higher than in the rest of Italy, the Italian authorities have not sufficiently explained why they represent an obstacle to the regional development of the island nor how the region will develop thanks to the preferential tariff.
- (63) In paragraph 32 of case C 34/02, the Commission did not accepted that the lack of energy connections in Sardinia constituted a handicap for the development of the SMEs of the region. Since 2002, when the Commission assessed this handicap, the region has experimented economic growth to the point that the region is currently considered to be an “economic development region” for the purposes of the Commission's Guidelines on national regional aid for 2007-2013. Therefore, if the lack of major energy connections with the mainland was not a handicap to the development of the region at the time, it cannot be expected that it is a handicap today.
- (64) The Commission has doubts that the electricity prices are a regional handicap and therefore it has doubts about the necessity of the measure. In fact, the measure does not seem to have an objective of regional development, but just the provision of aid to an aluminium producer, Alcoa.

Aid is not proportional

- (65) Point 4.15 of the regional aid guidelines states that that the aid should be justified in terms of its contribution to regional development and its nature and its level should be proportional to the handicaps it seeks to alleviate.
- (66) The Commission has doubts that the preferential tariffs established by the Energy Authority for 2005 are proportional to the handicap that the Italian authorities say that they seek to alleviate.
- (67) As explained the preferential tariff for Alcoa has two components. The fixed component was not established on the basis of a regional handicap and it does not take into account the prices of electricity in Sardinia in relation to the rest of Italy, not even the prices in the rest of Europe.
- (68) The updating system of the preferential tariff for Alcoa is based in a comparison of the reference prices practiced in the Frankfurt and Amsterdam exchanges, when, as explained before, it should be updated in relation with the prices practiced in the rest of Italy.

¹⁸ Studio di Fattibilità. Progetto Integrato Miniera Centrale. Part III. Revisone 1 del 28 maggio 2004. By Sotacarbo. Pages 1 to 9. Available at:

http://www.regione.sardegna.it/documenti/1_46_20051130102937.pdf.

¹⁹ The Portovesme area has two generators, one uses a coal-based circulating fluidized-bed combustor generator (340 MW) and that the other plant uses a mix of oil and coal to generate electricity (250 MW). Information from “Piano Energetico Ambientale Regionale – Sintesi della Proposta”. Available at: http://www.regione.sardegna.it/documenti/1_46_20051129115234.pdf

- (69) The Commission has doubts that approach taken by the Italian authorities to calculate the preferential tariff does not result in overcompensation, and that the aid is proportional to the regional handicap that Italy says that is seeking to alleviate.

Aid is not progressively reduced in time

- (70) Point 4.17 of the regional aid guidelines states that operating aid must be limited in time and progressively reduced.
- (71) In contrast to what the Italian authorities are arguing, the aid cannot be considered as degressive on time. The preferential tariff for Alcoa will increase to a maximum of 4% when the reference prices in the Amsterdam and Frankfurt power exchanges increases.
- (72) Therefore, when the reference prices in the Amsterdam and Frankfurt power exchanges increase more than 4%, the preferential tariff will increase less than the reference prices, and the aid will increase. From information available to the Commission²⁰ the forward prices of electricity for the long of the year 2006 in Belgium, France, Germany, the Netherlands, and the United Kingdom have increased by a minimum of 20%²¹. When the annual increase of the weighted average of the reference prices is below 4%, the preferential tariff will only increase by the same amount and the aid will stay the same. Only when the weighted average of the reference prices in the Amsterdam and Frankfurt power exchanges decreases, there will be a guaranteed reduction of the aid.

The measure is not temporary

- (73) The Commission cannot consider that the measure is temporary since the preferential tariff for Alcoa has been in force since 1994. Since the practice of the Commission is not to allow operating aid for more than five years, the Commission cannot allow an extension of a scheme that has been in force for eleven years already.

Guidelines on national regional aid for 2007-2013

- (74) The preferential tariff for Alcoa will be in force during the period of application of the Guidelines on national regional aid for 2007-2013²². Because the economy of Sardinia has grown over recent years, Sardinia is considered to be an “economic development region” for the purposes of the Commission's Guidelines on national regional aid for 2007-2013. This means that on 31 December 2006, Sardinia will cease to be eligible for the higher rates of aid allowed for Article 87.3(a) regions and will instead become eligible for the exception under Article 87.3(c). Since the possibility to grant operating aid is only allowed for Article 87.3(a) regions, this means that Sardinia will no longer be allowed to grant operating aid.

²⁰ Information submitted by a complainant in case C 13/06, in relation to the updating mechanism of Decision 217/05 of the Energy Authority that establishes the updating mechanism for the Terni scheme, Alcoa and the beneficiaries of Art. 11.12 of the law-decree.

²¹ Platts Forward Assessments.

²² Guidelines on national regional aid for 2007-2013, OJ, C 54, 4 March 2006, page 13.

- (75) While a two year transition period is allowed under the guidelines for the linear phasing out of existing operating aid schemes, it would not seem appropriate to allow new operating aid measures to be introduced for a few months and then phased them out, particularly when the operating aid scheme is as distortive as the present measure and in view of all the doubts expressed. Therefore, the Commission has doubts that the region would be eligible for a measure of operating aid that will mostly be in force under the Guidelines on national regional aid for 2007-2013.

Doubts that the aid is compatible

- (76) Accordingly, the Commission has doubts that the regional aid guidelines are a good basis for the approval of this measure. The Commission, furthermore, doubts that the measure qualifies for an exemption of the prohibition of State aid in Article 87.1 on any other grounds and Italy has failed to identify any such other possible grounds. Therefore, the Commission doubts whether the aid can be found compatible with the common market.

Choice of the least distortive instrument

- (77) The Commission has doubts whether the measure proposed by Italy granting aid through the electricity tariff is the least distortive instrument to address the problems of Alcoa.

4. CONCLUSION

- (78) This decision of the Commission concerns the State aid measures based Art. 11,11 of the law-decree of 14 March 2005, n. 35, converted into law of 14 May 2005, n.80, Decision 148/04 and Decision 217/05 of the Energy Authority only in as much as they are applicable to energy intensive industries.
- (79) In the light of the foregoing considerations, the Commission, acting under the procedure laid down in Article 88(2) of the EC Treaty, requests Italy to submit its comments and to provide all such information as may help to assess the aid, within one month of the date of receipt of this letter. It requests your authorities to forward a copy of this letter to the potential recipient of the aid immediately.
- (80) The Commission wishes to remind Italy that Article 88(3) of the EC Treaty has suspensory effect, and would draw your attention to Article 14 of Council Regulation (EC) No 659/1999, which provides that all unlawful aid may be recovered from the recipient.
- (81) The Commission warns Italy that it will inform interested parties by publishing this letter and a meaningful summary of it in the *Official Journal of the European Communities*. It will also inform interested parties in the EFTA countries which are signatories to the EEA Agreement, by publication of a notice in the EEA Supplement to the *Official Journal of the European Communities* and will inform the EFTA Surveillance Authority by sending a copy of this letter. All such interested parties will be invited to submit their comments within one month of the date of such publication.

If this letter contains confidential information which should not be published, please inform the Commission within fifteen working days of the date of receipt. If the Commission does not receive a reasoned request by that deadline, you will be deemed

to agree to publication of the full text of this letter. Your request specifying the relevant information should be sent by registered letter or fax to:

European Commission
Directorate-General for Competition
State Aid Greffe
B-1040 Brussels

Fax No: (32).2.296.12.42

Yours faithfully,

For the Commission

Neelie Kroes
Member of the Commission

