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**Subject: State aid No C 36/2008 (ex NN 33/2008) – Italy (Sardinia)  
State aid in favour of the Sulcis integrated power plant**

Sir, /Madam

The Commission wishes to inform Italy that, having examined the information supplied by your authorities on the aid/measure referred to above, it has decided to initiate the procedure laid down in Article 88(2) of the EC Treaty. Italy is also invited, pursuant to Article 11(1) of Regulation (EC) No 659/1999, to submit comments on the Commission's intention to launch a suspension injunction requiring Italy to suspend the grant of unlawful aid until the Commission has taken a decision on the compatibility of the aid with the common market.

## **I. PROCEDURE**

- 1) Following a complaint, the Commission learned of Italy's intention to grant State aid to subsidize the production of electricity obtained from indigenous coal in Sardinia on the basis of Article 11, paragraph 14 of Act 80/2005 on urgent measures in the framework of the Action Plan for economic, social and territorial development.
- 2) By letters of 18 December 2006 the Commission requested additional information, which was provided by letter of 13 March 2007. By letter of 22 July 2007 the Commission requested further information and invited Italy to notify the measure according to Article 88(3) of the EC Treaty. Italy provided the information by letter of 15 October 2007, with a wording suggesting that such submission could be taken as a notification. The information was, however, not submitted in accordance with

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Regulation 794/2004<sup>1</sup>, did not contain an explicit reference to Article 88(3) of the EC Treaty and the Italian authorities argued that the measure constitutes existing aid.

- 3) By letter dated 21 January 2008 the Commission requested further clarifications and again expressed serious doubts as to the existing aid character of the measure at hand. Italy provided information by letters of 18 March 2008 and 9 April 2008.
- 4) Since the applicable national legislation does not contain a suspensive clause and is therefore immediately applicable, the measure was transferred to the register of non-notified aid under number NN 33/2008.

## II. DESCRIPTION

- 5) The measure on which the Commission has decided to open the procedure laid down in Article 88(2) of the EC Treaty is the Sulcis project as laid down in Article 11, paragraph 14 of Act 80/2005 and further specified in the tender documentation. However, in order to properly assess the measure and, in particular, to address the arguments put forward by the Italian authorities, it is necessary to review the history of the Sulcis project in Italian legislation.

### *Coal as an energy source "assimilated to renewable "*

- 6) By Article 22 of Act No 9 of 9 January 1991 on the new National Energy Plan (hereinafter: Act 9/91) Italy laid down the possibility to grant State support towards the production of energy from renewable and "assimilated" sources. The notion of assimilated sources was not defined precisely. The Comitato Ministeriale Prezzi (Ministerial Price-setting Committee, hereinafter: CIP) was entrusted with the establishment of detailed eligibility criteria for "assimilated" sources. Act 9/91 was approved under the State aid rules in the framework of Commission decision on State aid NN 52/91<sup>2</sup>.
- 7) By Delibera CIP No 6 of 29 April 1992, (hereinafter: Delibera CIP 6) Italy adopted implementing provisions for Act 9/91. It established notably that the notion of "assimilated" energy sources should also cover fossil fuels obtained from minor isolated fields. Under Delibera CIP 6, State aid was provided in the form of guaranteed purchases of electricity by the State at fixed subsidized prices.
- 8) By Decreto del Presidente della Repubblica of 28 January 1994 (hereinafter: the 1994 Decree) on the implementation of the decontamination plan for the Sulcis-Iglesiente area, Italy declared that it was desirable for coal produced in the Sulcis area of Sardinia to be considered an "assimilated" source pursuant to Act 9/91. The 1994 Decree set out detailed technical and economic conditions for the award of an integrated coal mine-power plant concession. The power plant project was conditional upon the use of coal gasification technology, stringent emission levels and the combined production of heat and power. The project would be supported by State aid in the form of
  - a. investment aid worth ITL 185 billion (€85 713 million), and

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<sup>1</sup> Commission Regulation (EC) No 794/2004 of 21 April 2004 implementing Council Regulation No 659/1999 laying down detailed rules for the application of Article 93 of the EC Treaty, OJ L 140, 30.4.2004, p. 1.

<sup>2</sup> State aid NN 52/1991, letter SG (91) D/15502.

- b. the guaranteed purchase by ENEL, the State utility, of the electricity produced by the plant at a subsidized price. For the first 8 years of operation, the price would be set at the subsidized level of ITL 160/kWh, whereas for the remaining duration of the concession, the lower prices set out in Delibera CIP 6 and reflecting ENEL's avoided electricity production costs would apply<sup>3</sup>.
- 9) This project was included in Sardinia's Structural Funds Operational Programme for the period 1994-1998) The concession was awarded to a consortium of companies (ATI-Sulcis). However, the project encountered technical and financial difficulties. Already in 1997 the project was struck off the Operational Programme<sup>4</sup> and in May 2002 the consortium finally declared that it was not willing to go ahead with implementation. The concession was officially withdrawn in 2003.
- 10) By Article 11, paragraph 14 of Act No 80/2005 on urgent measures in the framework of the Action Plan for economic, social and territorial development, Italy revived the integrated Sulcis project by announcing a new tender. As regards the conditions for the award of the concession, Act 80/2005 referred back to the 1994 Decree, which would apply insofar as the guaranteed purchase price for the electricity produced was concerned. However, for most other aspects of the award, Act 80/2005 introduced new substantive criteria. The new project does not envisage any investment aid.
- 11) By Article 1, paragraph 1119 of Act 296/2006 (the 2007 Budgetary Act), Italy prolonged the validity of Article 11, paragraph 14 of Act No 80/2005.

*Detailed description of the new Sulcis integrated project*

- 12) The objective of the integrated project, as envisaged by Act 80/2005 read in conjunction with the 1994 Decree, is twofold: make electricity available at reduced prices to the local energy-intensive industries and promote the use of indigenous coal produced in the Sulcis-Iglesiente area.
- 13) Italy intends to achieve these aims by subsidizing the construction and operation of a new power plant using locally produced coal.
- 14) Sulcis coal is of low quality<sup>5</sup>, given its high sulphur content and low calorific value, and can only be used locally as long-distance transport would make it uneconomical. The containment of sulphur emissions from this type of coal requires appropriate technological solutions.
- 15) According to the information provided by Italy, coal extraction from the Sulcis mines was put on hold ("*active stand-by*"<sup>6</sup>) in the 1970s. The interim management of the mines (including the "Nuraxi Figus" mine) was supported via State funding until 2003. This intervention by the State is not the object of the present decision.

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<sup>3</sup> Under Delibera CIP 6, electricity produced from new plants using renewable or assimilated sources is purchased by the national utility ENEL at a fixed price until 2020. For the first 8 years of operation, the price is subsidized and . for the subsequent period, the price is set at a lower level reflecting ENEL's avoided investment and fuel costs (the costs ENEL would have had to bear if it had produced that electricity itself).

<sup>4</sup> Commission Decision C (97) 3778 of 22.12.1997.

<sup>5</sup> Sulcis coal has been classified as low-grade B in Annex I of the ECSC Treaty of 11 October 1986. It is a sub bituminous coal with lower calorific value of approx. 5100 Kcal/kg, 15% ash and 6% sulphur.

<sup>6</sup> Italy's definition of "active stand-by" implies that the mines are not in production but have not been decommissioned, and are therefore ready to resume production any time.

- 16) At any rate, the "Nuraxi Figus" coalfield, which will be exploited by the concessionaire, is currently in operation, as it supplies coal to ENEL's coal-fired power plant in Portovesme on the basis of a contract concluded in May 2006 for a quantity of 1 100 000 tonnes to be delivered over three years.
- 17) Like the 1994 project, the new Sulcis project, based on Act 80/2005, also foresees a public tender for the award of an integrated concession involving the management of mining operations at the "Nuraxi Figus" site and the construction/operation of a power plant. A first tender was organized at the end of 2006, but the concession was not awarded due to lack of bidders. A new tender with different conditions will be launched by the Sardinian administration.
- 18) By letter dated 9 April 2008, Italy submitted the new tender documentation. This documentation contains substantive rules which are relevant for the State aid assessment of the project.

*The tender conditions*

- 19) As regards the conditions offered by Italy, throughout the duration of the integrated concession (30 years). Region Sardinia will put at the disposal of the concessionaire, free of charge, the mining concession, the areas and infrastructure required to exploit the coalfield as well as the land on which the power plant will be constructed. Part of the electricity produced by the plant will be bought up by the public body Gestore dei Servizi Elettrici (Electric Services Operator, hereinafter: GSE) at guaranteed prices. The exact quantity to be bought up will be determined on the basis of the best bid.
- 20) Pursuant to the provisions of Act 80/2005<sup>7</sup>, the purchase price is the one set in the 1994 Decree. Accordingly, the GSE will purchase the electricity for the first 8 years of operation at an (updated) price of 120,50 €/MWh<sup>8</sup>. For the following years, the GSE will pay 100,06 €/MWh<sup>9</sup>.
- 21) The counterparts offered by the concessionaire will be determined on the basis of the best bid. However, the rules of the tender give precise indications as to the minimum content of the offers. In particular, bidders will have to present separate offers concerning different aspects of the project (economic/financial offer, technical/industrial offer).

*Economic offer*

- 22) Bidders will submit an economic/financial offer specifying:
  - a. the quantity of electricity to be bought up by the GSE (up to a maximum of 450 MWe for 7 500 hours<sup>10</sup>);

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<sup>7</sup> The Commission notes that there is a contradiction between the tender documentation and Act 80/2005. The tender documentation submitted by the Italian authorities on 9 April 2008 refers to the "prices laid down in the 1994 Decree, "which should be interpreted as the prices set by Delibera CIP 6". The 1994 Decree, referred to in Act 80/2005, set a purchase price for the first 8 years of operation of the plant of 160 ITL/kWh, which is different from the corresponding CIP 6 price of 150 ITL/KWh. Therefore, this criterion of the tender appears to have no legal basis in national legislation. However, this element of uncertainty does not affect the substance of the Commission's assessment of the measure.

<sup>8</sup> This is the updated equivalent of the ITL 160/KWh laid down in the 1994 Decree. Prices for guaranteed purchases of electricity from renewable and assimilated sources are updated by Cassa Conguaglio every two years. The amounts of €120,50 and €100,06 correspond to the prices set for the year 2007.

<sup>9</sup> This is the updated equivalent of the 150 ITL/kWh set in Delibera CIP 6, to which the 1994 Decree refers.

<sup>10</sup> This is the maximum allowed by the 1994 Decree.

- b. the quantity of electricity that will be sold yearly to the local industries. Such quantity cannot be lower than 3 500 GWh/year and must be offered as of 2011 for a minimum of 12 years.
- c. the preferential sales price for the electricity delivered to the local industries. The average weighted reference price will be €31.94/MWh (at 2005 prices).

23) As regards sales of electricity to the local industries, the prices offered by the bidders will be differentiated according to the industrial sector concerned, namely:

- a. Production of primary aluminium (approximately 64% of the uptake);
- b. Production of lead and zinc (17%);
- c. Production of chlorine and its derivatives (10%);
- d. Production of alumina (7%);
- e. Production of flat aluminium products (1%);
- f. Other production sectors (1%).

24) For each of these sectors, reference prices have been set by the Italian authorities. Prices range from a minimum of €27.87 for primary aluminium to a maximum of €67.90 for flat aluminium products. For some of the categories, offers can be higher or lower than the reference prices. They cannot, however, exceed the reference price by more than 10%.

*Technical/industrial offer*

25) The bidders will submit:

- a. a detailed power plant project indicating the methods proposed to reduce emissions, using coal gasification, supercritical cycles or equivalent technologies. The plant must use Sulcis coal for at least 50% of its coal requirements<sup>11</sup>.
- b. an industrial plan for the exploitation of the coalmine and the management of the power plant;
- c. a programme involving research activities in "clean coal" technologies;
- d. a training programme for staff employed in the mines;

26) The plant shall meet the same emissions levels established for the original 1994 project. Such levels improve on the mandatory Community standards laid down in Directive 2001/80/CE<sup>12</sup> of the European Parliament and of the Council of 23 October 2001 on the limitation of emissions of certain pollutants into the air from large combustion plants.

	Maximum emissions from Sulcis plant	Mandatory standard
SO <sub>2</sub>	60 mg/Nm <sup>3</sup>	200 mg/Nm <sup>3</sup>
NO <sub>x</sub>	70 mg/Nm <sup>3</sup>	200 mg/Nm <sup>3</sup>

<sup>11</sup> In terms of calorific value.

<sup>12</sup> OJ L 309, 27.11.2001, p. 1-21.

ESP or SF dust	2 mg/Nm <sup>3</sup>	30 mg/Nm <sup>3</sup>
CO <sub>2</sub>	50 mg/Nm <sup>3</sup> <sup>2</sup>	no mandatory standard

- 27) The concessionaire will take over all staff currently employed in the mines (and maintain current conditions of employment (but may reduce employment levels for reasons of efficiency)).

### III. ASSESSMENT

#### **Existence of aid within the meaning of Article 87(1) of the EC Treaty**

- 28) A measure constitutes State aid within the meaning of Article 87(1) of the EC Treaty if the following conditions are cumulatively fulfilled: the measure (a) confers an economic advantage to the beneficiary; (b) is granted by the State or through State resources and is imputable to the State; (c) is selective; (d) has an impact on intra-community trade and is liable to distort competition within the EU.
- 29) The Commission takes the view, at this stage, that the integrated Sulcis concession constitutes State aid in favour of a) the future concessionaire and b) the Sardinian energy-intensive industries.

#### *Advantage*

- 30) The measure will confer an economic advantage to the future concessionaire. The GSE will purchase approximately half of the plant's electricity at prices which are significantly higher than average wholesale prices in Italy and in Sardinia<sup>13</sup>. These guaranteed purchases will improve the beneficiary's competitive position on the market for electricity production.
- 31) The Commission considers that at least part of the economic advantage accruing to the concessionaire will be channelled to the local energy-intensive industries in the form of preferential sales prices. The estimated sales prices, ranging from € 27.87/MWh to 67.90/MWh, are below the market price<sup>14</sup>. The Commission does not dispose of exact figures on electricity prices negotiated bilaterally between Sardinian energy intensive industries and their suppliers. However, a price of € 25/MWh is substantially below spot<sup>15</sup> prices, whether average or off-peak. For the largest consumers, such as the primary aluminium sector, which should absorb over 60% of the electricity made available by the concessionaire, the price seems to be even below the average marginal cost of power generation in Sardinia.
- 32) It is, however, impossible to provide a more exact quantification of the respective advantages granted to the concessionaire and the energy-intensive industries. The economic factors at play, which include the quantity energy to be bought up by the GSE,

<sup>13</sup> In 2007 the Italian average wholesale price (PUN, or Single National Price) was €74.80/MWh. In Sardinia, where electricity is more expensive than on mainland Italy, the average price in 2006 was €80.55/MWh (GSE statistics). Therefore, both prices offered to the concessionaire (€120.50/MWh for the first 8 years, € 100.06/MWh afterwards) are above the market price.

<sup>14</sup> In 2007 the Italian average wholesale price<sup>14</sup> was €74.80/MWh. In Sardinia, where electricity is more expensive than on mainland Italy, the average price in 2006 was €80.55/MWh

<sup>15</sup> Prices recorded on the Italian Power Exchange (IPEX).

the quantity of energy to be purchased by the energy-intensive industries and the price of sale of that energy are not fixed in advance, but will depend on the offers made by applicants in the context of the tender.

- 33) In the light of the above, the Commission considers, at this stage, that the proposed measures will confer an advantage on the future concessionaire of the Sulcis project for its power generation as well as on the local energy-intensive industries.

*Selectivity*

- 34) This advantage will be granted selectively, since only the concessionaire and the Sardinian energy-intensive industries will benefit from the measure.

*State resources and imputability to the State*

- 35) The measure will be financed through State resources. The GSE is a public entity, fully owned by the Italian Ministry of Finance. According to the information provided by Italy, it is foreseen that the GSE will raise the resources required to purchase Sulcis electricity in the same way as under the CIP 6 arrangement, that is, via a parafiscal levy collected on all consumers' electricity bills (and possibly charged on the same component of the bill). The Commission has already concluded in two State aid cases<sup>16</sup> that the proceeds of parafiscal levies charged by Italy on electricity consumption and which are collected and distributed by the State-owned body Cassa Conguaglio constitute State resources. This interpretation is also in line with the case-law of the Community Courts on parafiscal levies<sup>17</sup>.

- 36) Since the concessionaire is required to pass on part of the advantage received via the higher GSE purchase price to the energy-intensive industries, and such requirement is established on the basis of national legislation read in conjunction with the tender documentation issued by Region Sardinia, the Commission considers that the ensuing advantage for the energy-intensive industries is also financed by means of State resources.

- 37) The measure is based on national and regional legislative and regulatory provisions, and is therefore imputable to the State.

*Impact on trade and distortion of competition*

- 38) The Commission considers, at this stage, that the measure has an impact on intra-community trade and distorts competition, both on the electricity market and on the downstream markets where the energy intensive industries concerned are active. The EU electricity market has been fully opened to competition. The new Sulcis plant will produce 650 MW of electricity, representing one sixth of current power production capacity in Sardinia (around 4000 MW). Approximately half of this power will be reserved for Sardinia's largest electricity consumers (the energy-intensive industries) on the basis of long-term contracts. The preferential prices offered are made possible by the guaranteed purchase of the remaining power by the GSE at prices which, as shown in point 30) supra, are above the market price.

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<sup>16</sup> Commission decision of 1.12.2004, C(2004) 4333/8 in Case N 490/2000 "Italy – Stranded costs" and Commission decision of 28.11.2007 in Case C 36/a/2006 " Terni companies".

<sup>17</sup> See, inter alia, judgments of the ECJ in Cases C-78/76, Steinike & Weinlig, ECR (1977) p.595 and in Case C-47/69 French textile, ECR [1970] p. 00487; the judgment of the CFI of 20 September 2007 in Earl Salvat v. Commission, Case T-136/05, not yet published and the opinion of the Advocate General Mengozzi of 24 January 2008 in Case Essent Netwerk Noord, Case C-206-06.

- 39) The new plant will therefore absorb a substantial fraction of local demand, with no realistic possibility for alternative providers to serve these customers. The Commission takes the view that, even taking into account the advantage passed on to the energy-intensive industries, it is likely that the competitive position of the concessionaire will be improved compared to other power generators who cannot benefit from the aid. The reduction in demand will, at any rate, worsen the competitive position of existing electricity generators in Sardinia. It seems inevitable that existing generators who cannot compete with the concessionaire's subsidized prices and cannot export electricity outside Sardinia will have to scale down production<sup>18</sup>. This is likely to affect their competitive position and, in particular, worsen their cost structure, which is already constrained by Sardinia's situation of structural overcapacity<sup>19</sup> in electricity generation.
- 40) Besides, in the absence of a meaningful customer base, it will be difficult if not impossible for new electricity providers to enter the Sardinian market. The Commission has received complaints, notably from windpower producers, which underline this distortive effect.
- 41) As regards the energy-intensive industries, the provision of electricity at subsidized prices has a direct and substantial impact on production costs and therefore improves the beneficiaries' competitive position on the product markets where they are active. The sectors concerned are fully open to intracommunity trade.
- 42) Therefore, the Commission takes the view, at this stage, that the measure at issue constitutes State aid caught by Article 87(1) of the EC Treaty.

#### **Character of aid: existing or new aid**

- 43) According to Italy, the measure constitutes existing aid on the basis of the considerations summarized below. The Italian authorities submit that the Sulcis project is part of the National Energy Plan, established by Acts No 9 and 10 of 9 January 1991 and approved by the Commission under the State aid rules. The detailed implementing measures of the National Energy Plan, set out in Delibera CIP 6, were also approved by the Commission. In the Italian authorities' view, the 1994 Decree would confine itself to further specifying the above provisions.
- 44) The Italian authorities also point out that the 1994 Decree was implicitly approved as the Commission included the Sulcis project in Sardinia's Operational Programme per the period 1994-1999. The fact that the project was later struck off the Operational Programme would not curtail the validity of that approval, since the 1994 Decree was prolonged, by way of national legislation, over the years, most recently by Article 11, paragraph 14 of Act 80/2005 and by the 2007 Budgetary Act.
- 45) The Italian authorities claim that Act 80/2005 did not introduce substantial changes to the project, but provided for mere "adaptations to technical progress and legal developments". Therefore, the project would constitute existing aid and Italy was not

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<sup>18</sup> Demand for electricity is inelastic, especially at the level of household and small industrial consumers. Besides, exports of electricity from Sardinia are constrained by the technical limits of the interconnector. Therefore, it is reasonable to assume that the reduction in demand caused by the switchover of large consumers to the new power plant will lead to a net reduction of electricity produced by existing generators.

<sup>19</sup> Given Sardinia's relative isolation from mainland Italy, the State has imposed a very high capacity reserve rate in order to guarantee uninterrupted service. This requirement makes generation overcapacity a structural feature of the electrical system in Sardinia. It has been estimated that Sardinia's power plants work at 40% of their capacity.

under an obligation to notify Article 11, paragraph 14 of Act 80/2005 under the State aid rules.

- 46) The Commission considers that the Sulcis project as introduced by Act 80/2005 constitutes new aid for the reasons specified below.

*Delibera CIP 6 is not the substantive legal basis for this measure*

- 47) Contrary to what the Italian authorities maintain, Delibera CIP 6 cannot be considered the relevant legal basis for this measure. This Delibera laid down, inter alia, support provisions for sources of energy which could be "assimilated" to renewable. The definition of assimilated sources includes "fossil fuels produced exclusively in minor isolated fields". The notion of "minor isolated field", originally absent from Delibera CIP 6, was introduced in 1994<sup>20</sup>: a field was defined as a "minor isolated field" where its verified size was smaller than 0.5 Mtep (million tonnes oil equivalent) and, for technical or economic reasons, the fuel extracted could not be directly distributed.
- 48) The Sulcis coalfields are Italy's largest<sup>21</sup>. Given their size, they could not have been declared "minor isolated fields" for the purposes of applying Delibera CIP 6. Therefore, the Italian authorities had to adopt a separate legislation (the 1994 Decree) latching back directly to Act 9/91 in order to declare Sulcis coal "assimilated to renewable" and provide a legal basis for State aid using a mechanism which is *similar*, but certainly not one and the same thing as the CIP 6 provision<sup>22</sup>.
- 49) Moreover, as underlined in point 19) supra, the aid amounts laid down, for the first 8 years of operation, in Delibera CIP 6 and in the 1994 Decree are different. The pricing mechanism set out in Delibera CIP 6 is referred to, in the 1994 Decree, only in respect of subsequent years. The duration of CIP 6 support (until 2020) also differs from the duration of support towards the Sulcis plant (30 years as of the award of the concession).
- 50) Therefore, the Commission has focused its assessment on Act 80/2005, read in conjunction with the 1994 Decree.

*The 1994 Decree is de facto superseded, as the modifications introduced by Act 80/2005 are substantive and wide-ranging.*

- 51) The Commission contends that the modifications introduced by Act 80/2005 are not mere technical adaptations to the original Sulcis project as set out in the 1994 Decree, but constitute amendments of a substantive nature which are so wide-ranging in scope that the 1994 Decree can be considered superseded.
- 52) First of all, the original project did not foresee the sale of electricity at low cost to energy-intensive undertakings. This element, which is new, alters the economics of the aid by introducing new beneficiaries and, in fact, already warrants the classification of the measure as new aid.
- 53) Secondly, the original 1994 Decree laid down specific technological requirements, namely the use of the innovative technology of coal gasification and the combined production of heat and power. The new project specifications no longer foresee the use of an innovative technology. According to the latest tender document, for the award of the concession it will suffice to use a "proven" technology, such as gasification,

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<sup>20</sup> Decreto del Ministero dell'Industria, del Commercio e dell'Artigianato of 4 August 1994, amending Delibera CIP 9/1992

<sup>21</sup> The Sulcis area has estimated reserves between 600 000 and 1 000 000 million tonnes- equivalent to 180 to 430 Mtep. The Nuraxi Figus mine alone has verified reserves of 50 million tonnes, equivalent 21.5 Mtep.

<sup>22</sup> See footnote 3.

supercritical cycles or equivalent. The Commission notes that the supercritical cycles technology is widely available and does not go beyond the state of the art<sup>23</sup>. The requirement of the use of co-generation technology does not appear, either, in the tender conditions. Besides, in the original project all of the electricity was to be purchased by ENEL, whereas in the new project, only part of it would be bought up by the GSE.

- 54) It appears, in fact, that the only provisions of the 1994 Decree which would continue to apply are the level of the guaranteed price and the environmental standards to be met by the plant, which are at any rate much less difficult to achieve today than they would have been 14 years ago.
- 55) In the light of the above, the Commission concludes that the project introduced by Act 80/2005 and further specified in the tender documentation is substantially different from the original Sulcis project laid down in the 1994 Decree, so that, even if the 1994 project constituted existing aid, which, as demonstrated below, is not the case, this conclusion could not apply to the new project.

*The 1994 project is not existing aid*

- 56) In order to carry out a complete analysis of the arguments put forward by the Italian authorities, the Commission has examined the argument that the 1994 project was approved by the Commission and that approval would still be valid.
- 57) The Commission points out that, even though the project was included in the Structural Funds Operational Programme for Sardinia 1994-1999, the 1994 Decree was neither notified nor approved under the State aid rules. Besides, the project was later cancelled from the Operational Programme.
- 58) Moreover, Italy should have adapted its existing environmental aid schemes following the adoption, in 2001, of the Guidelines on State aid for environmental protection<sup>24</sup>. The measure at hand, however, was never adapted. Therefore, even in the hypothesis that the measure might have constituted existing aid beforehand, which, as it explained above, is clearly not the case, the measure could not in any event be regarded as existing aid after the expiry of the deadline for adaptation to the 2001 Guidelines (1 January 2002).
- 59) On this point, Italy submits that it was not necessary to implement appropriate measures on the basis of the 2001 Guidelines, since the integrated concession "cannot be classified exclusively as environmental aid". According to Italy, "the environmental protection objectives for the Sulcis area are met through measures of various type which are not covered exclusively by the environmental guidelines". Notwithstanding this claim, Italy argues that the whole integrated project can, in fact, be seen as remediation of industrial sites which would be covered by the environmental guidelines.
- 60) The Commission notes that the original 1994 Decree assimilated Sardinian coal to a renewable source of energy, and that this assimilation was the rationale for granting State support. State aid in favour of environmental protection, and in particular of renewable energy sources is, as a matter of principle, covered by the environmental guidelines. Therefore, the Commission cannot follow Italy's reasoning, especially in

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<sup>23</sup> The notion of "state of art" is used to identify technologies which are commercially widely available and do not entail excessive costs for undertakings.

<sup>24</sup> OJ C 37 of 3.2.2001 p. 3. The Commission asked Italy whether it accepted the appropriate measures concerning the new Guidelines on State aid for environmental protection by letter of 20 February 2001. Italy accepted such appropriate measures by letter of 5 April 2001.

view of the Italian authorities' contradictory allegation that, in fact, the whole project should be seen as a form of environmental aid. Besides, the argued remediation aspect of the project would, indeed, be covered by the environmental guidelines.

*Other provisions of Regulation No 659/1999 on existing aid*

- 61) The notion of existing aid is defined in Article 1, letter (b) of Council Regulation No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 93 of the EC Treaty<sup>25</sup> (hereinafter: the procedural regulation). The Commission has examined whether the project at issue would fall in one of the categories of existing aid established by the procedural regulation.
- 62) The Commission notes that the measure introduced by Act 80/2005 was not put into effect before Italy's accession to the EU. It was never authorized by the Commission or the Council under the State aid rules, as explained in point 57) *supra*. The measure cannot be deemed authorized pursuant to Article 4(6) of the procedural regulation (concerning notified aid cases where the Commission did not take a decision within the two-month deadline). The measure does not concern unlawful aid for which the limitation period of 10 years has elapsed. Having regard to the nature of the measure, it can be concluded that it has always constituted State aid, and therefore the provision concerning measures which did not constitute aid at the time they were put into effect but became aid due to the evolution of the common market is not applicable.
- 63) The Commission has therefore come to the conclusion that the Sulcis project constitutes new aid.

**Legality of the aid**

- 64) Since the measure has not been notified to the Commission according to Article 88(3) of Regulation (EC) No 659/1999, the aid is unlawful.

**Compatibility of the aid**

- 65) The Commission has doubts that the proposed aid would be compatible with the common market.

*Aid to the concessionaire*

- 66) Having regard to the form of the aid, a feed-in tariff not related to a specified set of eligible expenses, the Commission considers that the proposed aid in favour of the Sulcis project constitutes operating aid.
- 67) Since operating aid can be authorized in exceptional circumstances, for example where it is related to environmental protection, the Commission has assessed whether the project could be found compatible as environmental aid in the light of the new Community Guidelines on State Aid for Environmental Protection<sup>26</sup> (hereinafter: the environmental guidelines).
- 68) Firstly, it should be noted that coal is a non-renewable fossil fuel, and therefore coal-fired power plants cannot be subsidized on the basis of the State aid rules applicable to operating aid for power production from renewable energy sources. The project will not

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<sup>25</sup> OJ L 83, 27.3.1999, p. 1.

<sup>26</sup> OJ C 82, 1 April 2008, p. 1-33.

use the co-generation technology, and the Italian authorities have not demonstrated that the project would lead to energy savings. It follows that the aid measure at hand cannot be considered by the Commission as complying with any provision on operating aid laid down in the environmental guidelines.

- 69) Based on the tender documentation submitted by the Italian authorities, the proposed power plant would meet emission standards which are more stringent than the Community's mandatory standards. Therefore, were the aid granted in the form of investment aid, linked to the extra investment costs, the plant could potentially qualify for investment aid for going beyond mandatory standards on the basis of point 3.1.1 of the environmental guidelines. The conditions set out in the environmental guidelines for this type of aid are:
- a. Aid intensity must not exceed 50% of the eligible costs;
  - b. The eligible costs must be limited to the extra investment costs necessary to achieve a higher level of environmental protection. The cost of the investment must be established by reference to a credible counterfactual situation, and operating costs/benefits must be taken into account.
- 70) Italy has not demonstrated compliance with any of these criteria of the Guidelines. Furthermore, Italy would have to clarify which combustion technology the new power plant will be using in order to enable the assessment of its performance vis-à-vis the emission levels associated with the Best Available Techniques (BAT) as set out in the LCP BREF.
- 71) The Italian authorities maintain that the integrated concession project may be considered compatible with the provisions of the environmental guidelines concerning the remediation of polluted industrial sites, since it contributes to improving the environment by avoiding its further degradation. The Commission notes that the substantive rules of point 3.1.10 of the environmental guidelines are not complied with. In particular, the Italian authorities have not demonstrated compliance with any of the conditions for granting such aid, notably the polluter pays principle and the requirement to clearly identify and calculate the eligible costs linked to remediation works (expenditure incurred for remediation less the increase in value of the land). It would be necessary for Italy to draw a clear distinction between aid granted for the generation of electricity and aid towards the remediation of polluted sites, and reference should be made to eligible expenses. Since compliance with the polluter pays principle is one of the main criteria for authorizing such aid, Italy would have to demonstrate that the mining company responsible for the pollution cannot be brought to bear the remediation costs under national legislation. Besides, in the tender documentation there is no indication that the concessionaire would commit to carry out remediation work other than the ordinary management of its mine waste.
- 72) Sardinia is currently an assisted region under Article 87(3)(c) of the EC Treaty. Therefore, the concessionaire could receive regional investment aid under the Guidelines on National Regional aid for 2007-2013<sup>27</sup> (hereinafter: the Regional aid Guidelines), provided the conditions specified therein were fulfilled. However, neither the power plant, nor the energy intensive industries could benefit from operating aid under the Regional aid Guidelines, as this type of aid can be authorized only in regions

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<sup>27</sup> OJ C 54, 4.3.2006, p. 13

assisted under Article 87(3) (a) and by way of exception. In any event, Italy has not provided any regional justification for the aid.

- 73) State aid may be granted for access to indigenous coal resources based on Council Regulation (EC) No 1407/2002 of 23 July 2002 on State aid to the coal industry<sup>28</sup>. However, by the time the power plant becomes operational (presumably not before the end of 2010) it will no longer be possible to pay aid under Article 5 of the Coal Regulation. In addition, the Coal Regulation is set to expire on 31 December 2010<sup>29</sup>. Therefore, this legal basis for assessment cannot be relied upon to declare the aid compatible. In any event, Italy has not demonstrated compliance with its provisions.
- 74) Theoretically, State aid may also be approved if the exploitation of indigenous coal is linked to a genuine service of general economic interest (Article 86(2) of EC Treaty in conjunction with Directive 2003/54/EC). However, the connected public service obligations must be legally entrusted, there must be clear evidence that the extraction and use of Sulcis coal for power generation would entail extra costs for the concessionaire and the parameters for compensation should be established ex-ante on the basis of such extra costs. These conditions are not fulfilled in the case at hand. Besides, the Commission considers that the Italian authorities can address the potential issue of security of supply with smaller distortion of competition on the Sardinian electricity market than it would be the case with State aid to the new Sulcis integrated power plant. The new power plant would just exacerbate overcapacity issues in the Sardinian electricity market while there seems to be no objective need for a new power plant for ensuring the use of Sardinia's coal reserves. (cf: already today coal from Nuraxi Figus coalfield is supplied to ENEL's coal powered plants).
- 75) As regards aid in favour of Sardinian energy-intensive industries, the Commission notes that the measure will benefit the same industrial sectors and, *de facto*, the same undertakings for which Italy had introduced preferential electricity tariffs between 2004 and 2005 (Decree of 6 February 2004, Articles 11(11) and 11(12) of Act 80/2005). The Commission opened in-depth investigations on such aid measures in cases C 38/2004<sup>30</sup>, C 13/2006<sup>31</sup> and C 36/2006<sup>32</sup>, expressing serious doubts as to their compatibility with the common market.
- 76) The distortive effects of the proposed aid measure on competition on the downstream markets of the beneficiaries are identical to the effects of the preferential tariffs under investigation in the mentioned State aid cases. Operating aid in the form of preferential electricity tariffs leads to a direct reduction of production costs for the beneficiaries, which is particularly substantial in the case of energy-intensive industries. This worsens the competitive situation of EU undertakings active in the same sectors and located outside Sardinia.
- 77) The Commission has doubts that this measure would contribute to horizontal objectives, and that such contribution would outweigh the distortions of competition resulting from the aid.

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<sup>28</sup> OJ L 205 of 2.8.2002, p. 1.

<sup>29</sup> The Coal Regulation expires on 31.12.2010.

<sup>30</sup> Preferential electricity tariffs in favour of Alcoa, Portovesme, ILA and Euroallumina;

<sup>31</sup> Preferential electricity tariffs in favour of Portovesme, ILA, Euroallumina and Syndial;

<sup>32</sup> Preferential electricity tariff in favour of Alcoa, Thyssen-Krupp, Cementir and Nuova Terni Industrie Chimiche.

#### **IV. LAUNCH OF THE SUSPENSION INJUNCTION PROCEDURE**

- 78) The aid will be paid out by Italy in the form of subsidized electricity purchases only after the Sulcis power plant has become operational. However, Italy has already held one tender with a view to granting the Sulcis concession, and is preparing to hold a second tender. Since the concession spells out in detail the terms of the agreement, including the exact financial commitments entered into by the parties, it may produce legally binding effects. Should the Commission come to the conclusion that the unlawful aid Italy intends to grant is not compatible with the common market, the Italian authorities would have to annul the concession. This may trigger legal action and produce damage to the concessionaire, the Italian authorities or any third parties involved, in particular if work has already started on the power plant or the management of the coal mine. Therefore, the Commission considers it necessary to prevent any further steps in the procedure.
- 79) Therefore, in accordance with Article 11(1) of Regulation (EC) No 659/1999, the Commission has decided to launch the procedure with a view to issuing a suspension injunction and invites Italy to submit its comments.

#### **V. DECISION**

- 80) 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/measure, 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 recipients of the aid immediately.
- 81) 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.
- 82) The Commission also invites Italy in accordance with Article 11(1) of Regulation (EC) No 659/1999, to submit its comments on the Commission's intention to adopt a suspension injunction requiring Italy to immediately cease any action which would lead to further implementation of the project as currently foreseen.
- 83) 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 Union*. 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 Union* 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 Registry  
B-1049 Brussels  
Fax No: + 32-2-296 12 42

Yours faithfully  
For the Commission

*Neelie KROES*  
Member of the Commission