II

(Acts adopted under the EC Treaty/Euratom Treaty whose publication is not obligatory)

DECISIONS

COMMISSION

COMMISSION DECISION

of 20 November 2007

on the State aid C 36/A/06 (ex NN 38/06) implemented by Italy in favour of ThyssenKrupp, Cementir and Nuova Terni Industrie Chimiche

(notified under document number C(2007) 5400)

(Only the Italian version is authentic)

(Text with EEA relevance)

(2008/408/EC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community, and in particular the first subparagraph of Article 88(2) thereof,

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

Having called on interested parties to submit their comments pursuant to the provisions cited above [1] and having regard to their comments,

Whereas:

I. PROCEDURE

(1) In framework of case C 13/06 (ex N 587/05) — Preferential Electricity Tariff in Sardinia, the Commission became aware of the extension of two measures granting a preferential electricity tariff. The extension was granted by virtue of Article 11, paragraph 11 of *decreto-legge* No 35/2005, converted into Law 80 of 14 May 2005 (hereinafter Law 80/2005) and was implemented without prior notification to the Commission. The beneficiaries are the aluminium producer Alcoa and the three successor companies of Società Terni: Terni Acciasi Speciali, Nuova Terni Industrie Chimiche and Cementir (hereinafter 'the Terni companies').

(2) By letter dated 23 December 2005 the Commission requested information from Italy, which replied by letter dated 24 February 2006. By letters dated 2 March 2006 and 27 April 2006, Italy provided additional information.

(3) By letter dated 19 July 2006, the Commission informed Italy that it had decided to initiate the procedure laid down in Article 88(2) of the EC Treaty in respect of both schemes (Case C 36/06).

(4) The Commission Decision to initiate the procedure was published in the *Official Journal of the European Union* [2]. The Commission invited interested parties to submit their comments on the measures.

(5) Italy submitted observations by letter dated 25 October 2006. Further information was submitted by letters dated 9 November 2006 and 7 December 2006.

(6) The Commission received comments from interested parties. It forwarded them to Italy, which was given the opportunity to react. Italy's comments were received by letter dated 22 December 2006.

[1] OJ C 214 of 6.9.2006, p. 5.

[2] See footnote 1.

(7) By letter of 20 February 2007, the Commission requested further information, which was provided by Italy by letters dated 16 April 2007, 10 May 2007 and 14 May 2007.

(8) On 18 September 2007 the file was split into part A, which deals with the three companies resulting from the splitting of Società Terni (the Terni companies) and part B, which concerns Alcoa. This decision concerns exclusively the extension of the preferential tariff in favour of the Terni companies.

(9) The exchanges of correspondence which concern Alcoa are not quoted here.

II. DETAILED DESCRIPTION OF THE MEASURE

(10) Article 11, paragraph 11 of Law 80/2005 provides for the extension in time of two measures granting reductions of the general electricity tariff. The beneficiaries of these two measures, which are different in nature and will be dealt with separately, are aluminium-producer Alcoa on the one hand, and three companies resulting from the splitting up of Società Terni, on the other.

The original measure and its first extension

(11) Italy nationalised its electricity sector by law No 1643 of 6 December 1962 (hereinafter the nationalisation law). The law provided for the transfer of Italy's existing power plants to the newly created State-owned company ENEL, which was to hold a monopoly in the production, distribution and supply of electricity.

(12) At the time of nationalization, Società Terni was a State-owned company active in the manufacturing of steel, cement, and chemicals. The State exercised effective control over the company via a majority stake in its capital, held by the State holding IRI and the State-owned Finsider group. Società Terni also owned and operated a hydropower plant. Most of the electricity produced was tused to power the company's manufacturing processes.

(13) The nationalisation law laid down that, as a general rule, companies which produced electricity primarily for self-consumption (*self-producers*) were excluded from nationalisation and were permitted to retain their power generating assets ([3]). Società Terni's electricity assets were nationalized in spite of the company's status as a self-producer because they were strategically located on the Italian territory. The transfer to ENEL was laid down in Article 4, paragraph 5, fourth indent of the nationalization law.

(14) By Presidential Decree No 1165/63, Italy granted the company compensation for the transfer of its electricity assets. The compensation took the form of a preferential electricity tariff which was to apply from 1963 to 1992.

(15) In 1964, Società Terni was split up into three companies: steel-maker Terni Acciai Speciali, chemical manufacturer Nuova Terni Industrie Chimiche and cement manufacturer Cementir. These undertakings were later privatized and acquired by ThyssenKrupp, Norsk Hydro and Caltagirone, respectively.

(16) As indicated in point (1) of this decision, these successor undertakings will be collectively referred to as '*the Terni companies*' whereas the original company will be referred to as '*Società Terni*'. The tariff applicable to Società Terni first, and to the Terni companies later, will be referred to as '*the Terni tariff*'.

(17) The preferential tariff continued to apply, under the same conditions, to the three Terni companies. The main beneficiary (in terms of the quantity of subsidized electricity, both in absolute terms and also as a proportion of the company's total electricity consumption) is ThyssenKrupp.

(18) The duration of the special tariff coincided with the general duration of hydro-electric concessions ([4]) in Italy, which were to expire in 1992. Società Terni's own hydroelectric concession had been granted for an exceptional duration of 60 years (against the normal 30 years) and was to expire at the end of the 1980s.

(19) In 1991 Italy extended existing hydroelectric concessions until 2001 by Law No 9 of 9 January 1991 'Implementing provisions for the new National Energy Plan: institutional aspects, hydro power plants and networks, hydrocarbons and geothermal energy, self-producers and fiscal provisions' (hereinafter Law 9/1991). By virtue of Article 20, paragraph 4 of Law 9/1991, Italy also prolonged until 2001 the preferential tariff for the Terni companies. Over the subsequent six years (2002-2007) the quantities of subsidized electricity supplied to the Terni companies were to be gradually reduced (phased-out), so that the tariff advantage would disappear by the end of 2007.

([3]) Article 4, paragraph 6, first indent, letters (a) and (b) of Law 1643/62.

([4]) Companies which exploit public water to generate power operate on the basis of a concession (*concessione di derivazione idroelettrica*) which is temporary. Its duration (generally thirty years in Italy) is sufficiently long to allow companies to defray their investment costs. As concessions expire, they should be awarded again on the basis of a transparent selection procedure.

(20) Law 9/1991 included a large number of provisions, some of which involved State aid. Law 9/1991 was submitted to the Commission together with Law 10/1991 'Implementing provisions for the National Energy Plan as regards energy efficiency, energy savings and the development of renewable energy sources'. The Commission declared compatible the aid contained in both laws under the State aid rules in 1991 ([5]).

Structure of the Terni tariff

(21) The conditions of Società Terni's preferential tariff were established in Articles 6, 7 and 8 of Presidential Decree No 1165/63 Transfer to Ente Nazionale per l'Energia Elettrica of the assets used for the activities mentioned in Article 1(1) of Law No 1643 of 6 December 1962 carried out by 'Terni-società per l'Industria e l'Elettricità S.p.A.' (hereinafter DPR 1165/1963). DPR 1165/1963 laid down that ENEL would supply Società Terni with a fixed amount of electricity (1 025 000 MWh a year) which was the equivalent of the company's electricity consumption in 1961, plus an extra amount (595 000 MWh a year) which corresponded to its additional expected consumption resulting from investments undertaken but not yet completed in 1962.

(22) The preferential price was calculated by comparing two alternative methods and applying whichever was more favourable to the company:

(a) Alternative 1 was based on the average electricity price paid by Società Terni's manufacturing branches to the company's electricity branch (corresponding to the production cost of Terni's own hydroelectric plant);

(b) Alternative 2 was linked to ENEL's reference price for a customer having the same profile (self-producer) as Società Terni.

(23) In practice, the first method was used until 2000, when changes in the Italian tariff structure due to the liberalization of the electricity market made it necessary to switch to the second method.

(24) In 1997 began the overhaul of the tariff structure, with the introduction of a structured tariff consisting of two parts: Part A representing fixed and general costs and Part B reflecting variable costs. As of 1 January 2000, the Terni tariff was awarded in the form of a compensatory component (*componente compensativa*) calculated as the sum of all components of the tariff which Terni, as a (virtual) self-producer, was not required to pay (the whole of part B and a fraction of part A). This method corresponds to the second of the alternative methods described in Decree 1165/63.

(25) The gradual reduction of the quantities of electricity and power delivered to the Terni companies at the preferential price during the phasing-out period (2002-2007) is shown in the table below:

Year	GWh	MW
2001	1 620	270
2002	1 389	231
2003	1 157	193
2004	926	154
2005	694	116
2006	463	77
2007	231	39

The second extension of the tariff

(26) By Article 11, paragraph 11 of Law 80/2005, Italy decided to interrupt the phasing-out and extend again the Terni tariff arrangement until 2010. Article 11, paragraph 13 of the Law made this measure applicable as of 1 January 2005. Shortly afterwards, ordinary hydroelectric concessions were extended until 2020 ([6]).

(27) The second extension of the tariff is the measure on which the Commission has opened the formal investigation procedure pursuant to Article 88(2) of the Treaty and which is the object of this decision.

(28) Law 80/2005 laid down that, until 2010, the Terni companies will benefit from the same treatment they enjoyed on 31 December 2004 in terms of quantities supplied (926 GWh for the three Terni companies) and prices (1,32 eurocents/kWh). The quantities of supplied electricity are currently broken down as follows: Thyssen-Krupp 86 %, Nuova Terni Industrie Chimiche 10 % and Cementir 4 %.

(29) Law 80/2005, as interpreted and implemented by the AEEG, also introduced an indexation mechanism whereby, as of 1 January 2006, the preferential tariff would increase yearly in line with price increases recorded on the European Power Exchanges of Amsterdam and Frankfurt, subject to a 4 % cap.

([5]) State aid NN 52/1991, letter SG (91) D/15502.

([6]) Article 1, paragraph 285 of Law 266/2005.

Financing mechanism

(30) The Terni preferential tariff was initially managed and paid for by the State-owned company ENEL, which held a monopoly position in the generation, transmission, import, distribution and supply of electricity in Italy.

(31) In 2002, as the electricity market was gradually liberalized and ENEL no longer held a monopoly position, the financial burden arising from the preferential tariff systems was transferred from ENEL to all electricity users ([7]). The compensatory components due to the Terni companies were advanced by electricity distributors, who were then reimbursed by the State-owned body *Cassa Conguaglio per il Settore Elettrico* (Equalisation Fund for the Electric Sector, hereinafter referred to as '*Cassa Conguaglio*') by means of a parafiscal levy collected via the A4 component of the electricity tariff, which is one of the cost items that appear on the electricity bill.

(32) In 2004 the AEEG decided to hand over the administrative management of the special tariff schemes entirely to *Cassa Conguaglio* ([8]). As of September 2004, the Terni companies pay the market price for the electricity they purchase (on the liberalized market) and receive from *Cassa Conguaglio* reimbursement corresponding to the difference between the price paid and the preferential price to which they are entitled (the compensatory component) minus charges for transport, measurement and sales. The costs are paid for by electricity consumers in Italy by means of the parafiscal levy mentioned in paragraph (31) above.

The guarantee imposed by the AEEG

(33) After the Commission initiated the formal investigation procedure, the AEEG, by Delibera 190/06, made payments under Law 80/2005 conditional upon the provision, by the Terni companies, of a guarantee to cover the risk of recovery of the aid.

(34) In the same *Delibera*, the AEEG foresaw, as an alternative, the possibility to pay out in 2006 as an advance the amounts of aid which would have become due until the end of the previous arrangement (2007) on the basis of Law 9/1991. For these amounts, the AEEG did not request a guarantee. This option was taken up by the Terni companies and implemented by the AEEG.

([7]) *Delibera* AEEG No 228/01.
([8]) *Delibera* AEEG No 148/04.

(35) With the exception of the advance payments mentioned in paragraph (34) above, all other payments made to the companies by *Cassa Conguaglio* under Law 80/2005 are covered by a guarantee.

III. DECISION TO INITIATE PROCEEDINGS UNDER ARTICLE 88.2 OF THE EC TREATY

(36) The Commission Decision to initiate a formal investigation was based on the grounds described in points (37) to (41).

(37) The Commission expressed doubts as to whether the tariff could be considered a compensatory measure, since Società Terni was a State-owned undertaking at the time of nationalization. Given that the State cannot expropriate itself, the Commission had doubts that the transfer of Società Terni's assets to ENEL could be construed as an expropriation entitling Società Terni to compensation, and formulated the hypothesis that such transfer could in fact be regarded as a mere restructuring of the State's own assets.

(38) The Commission took the view that, even if the compensatory nature of the measure were to be conceded, doubts would still persist as regards the proportionality of this compensation with regard to the financial damage suffered by Società Terni. The Commission in particular expressed doubts that compensation could still be justified after 44 years.

(39) The Commission pointed out that the nature of the tariff appeared to have changed when ENEL stopped administering the scheme and bearing the financial burden arising from it.

(40) The Commission Decision to open the procedure also relied on ECSC Decision 83/396: Commission Decision of 29 June 1983 concerning aid the Italian government intends to grant to certain steel producers ([9]), which precluded such aid from being granted to Società Terni, and the judgment of the Court of Justice in case C 99/92 ([10]), where the Court upheld the aforementioned ECSC Decision, as evidence that the Terni tariff had already been found to constitute State aid.

([9]) OJ L 227, 19.8.1983, p. 24.
([10]) Sentence of the ECJ in *Terni SpA and Italsider v. Cassa Conguaglio per il settore elettrico*, reference for a preliminary ruling, Case C 99/92, [1994] ECR p. I-00541.

(41) The opening decision also pointed out that ThyssenKrupp has not yet repaid a State aid granted by Italy and which was declared incompatible [11], and therefore, pursuant to the *Deggendorf* [12] case-law, could not receive any further State aid.

IV. COMMENTS FROM INTERESTED PARTIES

Comments from the Terni companies

(42) Most of the observations submitted by the Terni companies on Società Terni's functioning as *ente pubblico economico*, the nature of the operation leading to the transfer of the company's assets, the compensatory nature of the tariff, the interpretation of the ECSC decision and ECJ ruling as well as the role played by *Cassa Conguaglio* are largely equivalent to those made by Italy, which are summarized in points (52) to (69). Therefore, only the main thrust of the Terni companies observations and any additional elements submitted will be reported here in points (43) to (51).

Nature of the compensation

(43) According to the Terni companies, the tariff is the legitimate compensation to which Società Terni was entitled following the expropriation of its assets and cannot therefore be qualified as State aid.

Adequacy of the compensation

(44) Concerning the adequacy of the compensation, the Terni companies retrace the history of the tariff, pointing out that all the extensions of the Terni tariff beyond 1991 were concomitant with the general renewal of the hydroelectric concessions for other generators, and thus in line with the principle that there should be no discrimination between Terni and other self-producers who had not been expropriated and who could therefore continue to produce and consume electricity at very low cost.

(45) The Terni companies also point out that the financial amounts received in the form of lower electricity tariffs never exceeded the difference between the cost of acquiring energy on the market and the cost of self-produced electricity.

Impact on trade

(46) The Terni companies claim that the measure has no impact on trade between Member States for the reasons summarized below:

(a) Cementir: In its Spoleto plant (the plant which benefits from the tariff) Cementir produces and markets mainly cement, which is used the construction industry. Cement is difficult to substitute with other products. Since it is uneconomical to transport, the geographic market for cement is regional or multi-regional. Imports of cements are negligible in Italy, since they account for 5 % of overall demand in Italy and Cementir markets all the production of its Spoleto plant in central Italy;

(b) Nuova Terni Industrie Chimiche: The plant which benefits from the tariff produces ammonia and nitric acid. Ammonia can be economically transported only by sea and provided ports are suitably equipped for its storage. There are no such storage plants in central Italy. The same applies to nitric acid. Therefore, the Terni companies claim that the geographic market is at best national. National demand is fully met by domestic production and there are no trade flows;

(c) ThyssenKrupp: the Terni companies claim that the market for the distribution (not the production or sale) of steel products is national. In particular, ThyssenKrupp's Terni plant markets only 6 % of its production in the European Union.

Legitimate expectations

(47) The Terni companies claim legitimate expectations on two grounds:

(a) firstly, the Italian authorities had explicitly confirmed, in a letter to the AEEG, that the nature of the tariff was compensatory and that the extension of the existing tariff scheme was not subject to prior notification to the Commission under the State aid rules [13];

(b) secondly, the Commission had not called the measure into question, either when it was first prolonged by Law 9/1991 (approved in the context of case NN 52/1991), or when information on the second extension was submitted in the context of another State aid procedure (C 13/06).

[11] Commission Decision SEC/1999/687 of 11 May 1999 in Case C 49/98, Measures in favour of employment, Articles 15 and 26 of Law 196/97, OJ L 42, 15.2.2000, p. 1-18.

[12] Sentence of the ECJ in Deggendorf v. Commission, Case C-355/95 [1997] ECR p. I-02549.

[13] Communication of 16.12.2005 of the Ministry for productive activities to the AEEG.

State aid clearance of the second extension

(48) The Terni companies further submit, in this context, that when Article 11, paragraph 12 of Law 80/2005 (establishing a preferential tariff for certain energy-intensive companies in Sardinia, case C 13/06) was notified to the Commission, the Italian authorities had submitted information and clarifications also on the Terni tariff, so that the notification might be considered complete within the meaning of Article 4, paragraph 5 of Regulation EC 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 93 of the EC Treaty ([14]). The Commission had failed to take a decision within two months, and therefore, even if the tariff was to be considered State aid, *quod non*, it should be deemed to be authorized on the basis of Article 4, paragraph 5 of Regulation N 659/1999 ([15]).

(49) The Terni companies underline that their good faith is substantiated by the fact that, in case of doubts on the compatibility of the tariff, ThyssenKrupp would certainly not have launched large-scale investments in the Terni area.

Amounts received

(50) The Terni companies point out that, in the absence of Law 80/2005, they would have benefited until 31 December 2007 from the preferential tariff on the basis of Article 20, paragraph 4 of Law 9/1991 (approved by the Commission). The AEEG authorized *Cassa Conguaglio* to pay out in 2006 (as advance payment) only the sums which would have become due in 2007 ([16]). Therefore, the amounts received until 31 December 2006 should be considered authorized. According to the companies, the provisions of *Decreto-legge* No 80/2005 have *de facto* not been implemented in respect of these amounts.

Deggendorf case-law

(51) Concerning the *Deggendorf* case-law, ThyssenKrupp states its willingness, in principle, to repay the aid, subject to agreement being found on the amount to be recovered.

V. **COMMENTS FROM ITALY**

Expropriation of Terni's assets and its entitlement to compensation

(52) Italy submits that Terni's generating assets were nationalized as an exception to the general rule set out in the nationalization law, according to which self-producers would not be subject to expropriation. The nationalization law of 1962 was based on Article 43 of the Italian Constitution, according to which certain undertakings which carry out services of fundamental public interest or in the energy sector may be transferred to the State by way of expropriation, provided compensation is granted.

(53) Concerning the Commission's doubts as to the possibility to expropriate assets belonging to a State-owned company, Italy submits that neither Article 42, nor Article 43 of the Constitution limit the notion of expropriation to privately owned property. The expropriation of Società Terni's electrical branch was legally required, according to Italy, because Terni was controlled by an '*ente pubblico economico*', which, unlike an '*ente pubblico*' was obliged to operate according to market principles. The nationalization law did not envisage any compensation for undertakings managed by public entities *strictu sensu*, but it did for Terni in view of its different status and mode of functioning.

(54) As regards Terni's ownership structure, Italy underlines that Terni was a joint stock company (*società per azioni*) where the State had a majority stake, but equity was also owned by a large number of private investors. Italy has provided documentation showing that that Terni's capital was also partly in private hands and that the company was quoted on the stock exchange.

(55) According to Italy, depriving Terni of the same right to adequate compensation to which a private company would be entitled would have constituted a breach of the principle of neutrality of ownership enshrined in Article 295 of the EC Treaty.

(56) Italy quotes a number of rulings by the *Corte di Cassazione* and the *Consiglio di Stato* whereby these Courts confirmed that the logic of the tariff for Terni was to put the company on the same footing as self-producers of electricity from renewable sources of energy, and therefore the tariff could not be raised by means of supplements which would not apply to self-producers.

(57) As regards other electricity producers who were also expropriated, Italy submits that, with the exception of Terni, all expropriated producers were undertakings exclusively or primarily active in the production, import or supply of electricity. As a general rule, the compensation paid by the State reflected the market value of the assets, which was calculated in different ways according to the type of company. The net accounting value of the assets was taken as reference value, but was corrected on the basis of other factors which Italy did not identify in detail. For hydropower producers, the Italian observations suggest that the residual duration of the concession played a role in the calculation of the compensation.

([14]) OJ L 83, 27.3.1999, p. 1.
([15]) See footnote 14.
([16]) Delibera AEEG 190/2006.

Non-aid nature of Terni's tariff and its clearance under the State aid rules

(58) Italy submits that both the original tariff arrangement — which constituted Terni's legitimate compensation for the expropriation of its assets — and its further extensions in time do not constitute State aid. To substantiate this claim, Italy quotes a number of rulings of the European Court of Justice, which concern the non-aid nature of certain forms of compensation to undertakings ([17]), notably compensation for damages and services of general economic interest.

(59) As regards the State aid clearance of Terni's tariff, Italy underlines that Law 9/1991, laying down the first extension of the tariff, was duly notified to the Commission and approved by it. The subsequent extensions in time of the tariff, which are concomitant with the extensions of hydroelectric concessions for hydropower producers, follow the same logic, which was never challenged by the Commission. Therefore, according to Italy, the Terni tariff should be considered an existing non-aid measure.

(60) Italy submits that it has thus always acted in good faith. It did not notify under Article 88(3) the contested extension of the tariff arrangement for Terni since, in its view, it did not constitute State aid. Italy underlines that the Commission was informed of the existence of this measure (Report of November 2005 and letter of February 2006).

(61) As regards the policy reasons of the second extension, Italy submits that the tariff is necessary to establish a level-playing field between these energy-intensive companies active in Italy and their competitors in the EU ([18]), which also benefit from reduced energy prices (tariff or contract-based), pending the completion of ongoing infrastructure projects on electricity generation and transport. If the tariff was abolished, the companies in question would delocalize their operations outside the EU. This would inevitably lead to an industrial crisis and sever job losses in the affected regions. Therefore, according to Italy, the prolongation of the tariff should be seen as a transitional solution. Italy quotes the conclusions of the *High-level group on competitiveness, energy and environment* ([19]) which suggest, as a long-term solution, the improvement of interconnection and infrastructure, and, as a medium-term solution, long-term supply contracts and partnership between customers and energy suppliers/generators.

Absence of overcompensation

(62) As regards the absence of overcompensation, Italy makes the following observations. If Terni had retained its generating assets, it would have been able to sell part of its energy to third parties, thus obtaining additional profits. The damage suffered by Terni was compounded by the sharp increase, over the years, of electricity prices. The still incomplete process of liberalization of the energy markets has not yet delivered results in terms of competitive electricity prices, and therefore the need to continue compensating Terni persists. The Terni companies are currently paying a price (between 40 and 72 EUR/MWh) which is largely in line with electricity prices paid by companies with an equivalent consumption profile in the EU. In fact, if Terni had retained its assets, it would be paying between 5 and 7 euros per MWh of self-produced electricity. Italy thus concludes that the tariff does not involve any overcompensation.

(63) Italy has submitted a 'study' carried out by the private consultant *Energy Advisor S.r.l.* on behalf on the Terni companies. The study, which is perhaps better described as simple 'calculation', since it consists of one table with a few pages of methodological explanations, aims to assess the value of the electricity assets and compare this figure with the cumulative tariff advantage enjoyed by Terni. The study takes the book value of the electricity assets and actualizes it to 2006 in line with inflation. The study then calculates the net tariff advantage for Terni. For the period 1963-1999, the study considers the difference between the annual electricity costs of a comparable customer (Alternative 2) and the actual annual costs sustained by Terni on the 'own production costs' basis (Alternative 1). For the purpose of this calculation, a comparable customer is a self-producer of electricity (exempted, *inter alia*, from payment of the *sovrapprezzo termico*). For the period 2000-2006, the tariff advantage is calculated as the difference between the annual cost Terni would have sustained if the tariff was calculated on the basis of its own production costs (Alternative 1-no longer possible after the reform of the tariff) and the actual cost sustained by Terni on the basis of the 'comparable customer' method (Alternative 2). The results of the study are outlined below:

(a) Actualised value (2006) of Terni's assets: EUR 1 687 745 045,19;

([17]) Notably the following judgments: A.D.B.H.U., Case C 240/83 of 7.2.1985 ECR (1985) p 00531, Asteris, joint cases 106-120/87 of 27.9.1988, ECR (1988) p. 05515 Altmark, Case C-280/00 of 24/7/2003, (ECR 2003) p. I-07747; Ferring, Case C 53/00 of 22.11.2001, ECR (2001) p. I-09067.

([18]) Notably in France, Germany, Spain, Greece and Finland. Italy has provided a description of schemes allegedly in force in these countries in favour of energy-intensive industries.

([19]) First Report of the High Level Group '*Contributing to an integrated approach on competitiveness, energy and the environment policies — functioning of the energy market, access to energy, energy efficiency and the EU Emission Trading Scheme*' of 2 June 2006.

(b) Tariff advantage (also actualized to 2006): EUR 1 400 895 446,90.

(64) The study therefore contends that there has been no overcompensation of Terni's losses. A prospective calculation of the tariff advantage accruing to Terni until 2010 would also show the absence of overcompensation.

Irrelevance of the ECSC Decision and the ECJ Ruling concerning Terni

(65) Concerning ECSC Decision 83/396 and ECJ ruling C-99/92, Italy makes the following factual clarifications. The ECSC Decision does not concern either Cementir or Nuova Terni, which were never active in the steel sector. The ECSC Decision referred to the compatibility of of State aid granted in the form of reimbursement of a component of the tariff, the *sovrapprezzo termico* to the plant belonging to Terni's steelmaking branch, but located in Lovere, in Lombardy, not in the Terni area. This aid could be granted only to private steelmakers. The ECSC Decision ruled that, since Terni was State-owned, the Lovere plant could not benefit from the aid. The preliminary ruling of the Court of Justice concerned the issue of possible discrimination between private and State-owned producers. It confirmed the ECSC Decision in that it stated that it was not discriminatory to envisage different aid measures for private versus State-owned producers.

(66) Therefore, the Terni group submits that both the ECSC Decision and the Court ruling are irrelevant to the case at hand, in that they concern the *sovrapprezzo termico* paid by the Lovere plant, not the special global tariff granted to the three plants in the Terni area.

New investments planned by ThyssenKrupp in the Terni area

(67) Italy also underlines that the contested extension of the tariff laid down in Article 11, paragraph 11 of Law 80/2005 is linked to a wide-ranging program of investments which ThyssenKrupp is carrying out in the Terni-Narni industrial area. Under this action plan, new generating capacity will be developed in the area. The tariff is therefore meant as temporary solution until such generating capacity is in place, and its abolition would jeopardise the investments currently underway.

Role of Cassa Conguaglio and involvement of State resources

(68) On the nature and role of *Cassa Conguaglio*, Italy submits that it is a mere technical intermediary, whose role is confined to collecting and redirecting monetary flows. *Cassa Conguaglio* has no margin of manoeuvre in fixing the tariff and has no control over the funds. Therefore, according to Italy, (a) the resources handled by Cassa Conguaglio do not constitute State resources in the light of the case-law of the Court of Justice [20] and (b) the changes made to the administration of the special tariffs with the intervention of Cassa Conguaglio in 2004 have no impact on the compensatory nature of the tariff.

Deggendorf case-law

(69) On the Deggendorf case-law, Italy informs the Commission that it is carrying out the pending recovery order in respect of ThyssenKrupp, and that the company has set aside EUR 865 538,00 on a blocked account in view of final recovery, subject to agreement being found on the amount.

VI. ASSESSMENT OF THE MEASURE

(70) Compensation granted by the State for an expropriation of assets does not normally qualify as State aid. In the assessment of this measure, it is therefore necessary to ascertain first of all whether the transfer of Società Terni's hydropower assets to ENEL gave rise to an obligation to provide compensation, or whether it should be construed as a mere reorganisation of public assets. If the answer is that compensation was justified, the Commission must then determine until what date and/or what amount the Terni preferential tariff can be considered a commensurate compensatory measure.

Qualification as an expropriation and entitlement to compensation

(71) In 1962, when its hydropower assets were transferred to ENEL, Società Terni was a State owned company, controlled by an *ente pubblico economico*. According to the Italian authorities, such entities had to be managed according to market principles. The State was the majority shareholder in Società Terni, but part of the capital was also held by private investors and the company was quoted on the Stock exchange. The nationalization law did not foresee compensation for *enti pubblici* 'strictu sensu', but did so for *enti pubblici economici* such as Società Terni. This reflects the different principles which govern the functioning of these entities. Moreover, other 'pure' electricity producers were expropriated during the same period and also received compensation (although on the basis of different criteria).

[20] Judgement of the ECJ in Pearle and others, (Case C-345/02 [2004] ECR I-7139 and Preussen-Elektra, Case C-379/98 [2001] ECR I-02099.

(72) The Commission notes that the removal of Società Terni's assets without compensation would have damaged the interests of the company, and in particular those of its private shareholders. In the light of the principle of equality of treatment between private and public undertakings, and also in view of the need to protect the constitutional rights of Società Terni's private shareholders to receive compensation, the Commission considers that Italy's decision to treat Terni in the same way as a privately-owned company in the same position, and to grant it compensation for the removal of its assets, can be considered justified.

Compensatory nature of the tariff

The original compensatory arrangement

(73) In 1962, Italy decided not to compensate Società Terni up to a fixed amount based on the market value of the expropriated assets (contrary to what was done in the case of 'pure' electricity producers). Instead, the compensation took the form of the provision of a fixed amount of electricity at the price the company would have paid if it had retained its generating assets. It should be noted that this method made economic sense: the treatment of Società Terni as a 'virtual self-producer' of electricity had the advantage of neutralising the risk of additional damage that might have arisen to Terni, over the years, in case of an increase in energy prices, for example.

(74) The Commission can accept the principle of this method. However, compensation for an expropriation cannot consist in an open-ended arrangement, but must be clearly and predictably established at the time of the expropriation, subject to the possibility for the expropriated company to challenge the proposed amount. Once accepted, a compensatory package cannot be reopened at a later stage.

(75) In the case at hand, the overall amount of compensation depended on the duration of the tariff. The original compensatory package offered by the Italian authorities foresaw that the tariff would last thirty years and thus end in 1992. Società Terni could have challenged this mechanism under the nationalization law if it had considered it inadequate ([21]), but chose not to do so.

(76) The Commission has assessed whether, in view of its mechanism and duration, the original compensatory arrangement could be considered adequate.

([21]) The mechanism for challenging the amount of compensation was laid down in Article 5, paragraph 5 of the nationalization law.

(77) In Italy, the operation of a hydropower plant is subject to a concession, the duration of which is such as to allow the company to amortize the investment. When the concession expires, the company loses, in principle, the right to exploit its assets. Considering Terni's compensatory method, it made economic sense that the provision of electricity at production cost should not overrun the residual duration of the company's concession. And, indeed, this appears to be the rationale of the original provision of Italian law limiting the duration of the preferential tariff to 1992. While Terni's own concession would have expired already a few years earlier, it is conceivable that the Italian authorities intended to align the expiry of the Terni tariff with the general expiry of hydroelectric concessions in Italy in 1992. Moreover, Società Terni had been granted a particularly long concession (60 years instead of 30), and therefore, at the time of expropriation, the company had already had thirty years to amortize its investment.

(78) In conclusion, the Commission considers that the original compensatory package was commensurate and by no means penalized for the company.

(79) The crucial issue here is whether the repeated extensions of this tariff arrangement can still be considered part and parcel of the compensation. The Commission takes the view that this cannot be the case. When the State expropriates, it establishes ex-ante either an absolute amount of compensation or, as in the case at hand, a compensatory mechanism. Any ex-post revision of the amounts or the mechanism necessarily changes the nature of the measure, which can no longer be considered compensatory insofar as it departs from the original arrangement. To admit the contrary would result in the exclusion of this type of measures from the scope of State aid control.

(80) A Member State may, however, notify the Commission of its intention to grant further advantages to an expropriated company. Such notification will be examined by the Commission on its merits in the light of the State aid rules and taking into account the specific circumstances invoked.

The 'study'

(81) The study referred to in paragraph (63) purports to show that the compensation granted to Società Terni and its successor companies over the years did not fully cover the market value of the expropriated assets, and that therefore there was no overcompensation and the beneficiaries never *de facto* enjoyed an advantage.

(82) As a preliminary remark, the Commission would like to underline that an analysis of the adequacy of the compensatory agreement can only be carried out *ex ante*, that is, at the time of expropriation. In that context, it should be noted that the mechanism chosen by the Italian authorities aimed to put Società Terni in the same position as if its power plant had not been expropriated, by granting it access to electricity at cost price throughout the duration of its concession. Therefore, the argument that, under this arrangement, the Terni companies may have obtained less that what they were legitimately entitled to is difficult to follow. Besides, the Commission contends that, even if the findings of the study were substantiated (which is not the case, as demonstrated in points (88) to (92), that circumstance would be irrelevant for the purpose of establishing whether the tariff gave the beneficiaries an advantage.

(83) It should be recalled that, at the time of the expropriation, Italy could have chosen to compensate Terni by paying a fixed financial amount based on the value of the expropriated assets. However, Italy opted for a different method, which consisted in treating Società Terni as a virtual self-producer. This method made perfect economic sense, and it is within this reference framework that the presence of an advantage should be assessed. Following this approach, one must conclude that, until the expiry of the original compensatory tariff arrangement (and only until that date) the beneficiaries did not receive an advantage. This conclusion cannot be called into question as a result of applying alternative benefit and loss calculations, especially where these are carried out retrospectively.

(84) Using a different method retrospectively (*ex-post*) would lead to conflicting or even illogical results, as the following example will illustrate. Suppose that, due to an explosion in energy prices, the financial amounts received by the beneficiaries had already exceeded the market value of Terni's plant within the first 10 years of the tariff arrangement, following the study's methodology, it should be concluded that there was an overcompensation, even though the expropriation package foresaw that the tariff would last 30 years. This would be an obvious fallacy, since it would not take into account the *ratio* of the original arrangement. The same conclusion must apply *a contrario*, in the hypothesis that the actual amounts received fell short of covering the assets' value.

(85) Besides, in the context of an expropriation, an ex-post recalculation of benefits and losses is totally out of place. The long-term economic outcome for the expropriated company, which is unpredictable at the time of the expropriation, cannot be the object of revision, many decades later, in order to justify further tranches of compensation.

(86) Therefore, the study can be dismissed as irrelevant.

(87) The Commission has nevertheless examined the data and findings of the study. This analysis has shown that the study is methodologically flawed. As will be shown below, it systematically underestimates the tariff advantage for the Terni companies, and in all likelihood overestimates the value of the expropriated assets.

(88) In order to calculate the tariff advantage for the period 1963-1999, the study compares the price paid by Terni (Alternative 1-the cost of self-produced electricity) to the ordinary price paid by a *comparable* customer, meaning a self-producer who was exempt from certain tariff components (Alternative 2). The advantage is thus calculated as *the difference between the two alternative preferential treatments foreseen as compensation for Terni*. The Commission notes that, to calculate the tariff advantage, Terni's actual tariff should have been compared with the ordinary tariff payable by a *non self-producer* with Terni's consumption profile. The study therefore underestimates Terni's tariff advantage.

(89) For the period 2000-2006, the advantage is, again, taken to be the difference between the two preferential treatments, the only difference being that the actual price paid by Terni corresponds to Alternative 2 (and no longer Alternative 1, which was no longer possible after the reform of the tariff). Using this method, for some years the advantage even turns out to be negative, which demonstrates the flaws in the methodology, considering that the Terni companies always paid a tariff below the market price. In principle, for this period, the tariff advantage should have been simply equivalent to the compensatory component paid by Cassa Conguaglio. Therefore, the advantage is, again, very significantly underestimated.

(90) Another flaw in the study concerns the value of the assets. The study simply takes as the book value of the assets the difference between the item 'plant and machinery' in Terni's 1962 budget (the year before the nationalization) and the same item the following year. Firstly, it should be noted that there is no concrete proof that the difference is attributable exclusively to the loss of the hydro power plant. However, even if, *arguendo*, that book value could be accepted, the method used in the study would nonetheless be flawed. As confirmed by Italy, the real value of a hydro plant at the moment of an expropriation is linked to the residual duration of the underlying concession ([22]). Therefore, the book value of the plant should have been corrected to take this into account. In the study, the book value is simply actualized to 2006 in line with inflation. Therefore, there is evidence suggesting that the study overestimates the assets' value.

([22]) It should be noted that, under Italian law, when hydro-power concessions expire, the hydropower company loses ownership rights on part of its assets, notably certain engineering works, which automatically revert to the State.

(91) In conclusion, the study can be dismissed altogether.

The extensions of the tariff

(92) As regards the extensions in time of the Terni tariff, the Commission appreciates that their rationale was to retain the parallelism in treatment with those hydropower producers who had seen their concessions renewed. However, such parallelism, which lies at the heart of the compensatory mechanism, was foreseen in the expropriation arrangement only for 30 years, not indefinitely. Therefore, for the reasons already explained in paragraphs (73) to (78) above, these extensions did not have a compensatory nature.

(93) This conclusion is even more obvious for the second extension of the tariff. This extension interrupted a phasing-out mechanism intended to ease the companies' transition to the full tariff, which signalled the Italian authorities' conviction that the companies had been fully compensated for. Italy itself has, indeed, extensively explained the reasons which led to this second extension, and which are related to industrial policy alone (see Italy's comments in paragraph (61) above).

Conclusions on the compensatory nature of the tariff

(94) In the light of the above, the Commission considers that the Terni tariff can be considered compensatory until 1992. Until that date, the measure does not qualify as State aid. All further extensions of the tariff, however, must be examined in the light of the State aid rules.

Presence of aid within the meaning of Article 87(1) of the EC Treaty

(95) The Commission has therefore assessed whether the preferential tariff granted to the Terni group after 1992, and in particular as of 1 January 2005, date of entry into force of Article 11, paragraph 11 of Law 80/2005, which is the object of these proceedings, constitute State aid within the meaning of Article 87(1) of the EC Treaty.

(96) In this context, the Commission takes note of the Italian clarifications as regards the irrelevance of the ECSC Decision 83/396 and Court judgment C 99/92 and can agree that such decisions have no bearing on the assessment of the State aid nature of the tariff granted to the three plants in the Terni area.

(97) 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.

Advantage

(98) In the light of the reasoning developed in points (73) to (94), the Commission has come to the conclusion that the preferential tariff for Terni did not provide an advantage to the beneficiaries throughout the duration of the original compensatory package, that is, until 1992. Therefore, only the extensions of the tariff have to be assessed in order to ascertain the presence of an advantage.

(99) There can be no doubt that the provision of electricity at lower prices compared to the ordinary electricity tariff constitutes a clear economic advantage for the beneficiaries, who see their production costs reduced and their competitive position strengthened.

Selectivity

(100) Since this particular tariff arrangement applies only to the Terni group, the measure is selective.

Financing through State resources and imputability to the State

(101) As regards the financing through State resources, it should be noted that, as of 2002, the financial burden arising from the tariff is borne by all electricity consumers in Italy by means of a parafiscal levy collected by *Cassa Conguaglio* via the A4 component of the electricity tariff. Such levy is obligatory as it imposed by means of *Delibere* of the AEEG which implement national legislation. *Cassa Conguaglio* is a public body established by law, which carries out its functions on the basis of precise instructions laid down in the *Delibere* of the AEEG and the relevant legislative and regulatory provisions.

(102) It is settled case-law that, the yield of a levy which is obligatory under national law and is paid to a public body established by law constitutes State resources within the meaning of Article 87(1) of the Treaty when it is earmarked for the financing of a measure which fulfils the other criteria of that Article ([23]).

([23]) See judgments of the ECJ in Steinike & Weinlig, C-78/76, [1977] ECR p. 595 and in French Government v. Commission, Case C-47/69 [1970] ECR p. 00487.

(103) In paragraph (68) above, Italy quotes *Pearle* ([24]) in order to substantiate its claim that the resources transiting through Cassa Conguaglio do not constitute State aid. In *Pearle*, the Court found that under certain, precisely defined circumstances, the resources of a levy which transited through a public body could not be considered State resources. In Pearle, the measures were financed entirely by an economic sector, at the initiative of that sector, by way of a levy which merely transited through a public body and the the subjects paying the levy were identical to those who received the benefits of the aid measure. The Commission contends that the case at hand is manifestly different. The Terni tariff was established at the initiative of the State, (not an economic sector), the beneficiaries of the tariff do not bear any of the financial burden of the levy, which rests solely on electricity consumers, and the State can, at any time, give instructions to Cassa Conguaglio via a *Delibera* of the AEEG or other legislative or regulatory provisions, as to how to dispose of the funds collected through the levy. Therefore, *Pearle* is irrelevant to this case.

(104) In the *Preussen-Elektra* case, also quoted by Italy in paragraph (68) above, the Court considered that a purchase obligation imposed on private electricity supply undertakings to purchase electricity from renewable sources at minimum prices higher than the real economic value of that type of electricity did not constitute State aid because the measure did not involve any direct or indirect transfer of State resources.

(105) Here again, the substance of the cases is clearly different. In Preussen Elektra, the resources required to finance the measure were provided directly by the electricity suppliers without any public body being involved, not even as a passive vehicle for the transit of such monies. In that case, no transfer of State resources could be identified. In the case at hand, however, the monies come from the general public via a parafiscal charge which transits through a public body before being channelled to the final beneficiaries. This is therefore a classic case of involvement of State resources.

(106) In the light of the above, therefore, the parafiscal levy used to finance the Terni tariff constitutes State resources.

([24]) Judgment of the ECJ in Pearle and others v. Commission, Case C-345/02 [2004] ECR I-7139.

(107) The criterion of imputability to the State ([25]) is also fulfilled, since the legal basis for the Terni tariff is laid down in national legislation, in conjunction with the *Delibere* of the AEEG which is a public body.

Impact on trade and distortion of competition

(108) As regards the last criteria of Article 87(1) — impact on trade between Member States and distortion of competition — the Commission can dismiss the arguments put forward by the Terni companies in paragraph (46) on the basis of the considerations developed in points (109) to (116).

(109) The beneficiaries' main substantive argument is that the plants which benefit from the tariff are not active in intra-community trade as they sell most of their products on the domestic market.

(110) It should be noted, in this respect, that the analysis cannot be limited to the plants located in the Terni area. The beneficiaries are part of international groups active in various sectors of the economy ([26]), and operating aid granted to one branch or plant can be used to cross-subsidize other branches of the group in sectors open to intra-community trade, and in fact, this circumstance alone could warrant the conclusion that the tariff has an impact on trade between Member States.

(111) Besides, even if it was demonstrated that most or all of the companies' production was sold on the Italian domestic market, *quod non*, this would be irrelevant for the purpose of establishing the impact on intra-community trade of the measure. The Court has ruled that 'aid to an undertaking may be such as to affect trade between the Member States and distort competition where that undertaking competes with products coming from other Member States even if it does not itself export

([25]) See judgment of the ECJ in Italy v. Commission, Case C-303/88,[1988] ECR I.1433, France v. Commission, Case C 47/69 [1970] ECR 4393; judgment of the CFI in Deutsche Bahn/Commission, Case T-351/02, [2006] ECR II. 1047.

([26]) Cementir belongs to the Caltagirone Group, operates a number of plants in Italy, some of which are active in the export business. The company produces a variety of cement and lime products and controls a cement-producer in Turkey which exports to the EU. Nuova Terni Industrie Chimiche belongs to the Norsk Hydro group, active in the production of chemical and mineral fertilizers, oil and gas and petrochemicals. ThyssenKrupp is a global conglomerate active mainly, but not only, in steel production.

its products (…). Where a Member State grants aid to an undertaking, domestic production may for that reason be maintained or increased with the result that undertakings established in other Member States have less chance of exporting their products to the market in that Member State' ([27]).

(112) Therefore, the Commission has examined whether, in general terms, there is intra-community trade in the sectors concerned.

(113) As regards cement-producer Cementir, the Commission has extensively analysed the cement market and its various segments, most notably in its 1994 Cement Decision ([28]). Cement is a heavy product having a low value in relation to its weight, so that the cost of transport may make it uneconomical to transport over long distances. The Commission found, however, that this constraint did not impede intracommunity trade. Cement products are *de facto* traded between Member States, and the conclusion in the past of unlawful agreements and concerted practices between cement producers (sanctioned in the above Decision) in order to protect their home markets is further evidence that there is effective competition at the EU level.

(114) As regards Nuova Terni Industrie Chimiche, it suffices to say that, in the very merger decision whereby the Commission authorized the takeover by Norsk Hydro of Nuova Terni Industrie Chimiche ([29]), the Commission found that, for the products manufactured by the Terni chemical branch, there was intra-community trade and the geographical market was at least EEA-wide.

(115) Concerning ThyssenKrupp, the Commission notes that the steel market is a global, highly competitive market. In previous decisions, the Commission had already found that the market segments in which ThyssenKrupp is active were at least EU-wide ([30]).

(116) Therefore, the conclusion must be drawn that the preferential electricity tariff granted to the three Terni companies is liable to improve their competitive position vis-à-vis competing undertakings in intra-community trade. It is settled case-law ([31]) that in such circumstances intra-community trade should be considered affected and competition distorted.

Conclusions on the presence of aid

(117) In the light of the above, the Commission has come to the conclusion that the preferential tariff granted to the Terni companies as of 1 January 2005 constitutes State aid within the meaning of Article 87(1) of the EC Treaty and can only be authorized if it can benefit from one of the derogations laid down in the Treaty.

Qualification of the measure as new aid and lawfulness of the aid

(118) The measure cannot be considered existing aid for the reasons explained in points (119) to (133).

(119) The original provision of Law 9/1991 which is considered to be covered by a State aid authorisation was modified in 2005 by Article 11(11) of Law 80/2005.

(120) It should be noted that the substance of the implicitly approved tariff and that of the tariff introduced by Law 80/2005 are only apparently similar.

(121) Law 80/2005 laid down that Terni should continue benefiting from a preferential tariff until 2010. Even if the second extension had been a mere prolongation in time of the previous measure, it would have constituted new aid. It is settled case law that an amendment to the duration of an existing aid should be regarded as new aid ([32]).

(122) A more detailed analysis shows, however, that the differences between the two measures are much more substantive.

(123) Before the entry into force of Law 80/2005, the Terni price (and its annual update) was still based on the original parallelism in treatment with self-producers. Law 80/2005 intervenes by severing this link and effectively decoupling Terni from self-producer treatment. The price set for 2005 happens to coincide with the 2004 price, but the price formation mechanism is fundamentally altered, since the new price is updated in line with average increases in energy prices, with a guarantee that, however high such price increases may be, the tariff will not rise by more than 4 % yearly.

([27]) Judgment of the ECJ France Republic v. Commission, Case C 102/87, [1988] ECR p. 04067.

([28]) Commission Decision of 30 November 1994 (Cases IV/33.322 — cement), OJ L 343/1994, p. 1-158.

([29]) Decision IV/M.832 of 25.10.1996 Norsk Hydro/Enichem Agricoltura — Terni (II).

([30]) See, *inter alia*, Decision IV/M.925 Krupp-Hoesch/Thyssen of 11 August 1997.

([31]) See, *inter alia*, the judgment of the ECJ in Philip Morris/Commission, (Case 730/79, ECR [1980] p. 02671, paragraph 11) and judgment of the ECJ in Air Liquide Industries/Ville de Seraing et Province de Liège (Joint Cases C 393/04 and C 41/05, [2006] ECR p. I-05293).

([32]) See, for example, on this point, the judgment of the CFI in Territorio Historico de Alava — Diputacion Foral de Alava, Joint Cases T-127/99 and T-148/99, [2002] ECR II-012575, paragraphs 173-175.

(124) The level of aid is also raised due to the increase in the quantities supplied at the preferential price. The degressivity element is eliminated altogether.

(125) It should be underlined, in this context, that even if the aid level had remained unchanged, the same conclusion would necessarily have to be drawn, if the the Opinion of Advocate General Fennelly in Case Italy and Sardegna Lines v. Commission ([33]) is to be followed. In assessing what constitutes a substantive change to a scheme, Advocate General Fennelly stated that 'the introduction of a wholly new method of providing effectively the same level of aid constituted a significant amendment of the original regime'.

(126) The Commission also notes that, in the light the different mechanisms governing the tariff, it would be impossible to distinguish, in the new measure implemented in 2005, a part which, until 2007, would continue to be existing aid, and an alteration liable to be classified as new aid ([34]).

(127) Therefore, the Commission considers that the measure referred to as 'second extension' is in fact a fully new aid scheme in that it is substantially altered compared to that covered by the 1991 Decision.

(128) In the light of the above, the measure must be considered new aid as from 1 January 2005, which is the date when Law 80/2005 made the extension of the tariff applicable ([35]).

(129) The allegation, made in paragraphs (48) and (60), that the measure should be deemed authorized pursuant to Article 4, paragraph 5 of Regulation N 659/1999 because the Commission had been informed of it and failed to take a decision within the procedural time-limits) is manifestly unfounded. There is a substantial difference between notifying a measure pursuant to Article 88(3), on the one hand, and simply informing the Commission of the existence of a measure, on the other. In *Breda Fucine Meridionali* ([36]), the Court of First Instance has notably ruled that the transmission of documents which are not addressed to the Secretary General and do not contain an explicit reference to Article 93, paragraph 3 of the EC Treaty cannot not be considered as a valid notification.

(130) Only measures which are duly notified pursuant to Article 88(3) and are not implemented before a Commission Decision can benefit from the procedural time limits set out in Regulation 659/99. In the case as issue, it is undisputed that Article 11(11) of Law 80/2005 was not notified.

(131) Besides, according to Article 4, paragraph 6 of Regulation 659/99, where the Commission fails to take a decision within the two months' procedural time limits, the aid is deemed to have been authorized provided the Member State gives prior notice of its intention to implement the measure, and unless the Commission takes a decision within a period of 15 working days following receipt of the notice. In the case at hand, no prior notice was given by Italy. Therefore, even if the Terni's companies allegation was substantiated, which is not the case, as explained in paragraphs (129) and (130) above, Article 4, paragraph 6 of Regulation 659/99 would not be applicable.

(132) Since Italy failed to notify Article 11(11) of Law 80/2005, the aid is unlawful.

Compatibility of the aid

The first extension

(133) Even though this procedure concerns only the second extension of the tariff, the Commission deems it appropriate to make a number of considerations on the first extension and its approval under the State aid rules.

(134) This first extension of the Terni tariff was provided for in Article 20(4) of Law 9/1991. This law was declared compatible under the State aid rules in case NN 52/1991 ([37]). The Commission Decision as notified to Italy does not specify which articles of the Law were found compatible. However, the internal documents leading to the Commission Decision provided for a brief description and assessment of the articles with State aid relevance. Article 20(4) of the law, providing for the extension of the Terni tariff, was not mentioned.

(135) Given such scant information, it is unfortunately impossible to trace back the reasoning followed in that case, and in particular to know whether the Commission had examined and intended to approve the Terni tariff.

([33]) Joined Cases C 15/98 and C 105/99, Italy and Sardegna Lines v. Commission ECR [2000] I-8855, paragraph 74 of the Opinion.
([34]) Judgment of the CFI in Government of Gibraltar v. Commission, Joint Cases T 195-01 and T 207/01 [ECR 2002] p. II-02309.
([35]) The conversion law of Decree 80/05 provided for the retroactive entry into force of the tariff extension as of 1 January 2005.
([36]) *Breda Fucine Meridionali* v *Commission*, Joined Cases T-126/96 and T-127/96 [1998] ECR II-3437, paragraph 47.
([37]) See footnote 5.

(136) However, since Italy notified the entire law and the approval decision also refers to the entire law, the extension of the Terni tariff should be considered covered by the 1991 Commission Decision.

The second extension under challenge

(137) In derogation from the general prohibition of State aid laid down in Article 87(1) of the EC treaty, aid may be declared compatible if it can benefit from one of the derogations enumerated in the Treaty.

(138) The State aid granted to the Terni companies pursuant to Article 11(11) of Law 80/2005 can be classified as operating aid.

(139) It is settled case-law that operating aid, that is to say, aid intended to relieve an undertaking of the expenses which it would normally have had to bear in its day-to-day management or its usual activities, in principle, distorts competition to an extent contrary to the common interest in the sectors in which it is granted ([38]). The Commission notes that operating aid granted in the form of a preferential electricity price to an energy-intensive undertaking, that is, an undertaking having electricity as one of its major cost factors, is a particularly distortive form of support since the aid has a substantial and direct impact on that undertaking's production cost and resulting competitive position.

(140) Operating aid may be granted, under specific conditions, under the Guidelines on State aid for environmental protection ([39]). The tariff under consideration, however, serves no environmental purpose.

(141) Exceptionally, operating aid may be granted in assisted areas eligible for aid under the derogation of Article 87(3)(a) of the EC Treaty. Throughout the period considered, Region Umbria was not eligible for aid under Article 87(3)(a) of the Treaty.

(142) Even though, for the reasons explained above in paragraphs (123) to (127), the two extensions constitute different measures, the Commission deems it useful to recall that, when the first extension was notified, Region Umbria was going through a serious economic crisis, which affected in particular the steel and chemical sectors in the Terni area. This crisis, which had come to a head at the beginning of the 1990s, was acknowledged by the Commission when, in 1997, it approved the Italian map of areas eligible for aid under Article 87(3)(c) ([40]). The Terni and Perugia areas were declared eligible for aid under Objective 2 of the Structural Funds.

(143) In 2005, however, at the time Law 80/2005 was adopted, the process of structural adjustment in Umbria had already largely taken place. In the proposed regional aid map for the period 2007-2013, Umbria will lose the status of assisted region altogether. Therefore, while it is difficult to know whether Regional development considerations may have played a role in the original approval decision, it is nevertheless certain that the Commission cannot rely on any such considerations in assessing the second extension of the tariff.

(144) Italy has in fact extensively explained the industrial policy reasons for the second prolongation of the Terni tariff (see paragraph (61)). The main thrust of Italy's argument in favour of the tariff is that energy intensive companies in other Member States can also benefit from reduced energy prices and the tariff is required as a transitional measure to avoid delocalization outside the EU pending the full liberalization of the energy market and the improvement of infrastructure. Incidentally, these explanations contradict the Italian claim that the Terni tariff would still be compensatory and certainly offer no justification for a revision of the expropriation package.

(145) The Commission notes that the Court has ruled that 'the fact that a Member State seeks to approximate, by unilateral measures, conditions of competition in a particular sector of the economy to those prevailing in other Member States cannot deprive the measures in question of their character as State aid' ([41]). Further, the Italian argument that such a State aid would be justified by the existence of other (equally distortive) State aids in

([38]) See Judgments of the ECJ in *Italy* v *Commission*, Case C-86/89 [1990] ECR I-3891, paragraph 18, and *France* v *Commission*, Case C-301/87 [1990] ECR I-307, paragraph 50; judgment of the Court of First Instance in *Siemens* v *Commission*, Case T-459/93 [1995] ECR II-1675, paragraph 48.

([39]) OJ C 37, 3.2.2001, p. 3.

([40]) State aid No 27/1997, Commission Decision SG(97) 4949 of 30 June 1997.

([41]) See, for example, the judgment of the ECJ in Italian Republic v Commission, Case C-372/97 [2004], ECR I-03679, paragraph 67.

the EU is to be dismissed altogether. Such an approach would lead to subsidy races and would run counter to the very objective of State aid control. As regards the alleged risk of delocalization outside the EU, the Commission notes that there is no precedent in its decisional practice or in the jurisprudence of the Community courts, where such an argument has been accepted as a justification for the grand of State aids. In the case at issue, there is no need for the Commission to even consider this question since the Italian authorities have not provided any substantiation for such an allegation. Notably, it has not been shown that the tariff was necessary and proportionate to prevent that risk.

(146) As regards the conclusions of the High Level group mentioned in point (61), they are irrelevant as they reflect the outcome of general political debate and do not constitute legally binding provisions. It should be noted, incidentally, that the solutions proposed by the group and quoted by Italy do not involve the granting of State aid.

(147) Since the aid cannot benefit of any of the derogations laid down in Article 87 of the EC Treaty, the second extension of the preferential tariff in favour of the Terni companies should be declared incompatible with the common market.

(148) Pursuant to Council Regulation (EC) No 659/1999 ([42]) laying down detailed rules for the application of Article 93 of the Treaty, in cases of unlawful aid which is not compatible with the common market, effective competition should be restored and the aid, including interest, needs to be recovered without delay.

Legitimate expectations

(149) It is settled case-law that, when aid has been granted without prior notification pursuant to Article 88(3) of the Treaty, the recipient of the aid cannot have at that time a legitimate expectation that its grant is lawful ([43]). A diligent businessman should normally be able to determine whether the notification procedure has been followed and the aid is lawful.

(150) However, a recipient of unlawfully granted aid is not precluded from relying on exceptional circumstances on the basis of which it had legitimately assumed the aid to be lawful and thus declining to refund that aid ([44]). The Commission has examined whether the exceptional circumstances alleged by the Terni companies in paragraph (47) could have led them to entertain such legitimate expectations.

(151) In substance, the beneficiaries plead that Italy had given them assurances about the non-aid character of the measure, and that the Commission had not called the measure into question, either when it was first extended, or when information on the second extension was submitted.

(152) As regards the first claim, it will suffice to recall that, according to settled case-law, the existence of legitimate expectations cannot depend on the behaviour of the Member State granting the aid. The CFI has ruled, in particular, that 'incorrect information given by a Member State about the legality of a measure cannot in any circumstances give rise to legitimate expectations, especially where the Commission has not even been informed of that information' ([45])

(153) Only the behaviour of the Community administration may thus give rise to legitimate expectations. In particular, the Court has ruled that 'a person may not plead infringement of that principle unless he has been given precise assurances (emphasis added) by the Community administration' ([46]).

(154) The Terni companies claim that the measure was not called into question in 1991, when the Commission approved Law 9/1991. It should be pointed out that the 1991 Commission Decision covers only the measure laid down in Law 9/1991, so that the approval of that measure cannot give rise to legitimate expectations concerning the lawfulness or compatibility of the new aid measure introduced by Law 80/2005. Even if the Commission had explicitly stated that the 1991 measure did not constitute aid, *quod non*, the beneficiaries could not assume that the 2005 measure would also automatically qualify as non-aid, since there are many circumstances that may transform a non-aid measure into a State aid.

(155) Moreover, the wording of the Commission Decision as notified to Italy, which declares compatible the aid measures contained in Law 9/1991 and 10/1991 would, if anything, suggest the opposite, that the Terni measure did constitute aid.

([42]) OJ L 83, 27.3.1999, p. 1.

([43]) Judgment of the ECJ in *Alcan Deutschland*, Case C 24/95 [1997], ECR I-1591, paragraphs 25, 30 and 31, and *Demesa and Territorio histórico de Alava* v *Commission*, Joined Cases C-183/02 P and C-187/02 [2004] ECR I-10609, paragraph 45.

([44]) Judgment of the ECJ in *Commission* v *Germany, Case* C-5/89 [1990] ECR I-3437, paragraph 16.

([45]) See judgment of the CFI in *Fleuren Compost v. Commission*, Case T-109/01 [2004] ECR p. II-127, paragraphs 141-143.

([46]) See judgment of the ECJ in *Germany v. Commission*, Case C-506/03, [2005] ECR p. I-0000, paragraph 58.

(156) Therefore, the Commission Decision could not possibly have given the beneficiaries precise assurances as to the non-aid character of the tariff, but — at best — a legitimate expectation that the 1991 extension of the tariff was compatible. No expectations could be entertained, however, in respect of the 2005 extension. Therefore, this argument should also be dismissed.

(157) As regards the Commission's alleged failure to act diligently when it received information on the second extension of the tariff, this claim is manifestly unfounded. Italy allegedly mentioned the Terni tariff in the 2005 State aid Report. Detailed information on the measure provided for in Article 11(11) of Law 80/2005 was provided, however, only in February 2006, on request by the Commission, in the context of the State aid investigation on Article 11(12) of the same Law (State aid C 13/06). The formal investigation procedure was opened by the Commission in July 2006.

(158) Considering the short time elapsed between the submission of information and action by the Commission, it is manifest that the Commission acted diligently.

(159) In the light of the above considerations, the Commission has concluded that there are no extraordinary circumstances which could have led the Terni companies to entertain legitimate expectations as to the lawfulness of the contested measure.

Recovery

(160) All amounts of incompatible aid received by ThyssenKrupp, Cementir and Nuova Terni Industrie Chimiche pursuant to Article 11(11) of Law 80/2005 and which cover the period starting on 1 January 2005 (see paragraph (26)) shall be recovered, with interest, in accordance with Chapter V of Commission Regulation (EC) No 794/2004 of 21 April 2004 implementing Council Regulation (EC) No 659/1999 laying down detailed rules for the application of Article 93 of the EC Treaty ([47]).

(161) It should be recalled, in this context, that the purpose of recovery is to restore the beneficiary's competitive situation prevailing before the grant of the incompatible aid. In establishing what was the competitive situation of the Terni companies before the introduction of Law 80/2005, account should be taken of the existence of the existing aid measure laid down in Law 9/1991, which was cleared under the State aid rules until 2007.

([47]) OJ L 140, 30.4.2004, p. 1-134.

(162) Therefore, the Commission considers that the residual amounts of aid to which the beneficiaries would have been entitled under Law 9/1991 in 2005, 2006 and 2007 if Law 80/2005 had not been implemented may be deducted from the sums to be recovered, if Italy considers that the beneficiaries are entitled to them under national law.

VII. **CONCLUSION**

(163) The Commission finds that Italy has unlawfully implemented, in breach of Article 88(3) of the EC Treaty, the provision of Article 11, paragraph 11 of *Decreto-legge* 80/05, converted into Law 80/2005, providing for the modification and extension in time until 2010 of the preferential electricity tariff applicable to the three Terni companies. The Commission considers that such measure, which constitutes pure operating aid, is not eligible for any derogation under the EC treaty, and is therefore incompatible with the common market. Therefore, the parts of the above measure that have not yet been granted or paid must not be implemented. The aid already paid has to be recovered. The amounts to which the beneficiaries would have been entitled in 2005, 2006 and 2007 under Law 9/1991 may be deducted from the total amount to be recovered,

HAS ADOPTED THIS DECISION:

Article 1

1. The State aid which Italy has implemented in favour of ThyssenKrupp, Cementir and Nuova Terni Industrie Chimiche is incompatible with the common market.

2. The State aid which Italy has granted but not yet paid out to ThyssenKrupp, Cementir and Nuova Terni Industrie Chimiche is also incompatible with the common market and may not therefore be implemented.

Article 2

1. Italy shall recover from the beneficiaries the aid referred to in Article 1(1).

2. The sums to be recovered shall include interest for the entire period running from the date on which they were put at the disposal of the beneficiaries until the date of their recovery.

3. The interest shall be calculated on a compound basis in conformity with Regulation (EC) No 794/2004.

Article 3

1. Italy shall take all necessary measures to recover from the beneficiary the illegal and incompatible aid referred to in Article 1.

2. Recovery shall take place without delay and in accordance with the procedures under national law provided that they allow the immediate and effective execution of the decision.

3. Italy shall ensure that the present decision is implemented within four months of the date of notification.

Article 4

1. Italy shall keep the Commission informed of the progress of the national proceedings to implement this decision until these proceedings have been completed.

2. Within two months of notification of this decision, Italy shall submit information specifying the total amounts (principal and interest) to be recovered from the beneficiaries and a detailed description of the measures already taken or planned to comply with the present decision. By the same deadline, it shall send to the Commission all the documents demonstrating that the beneficiaries have been ordered to repay the aid.

3. After the period of two months referred to in paragraph 2, Italy shall submit, on a simple request by the Commission, a report on the measures already taken or planned to comply with this decision. This report shall also provide detailed information on the amounts of aid and interest already recovered from the beneficiaries.

Article 5

This Decision is addressed to Italy.

Done at Brussels, 20 November 2007.

For the Commission

Neelie KROES

Member of the Commission