

II

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

DECISIONS

COMMISSION

COMMISSION DECISION

of 2 July 2008

on State Aid C 11/2007 which Italy has implemented in favour of the company Ottana Energia Srl

(notified under document C(2008) 3117)

(Only the Italian text is authentic)

(Text with EEA relevance)

(2009/730/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 on the European Economic Area, and in particular Article 62(1)(a) thereof,

Having called on interested parties to submit their comments pursuant to those provisions ⁽¹⁾, and having regard to their comments,

Whereas:

I. PROCEDURE

- (1) On 23 February 2006, the Italian authorities notified the Commission a rescue aid to Ottana Energia Srl (*Ottana Energia*), which had been put into effect on 29 December 2005, i.e. before the notification.
- (2) On 14 July 2006, the Italian authorities notified a restructuring plan. Such plan would have automatically resulted in the prolongation of the rescue aid pursuant to point 26 of the guidelines on State aid for rescuing and restructuring firms in difficulty ⁽²⁾ (hereinafter guidelines).
- (3) On 6 December 2006, the Commission with decision C(2006) 5829 (hereafter the rescue decision) indicated that it had no objections against the rescue aid. As the restructuring plan appeared however not credible the decision rejected its capability to prolong the rescue aid and ruled that the rescue aid should end on 8 January 2007.
- (4) As the rescue aid was not terminated, the Commission on the basis of point 27 needed to follow up on the illegal rescue aid. By letter dated 4 April 2007 the Commission informed Italy that it had decided to initiate the procedure laid down in Article 88(2) of the EC Treaty in this respect. The Commission also raised doubts about the compatibility of the restructuring aid.

⁽¹⁾ OJ C 122, 2.6.2007, p. 22.

⁽²⁾ OJ C 244, 1.10.2004, p. 2.

- (5) The Commission decision to initiate the procedure was published in the *Official Journal of the European Union* ⁽¹⁾. The Commission invited interested parties to submit their comments on the aid/measure. The Commission received no comments from interested parties.
- (6) Italy submitted observations by letter dated 22 May 2007. Additional information was requested by letters of 11 July 2007 and 17 October 2007 and 20 December 2007 which was submitted on 31 August 2007, 12 November 2007 and 13 March 2008. In addition, a meeting was held between Commissions services and the Italian authorities on 7 December 2007. In addition, several e-mail exchanges took place; the latest replies by Italy were provided on 14 May 2008 and 28 May 2008.

II. DETAILED DESCRIPTION OF THE AID

1. The beneficiary

- (7) Ottana Energia is a local utility company situated in the province of Nuoro in Sardinia ⁽²⁾. It is owned by PC holding, which is a holding company for Ottana Energia by a private person and has no significant other activities.
- (8) Ottana Energia has about 115 employees and in rescue decision it was held that it can be considered SME ⁽³⁾. Given that it has more than 50 employees it is however not a small enterprise.
- (9) Ottana Energia operates a thermoelectric power station which was built to meet the electrical and thermal needs of the Ottana industrial site. Therefore it is active in electricity generation and provides pressurised steam, water, nitrogen and compressed air. The plant comprises essentially two identical boilers for the production of superheated high pressure steam and two turbo alternators for the production of electrical energy and of process steam at two different pressure levels.
- (10) In the electricity market Ottana Energia was active on the Borsa Elettrica selling on the MGP (Day before market) segment mainly at peak hours. It has a capacity of 140 MW of which it sold an average of around 30 MW. The Commission understands that Ottana Energia's market share is 5 % in terms of capacity and 4 % in terms of production the Sardinian electricity market.
- (11) In 2005 Ottana Energia experienced financial difficulties resulting mainly from a shortage of funds to pay fuel oil. Fuel price did indeed rose from EUR 140/tonne in 2004 to EUR 279/tonne in the first half of 2006. The increasing prices of oil constituted up to 85 % of the company's costs. Therefore, it was estimated that for the first half of 2006 about EUR 5 million were needed to keep the company afloat.

2. The measure

- (12) On 29 December 2005, Ottana Energia received a guarantee for a loan by the Ministry for Economic Development amounting to EUR 5 million. In August 2006, the Ministry later prolonged the same guarantee for a loan on the basis of a restructuring plan as restructuring aid.
- (13) The Italian authorities indicated in the meantime that the loan would be reimbursed over five years as of 2009 until 2014 by EUR 1 million per annum.

3. The restructuring plan

- (14) The current restructuring plan dates in its first version back to June 2006. In August, it was approved by a Committee in the ministry of economy subject to a final approval by the Commission. It was then submitted for approval to the Sardinia region and trade unions. On 9 January 2007 it was approved. The approval comprises a commitment from the Sardinia region to endeavour to release the necessary authorisations for 'step two' as soon as possible.

⁽¹⁾ OJ C 122, 2.6.2007, p. 22.

⁽²⁾ The plant was constructed in 1970 and has changed ownership several times as indicated in the opening decision, op cit fn. 1.

⁽³⁾ In the light of Article 2(1) in conjunction with Article 4(3) of the Annex of Commission Recommendation 2003/361/EC of 6 May 2003 concerning the definition of micro, small and medium-sized enterprises (OJ L 124, 20.5.2003, p. 36).

- (15) The plan is based on a feasibility study from Electrowatt-Econo-Poyry, a well known consultancy firm which explored several repowering options. Moreover it has in the meantime been supplemented by a market study.
- (16) The plan identifies as a main reason for failure its dependence on fuel oil and the inability to pass on price increases in fuel oil via the electricity price. Indeed the Sardinian Electricity reserve is made up of coal power plants which have lower costs than oil. Therefore Ottana Energia aims at reducing direct costs, particularly those connected to fuel and related transport charges. The company prepared a conversion plan for the power plant.
- (17) To this end, the Italian authorities provided the Commission with a perspective of the future development of the company which indicates two main restructuring steps, while a third step remains optional and will not neither be subjected to State aid nor to any financing indicated in the present restructuring plan. The Commission thus considers that the restructuring will concentrate on the first and second phase and that the restructuring period ends in 2014 when the aid is reimbursed.
- (18) Step one, which is currently ongoing is the re-powering of one boiler of the power plant to use of liquid coal (carbone fluido) while the other continues to run on fuel oil. In addition an automatic control system has been constructed for electrical loads for enabling operation on the secondary regulation services market. Moreover also an inverse osmosis plant is foreseen.
- (19) With regard to the provision of electrical and thermal utilities, Ottana Energia has attempted to shift its own production to utilities with a higher added value. With regard to electricity generation, Ottana Energia has also shifted its own electricity production from day-ahead ⁽¹⁾ to the balancing market ⁽²⁾, where the assets traded are services provided by the Ottana Energia electricity power station to the national transmission network manager to control the frequency and voltage of the network itself. The balancing market is normally more profitable for electricity producers due to high concentration in the market and long term provisions on supply.
- (20) Step two concerns the conversion of the second generator from fuel oil to vegetable oil. In this way a reduction of the emissions is envisaged which can be utilised to acquire and sell 'green certificates'. This seems indispensable for the success of the plan so as to set off the higher prices of bio-fuels compared to fossil fuels, which can at least for the time being not be equalised by excise tax rebates as no authorisation to this respect has been obtained. The technical restructuring envisages installing new equipment in the power plant to enable electricity generation from vegetable oil.
- (21) In order to realise the investments foreseen in phase 2, in the beginning of 2007 Ottana Energia won Azienda-Energetica SpA Etschwerke AG (AE-EW) of Bolzano, a leading operator in the energy market in southern Tirol for a joint venture under the name Biopower Sardegna Srl's. Its assets will consist of EUR 14,5 million in equity. EUR 8,5 million will be provided as equity and EUR 6 million in infrastructure and plant, the latter coming from Ottana Energia. The EUR 8,5 million is made up of EUR 1,4 million from PC Holding and a EUR 7,1 million cash transfer from AE-EW. PC Holding will thus have the 51 % share for about 10 % and Ottana Energia about 41 %. The equity is equivalent to 25 % of the project total in conformity with the request of the financial institution.
- (22) The agreement with the Sardinia region and trade unions provides also for a reduction of 45 jobs. It is envisaged to take advantage of an 'early retirement' scheme.

⁽¹⁾ On the day ahead market the asset traded is electricity.

⁽²⁾ The balancing market requires supply of certain amount of electricity to balance it in the national grid. The supply is carried out on request by the national transmission network operator on the basis of a long term contract on electricity supply. Whereas the supply of electricity in the day-ahead market is subject to every day auctions.

- (23) Altogether the restructuring costs for phase 1 and 2 are as following:

Table 1

Overview restructuring costs

(EUR)

Restructuring action	Estimated cost	Financing
Modernisation of plant	900 000	Self-financed
Severance pay	1 000 000	Self-financed
Phase 1: Use of coal water	1 090 000	Self-financed
Phase 2: Vegetable-oil engines	42 300 000	25 % Equity, of which: — 51 % Ottana Energia/PC Holding — 49 % AE-EW 75 % Bank financing

- (24) Italy clarified that self financing in phase 1 relates to financed from the companies cash flow and is taking place between 2006 and 2008. Phase 2 is financed by equity of the new shareholder and by a bank loan which is backed by guarantees of AE-EW and mortgages on the machinery.
- (25) Italy submits that the 2 phase will have a very high internal rate of return (almost 25 %) and a significant net present value. Moreover, as regards the prospects for viability the Italian authorities have updates their financial projections. It was explained although the business projection of phase two last until 2020, they indicate that the company should have a positive operating margin and make profits as of 2010. Also as of 2010 Ottana Energia is expected to have a return on equity (ROE) of 2 % and of 2011 of 3 % average as of 2011 which is according to Italy equal or above those of competitors which are said to have a ROE of 2 %.
- (26) Step three would be to use natural gas transmitted in the future via the so-called GALSI pipeline connecting Algeria with Italy via Sardinia (the completion of which is expected not before 2009). As the construction schedule has not been decided upon, this step is hypothetical. This is also the case for the financing of this project which is estimated to require about EUR 250 million. On completion of this phase, Ottana Energia anticipates replacing the existing fuel-oil turbines and boilers with the construction of the new gas plant. However, vegetable oil will continue to be used at least throughout the twelve-year term of the green certificate, i.e. until the end of 2021 if it starts by the end of 2008.

III. REASONS FOR OPENING

- (27) In the opening decision the Commission noted that the rescue aid has not been terminated. The Commission decided therefore that the rescue aid was illegally maintained and considered itself obliged to open proceedings under point 27 of the guidelines on aid for rescue and restructuring of firms in difficulty ⁽¹⁾.
- (28) The Commission indicated that it did not see yet how the illegal prolongation of the rescue aid could be compatible restructuring aid as the restructuring plan lacked essential elements indicating how the company would restore long term viability. In particular it found no precise information had been submitted clarifying the restructuring strategy, indicating credible forecasts for the future performance of the company and supporting the existence of a significant own contribution and compensatory measures. To this end the Commission was enjoining Italy to answer several previously raised questions.

⁽¹⁾ OJ C 244, 1.10.2004, p. 2.

- (29) Further, the Commission questioned whether a prolongation of the rescue aid for 12 years, as originally foreseen, is necessary. This would put into question that the aid is limited to the strict minimum required. Moreover information on own contribution seemed insufficient as the plan and the explanations by Italy merely indicate that the company will contribute to the restructuring from its own funds and, with external support from a new shareholder, without specifying in detail how these own funds are generated.
- (30) Finally, the Commission could not see sufficient compensatory measures, as no such measures are indicated in the plan.

IV. COMMENTS FROM ITALY

- (31) In its submissions, Italy provided much more information on the restructuring plan. In particular it presented:
- a feasibility study underpinning the choice for the current strategy,
 - a market study which indicates that there is no overcapacity in the energy market in Sardinia,
 - information on the realisation of phase 1 and phase 2 as indicated in recital 0,
 - information on the engagement of a new shareholder as well as on the financing of phase 2 as indicated in recital 0 and following,
 - an update of the financial forecast of the company as indicated above in recital 25.
- (32) Italy puts forward the following compensatory measures:
- [...] (*)
 - divestiture of [...] operations by the end of 2010 [...]
- (33) As regards the first issue Italy explains that Ottana Energia has changed *de facto* its reference market and, consequently, its competitors. [...]. These divisions are not strategic and could therefore be sold as a compensatory measure. [...].
- (34) In addition, Italy ensures that Ottana commits not to produce more than 90 MW out of a total possible production capacity of 140 MW before the beginning of Phase 3, and in any event not before the beginning of 2012.
- (35) Italy also committed that Ottana Energia will reimburse from 2009 to 2014 EUR 1 million each year and will not receive any other aid before the total reimbursement of the EUR 5 million received

V. ASSESSMENT

1. Existence of aid

- (36) As already indicated in the Decision of 6 December, the measure constitutes State aid pursuant to Article 87(1) of the EC Treaty as it distorts or threatens to distort competition ⁽¹⁾ by favouring Ottana Energia and in so far affects trade among Member States (see recitals 12 to 15) as it is unlikely that without the State guarantee Ottana Energia could have obtained the same loan conditions on the market.

(*) Confidential information.

⁽¹⁾ The electricity market is partially liberalised within the Community since the entry into force of Directive 96/92/EC of the European Parliament and of the Council (OJ L 27, 30.1.1997, p. 20) and thus the competition between the electricity suppliers is possible. Consequently the measure may improve the position of Ottana in relation to its competitors in the EU, which may affect trade between the Member States.

2. Compatibility of the aid

- (37) Given that the rescue aid has not been repaid on 8 January 2007, it became illegal rescue aid on 9 January 2007 (see recital 3).
- (38) However, that alone does not suffice to constitute a misuse of the aid, but requires also that the aid is not compatible under Article 87(3) EC. That implies that the Commission has to assess the compatibility of such aid on all other possible grounds⁽¹⁾. However, point 20 of the guidelines limits the grounds to those stipulated under the guidelines. Consequently the illegal rescue aid may still qualify as restructuring aid.
- (39) The Commission indicated in the opening decision that the aid must therefore meet the conditions of points 32 to 51 of the guidelines comprising the provision of a restructuring plan which restores long-term viability as well as that the aid is limited to the minimum and avoids undue distortions of competition. The opening decision had put this into doubt but the investigation confirmed that these conditions are met.

Eligibility

- (40) First, the investigation confirmed that Ottana Energia is a company in difficulty. The Commission acknowledges in the rescue decision that Ottana Energia is eligible for restructuring aid. However in the opening decision it was wondering whether this changed since the company was able to obtain loans to finance its restructuring. The doubts could however be allayed, as Italy has substantiated that the loan was not provided only for the rescue phase but that Ottana Energia would not have sufficient funds to reimburse the aid during the restructuring period. As it would generate significant revenues only in 2008, without the guarantee the banks would not have allowed Ottana Energia even to implement the first phase and so would have put Ottana Energia at the risk of insolvency in the sense of point 10(c) of the guidelines.
- (41) The investigation also confirmed that PC Holding, the owner of Ottana Energia, was not able to provide the necessary funds to restructure the company, so that eligibility is not questioned by point 13 of the guidelines.

Restructuring plan and restoration of viability

- (42) The Commission in the opening of procedure questioned whether there existed a restructuring plan which would enable the company to restore long-term viability.
- (43) Italy was in the meantime able to substantiate its restructuring project and to provide the missing elements to make up a credible plan. The Commission acknowledges first that the restructuring plan is based on a feasibility study underpinning the choice for the current strategy (this existed already in 2006 but was simply not furnished to the Commission). Second, Italy explained that the realisation of phase 1 and phase 2 are complementary not alternatively as understood by the Commission initially (this would only be the case for phase 3 after 2020). Third, Italy explained that the beneficiary had found a new shareholder in order to co-finance the second phase as indicated in recital 0. Finally, it was established that already phase 2 should enable the beneficiary to restore viability, and that the necessary authorisation for this project was on its way.
- (44) On this basis, the Commission can now identify precise internal measures which are apt to redirect the activities of the firm. Such is first the change from the very expensive fuel oil to liquid coal. Moreover, also the change of electricity provision from day-ahead to the balancing market contributed to viability as it is more profitable for Ottana Energia due to long term provisions on supply.
- (45) Second, the Commission concludes that also new investments into bio energy are profitable. They should yield a very high internal rate of return and have a significant net present value (see recital 25).

⁽¹⁾ This is constant practice of the Commission (see Commission Decision 2008/344/EC, in case C 23/2006, *Technologie Buczak* (OJ L 116, 30.4.2008, p. 26)).

- (46) Altogether, Italy substantiated that on the basis of credible future energy supply forecasts, which always remain subject to changes, and the proceeds from greengas certificates, it will make significant revenues as of 2008. Moreover, it is indicated that the company should have a positive operating margin and make profits as of 2010. Also its ROE should as of 2010 at least match those of its competitors (see recital 25). On this basis, the Commission considers that Ottana Energia is capable to ensure the restoration of long term viability.
- (47) Given that all the necessary elements for the restructuring plan existed already on 9 January 2007, were on this day endorsed by the region, and were at that time — contrary to what was assumed in the opening decision — apt to restore viability, the Commission views the restructuring project now as a continuation of the rescue phase.
- (48) Moreover, a committee in the ministry of economy has endorsed the restructuring plan upon presentation of the restructuring plan and proposed a prolongation of the rescue aid measure conditional upon approval of the Commission. Because an approval should not be subject to the Commission's approval this does not correspond exactly with the principles laid down in point 59 of the guidelines. However, such procedural inconsistency can alone not be sufficient to make the restructuring aid incompatible.

Own contribution and minimum necessary

- (49) The Commission in the opening of procedure questioned whether the undertaking was making a significant own contributions to the restructuring, as required by point 44 of the guidelines and whether the aid was limited to the minimum necessary as the repayment of the aid was only envisaged after 12 years.
- (50) Italy has in the meantime proven that there exists a significant own contribution. This does however not concern the financing of phase 1, which is financed from regular cash flow, which is not accepted as own contribution as it is seen as being at least induced by State aid ⁽¹⁾. However, the second phase is entirely financed through own contribution, be it either by shareholder equity or by external financing secured by the shareholders or the production assets (and not by the State guarantee). Therefore, considering that the restructuring costs are roughly EUR 50 million of which 5 million are financed through aid and EUR 42,3 million come from own contribution (see recital 23) Ottana Energia managed to come up with an own contribution of more than 80 %. This clearly exceeds the threshold indicated in point 44 of the guidelines.
- (51) Finally, Ottana Energia shortened now the pay back period for the rescue aid loan. The aid shall now be repaid between 2009 and 2014 in tranches of EUR 1 million. This seems reasonable as the company appears to make significant revenues as of 2008.

Compensatory measures

- (52) The Commission has during the investigation identified several measures which are apt to mitigate adverse effects of the aid on competitors.
- (53) The Commission first accepts that the divestiture of [...] can be a compensatory measure as these activities are according to the Italian authorities profitable. However, the Commission does not see that more recourse [...] is a compensatory measure because this is in any event a measure which is likely to benefit the company and thus not a sacrifice for the company.
- (54) The Commission further observes that Ottana Energia cannot reduce its capacity, as it has only two boilers which are required for restoring the company's viability. Therefore, only production limitations measures are feasible in the present case. Such measures were indeed committed by the company and Italy and can be considered as compensatory measures.

⁽¹⁾ Guidelines, point 43 (See Commission Decision 2002/185/EC in case C 19/2000, *Technische Glaswerke Ilmenau* (OJ L 62, 5.3.2002, p. 30) point 106).

- (55) The Commission concluded that the compensatory measures are sufficient to mitigate as far as possible any adverse effects of the aid on competitors, because the beneficiary is small in size and its market position in the relevant Sardinian electricity market is compared to that of its competitors insignificant. Indeed, the survival of Ottana Energia even contributes to stabilise competition in the Sardinian energy market, as Ottana Energia is in fact the only alternative energy supplier to the dominant suppliers *Enel* and *Endessa* which have together more than 95 % market share. Thus, the entering of Ottana Energia [...] will further enhance competition in this very concentrated market.
- (56) Moreover, the Commission also could not uphold its observation of the opening decision that there was overcapacity in the Sardinian energy market. Although such overcapacity *de facto* exists it is there only for the purposes of keeping always a certain reserve for supplying the Island.
- (57) Finally, the Commission also gives significant consideration to the commitment not to provide any investment aid to Ottana Energia until 2014. In this context, the Commission observes that the Sardinian electricity market is about to change, in particular with the construction of the GALSI pipeline and due to a project to install a very powerful cable with the mainland. At this moment the Sardinian electricity market will be more open for competition and thus more susceptible to distortions provided by State aid. Therefore, the commitment ensures that no distortions would emanate to the third phase, because the restructuring aid is reimbursed before the third phase and cannot be replaced by any other aid be it restructuring or investment aid.

One time, last time condition

- (58) Finally, the one time, last time condition as stipulated in point 72 and following of the guidelines is met, as Ottana Energia has not benefited from rescue or restructuring aid in the past. In particular given that all the necessary elements for the restructuring plan existed already on 9 January 2007, the Commission views the restructuring project now as a continuation of the rescue phase. It thus constitutes a single restructuring, which is not caught by the one time, last time condition as indicated in point 73(a) of the guidelines.

Implementation and Monitoring

- (59) Ottana must fully implement its restructuring plan pursuant to point 47 of the guidelines. The Commission will need to be kept informed of the progress in the implementation of the abovementioned compensatory measures in the sense of point 50 and 51 of the guidelines.

VI. CONCLUSION

- (60) In view of the above, the Commission finds that the aid in question can be considered as restructuring aid. The restructuring aid follows up immediately on the rescue aid. Therefore it concludes that although Italy has unlawfully implemented the restructuring aid to Ottana Energia in breach of Article 88(3) of the Treaty the State aid is compatible with the common market,

HAS ADOPTED THIS DECISION:

Article 1

The State aid which Italy has implemented for Ottana Energia Srl is compatible with the common market within the meaning of Article 87(3)(c) EC and the Community guidelines on State aid for rescuing and restructuring firms in difficulty of 1999, subject to the fulfilment of the conditions listed in Article 2.

Article 2

1. The restructuring plan shall be fully implemented. All necessary measures shall be taken to ensure that the plan is implemented.
2. Italy ensures that [...] operations shall be sold [...] by end of 2010.

3. Italy commits to ensure that the following commitments shall be respected:
- (a) Ottana Energia Srl shall not produce more than 90 MW out of a total possible production capacity of 140 MW before the beginning of Phase 3, and in any event not before the beginning of 2012,
 - (b) Ottana Energia will reimburse from 2009 to 2014 EUR 1 million each year and will not receive any other aid before the total reimbursement of the EUR 5 million received.
4. For the purpose of monitoring compliance with the conditions set out in paragraph 1 to 3, Italy shall provide short updates at the end of each year until 2014 on the progress of the implementation of the restructuring plan and the commitments listed above.

Article 3

This Decision is addressed to the Italian Republic.

Done at Brussels, 2 July 2008.

For the Commission
Neelie KROES
Member of the Commission
