DECISIONS

COMMISSION DECISION

of 15 September 2010

on State aid that Italy plans to grant to Fri-El Acerra Srl (Case C 8/09 (ex N 357/08))

(notified under document C(2010) 6159)

(Only the Italian text is authentic)

(Text with EEA relevance)

(2011/110/EU)

THE EUROPEAN COMMISSION,

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

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

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

Whereas:

1. PROCEDURE

(1) On 22 May 2008, a pre-notification meeting took place between the Commission departments and the Italian authorities.

(2) By electronic notification dated 16 July 2008, registered at the Commission on the same day, the Italian authorities notified the Commission, pursuant to Article 108(3) TFEU, of their intention to grant ad hoc aid to Fri-El Acerra Srl.

(3) By letters dated 2 September 2008 (D/53398) and 12 December 2008 (D/54895) the Commission requested additional information, which the Italian authorities provided by letters of 1 October 2008 (A/20101), 22 October 2008 (A/22018), and 19 January 2009, which last was registered at the Commission on 21 January 2009 (A/1460).

(4) On 10 March 2009 the Commission decided to initiate the procedure laid down in Article 108(2) TFEU in respect of the aid. The decision to initiate the procedure was published in the Official Journal on 24 April 2009 [2]. The Commission there invited interested parties to submit their comments.

(5) On 15 May 2009 the recipient of the aid, Fri-El Acerra Srl, submitted its observations on the opening decision (A/11823). On 9 June 2009 these observations were sent to Italy for comment (D/52516). On 7 July 2009 the Italian authorities asked for a three-month extension of the deadline for the submission of comments (A/16162). On 20 August 2009 the Commission departments replied, allowing a further month for the submission of comments (D/53581). On 10 September 2009 the Italian authorities requested an urgent meeting to discuss the case with the Commission departments (A/19513). On 18 September 2009 the Italian authorities submitted comments for discussion at the meeting (A/20172); the meeting took place in Brussels on 24 September 2009, in the presence of the lawyers representing the granting authority (the Region of Campania) and the recipient (Fri-El Acerra Srl).

(6) By letter dated 21 October 2009 (D/54421) the Commission departments reminded the Italian authorities that at the meeting they had agreed to submit additional documents and information. The Italian authorities eventually provided this material on 2 November 2009, the consignment being registered at the Commission on the same day (A/23266). By letter dated 23 December 2009 (D/55541) the Commission departments asked the Italian authorities to submit further documents if available. By letter dated 1 February 2010 (A/1892) the Italian authorities provided various documents, mainly originating with the recipient of the aid. Italy submitted additional clarification by e-mail message of 5 May 2010.

[1] OJ C 95, 24.4.2009, p. 20.

[2] OJ C 95, 24.4.2009, p. 20.

2. DETAILED DESCRIPTION OF THE AID MEASURE

(7) The Italian authorities notified their intention to provide ad hoc regional aid to Fri-El Acerra Srl, in accordance with the guidelines on national regional aid for 2007-2013 ('the 2007 Guidelines') ([3]), for the conversion of a closed thermoelectric power plant in Acerra in the Region of Campania into a power plant fuelled by vegetable oil (biofuel). Campania is a NUTS II region that qualifies for regional aid under Article 107(3)(a) TFEU, which in accordance with the Italian regional aid map 2007–2013 has a standard regional aid ceiling for large enterprises of 30 % gross grant equivalent (GGE) ([4]). The Italian authorities intended the aid to promote regional development.

2.1. The recipient of the aid

(8) The recipient of the aid is Fri-El Acerra Srl (hereinafter referred to as 'Fri-El Acerra' or 'the recipient'). Fri-El Acerra was set up on 20 December 2005, in the form of a private limited company (*società a responsabilità limitata*), 95 % of the shares being held by Fri-El Acerra Holding Srl and the remaining 5 % by NGP SpA, the owner of the closed thermoelectric plant. On 9 February 2006 NGP temporarily increased its equity share in Fri-El Acerra from 5 % to 90,5 %, against the transfer to Fri-El Acerra of the branch of NGP's business related to the power plant. A few days later, on 20 February 2006, NGP's stake was reduced to 49 %, and some months thereafter, on 10 October 2006, it was brought back to 5 %.

(9) At the time the measure was notified, Fri-El Acerra was a 95 % subsidiary of Fri-El Acerra Holding, and the remaining 5 % belonged to NGP. In January 2009 the Italian authorities informed the Commission that on 11 December 2008 NGP had decided to withdraw from the ownership of Fri-El Acerra. At present, therefore, Fri-El is a wholly owned subsidiary of Fri-El Acerra Holding, and consequently of Fri-El Group Green Power SpA.

(10) Fri-El Green Power SpA (the 'Fri-El Group') was set up in the Province of Bolzano in 1994, by the three Gostner brothers: it produces and sells electricity from renewable sources. The Fri-El Group operates especially in wind power production, producing electrical energy in 19 wind farms in Italy. The investment project in Acerra is the first in which the group to which the recipient belongs is to produce energy from liquid biomass: other biomass and biogas power plants are under development ([5]).

(11) NGP was set up in 2003, as a result of the divestment of polyester polymer production in Acerra by Montefibre, a producer of acrylic and polyester fibres. NGP ran into difficulties and received aid for restructuring, which was notified to the Commission (NN 15/2007, C 14/2007), to a total amount of EUR 20,87 million. The Commission approved the aid to NGP on 16 July 2008 ([6]). One component in the restructuring plan presented by the Italian authorities was the sale of the closed thermoelectric power plant.

(12) The Italian authorities supplied data confirming that in 2006 the aid recipient and the Fri-El Group were both SMEs.

(13) In the course of the assessment, the Italian authorities provided information about the changes in the structure of ownership of the aid recipient. This information showed that when ownership of the closed power plant was transferred, in February 2006, NGP, the former owner of the assets, owned 90,5 % of Fri-El Acerra's shares. Subsequently, in the course of 2006, NGP's stake in Fri-El Acerra decreased to 5 %.

2.2. The investment project

(14) The notified investment project has been carried out in the Region of Campania, in the Acerra industrial area. A closed thermoelectric power plant belonging to NGP has been acquired and converted into a power plant fuelled by vegetable oil, principally palm oil.

(15) The new power plant accommodates four Wärtsilä 18V46 combustion engines, each with a capacity of 17,2 MW, and one 6-MW steam turbine. Total production of electricity and heat is 74,8 MW.

(16) The Italian authorities told the Commission that work on the project had started in July 2007 and was to be completed in 2009. However, the purchase of the old power plant was in fact initiated in February 2006. According to publicly available information, the biofuel power plant has been operational since 2009 ([7]).

(17) The Italian authorities provided the Commission with authorisations and licences regarding the compliance of the investment project with national and European environmental regulations.

([3]) OJ C 54, 4.3.2006, p. 13.
([4]) Commission Decision of 28 November 2007 on state aid case N 324/2007 *Italy: Regional state aid map 2007–2013*, C(2007) 5618 def. cor. (OJ C 90, 11.4.2008, p. 4).
([5]) Information from the Internet site of the Fri-El Group: www.fri-el.it.
([6]) Commission Decision of 16 July 2008 on State aid C 14/07 (ex NN 15/07) implemented by Italy for NGP/SIMPE (OJ L 301, 12.11.2008, p. 14).
([7]) Information from the Internet site of the Fri-El Group: www.fri-el.it.

2.3. **Eligible costs of the project**

(18) The total eligible investment costs of the project amount to EUR 80 635 000 in nominal value ([8]), made up of EUR 3 300 000 for design and feasibility studies, EUR 60 920 000 for new equipment and machinery (the new biofuel power plant), and the remainder for existing infrastructure and building works. The cost of purchase of the existing infrastructure includes the cost of buying the closed thermoelectric power plant and the steel fuel tanks previously belonging to NGP.

(19) The Italian authorities gave the Commission details of Fri-El Acerra's purchase of the closed power plant from NGP. The Italian authorities explained that when NGP had subscribed to the increase in Fri-El Acerra's capital it had transferred to Fri-El Acerra the branch of its business related to the power plant, at a total value of EUR 8 296 520; this was subject to EUR 3 771 043 in debts to third parties, and the difference, rounded to EUR 4 525 000, was allocated to reserves. The Italian authorities provided an external evaluation confirming the value of the power plant.

(20) The Italian authorities also provided a copy of the agreement between Fri-El Acerra and NGP concerning the sale of fuel tanks. The price agreed was EUR 4 200 000. During the preliminary assessment stage, notwithstanding a request from the Commission, the Italian authorities did not present any external evaluation confirming the value of these fuel tanks.

(21) The Italian authorities stated that the costs incurred by the recipient were EUR 35 000 000 in 2007 and EUR 45 635 000 in 2008.

2.4. **Financing of the investment**

(22) The Italian authorities stated that EUR 21 000 000, equal to 25 % of the total EUR 80 635 000 cost of the investment (nominal value), was to be financed out of Fri-El Acerra's own resources; the aid would amount to EUR 19 000 000, and the rest would be covered by short-term and medium- to long-term bank loans.

2.5. **Legal basis of the ad hoc aid measure**

(23) The Italian authorities stated that Fri-El Acerra had launched the investment project to convert the Acerra power plant in 2006 (on the date of the purchase of the closed power plant), on the basis of a commitment given by the Italian authorities under the Programme Agreement for Coordinated Action in the Industrial Crisis Area of NGP SpA in Acerra (*Accordo di programma per l'attuazione coordinata dell'intervento nell'area di crisi industriale della NGP Spa di Acerra*). According to the Italian authorities, the incentive effect could be seen from the Programme Agreement, which was binding in law.

(24) The Programme Agreement was concluded on 15 July 2005 between the national, regional and local authorities and NGP, Montefibre and Edison SpA, and concerns the NGP site and other activities in the Acerra zone. The agreement does not refer to aid for the conversion of the closed power plant. It lists investments to be carried out and measures to be taken with the aim of restructuring NGP. The energy company Edison SpA, which is not related to Fri-El Acerra, was cited at the time as a future investor in the existing power plant, but it ultimately withdrew from the transaction. The Programme Agreement was subsequently amended by a protocol of 6 April 2006 ([9]) and a protocol of 8 April 2008.

(25) The decision of the Region of Campania to grant ad hoc regional aid to Fri-El Acerra for the conversion of the power plant in Acerra was taken on 26 October 2007.

(26) In the initial notification the Italian authorities provided a chronology of events, and stated that the legal basis of the aid was provided by the following documents:

— the protocol of 8 April 2008 amending the Programme Agreement; and,

— Resolution No 1857 of the Campania Regional Executive, 26 October 2007 ([10]).

2.6. **The aid**

(27) The notified measure concerns aid for the takeover and the conversion of an existing establishment that has closed. The aid would be in the form of a direct grant totalling EUR 19,5 million in nominal value.

3. **GROUNDS FOR INITIATING THE FORMAL INVESTIGATION PROCEDURE**

(28) After a preliminary assessment of the measure, the Commission expressed doubts as to whether the notified aid could be considered compatible with the internal market under Article 107(3)(c) TFEU in the light of the 2007 Guidelines, and decided to initiate the procedure laid down in Article 108(2) TFEU. The doubts expressed by the Commission in that decision are explained below.

([8]) All values are nominal unless otherwise indicated.

([9]) The protocol itself is dated 6 April 2006, though its annexes were signed on 4 April 2006.

([10]) *Deliberazione della Giunta Regionale della Regione Campania n. 1857*, published in the *official gazette of the Region of Campania* (BURC), No 63 of 3 December 2007.

Incentive effect

(29) The Commission doubted whether the aid would have the incentive effect required by paragraph 38 of the 2007 Guidelines: 'In the case of ad hoc aid, the competent authority must have issued a letter of intent, conditional on Commission approval of the measure, to award aid before work starts on the project'. The document the Italian authorities referred to as the letter of intent — the Programme Agreement of 15 July 2005 — did not seem to fulfil these conditions: it did not grant aid for the project, nor did it mention the recipient, the project or the amount of the aid. The recipient of the aid was formally set up only later, on 20 December 2005. According to the information available to the Commission, the project had started in February 2006, with the takeover of the closed thermoelectric power plant, which was the first eligible cost for purposes of the aid measure notified, while the first document that could be considered a letter of intent within the meaning of paragraph 38 of the 2007 Guidelines had been issued by the Region of Campania much later, on 26 October 2007.

Eligible costs

(30) The Commission also doubted whether part of the existing assets, namely the closed thermoelectric power plant, had been bought by an independent investor within the meaning of paragraphs 34 and 35 of the 2007 Guidelines, which read: 'In case of acquisition of an establishment, only the costs of buying assets from third parties should be taken into consideration … The acquisition of the assets directly linked to an establishment may also be regarded as initial investment provided the establishment … is bought by an independent investor'. At the time of the transaction, Fri-El Acerra, the recipient of the aid, was controlled by NGP, the owner of the assets being sold. More precisely, at the time that the transfer of assets took place, NGP owned 90,5 % of the shares in Fri-El Acerra: on 9 February 2006 Fri-El Acerra's capital had been increased from EUR 10 000 to EUR 100 000, and this capital increase had been subscribed exclusively by NGP. NGP had thus temporarily increased its equity share in Fri-El Acerra from 5 % to 90,5 %. After the transfer on 9 February 2006, the process which led to the withdrawal of NGP as majority shareholder in Fri-El Acerra was almost immediate. Only a few days later, on 20 February, NGP's stake was reduced to 49 %, and some months later, on 10 October, it was reduced to 5 %.

(31) It was not clear whether the subsequent purchase from NGP of other existing assets — fuel tanks — had taken place 'under market conditions', as required by paragraphs 34 and 52 of the 2007 Guidelines. The Italian authorities had not provided a valuation by an independent expert clearly establishing the market price of the fuel tanks.

Contribution to regional development

(32) The regional contribution of the ad hoc aid to Fri-El Acerra had not been demonstrated as required by paragraph 10 of the 2007 Guidelines: 'Where, exceptionally, it is envisaged to grant individual ad hoc aid to a single firm … it is the responsibility of the Member State to demonstrate that the project contributes towards a coherent regional development strategy'. The creation (or maintenance) of 25 jobs, against aid of EUR 19,5 million, and the contribution of a biofuel power plant with a capacity of 75 MW to a regional energy deficit of 2 489 MW, did not appear to be sufficient, and the aid appeared to be disproportionate to the impact of the project. Nor had it been clearly shown that the project would contribute to a revitalisation of the industrial area of Acerra.

(33) The Commission asked the Italian authorities and third parties for their observations on the question whether the new power plant fuelled by palm oil would indeed contribute to the development of the Acerra area and the Region of Campania.

Compliance with environmental rules

(34) In the decision, the Commission also requested observations from the Italian authorities regarding the application of the Community guidelines on State aid for environmental protection ('the 2008 Environmental Guidelines') ([11]).

4. OBSERVATIONS RECEIVED FROM THIRD PARTIES AND COMMENTS BY THE MEMBER STATE

(35) As previously mentioned, the Commission received observations from the recipient of the aid, Fri-El Acerra, on 15 May 2009. The Italian authorities commented on those observations by letters of 18 September and of 2 November 2009. On 1 February 2010, following a further request from the Commission, the Italian authorities supplied the Commission with documents provided by the recipient.

4.1. Summary of the observations from the recipient, Fri-El Acerra

Incentive effect

(36) With regard to the incentive effect, Fri-El Acerra refers to various documents signed by the Italian authorities between 2004 and 2008 with the aim of revitalising

([11]) OJ C 82, 1.4.2008, p. 1.

the industrial area of Acerra. More specifically, Fri-El Acerra refers to the Memorandum of Understanding of 12 May 2004 ([12]), the Programme Agreement of 15 July 2005 ([13]), the amendment to the Programme Agreement of 6 April 2006 ([14]), Resolution No 1857 of the Regional Executive of Campania ([15]), and the amendment to the Programme Agreement of 8 April 2008 ([16]). Fri-El Acerra argues essentially that the doubts expressed by the Commission in the opening decision do not take proper account of these documents, and in particular of the Programme Agreement signed on 15 July 2005, which it says is an instrument that is legally binding with regard to the aid for all the steps it took subsequently.

(37) The committee supervising the implementation of the Programme Agreement held two meetings, on 29 September and 6 October 2005, for which Italy provided the Commission with the minutes; at the second of these meetings the representative of NGP mentioned Fri-El Acerra as a potential investor, which had manifested interest in a takeover of the old power plant on the condition that the investment project would qualify for regional aid.

(38) Fri-El Acerra considers that the legitimate expectation was reinforced by the first amendment to the Programme Agreement signed by the Italian authorities on 6 April 2006, Article 3 of which clearly referred to the Region of Campania's obligation to provide financial support for the new biofuel power plant project. Fri-El Acerra therefore takes the view that the Region of Campania was under a legal obligation to aid the investment long before 7 June 2006, when Fri-El Acerra formally submitted the first application for aid. The steps subsequently taken by the Region of Campania on 26 October 2007 and 8 April 2008 merely confirmed this obligation.

Eligible costs

(39) On the question of eligible costs, Fri-El Acerra agrees with the Commission that at the time of the transfer of the assets (the closed power plant), the two companies NGP and Fri-El Acerra were not independent, as NGP had 90,5 % control of Fri-El Acerra. However, Fri-El Acerra emphasises that the transaction did take place on market terms, as the purchase price was set at a value established by an independent expert. Fri-El Acerra adds that NGP's stake in Fri-El Acerra had fallen to 5 % by the end of 2006. In order to eliminate any possible doubt that there might be an advantage conferred on NGP, the Fri-El Group took over the remaining 5 % from NGP on 11 December 2008. Fri-El Acerra takes the view, therefore, that the transitional control by NGP did not reflect a medium- to long-term economic rationale, but was due to the specific mechanism chosen for the transfer of the assets (the closed power plant).

(40) The price paid for the other assets Fri-El Acerra bought from NGP (the fuel tanks) was set in the preliminary purchase contract of 8 March 2006, and Fri-El Acerra confirms that it reflected the market value of the assets. In evidence Fri-El Acerra has produced a new document assessing the value of the fuel tanks, which was prepared by the same independent expert who assessed the value of the closed power plant. This new expert's report, drawn up ex post in 2009, during the formal investigation stage, refers expressly to the market prices of these used assets at November 2008 and confirms the price paid by the aid recipient to NGP.

Contribution to regional development

(41) As to the project's contribution to regional development, Fri-El Acerra draws attention in the first place to the 25 jobs created. Fri-El Acerra also emphasises that the biofuel power plant forms part of the new development strategy for the Acerra industrial area. This development strategy takes account of the need for new investments with a low environmental impact, such as Fri-El Acerra's biofuel power plant. With the exception of the section formerly occupied by Montefibre, the Industrial Development Agency of the Province of Naples ([17]) intends to transform the area into an innovation pole for the aeronautic industry. All this would have a major impact on employment, on the environment and on social and economic conditions in the region, and Fri-El Acerra's biofuel power plant contributes positively to the strategy.

Compliance with environmental rules

(42) As regards the environmental aspects, finally, Fri-El Acerra refers to the same programming documents of the Region of Campania previously mentioned by the Italian authorities: the 2002 guidelines for sustainable development in the energy sector, which set out the

([12]) The Memorandum of Understanding (*Protocollo d'intesa*) sought to secure a solution to the industrial crisis at NGP, and was signed on 12 May 2004 by, among others, national, regional and local authorities, Sviluppo Italia, Montefibre SpA, NGP SpA, Edison SpA and the trade unions.

([13]) Already referred to.

([14]) The first amendment to the Programme Agreement (*Protocollo integrativo dell'Accordo di programma*) sought to secure a solution to the industrial crisis at Ilmas SpA, and was signed on 6 April 2006 by, among others, national, regional and local authorities, Sviluppo Italia, Consorzio ASI di Napoli, Exide Italia Srl, ILMAS SpA and the trade unions.

([15]) Already referred to.

([16]) The second amendment to the Programme Agreement (*Protocollo integrativo dell'Accordo di programma*) was signed on 8 April 2008 by, among others, national, regional and local authorities, NGP and Fri-El Acerra.

([17]) *Consorzio per l'Area di Sviluppo Industriale della Provincia di Napoli.*

goals of the regional energy policy; the action plan for regional economic development of 2006; and the environmental energy plan of 2008. Fri-El Acerra considers that all these documents clearly point to the need for a power plant fuelled by renewable sources in the Region of Campania.

4.2. **Summary of comments by the Member State**

Incentive effect

(43) In their letter of 18 September 2009, the Italian authorities submit detailed argument regarding the requirement of an incentive effect laid down in paragraph 38 of the 2007 Guidelines. In particular, they consider that the 2007 Guidelines do not clearly specify the form of the required letter of intent.

(44) They repeat that the Programme Agreement signed on 15 July 2005 was of a binding nature, and reaffirm that the administrative proceedings started no later than the 2004 Memorandum of Understanding, which included a commitment on the part of the public authorities to provide incentives for the revitalisation of the Acerra industrial area. They observe that the first amendment to the Programme Agreement, dated 6 April 2006, contains an implicit reference to Fri-El Acerra, and that it states that the Region of Campania intends to provide incentives for the investment in the new power plant.

(45) The Italian authorities argue that the identity of the private entities that are to implement the project is of absolutely marginal importance, as long as the project remains within the agreed scope and the agreed socioeconomic and industrial aims. They stress that if the incentives had not been available the investor would not have located its operation in the area concerned, as can be seen from the minutes of the meeting of the committee supervising the implementation of the Programme Agreement held on 6 October 2005.

Eligible costs

(46) The Italian authorities confirm Fri-El Acerra's position with regard to the mutual independence of Fri-El Acerra and NGP: the sole and exclusive project owner and recipient of the aid is Fri-El Acerra, a company wholly independent of NGP. NGP held a temporary stake in Fri-El Acerra only for a brief period, as a consequence of the mechanism chosen by the parties for transferring the power plant ([18]). In their letter of 2 November 2009, the Italian authorities explain the reasons why the power plant was transferred from NGP to Fri-El Acerra, not by selling the assets, but by first transferring the business division to Fri-El Acerra and then transferring NGP's shareholding to the Fri-El Group; this was due essentially to (a) tax considerations; (b) the possibility of payment by instalments; and (c) authorisation issues.

([18]) The Commission observes that NGP held shares in Fri-El Acerra from the date on which Fri-El Acerra was set up, on 20 December 2005, until 11 December 2008.

(47) As regards the determination of the value of the assets, the Italian authorities observe that for the closed power plant Fri-El Acerra paid the equivalent of the value arrived at by an independent expert, and that there appears therefore to be no possible doubt that the transfer of the power plant took place between independent parties, and that in any event it was undertaken on market terms.

(48) The same considerations regarding the independence between NGP and Fri-El Acerra naturally also apply to the acquisition of the fuel tanks. Hence, the sale of the tanks was also between independent parties. And the parties determined the asset value of the tanks in strict adherence to market conditions, applying the same criteria and parameters that had been applied by the independent expert in the report valuing the power plant.

Contribution to regional development

(49) As regards the regional contribution, the Italian authorities in their comments reaffirm that the investment project will:

— increase employment, by creating 25 jobs directly,

— produce a multiplier effect, as a result of the concentration of significant industrial initiatives on the Acerra site, with at least a further 10 jobs linked to the supply and storage of palm oil and assistance in transporting it,

— play a significant part in the development strategy for the Acerra industrial area, with the revitalisation of the area in social, industrial, and employment terms and the development in the area of a power plant with a low environmental impact,

— help to overcome the deficit in electrical power in the region in terms of quality of the energy, which will be produced from renewable sources (biofuels); with its output of 75 MW, the plant will play an important role in achieving the regional target of 200 MW from biomass by 2013 set in the Regional Environmental Energy Plan (PEAR) 2008.

(50) With their letter of 2 November 2009 the Italian authorities enclose a memo from the Ministry of Economic Development, dated 21 October 2009, which they say will confirm the contribution the project will make to regional development. The Ministry there confirms the following:

— The Programme Agreement of 15 July 2005 focuses on: putting together a package of investments for the diversification of industrial activities in the area; modernising the main support infrastructure — the power plant and treatment plant — with a view among other things to reemploying redundant workers; and combining funding from central government and the Region of Campania in order to finance the incentives necessary to attract new investment.

— Three major economic and industrial objectives are to be pursued: (a) to avoid the closure of the newest part of the SIMPE (formerly NGP) establishment; (b) to launch a process of diversifying industrial activities on a site which in the past had been dominated by just one large business group, and thereby to reduce the risk of recurrent business crises; and (c) to exploit the potential of an industrial conurbation such as Acerra, which is particularly hard hit by unemployment and social difficulties.

— Great efforts have been made in all quarters to promote new investment aimed at giving shape to the 'industrial park' in Acerra proposed by the Region of Campania in the Programme Agreement,

Compliance with environmental rules

(51) In their letter of 2 November 2009 the Italian authorities comment on the compliance of the power plant with the legal requirements governing energy sources and fuel supply, showing that the technology used allows the plant to be fuelled not only by palm oil but also by coconut, copra or rape-seed oil or other similar vegetable-based biofuels without prejudice to its normal operation or productivity.

4.3. **Further documents originating with the recipient provided by the Member State**

Incentive effect

(52) On 23 December 2009, in order to have a full understanding of the decision-making process, the Commission departments asked the Italian authorities to provide any further documents available, dating from before the point at which Fri-El Acerra embarked upon the investment project, which might serve to justify the investment decision.

(53) The Italian authorities answered on 1 February 2010, repeating that the minutes of the meeting of 6 October 2005 clearly identified the Fri-El Group as the alternative investor after Edison's withdrawal. In these minutes, the NGP representative stated that the Fri-El Group expects regional support.

(54) With their reply the Italian authorities enclosed a further letter from the recipient of the aid, enclosing internal documents of the Fri-El Group: a memo from a consultant, referring to the opportunity to take over NGP's power plant in Acerra after Edison's withdrawal; two subsequent contracts with the same consultant; and an internal report dated 26 January 2006, examining the financial feasibility of the project with and without regional aid

5. **ASSESSMENT OF THE AID MEASURE**

5.1. **State aid**

(55) Article 107(1) TFEU states that 'Save as otherwise provided in the Treaties, any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between Member States, be incompatible with the internal market.'

(56) The aid is to be granted by the Italian authorities in the form of a direct grant. The assistance can thus be considered to be granted by the Member State and through state resources within the meaning of Article 107(1) TFEU.

(57) The aid is to be granted to a single company, Fri-El Acerra, and is therefore selective.

(58) The aid is to be granted for an investment relating to the production of energy. The electricity market has been gradually opened to competition, notably by Directive 96/92/EC of the European Parliament and of the Council of 19 December 1996 concerning common rules for the internal market in electricity (OJ L 27, 30.1.1997, p. 20), a process that culminated in the full liberalisation of the sector on 1 July 2007 ([19]). Moreover, there was some competition in this sector in Italy even before the Community legislation ([20]). Since the product is traded between Member States, the measure is likely to affect trade between Member States.

([19]) The electricity market opened completely on 1 July 2007 under the terms of Directive 2003/54/EC of the European Parliament and of the Council of 26 June 2003 concerning common rules for the internal market in electricity and repealing Directive 96/92/EC ('the Second Electricity Directive'), OJ L 17, 15.7.2003, p. 37.

([20]) See Court of First Instance in Case T-297/02 *ACEA* v *Commission* [2009] ECR II-1683, paragraph 90, and Case T-301/02 *AEM* v *Commission* [2009] ECR II-1757, paragraph 95.

(59) The aid granted to Fri-El Acerra will relieve the company from costs which, if it were to install a similar power station, it would ordinarily have to bear itself, and thus gives it an economic advantage over its competitors.

(60) By favouring Fri-El Acerra and its product over its competitors, the measure distorts or threatens to distort competition.

(61) Consequently, the Commission considers that the notified measure constitutes state aid within the meaning of Article 107(1) TFEU.

(62) Having established that the notified measure constitutes state aid within the meaning of Article 107(1) TFEU, the Commission must consider whether it can be held to be compatible with the internal market.

5.2. **Legality of the aid measure**

(63) By notifying the aid to Fri-El Acerra before putting it into effect, Italy has complied with the individual notification requirement laid down in Article 108(3) TFEU.

5.3. **Legal basis of the assessment**

(64) Having established that the notified measure constitutes state aid within the meaning of Article 107(1) TFEU, the Commission must consider whether it can be held to be compatible with the internal market under one of the exemptions in Article 107(2) and (3) TFEU.

5.3.1. *Article 107(2) TFEU*

(65) The exemptions in Article 107(2) TFEU concern aid having a social character granted to individual consumers, aid to make good the damage caused by natural disasters or exceptional occurrences, and aid granted to certain areas of the Federal Republic of Germany: they do not apply in this case.

5.3.2. *Article 107(3)(a) TFEU*

(66) Article 107(3)(a) TFEU provides for the authorisation of aid to promote the economic development of areas where the standard of living is abnormally low or where there is serious underemployment. As explained in section 2 of this Decision, the Region of Campania qualifies for aid under this exemption.

(67) The Commission observes that the objective of the aid is to promote regional development, and the measure constitutes ad hoc regional aid towards an investment. The Commission notes that the investment project which the Italian authorities intend to support started in 2006. This raises the question whether the measure has to be assessed under the 2007 Guidelines or under the guidelines on national regional aid that covered the period 2000-2006 ('the 1998 Guidelines') ([21]).

(68) Rules on the application *ratione temporis* of the two sets of guidelines are set out in paragraph 105 of the 2007 Guidelines: the 2007 Guidelines are to apply to all regional aid to be granted after 31 December 2006, and the 1998 Guidelines are to apply to all regional aid awarded or to be granted before 2007. In the present case, the aid was not awarded before 2007, despite the fact that the project started in 2006. The first act that can be considered an award of aid to the recipient is the decision of the Region of Campania of 26 October 2007 (see section 5.4.1.5) ([22]). The compatibility of the aid with the internal market under Article 107(3)(a) TFEU has consequently to be assessed on the basis of the 2007 Guidelines.

5.3.3. *Article 107(3)(b), (c) and (d) TFEU*

(69) The measure cannot be considered to be aid towards an important project of common European interest or aid to remedy a serious disturbance in the Italian economy, as provided for by Article 107(3)(b) TFEU. It is not aid to promote culture and heritage conservation as provided for by Article 107(3)(d) TFEU.

(70) The exemption in Article 107(3)(c) TFEU allows the authorisation of aid to facilitate the development of certain economic activities or of certain economic areas, where such aid does not adversely affect trading conditions to an extent contrary to the common interest: the Commission notes that aid for the protection of the environment can be declared compatible on this basis, provided that it meets the conditions of the Community guidelines on State aid for environmental protection ('the 2008 Environmental Guidelines') ([23]).

([21]) OJ C 74, 10.3.1998, p. 9.

([22]) The Court of First Instance has held that in order to establish when aid was granted the relevant criterion is 'the legally binding act by which the competent [national] authorities undertake to grant aid': see Case T-109/01 *Fleuren Compost* v *Commission* [2004] ECR II-127, paragraph 74, and Joined Cases T-362/05 and T-363/05 *Nuova Agricast* v *Commission* [2008] ECR II-297*, paragraph 80. See also the recent judgment in Case T-62/08 *Thyssenkrupp Acciai Speciali Terni* v *Commission*, 1 July 2010, not yet published in the ECR, paragraphs 234-236.

([23]) OJ C 82, 1.4.2008, p. 1.

(71) The Italian authorities have not put forward any arguments to suggest the aid concerned might be compatible with other Treaty provisions or other state aid rules, frameworks or guidelines.

5.4. **Compatibility under Article 107(3)(a) in the light of the 2007 Guidelines**

(72) The 2007 Guidelines set out the conditions for the approval of regional investment aid in sections 2 ('Scope') and 4 ('Regional investment aid'). The aid in the present case must comply with paragraph 10, on the contribution to be made by ad hoc measures to regional development strategy, and with sections 4.1 ('Form of aid and aid ceilings') and 4.2 ('Eligible expenses'), which lay down the following requirements:

— *Incentive effect:* In order to ensure that regional aid provides a real incentive to undertake investments which would not otherwise be made in the assisted areas, paragraph 38 of the 2007 Guidelines states that 'In the case of ad hoc aid, the competent authority must have issued a letter of intent, conditional on Commission approval of the measure, to award aid before work starts on the project'.

— *Contribution to a coherent regional development strategy:* Paragraph 10 of the 2007 Guidelines states that: 'Where, exceptionally, it is envisaged to grant individual ad hoc aid to a single firm … it is the responsibility of the Member State to demonstrate that the project contributes towards a coherent regional development strategy'.

— *Eligible costs:* The precise definition of eligible costs is set out in paragraphs 34–36 and 50–56 of the 2007 Guidelines.

— *Recipient's own contribution:* Paragraph 39 of the 2007 Guidelines requires that the recipient provide a financial contribution of 25 %.

— *Maintenance of investment in the region:* Paragraph 40 of the 2007 Guidelines requires that the investment be maintained in the region for at least 5 years (or 3 years for an SME).

— *Aid ceilings:* Aid ceilings are set in paragraphs 42-49 of the 2007 Guidelines.

(73) The Commission assessed the compliance of the proposed aid measure in paragraph 34, section 3.3 of the decision to initiate the formal investigation procedure ([24]). In paragraph 34(i) it explained that the measure concerned initial investment, namely the setting-up of a new establishment. The acquisition of assets directly linked to an establishment, in this case the closed thermoelectric power plant and the used fuel tanks, could also be regarded as initial investment, provided that the assets were bought by an independent investor (see paragraphs 34–35 of the 2007 Guidelines): this aspect will be assessed in section 5.4.3 below. Paragraph 34(vi) of the decision initiating the procedure stated that the recipient was to provide a financial contribution of at least 25 % of the eligible costs in a form free of any public support (see paragraph 39 of the 2007 Guidelines). Paragraph 34(vii) of the decision initiating the procedure stated that the aid was subject to an obligation to maintain the investment for at least 5 years after its completion (see paragraph 40 of the 2007 Guidelines). Paragraph 34(ii) and (iii) stated that the notified intensity of the aid was below the applicable regional aid ceiling of 30 % GGE adjusted in accordance with paragraph 67 of the 2007 Guidelines (see paragraphs 42–49 of the 2007 Guidelines). Paragraph 34(iv) stated that the aid towards the costs of preparatory studies and consultancy costs was below the ceiling of 50 % authorised for SMEs (see paragraph 51 of the 2007 Guidelines).

(74) In what follows the Commission will assess compliance with the conditions relating to the incentive effect, to the contribution to regional development, and to eligible investment costs.

5.4.1. *Incentive effect (paragraph 38 of the 2007 Guidelines)*

(75) Paragraph 38 of the 2007 Guidelines reads as follows:

— 'It is important to ensure that regional aid produces a real incentive effect to undertake investments which would not otherwise be made in the assisted areas. Therefore aid may only be granted under aid schemes if the beneficiary has submitted an application for aid and the authority responsible for administering the scheme has subsequently confirmed in writing that, subject to detailed verification, the project in principle meets the conditions of eligibility laid down by the scheme before the start of work on the project. An express reference to both conditions must also be included in all aid schemes. *In the case of ad hoc aid, the competent authority must have issued a letter of intent, conditional on Commission approval of the measure, to award aid before work starts on the project. If work begins before the conditions laid down in this paragraph are fulfilled, the whole project will not be eligible for aid.*'

([24]) Decision on State aid case N 357/08, published OJ C 95, 24.4.2009, p. 20.

— Footnote 39 reads: 'In the case of aid which is subject to individual notification to and approval by the Commission, confirmation of eligibility must be made conditional on the Commission decision approving the aid.'

— Footnote 40 reads: '"Start of work" means either the start of construction work or the first firm commitment to order equipment, excluding preliminary feasibility studies.'

— Footnote 41 reads: 'The only exception to these rules is in the case of approved tax aid schemes where a tax exemption or reduction is granted automatically to qualifying expenditure without any discretion on the part of the authorities.'

(76) According to settled case-law:

The Commission can declare an aid measure compatible with Article 87(3) EC only if it can make a finding that the aid contributes to the achievement of one of the objectives listed, and that the recipient undertaking could not achieve that objective relying on its own resources under normal market conditions. In other words, in order for aid to benefit from one of the derogations contained in Article 87(3) EC, it must not only comply with one of the objectives set out in Article 87(3)(a), (b), (c) or (d) EC, but it must also be necessary for the attainment of those objectives (Court of First Instance in Case Case T-187/99 *Agrana Zucker und Stärke* v *Commission* [2001] ECR II-1587, paragraph 74).

Aid which improves the financial situation of the recipient undertaking without being necessary for the attainment of the objectives specified in Article 87(3) EC cannot be considered compatible with the common market (Court of Justice in Case C-390/06 *Nuova Agricast* [2008] ECR I-2577, paragraph 68; to the same effect Court of Justice in Case 310/85 *Deufil* v *Commission* [1987] ECR 901, paragraph 18, and Case C-400/92 *Germany* v *Commission* [1994] ECR I-4701, paragraphs 12, 20 and 21) ([25]).

The Court of First Instance took the same approach in a case ([26]) involving an ad hoc measure under the previous guidelines on national regional aid ([27]), where it made it clear that the provisions on the incentive effect also applied to ad hoc measures. It confirmed that the Commission could base its assessment of the incentive effect on a circumstance of a chronological nature ([28]).

(77) The Commission's settled practice in its decisions with regard to ad hoc aid measures to be approved under the 2007 Guidelines is that in order to be considered proof of incentive effect within the meaning of paragraph 38 of the 2007 Guidelines, the written confirmation provided by the authority responsible should specify at least the investment project to be supported, the amount of the eligible costs, and the amount of the aid, and should include the conditionality clause ([29]).

(78) The Italian authorities and the recipient have submitted a number of documents which in their view constitute confirmation in writing within the scope of paragraph 38 of the 2007 Guidelines. The Commission will analyse each one of them, in order to verify whether it meets the conditions laid down in paragraph 38 of the 2007 Guidelines. Before doing so the Commission must determine the date on which realisation of the project began.

5.4.1.1. Date on which realisation of the project began

(79) The Italian authorities have stated that the realisation of the project began in July 2007. However, the Commission points out that the purchase of the closed thermoelectric power plant was initiated on 9 February 2006, with the transfer to Fri-El Acerra of the branch of NGP's business related to the power plant. Since the acquisition of assets directly linked to an establishment (in this case the closed power plant) is regarded as an initial investment, the date on which realisation of the project began is the date of purchase of the closed thermoelectric power plant. The Commission consequently considers that the date on which the realisation of the project began is 9 February 2006. However, the Commission observes that its findings with regard to the incentive effect would remain unchanged if the view were to be taken that the relevant date was 4 August 2006, when Fri-El Acerra placed the order for the supply of the new power plant with Wärtsilä, or even 23-30 July 2007, when Fri-El Acerra started work on the construction of the new biofuel plant.

([25]) Unofficial Commission translation. Court of First Instance in Case T-396/08 *Freistaat Sachsen* v *Commission*, 8 July 2010, not yet published in the ECR, paragraphs 46 and 47.

([26]) Case T-162/89 *Kronoply* v *Commission* [2009] ECR II-1, paragraphs 80 and 81.

([27]) OJ C 74, 10.3.1998, p. 9.

([28]) *Kronoply* v *Commission*, paragraph 80.

([29]) These conditions were met for example in the letter of intent (in the form of a written document signed by the recipient and the Region of Piedmont) in another recent Italian ad hoc regional aid case, Case N 381/2008 *Pirelli Industrie Pneumatici Srl* (OJ C 284, 25.11.2009), and also in a long list of Polish ad hoc regional aid cases: N 468/2009 *Roche Polska Sp z oo* (OJ C 53, 5.3.2010); N 448/2009 *Crisil Irevna Poland Sp z oo* (OJ C 147, 5.6.2010); N 447/2009 *TietoEnator Sp z oo* (OJ C 25, 2.2.2010); N 338/2009 *Unicredit Processes & Administration SA* (OJ C 93, 13.4.2010); N 293/2009 *Samsung Electronics Polska Sp z oo* (OJ C 94, 14.4.2010); N 433/2008 *UPS Polska Sp z oo* (OJ C 1, 5.1.2010); and N 67/2008 *Google Poland Sp z oo* (OJ C 217, 26.8.2008).

5.4.1.2. The Programme Agreement of 15 July 2005

(80) The Commission considers that this document, described in paragraphs 23 and 24, cannot be considered as written confirmation within the scope of Article 38 of the 2007 Guidelines, as it is concerned mainly with the rescue and restructuring plan for NGP ([30]). The document does speak of the construction of a new power plant, but is referring to another company (Edison) and another project (a new 400 MW thermoelectric power plant), and does not mention any plan to grant aid towards that project. The Programme Agreement indicates only that NGP, Edison and the Italian authorities are to conclude a further agreement within 60 days, something that did not in fact happen. As explained in paragraph 24, Edison is a company completely unrelated to Fri-El Acerra

(81) The Italian authorities have argued that the 2007 Guidelines do not specify the precise form of the written confirmation required; the Commission considers that this argument does not justify the view that the requirements of paragraph 38 of the 2007 Guidelines are met by any document making a vague reference to a possible aid project. The Programme Agreement does not mention the investment project to be supported (the biofuel power plant), nor the amount of the eligible costs, nor the amount of the aid. It does not even mention that any aid is planned for the conversion of the closed power plant. The requirements for proof of incentive effect set out in paragraph 38 of the 2007 Guidelines clearly refer to an investment project; to aid; to a recipient; and to the need for Commission approval. A document establishing the incentive effect must contain all of this information.

(82) Nor can the Commission accept the Italian authorities' argument that the Programme Agreement has created a legitimate expectation that subsidies will be available for any project relating to the production of electricity in the Acerra industrial area: the Programme Agreement does not state that aid is to be granted for this purpose.

(83) The Commission concludes that the Programme Agreement of 15 July 2005 does not satisfy the tests of paragraph 38 of the 2007 Guidelines.

5.4.1.3. The amendment of 6 April 2006 to the Programme Agreement

(84) The Programme Agreement was amended on 6 April 2006 by the Region of Campania and NGP (see paragraph 36 above). The amendment contains a reference to an alternative plan for the power plant, in which it would be converted to biofuel, and envisages aid for this project under a block-exempted scheme, namely measure 1.12 in the operational programme for the Region of Campania ([31]).

(85) However, that scheme could not cover the whole of the aid planned for the Fri-El Acerra project, because it excluded projects where the amount of aid would be substantial, i.e. projects with eligible costs above EUR 25 million and an aid intensity above 17,5 % GGE, and projects for which the total amount of aid was above EUR 15 million. The exempted scheme also excluded from the eligible costs the acquisition of used machinery and equipment ([32]).

(86) Even if the Commission were to consider that the amendment of 6 April 2006 constituted a letter awarding aid (which it does not), the letter would not satisfy the tests of paragraph 38 of the 2007 Guidelines. First, the amendment came after the start of work (9 February 2006). Second, the amendment, like the original Programme Agreement, does not provide all the information required in a letter of intent: in particular, it does not indicate the amount of the eligible costs or the amount of aid to be granted, and does not contain a conditionality clause. Third, the letter refers expressly to a regional scheme that expired on 31 December 2006 ([33]). The Commission has already decided that the incentive effect cannot be transferred from one aid scheme to another, because every scheme is independent and has its own conditions of eligibility ([34]); this is all the more true when the national authorities have made reference to the prospect of assistance being provided under a specific scheme that

([30]) Commission Decision of 16 July 2008 on State aid C 14/07 (ex NN 15/07) implemented by Italy for NGP/SIMPE, referred to above.

([31]) Measure covered by the SMEs scheme XS 67/05, published OJ C 19, 26.1.2006, p. 4. That scheme, exempted under Regulation (EC) No 70/2001 (OJ L 10, 13.1.2001, p. 33), expired on 31 December 2006.

([32]) Resolution of the Campania Regional Executive (*Deliberazione della Giunta Regionale della Regione Campania*) No 168 of 15 February 2005, published in the *official gazette of the Region* (BURC), No 20 of 11 April 2005.

([33]) The exempted SMEs scheme XS 67/05 referred to above.

([34]) As in decision C(2008) 2997 final of 2 July 2008 on a State aid scheme (C 1/04 (ex NN 158/03 and CP 15/2003)): Misuse of aid measure N 272/98, Regional Act No 9 of 1998, where the Commission adopted a negative decision and ordered recovery. This approach has been upheld by the Court of First Instance: 'The general principle established by Article 87(1) EC is that state aid is prohibited. According to the case-law, exceptions to that principle are to be interpreted strictly … It follows that a decision to raise no objection to an aid scheme relates only to the grant of aid under that scheme: it is for the national authorities concerned to grant the aid before that decision expires' (unofficial Commission translation; Joined Cases T-362/05 and T-363/05 *Nuova Agricast* v *Commission* [2008] ECR II-297*, paragraph 80). Thus the fact that a company meets the eligibility conditions of one aid scheme does not entitle it to obtain aid under another aid scheme or measure.

would not in fact allow the granting of aid of an amount such as that at issue here, or to a project of this size.

(87) The Commission concludes that the amendment of 6 April 2006 to the Programme Agreement of 15 July 2005 does not satisfy the tests of paragraph 38 of the 2007 Guidelines, and that in any event it dates from after the date on which the realisation of the project began.

(88) In the course of 2006, before the existing aid schemes expired, Fri-El Acerra applied for state aid twice: on 7 June 2006 it applied for EUR 30 000 000 under measure 1.12 in the operational programme for the Region of Campania 2000–2006, and on 18 December 2006 it applied for EUR 43 396 000 under the national scheme N 488/1992, as amended and approved as state aid measure N 715/99 ([35]). The Commission is not aware of any positive reaction to those requests on the part of the Italian authorities. Nonetheless, Fri-El Acerra had already started work by taking over the assets from NGP in February 2006, and it placed the order for the supply of the new power plant with Wärtsilä on 4 August 2006. Finally, Fri-El Acerra started the construction work on 23–30 July 2007. Those applications consequently cannot be considered to be a letter of intent within the meaning of paragraph 38 of the 2007 Guidelines, and do not prove that the aid has a real incentive effect.

5.4.1.4. The authorisation of the Region of Campania dated 9 October 2006

(89) Another document dated 2006 which is mentioned by the Italian authorities in their comments, namely the authorisation granted by the Region of Campania on 9 October 2006 ([36]), relates to administrative authorisations for the technical conversion of the existing power plant, and not to aid to be granted by the regional authorities for this purpose. Thus it cannot be considered a letter of intent within the meaning of paragraph 38 of the 2007 Guidelines; and it is dated after the date on which the realisation of the project began.

5.4.1.5. The decision of the Region of Campania dated 26 October 2007

(90) The Commission takes the view that the Resolution of the Campania Regional Executive of 26 October 2007 referred to in paragraphs 25, 26, 29 and 68 above (*Deliberazione della Giunta Regionale della Regione Campania* No 1857) is the first document issued by the Italian authorities which legally binds them to grant the aid to Fri-El Acerra and satisfies the tests of paragraph 38 of the 2007 Guidelines. This document clearly identifies the investment project (the biofuel power plant) and the amount of aid (maximum EUR 19,5 million), and is conditional on notification and Commission approval.

(91) Since work on the project began in February 2006, more than one and half years before the date of this document, the Commission considers that the notified project does not satisfy the tests of incentive effect laid down in paragraph 38 of the 2007 Guidelines ([37]). The project was notified only on 16 July 2008. A decision of the Region taken in October 2007, containing a conditional commitment to grant aid, cannot be regarded as a decisive factor that provided Fri-El Acerra with an incentive to carry out an investment project that had in fact started with the purchase of the plant in February 2006. The decision of the Region taken in October 2007 cannot be considered sufficient to prove the incentive effect of the aid even if the date on which work started on the project is taken to be the date of the first construction work carried out by Fri-El Acerra, in July 2007, as that work also predated the decision.

5.4.1.6. The minutes of a meeting, held on 6 October 2005, of the committee supervising the implementation of the Programme Agreement of 15 July 2005

(92) As proof of the incentive effect for Fri-El Acerra's incentive project, the Italian authorities further refer to the minutes of a meeting, held on 6 October 2005, of the committee supervising the implementation of the Programme Agreement of 15 July 2005. At this meeting, according to the minutes, the NGP representative for the first time referred to the Fri-El Group as a potential investor that had manifested an interest in taking over the closed power plant. The Fri-El Group's interest was said to be motivated by the availability of regional aid to the industry which could reduce the financial costs at the site, which at the time was not very competitive.

(93) The Commission considers that the presence of this statement in the minutes does not point to a firm and binding intention on the part of the Italian authorities to grant aid to the investment project subject only to the Commission's approval. The statement comes from the representative of NGP, a company in difficulty that was looking for a buyer for its closed power plant. The minutes do not contain any statement on the part of the Italian authorities confirming that the Fri-El Group's expectations of regional investment aid would be fulfilled.

([35]) Commission Decision D/105754 of 2 August 2000.

([36]) *Decreto Dirigenziale* No 416, published BURC No 62, 26.11.2007.

([37]) The 2007 Guidelines were published in the Official Journal on 4 March 2006, but Member States had been informed earlier. Press release IP/05/1653 ('State aid: Commission adopts new regional aid guidelines for 2007–2013') dates back to 21 December 2005.

(94) The Commission stresses that a letter of intent clearly has to be a written document originating from the authority competent to grant the aid, and not from the representative of a company which is not the recipient of the aid and which has an interest in the sale of the asset in question (the thermoelectric plant). Moreover, these minutes do not meet the minimum requirements set out in paragraph 38 of the 2007 Guidelines for the content of a letter of intent.

5.4.1.7. Internal company documents

(95) With regard to the other documents provided by the Italian authorities (see paragraph 54), the Commission considers that, in the light of the clear language of the last sentence of paragraph 38 of the 2007 Guidelines, and of the fact that a letter of intent must originate from the authority competent to grant the aid, the company's internal documents cannot be deemed equivalent to a letter of intent showing that the authorities intended to award aid for a regional investment project.

(96) In any event, these documents tend in fact to confirm that the investment decision was taken without a firm and binding commitment on the part of the Italian authorities to grant aid. In particular, an internal report of 26 January 2006 assesses the financial feasibility of the project with and without regional aid. This shows that both hypotheses were being considered. The report concludes that if Fri-El Acerra did not receive regional investment aid the project would be less profitable and more risky. Nevertheless, just a couple of weeks thereafter, on 9 February 2006, Fri-El Acerra set the investment in motion by acquiring NGP's closed power plant. Neither the Italian authorities nor the recipient have argued that between 26 January 2006 and 9 February 2006 there was any event that might have indicated or confirmed the Italian authorities' intention to grant aid.

5.4.1.8. Conclusion: no incentive effect

(97) The Commission therefore considers that the notified project does not fulfil the conditions with regard to the incentive effect of ad hoc aid set out in paragraph 38 of the 2007 Guidelines, which stipulates that the incentive effect has to be shown by a letter of intent from the authorities in charge, before work on the project starts, stating that the investment project is in principle eligible for aid subject to the Commission's approval.

5.4.2. *Contribution to a coherent regional development strategy (paragraph 10 of the 2007 Guidelines)*

(98) The Commission repeats, first of all, that under paragraph 10 of the 2007 Guidelines ad hoc regional aid is to be considered admissible only by way of exception. Thus it is for the Member State to demonstrate that ad hoc regional aid contributes to regional development by producing positive effects on such things as job creation (number of jobs directly and indirectly created by the investment), training and knowledge transfer, and spillover and multiplier effects generating further investment by related service providers and manufacturers, while limiting distortion of competition

(99) The Commission takes account of the fact that the direct creation (or maintenance) of 25 jobs and the indirect creation of 10 jobs does represent a contribution to regional development. But the Commission considers that the number of jobs created is manifestly disproportionate to the amount to be given in aid, which is EUR 19,5 million, meaning that the ad hoc aid per directly created job is EUR 780 000; the disproportion is especially striking by comparison with a large number of ad hoc regional aid measures that the Commission has approved in recent years, where the average aid per job maintained or created was below EUR 70 000 ([38]). This conclusion holds even when allowance is made for fact that the costs of job creation or maintenance may be vary between Member States.

(100) The Commission considers, secondly, that the formal conditions laid down for energy production in the various regional development programming and planning documents ([39]), in particular the target of 200 MW capacity for electricity generation from biomass by 2013 set in the regional environmental energy plan of 2008, do not provide a substantial and significant

([38]) For examples see the following state aid cases: for Italy: N 381/2008, already referred to; for Poland: N 468/2009, already referred to; N 447/2009, already referred to; N 649/2008 *SWS Business Process Outsourcing Poland Sp z oo* (OJ C 122, 29.5.2009); N 522/2008 *Franklin Templeton Investments Poland Sp z oo* (OJ C 186, 8.8.2009); N 406/2008 *Robert Bosch Sp z oo* (OJ C 122, 29.5.2009); N 360/2008 *State Street Services (Poland) Limited Sp z oo* (OJ C 328, 31.12.2008); N 67/2008, already referred to; C 46/2008 *Dell Poland* (OJ L 22, 2.2.2010); N 299/2007 *Sharp Manufacturing Poland Sp z oo* (OJ C 20, 27.1.2009); NN 4/2007 *Delitissue Sp z oo* (OJ C 107, 11.5.2007); N 904/2006 *Funai Electric (Polska) Sp z oo* (OJ C 41, 15.2.2008); N 828/2006 *Bridgestone Stargard Sp z oo* (OJ C 278, 21.11.2007); N 535/2006 *Shell Polska Sp z oo* (OJ C 200, 28.8.2007); N 256/2006 *LG Electronics Wroclaw Sp z oo* (OJ C 276, 17.11.2007); N 251/2006 *LG Innotek Poland Sp z oo* (OJ C 270, 13.11.2007); N 247/2006 *Lucky SMT Sp z oo* (OJ C 282, 24.11.2007); and N 630/2005 *MAN Trucks Sp z oo* (OJ C 126, 30.5.2006); for Romania: N 767/2007 *Ford Craiova* (OJ C 238, 17.9.2008); for Latvia: N 730/2007 *SIA Ekobriketes Karsava* (OJ C 210, 19.8.2008); and N 729/2007 *SIA Eko Osta Riga* (OJ C 80, 3.4.2009); for Slovakia: N 847/2006 *Samsung Electronics Co. Ltd* (OJ C 195, 19.8.2009); N 857/2006 *Kia Motors Slovakia* (OJ C 214, 13.9.2007); and N 651/2005 *INA Kysuce as* (OJ C 205, 5.9.2007); and for the Czech Republic: N 661/2006 *Hyundai Motor Manufacturing Czech sro* (OJ C 262, 1.11.2007).

([39]) Annual update of the Regional Development Action Plan (PASER) under Article 27(1) of Regional Act No 1 of 19 January 2007, approved by the Campania Regional Executive on 30 May 2008, and Regional Environmental Energy Plan (PEAR) 2008.

argument for this ad hoc regional aid. The contribution of the Fri-El Acerra power plant, with a capacity of 74,8 MW and an output of 600 GWh per year, is marginal by comparison with the overall regional energy deficit of 15 000 GWh per year. The Commission considers that the existence of a functioning energy market renders this specific investment unnecessary. The Commission acknowledges that the investment project may help to achieve other formal targets set in various regional programming documents, but considers that its contribution in terms of energy produced from renewable sources is hardly a sufficient justification for ad hoc regional aid to a single company.

(101) At the notification stage the Italian authorities repeatedly argued that the power plant would produce energy for the Acerra industrial area, shielding enterprises to be established there from the risk of power failures. In the formal investigation stage this argument has been dropped, as Italy has confirmed that Fri-El Acerra must sell its output on the energy market by connecting to the national grid ([40]). Thus one of the main arguments advanced in justification at the time of the notification has gone, because the energy produced by Fri-El Acerra is to be sold on the national energy market and the new biofuel power plant is directly connected to the national grid.

(102) In the light of the information provided by the Italian authorities during the formal investigation, the Commission takes note of the argument that the development of the Acerra industrial site might be adversely affected if the Fri-El Acerra investment project were to be discontinued, because this would give another negative signal to potential investors in the area, which is already hard hit by social and economic difficulties. The other enterprises that have manifested an interest in setting up on the site might withdraw, with a further negative impact on a run-down urban area already in crisis. However, it must be pointed out that if an aid measure has no incentive effect ex ante, the fact that the Commission declares it incompatible cannot prevent other investors from locating on the same industrial site or deprive other aid measures of their own incentive effect.

(103) Finally, the Commission observes that the Italian authorities have not provided specific data to show that the investment would produce a transfer of training or knowledge, a spillover effect or a multiplier effect similar to the effects demonstrated in most ad hoc regional aid cases approved by the Commission in recent years ([41]).

(104) For the reasons set out here, and taking account of the practice followed in the past and of all possible relevant factors (the number of jobs created directly and indirectly by the project is limited, the contribution to the regional energy policy is negligible, there would be no direct energy supply to the industrial area, there would be no spillover effects, and above all the amount of aid per job created or maintained would clearly be excessive), the Commission concludes that the investment does not contribute to a coherent regional development strategy, as required by paragraph 10 of the 2007 Guidelines.

5.4.3. *Eligible costs (paragraphs 34–36 and 50–56 of the 2007 Guidelines)*

(105) Notwithstanding the economic rationale put forward by the Italian authorities, the transfer of the assets (the power plant) from NGP to Fri-El Acerra did not take place in full observance of the rules. The purchaser, Fri-El Acerra, confirms that at the time of the transfer it was 90,5 % controlled by NGP.

(106) Nevertheless, NGP's temporary stake in Fri-El Acerra seems to be linked to the chosen method for transferring the existing plant between two formally independent parties, in which a branch of the business of one was passed to the other as a contribution in kind to capital. The branch of NGP's business became a contribution to the joint venture, and the shares were then sold to the Fri-El Group; when the transaction was complete, the two companies were again independent. The requirement that the price of the closed thermoelectric power plant be assessed by an independent valuer has been complied with, in line with the principles and the purpose of paragraph 35 of the 2007 Guidelines.

(107) The Commission concludes that in formal terms the transfer of the closed thermoelectric power plant did not comply fully with paragraph 35 of the 2007 Guidelines, under which an establishment must be 'bought by an independent investor', but that the substance of that paragraph has in any event been respected. The price paid by Fri-El Acerra for the closed power plant was the value assessed by an independent expert, and shortly after completion of the transfer of the assets the buyer became independent of the seller, NGP.

([40]) This is confirmed by the presence of Fri-El Acerra on the list of energy operators published by the organisation managing energy markets, Gestore del Mercato dell'Energia, at http://www.mercatoelettrico.org/

([41]) See footnote 38.

(108) With regard to the other used assets included in the eligible costs, the Commission accepts the reasoning put forward by the Italian authorities and by Fri-El Acerra that even if there was no formal ex ante valuation by an independent expert, the transfer of the used fuel tanks took place between two independent parties at arm's length. The price paid for these assets corresponds to the market price, as confirmed in the new document drawn up by the same independent expert that had previously assessed the value of the closed power plant.

(109) Consequently, the acquisition of these assets directly linked to the establishment, i.e. the closed thermoelectric power plant and the used fuel tanks, can be considered to be initial investment within the meaning of paragraph 35 of the 2007 Guidelines.

5.4.4. *Compatibility with the 2007 Guidelines*

(110) While some of the requirements for regional investment aid set out in the 2007 Guidelines are fulfilled, therefore, the Commission concludes that the obligations for regional ad hoc aid to an investment project in terms of incentive effect and regional contribution are not met. The Commission concludes that the measure cannot be declared compatible under Article 107(3)(a) TFEU and the 2007 Guidelines.

5.5. **Compatibility with the 2008 Environmental Guidelines**

(111) Neither at the preliminary assessment stage nor at the formal investigation stage have the Italian authorities responded to the Commission's observation that the 2008 Environmental Guidelines seem more relevant to the assessment of measures of this kind, where the objectives have to do with energy and the environment, and the investment is in a biofuel plant.

(112) Section 1.3.4 of the 2008 Environmental Guidelines requires a measure to have an incentive effect. Point 27 provides, therefore, that 'it needs to be verified that the investment concerned would not have been undertaken without any State aid.'.

(113) In the present case, as explained in section 5.4.1 above, the investment was undertaken before the authority that was competent to grant the aid had expressed any firm intention actually to do so. The notified aid consequently cannot have any incentive effect, and for this reason alone the tests of the Environmental Guidelines 2008 are not satisfied.

(114) In addition, the Commission observes that despite an express invitation to that effect Italy has not provided the information necessary to demonstrate that the measure meets the conditions for investment aid for renewable energy set out in the Environmental Guidelines 2008 (points 102-106).

(115) It is for the Member State to demonstrate that an aid measure is compatible ([42]). As Italy has not provided information on this point the Commission does not possess sufficient information to reach a conclusion regarding compliance with the other criteria of the 2008 Environmental Guidelines.

(116) The Commission concludes that the aid measure cannot be declared compatible with the internal market under Article 107(3)(c) TFEU or with the 2008 Environmental Guidelines, or with any of the other exemption clauses in the TFEU. The measure should therefore be prohibited.

6. **CONCLUSIONS**

(117) In its decision to initiate the formal investigation procedure, the Commission explained why it doubted that the measure under scrutiny would qualify for exemption under Article 107(3)(a) TFEU; the reasons are summarised in section 3 of this Decision. Those doubts have not been entirely dispelled by the information and argument in the observations supplied by the Italian authorities and the recipient of the aid.

(118) The Commission concludes that the notified ad hoc regional aid to be granted by the Italian authorities to Fri-El Acerra, described in section 2 of this Decision, does not satisfy all the tests set out in the 2007 Guidelines for compatibility with the internal market under Article 107(3)(a) TFEU, nor all the tests set out in the 2008 Environmental Guidelines for compatibility with the internal market under Article 107(3)(c) TFEU. There are no other grounds for compatibility that might apply.

(119) As it does not qualify for any of the other exemptions set out in the TFEU, the aid measure may not be implemented. According to the Italian authorities, the aid has not yet been granted; there is consequently no need to order its recovery,

([42]) See Court of Justice in Joined Cases C-278/92 to C-280/92 *Spain* v *Commission* [1994] ECR I-4103, paragraph 49, and Court of First Instance in Case T-176/01 *Ferriere Nord* v *Commission* [2004] ECR II-3931, paragraph 94.

HAS ADOPTED THE FOLLOWING DECISION:

Article 1

The state aid which Italy plans to grant to Fri-El Acerra Srl, amounting to EUR 19,5 million, is incompatible with the internal market.

Consequently, the aid may not be implemented.

Article 2

Within 2 months of notification of this Decision, Italy shall inform the Commission of the measures taken to comply with it.

Article 3

This Decision is addressed to the Italian Republic.

Done at Brussels, 15 September 2010.

For the Commission
Joaquín ALMUNIA
Vice-President