II

(Acts whose publication is not obligatory)

COMMISSION

COMMISSION DECISION

of 5 November 1997

concerning aid Spain proposes to grant to Astilleros Zamacona SA in respect of five tugboats

(Only the Spanish text is authentic)

(Text with EEA relevance)

(98/157/EC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community, and in particular the first subparagraph of Article 93(2) thereof,

Having regard to Council Directive 90/684/EEC of 21 December 1990 on aid to shipbuilding [1], as amended by Directive 94/73/EC [2], and in particular Article 4(3) thereof,

Having given the parties concerned notice to submit their comments in accordance with Article 93(2) and having regard to their comments,

Whereas:

I

On 20 November 1996 the Commission decided to open a procedure pursuant to Article 93(2) of the Treaty to investigate a request by the Spanish authorities to extend the three-year delivery limit pursuant to Article 4(3) of Directive 90/684/EEC in respect of five tugboats contracted in December 1991 by Astilleros Zamacona SA (hereinafter referred to as 'Zamacona'), a small shipyard in Bilbao. If this request were accepted the yard would be allowed to receive 9 % aid per contract for the vessels in question (that is to say, up to the aid ceiling applicable in 1991).

Pursuant to Article 4(3) of the shipbuilding aid Directive the aid ceiling applicable to a contract is that in force when the contract is signed, except where the ship is delivered more than three years after the signing of the final contract. In such cases the ceiling is that in force three years before the date of delivery of the ship. Since the vessels in this case were not delivered until 1995/96 the applicable aid ceiling in this case would therefore normally be 4,5 %.

The second paragraph of Article 4(3) of the Directive, however, states that the Commission may grant an extension of the three-year delivery limit when this is found justified by the technical complexity of the project or by delays resulting from unexpected disruptions of a substantial and defensible nature in the working programme of a yard.

Since the Commission had doubts whether these conditions were fulfilled it decided to open the procedure.

The decision to initiate the Article 93(2) procedure was communicated to the Spanish Government by the Commission's letter SG(96) D/10713 dated 6 December 1996. That letter was published in the *Official Journal of the European Communities* [3] as notice to other Member States and interested third parties to submit their comments.

[1] OJ L 380, 31. 12. 1990, p. 27.
[2] OJ L 351, 31. 12. 1994, p. 10.
[3] OJ C 58, 25. 2. 1997, p. 8.

II

Within the framework of the procedure the Spanish authorities submitted comments by letter dated 24 January 1997. This material was supplemented by further information supplied at two informal meetings between the Commission and the yard representatives, held on 10 April 1997 and 28 May 1997, and through subsequent bilateral contacts.

The Commission also received comments from the Governments of two Member States (Denmark and the United Kingdom), both of which shared the Commission's doubts that the proposed extension of the delivery date was compatible with Directive 90/684/EEC, the United Kingdom in particular pointing out that it has a number of yards located in sensitive regional areas that are engaged in the construction of tugs and are in direct competition with Spanish yards such as Zamacona. The comments were communicated to the Spanish Government by Commission letter dated 21 April 1997, inviting it to submit observations. Those observations were received by letter dated 12 May 1997.

III

In their comments the Spanish authorities reiterated their view that, on the basis of the information previously supplied, the circumstances affecting Zamacona should be regarded as constituting 'unexpected disruptions of a substantial and defensible nature in the working programme of the yard'. In particular, various points were made setting out the grounds in support of this contention, which can be summarised as follows.

(a) *Changes to port legislation*

Law 27/1992 of 24 November 1992 on State ports and the merchant navy, which introduced a new regulatory framework which altered the arrangements for port services including pilotage, had not been foreseen when the five tug contracts were signed in December 1991.

The spirit of the new law took precedence over the commercial decisions taken by the owners a year before its entry into force. This resulted in changes of ownership of four of the vessels, joint operating arrangements, etc. In addition, since the legislation placed emphasis on safety, changes were made to vessel specifications as follows: building cavity walls in the engine rooms, new layout for fuel tanks, increased power in auxiliary engines, improved firefighting capability and changes to funnels and bridges to improve visibility.

According to the Spanish authorities the disruption arising from the entry into force of the law was of a substantial and defensible nature.

(b) *Construction of a new fitting-out wharf*

According to the Spanish authorities, the construction of the new wharf by the Port of Bilbao Authority (the owner of the land on which Zamacona operates) caused an unexpected disruption of Zamacona's work programme. The yard maintains that although the provisions of an agreement with the authority dated 10 October 1991 did not include precise deadlines for the completion of the works or the full extent of their nature, it received verbal assurances that the work would be completed by 30 April 1992; yet, in the event, the work did not start until 19 May 1992 and was not completed until 4 May 1993. Moreover, the new wharf was not ready to be put into full use until June 1994, once the yard had carried out further works and commissioned the necessary facilities (power, water, gas tanks, crane, firefighting facilities, workshops, etc.).

As regards the impact of the work on Zamacona's programme, the work entailed building containing walls around an area adjoining Zamacona's facilities; after completion filling in the area; demolishing a breakwater within whose perimeter the yard's fitting-out area was previously situated; and constructing the new wharf. The construction of the containing walls and filling-in meant that 40 to 50 lorries a day had to go through the yard, thereby slowing down shipbuilding work. In addition, the old fitting-out wharf and main slipway had to be manned until the new wharf was built, since they gave access to the worksite and were part of the working area. According to Zamacona this meant that two vessels already under construction had to be built in difficult conditions, the remaining vessels having to be built on dry land, in the repair shed.

The adverse effect on the productivity of Zamacona is, in the view of the Spanish authroities demonstrated by an analysis of the main features of Zamacona's activities since 1988 as shown in the following table:

	Previous period	1988	1989	1990	1991	1992	1993	1994	1995
Contracts entered into force		6	4	3	15	3	1	11	8
Cumulative total	5	11	15	18	33	36	37	48	56
Keels laid		4	5	5	6	4	5	8	12
Cumulative total		4	9	14	20	24	29	37	49
Launches		4	6	6	4	5	6	6	11
Cumulative total		4	10	16	20	25	31	37	48
Deliveries		4	5	5	3	7	4	7	12
Cumulative total		4	9	14	17	24	28	35	47
Workforce					54	50	74	76	82
Turnover (ESP million)					1 695	2 176	2 013	2 840	3 941
Turnover per person (ESP million)					31,39	43,52	27,20	37,37	48,06

According to the Spanish authorities, these data show that:

— the lowest number of contracts was in 1993,

— work represented by the order books for 1992 and 1993 could not be completed satisfactorily, keel-laying and deliveries suffering a fall in both absolute and relative terms,

— in 1994 once the work had been completed output rose to a satisfactory level.

Similarly, the data provided on the basis of turnover, workforce and turnover per person are said to show that growth recorded in 1991 and 1992 slowed down in 1993 (notwithstanding the takeover of the Ardeag yard — on which see point (c) below) but resumed in 1994.

(c) *Takeover of the Ardeag yard*

The Spanish authorities have explained that Zamacona's action programme for 1991 to 1993 was approved by the Ministry of Industry on 18 March 1992. Subsequently within the framework of the wider restructuring of the Spanish shipbuilding industry Zamacona took over the Ardeag yard including its order book and workforce as from 1 January 1993. As a result, Zamacona submitted a revised plan in December 1992 which obtained Ministry approval on 10 March 1993.

The Spanish authorities acknowledge that the takeover does not *per se* justify the delay in delivery of the five tugs but they maintain that when seen in conjunction with all the other circumstances at that time the situation led to unexpected disruption of a substantial and defensible nature. The disruption was unexpected since the takeover was not foreseen when the five tug contracts were signed, and defensible since the takeover resulted in a net capacity reduction in the two yards, thus contributing towards the necessary structural adjustment of the sector. So far as the extent of the disruption is concerned, according to the Spanish authorities this was substantial since the transfer of Ardeag's order book, including work in progress, resulted in extra work causing delays to Zamacona's original production programme. Zamacona maintains that it was obliged to give the Ardeag contracts priority and that the extra workload represented, according to its estimates, a total of 78 846 man/hours of work (two completions, two new buildings from scratch, and assorted repair and conversion work to be carried out in 1993 and 1994), which Zamacona had calculated as equivalent to just over 10 months' work on the basis of the monthly average level of effective man/hours in the period 1993 to 1995.

According to the Spanish authorities, the fact that the takeover was a voluntary decision is irrelevant for the purposes of determining whether there was an unexpected, substantial and defensible disruption in the Zamacona work programme, since the second subparagraph of Article 4(3) of Directive 90/684/EEC does not stipulate that the circumstances of the disruption must be external to the yard concerned.

IV

It should be recalled that the first subparagraph of Article 4(3) of Directive 90/684/EEC states that the aid ceiling applicable to a contract is to be that in force at the date of signature of the final contract. However, this rule does not apply in respect of any ship delivered more than three years from the date of signing of the final contract; in such cases, the ceiling applicable to that contract is that in force three years before the date of delivery of the ship. The aim of the latter provision is to prevent yards from circumventing the effect of the progressive reduction in the aid ceiling by taking on orders at a higher aid level at the end of the calendar year just prior to commencement of a reduction, with no realistic prospect of the ships being completed within a reasonable timeframe.

In this case, the vessels had a contract value of less than ECU 10 million. In December 1991, when the contracts were signed, the aid ceiling applicable was 9 %. However, as will be seen below, the vessels were not delivered until the second half of 1995 or early 1996, so that the three-year delivery limit was exceeded by periods ranging from seven to 14 months. Accordingly, the aid ceiling applicable to these contracts should be that in force three years before the date of delivery of the tugs, namely that prevailing in 1992/93, which was 4,5 %.

The second subparagraph of Article 4(3) of the Directive, however, provides that the Commission may grant an extension of the three-year delivery limit when this is found justified by the technical complexity of the shipbuilding project or by delays resulting from unexpected disruptions of a substantial and defensible nature in the working programme of a yard. The request of the Spanish authorities is based on the latter grounds. The Spanish authorities maintain that granting this request would not breach conditions of completion in the shipbuilding sector. However, this would allow Zamacona to receive a higher level of aid than it would otherwise have been entitled to receive and thus to obtain an advantage over other yards. Furthermore, granting the request would set an important precedent, since to date the Commission has interpreted the second subparagraph of Article 4(3) of the Directive restrictively and has only approved one application for an extension, which was allowed on the grounds of the technical complexity of the shipbuilding project.

V

On the basis of an analysis of the contract documentation, the facts in this case appear to be as follows. The five contracts were signed in December 1991 (together with 11 other contracts, only one of which ever came into effect). The deadline for entry into force (clause 18 of the contracts) was deferred until various dates ranging from 30 April 1992 to 30 December 1992 and was contingent on a first down-payment by the owner. Clause 10 of the contracts specified that the construction period would be 14 months from the date of entry into force (except in the case of contact No 300, where the construction deadline was 14 to 16 months), unless the yard informed the owners that these dates could not be met for reasons outside Zamacona's control (*force majeure*). Clause 18 of all the contracts apart from contract No 300 also specified that if the contracts had not entered into force by the due date they would be void.

On 25 November 1992 two contracts (Nos 318 and 319) were amended so as to extend the deadline for entry into force until 31 July 1994 at the latest (prolonging the original deadline by a further 19 months). Addenda to contracts Nos 318 and 319 were signed on 20 December 1993 to amend the vessels' specifications (in both cases resulting in a small decrease in the contract price), and on 5 March 1994 to put the contracts into force. Addenda to contracts Nos 300 and 301 were signed on 10 May 1994 to revise the vessels' specifications (increasing the contract price by nearly 30 %) and to put the contracts into force. (A further addendum to contract No 301 was apparently signed on 28 April 1995; details are not known). An addendum to contract No 320 was signed on 20 March 1994 revising the vessel specifications (slightly increasing the contract price) and putting the contract into effect.

Finally, in 1994, after the entry into force, four of the five contracts were transferred to other shipowners.

These developments can be summarised in the following table:

No	Date of contract	Original entry into force	Modification of contract	Addendum No 1	New entry into force	Addendum No 2	Date of actual entry into force	Transfer of contract	Deadline for construction	Actual date of delivery
300	16.12.91	30.4.92 subject to first payment by owner		10.5.94	10.5.94		10.5.94	12.5.94	14 to 16 months	19.10.95

No	Date of contract	Original entry into force	Modification of contract	Addendum No 1	New entry into force	Addendum No 2	Date of actual entry into force	Transfer of contract	Deadline for construction	Actual date of delivery
301	30.12.91	30.11.92, subject to first payment and written confirmation by owner		10.5.94	10.5.94	28.4.95	10.5.94	22.12.94	14 months	14.5.96
318	27.12.91	30.12.92, subject to first payment and written confirmation by owner	25.11.92	20.12.93	31.7.94, subject to written confirmation and first payment by owner	5.3.94	5.3.94		14 months	11.7.95
319	27.12.91	30.12.92, subject to first payment and written confirmation by owner	25.11.92	20.12.93	31.7.94	5.3.94	5.3.94, with Addendum No 2	6.3.94	14 months	26.7.95
320	27.12.91	30.12.92, subject to first payment and written confirmation by owner		20.3.94	20.3.94, with payment on signature of addendum		20.3.94	12.4.94	14 months	19.10.95

It will be seen from this that the three-year delivery limit pursuant to Article 4(3) of Directive 90/684/EEC was exceeded by periods ranging from seven to 14 months; moreover, the originally forecast delivery dates under the contracts were exceeded as follows:

— No 300: 2 years and 2 months,

— No 301: 2 years and 4 months,

— No 318: 1 year and 4 months,

— No 319: 1 year and 5 months,

— No 320: 1 year and 7 months.

In view of the delays in the entry into force and the other substantial amendments, it is highly questionable whether any of the 1991 contracts can be regarded as definitive and thus qualifying as final contracts for the purposes of the first subparagraph of Article 4(3) of the Directive, which refers to the applicable aid ceiling being that 'in force at the date of signature of the final contract' (emphasis added). These doubts apply particularly to contracts Nos 301 and 320, which it appears should have become void under the terms of the original contracts when the owners failed to fulfil their obligations under clause 18 relating to entry into force; and to contracts Nos 300 and 301, which increased significantly in price.

The above facts alone provide sufficient grounds for concluding that the relevant conditions for an extension of the delivery date pursuant to Article 4(3) of the Directive have not been met.

VI

Turning now to the arguments put forward by the Spanish authorities in support of the requested extension, the wording of the second subparagraph of Article 4(3) of Directive 90/684/EEC requires the Commission to determine whether or not the delay in delivery of the vessels at issue was caused by an unexpected disruption in the working programme of the yard that was substantial and defensible. None of the arguments put forward by the Spanish authorities show that this condition has been fulfilled.

The changes to port legislation seem to have been an unexpected development that was unforeseen when the contracts were signed in December 1991. However, no evidence has been presented to show that this unexpected event constituted a disruption to the working programme of Zamacona that led to the delivery of the vessels being delayed. The new legislation served only to create uncertainty for the shipowners, causing them themselves to delay putting the contracts into effect. The owners also decided to make significant modifications to the vessel design and specifications, not only to take account of the new legal framework, but also (as was noted in the opening of the procedure) to take account of the devaluation of the peseta (which had increased the costs, such as those of the German propulsion engines originally specified, which were replaced with cheaper

engines), which, together with the need to arrange the necessary financing, further added to the delays in the owners' final implementation of the contracts. It is clear that it was this that delayed the delivery of the vessels, not a disruption in Zamacona's work programme.

As regards the construction of the new fitting-out wharf, this does not seem to have been an unexpected event at the time when the contracts were signed in December 1991, since it appears that prior to that date the Port of Bilbao had approved a project to remodel its facilities that would have involved the disappearance of Zamacona's wharfage line, used for the fitting-out and repair of vessels. This raised serious doubts about the very existence of the yard until an agreement was signed in October of that year when the Port of Bilbao authority and Zamacona agreed that the demolished wharf should be replaced with a new one.

So far as the extent of the disruption is concerned, the works clearly had an adverse effect on Zamacona's activities throughout 1992 and until May 1993, although it should be noted that keel laying, launches and deliveries do not appear to have been significantly below previous levels despite the yard's assertions to the contrary.

However there is no evidence that the disruption caused any delay in the delivery of the tugs. In particular, there is no evidence that Zamacona, for example pursuant to clause 10 of the contracts, informed the owners that it had to postpone delivery of the vessels because of the disruption to its work programme. This is not surprising, since the contracts did not enter into force until March or May 1994 — nearly one year after the work had been completed and just before Zamacona completed the commissioning of the new wharf.

Finally, as regards the takeover of the Ardeag yard as from 1 January 1993, this was not foreseeable when the contracts were signed in December 1991 and was therefore an unexpected development. The effect on Zamacona, in terms of absorbing the extra workforce and taking over the Ardeag order book, was also substantial. However, despite the Spanish arguments to the contrary, it is relevant to note that the takeover was a commercial decision taken by the yard (which also allowed it to benefit from investment aids totalling ESP 559 million) and the consequences in terms of increasing and possibly disrupting Zamacona's existing work programme would not be unexpected in the circumstances.

As regards the extent of that impact, the Spanish authorities themselves appear to recognise that this was not such as to justify the delay in the delivery of the five tugs. According to the yard, extra work generated by the takeover amounted to 78 846 man/hours (of which work on the two complete new buildings represented over 41 000 hours, or over 50 %). Zamacona estimates that this corresponded to about 10 months' work for the yard. However, it is difficult to follow these calculations since there are inconsistencies with the data provided in relation to the effects of the construction of the new fitting-out wharf (which appear to include data for ex-Ardeag workforce and contracts and show that only one new building contract came into force in 1993). Even if the estimated figure of 10 months extra work is accepted, this would not justify the delay in the original delivery dates for the vessels at issue, which greatly exceeded 10 months. More importantly, as with the new fitting-out wharf, no evidence has been put forward to substantiate Zamacona's claims that the disruption arising from the takeover caused it to delay delivery of the vesels in question. This serves to underline the point that the reason for the delay in the delivery of the vessels was the owners' decision to delay the entry into force of the contracts.

VII

In the light of the above it must be concluded that there are serious doubts whether contracts Nos 300, 301, 318, 319 and 320 signed in December 1991 were final contracts. It must also be concluded that the delay in the delivery of the five tugs covered by these contracts was not due to any unexpected disruption in Zamacona's working programme of a substantial and defensible nature. Accordingly, the conditions of the second subparagraph of Article 4(3) of Directive 90/684/EEC have not been fulfilled and the level of aid granted for these five tugs must not exceed the level of the aid ceiling preveiling three years prior to actual delivery of the vessels, namely 4,5 %. To decide otherwise would create a dangerous precedent with serious implications for the inspection of State aid in the shipbuilding sector.

Since the Spanish authorities have given assurances that no aid above 4,5 % has yet been granted for the contracts in question there is not need to order reimbursement,

HAS ADOPTED THIS DECISION:

Article 1

The proposal of Spain to grant aid in the form of a direct grant to Astilleros Zamacona SA of up to 9 % of the contract value before aid for five tugboat contracts (Nos 300, 301, 318, 319 and 320) signed in December 1991 is incompatible with the common market, since the aid does not comply with Article 4(3) of Directive 90/684/EEC.

Article 2

Spain shall reduce the level of aid proposed for the five contracts in question so as to ensure that the level of aid in respect of each vessel does not exceed 4,5 % of the contract value before aid, in accordance with the common maximum ceiling for 1992 and 1993 as fixed by the Commission in accordance with the provisions of Article 4(2), (3) and (4) of Directive 90/684/EEC.

Article 3

Spain shall inform the Commission, within two months of notification of this Decision, of the measures taken to comply therewith.

Article 4

This Decision is addressed to the Kingdom of Spain.

Done at Brussels, 5 November 1997.

For the Commission
Karel VAN MIERT
Member of the Commission