II

(Acts whose publication is not obligatory)

COMMISSION

COMMISSION DECISION

of 25 February 1998

on development aid granted by Germany for the construction of a dredger sold to Indonesia

(notified under document number C(1998) 583)

(Only the German text is authentic)

(Text with EEA relevance)

(1999/142/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 extended by Council Regulation (EC) No 3094/95 of 22 December 1995 on aid to shipbuilding [2], as last amended by Regulation (EC) No 2600/97 [3], and in particular Article 4(7) thereof,

Having, in accordance with Article 93 of the EC Treaty, given notice to the parties concerned to submit their comments, and having regard to those comments,

Whereas:

I

By letter dated 3 January 1996, the European Dredging Association lodged a complaint concerning the sale of three dredgers by Germany to Indonesia. The Association suspected that the aid granted in connection with the sale was in breach of Council Directive 90/684/EEC (Seventh Directive on aid to shipbuilding). According to the letter, the aid appeared to enable the supplier to charge a price below the market price in Taiwan and Thailand where the supplier participated in international tenders in competition with other companies supplying dredging services.

By letter SG(94) D/6533 of 17 May 1994 to Germany, the Commission had approved the granting of development aid in connection with the sale of three dredgers by Volkswerft Stralsund to the Indonesian public corporation Pengerukan ('Rukindo'). Rukindo is a State limited-liability corporation, 100 % of its shares being owned by the Ministry of Finance. The development aid was granted in the form of a loan from the Reconstruction Loan Corporation (Kreditanstalt für Wiederaufbau). The loan covered 90 % of the contract value for a period of 11 years at an interest rate of 3,5 %. The OECD aid equivalent was 25,35 %. The borrower was the Republic of Indonesia, represented by the Ministry of Finance.

In the German notification of the proposed aid submitted on 24 March 1994, it was stipulated in which locations in Indonesia the dredgers were to be used. In its letter to Germany approving the aid, the Commission stated that the dredgers were to be used only in Indonesia ('Die neuen Bagger sollen allein in Indonesien eingesetzt werden, ...').

[1] OJ L 380, 31. 12. 1990, p. 27.
[2] OJ L 332, 30. 12. 1995, p. 1.
[3] OJ L 351, 23. 12. 1997, p. 18.

II

Since the use of the dredgers appeared to differ from the conditions under which the aid was approved and since no amendments had been notified by Germany, the Commission sent a letter to the German Government on 31 July 1996 requesting information on the use made of the vessels, the level of aid granted and the financial situation of the Indonesian company.

Following an extension of the time limit, the German Government provided the relevant information by letter dated 6 November 1996. The letter confirmed that one dredger had been used outside Indonesian territorial waters, in Malaysia. The letter did not mention any operations in Taiwan or Thailand, as reported by European Dredging Association.

The German Government claimed that the dredger could not operate optimally in Indonesian waters due to delays in a number of large harbour-building projects for which the dredger had originally been acquired. Furthermore, the use of the dredger in Malaysia formed part of a subcontracting order for an Indonesian firm, and Rukindo had not participated directly in international invitations to tender. Furthermore, the German authorities undertook that they would draw the Indonesian government's attention to the fact that the use of the dredgers must be in accordance with the purpose for which they had originally been acquired.

The German Government could not provide information on Rukindo's financial situation since this subordinated body did not draw up any certified and informative annual reports and since no direct loan relationships existed with the company.

III

In the light of the answer given by the German Government, the Commission took the view that the manner in which the dredgers had been used did not comply with the approval given by the Commission in its letter of 17 May 1994 and with the development aid conditions laid down in Article 4(7) of the Seventh Directive on aid to shipbuilding. At that stage it was not clear whether the project had a development content.

Accordingly, the Commission decided to initiate Article 93(2) proceedings in order to allow it to examine whether the aid had been granted and used in line with its approval of 17 May 1994, and in particular whether the development content of the aid project and its overall compatibility with the common market were still in evidence. The German Government was informed of this by letter dated 15 April 1997.

IV

Following publication of a notice on the initiation of proceedings [1], the Danish Government and European Dredging Association submitted their comments. They took the view that the use of the dredgers was not in accordance with the conditions laid down in the Commission's approval and was in breach of the Seventh Directive on aid to shipbuilding.

The comments were transmitted to the German Government by letter dated 25 August 1997 in order to give the German Government the opportunity to submit a reply.

V

The German Government reacted to the initiation of proceedings by letter dated 18 June 1997 and to the comments of the Danish Government and the European Dredging Association by letter dated 9 October 1997. Germany's comments can be summarised as follows:

The dredgers were purchased primarily for deepening the harbours at Tanjung Priok, Batam, Bojonogara, Surabaya, Belawan, Semarang, Panjang and Ujung Pandang. The harbour-deepening projects were delayed because of financing problems, with the result that dredging work could be carried out only in the harbours of Belawan, Tanjung Priok and Surabaya. Neither Rukindo nor the Kreditanstalt für Wiederaufbau could be held responsible for the delays.

The dredger KK Aru II was employed in Malaysia for 173 days in 1995 and for 156 days in 1996, although the actual operational time was considerably less than the overall time spent in Malaysian waters on account of damage to the dredging pumps and the sea valves. In 1996 KK Aru II was the only one of PT Rukindo's fleet of 32 dredgers employed abroad.

In initiating the proceedings, the Commission referred to information that one vessel had been used in Thailand. In the German Government's view, the vessel involved was none of the three dredgers in question, but rather the KK Irian Jaya, which had been employed in Thailand for 31 days between 21 April and 29 May 1994.

The German Government stated that the dredgers were designed specially for the work in Indonesia, which required a deeper draught than the dredgers in service at the time. To be able to work effectively, the dredgers need a water depth of about eight metres. It was argued that the greater draught of these dredgers restricted the possibilities for alternative use in other Indonesian harbours and waterways. In order to limit periods of inactivity as far as possible and to recoup at least a portion of the fixed costs (personnel costs, capital costs, etc.), Rukindo saw no option but to tender the services of the dredgers to other

[1] OJ C 192, 24. 6. 1997, p. 9.

dredging firms which then used the vessels outside Indonesia. This action did not run counter to the primary objective of developing the Indonesian transport infrastructure. Furthermore, the German Government stated that the completion of work on domestic projects continued to have absolute priority. Periods of use abroad were only during slack periods when harbour extension projects were delayed. The leasing-out of the dredgers for use abroad should rather be seen as an effort to make efficient use of the development aid by generating additional capital for the project in the form of foreign currency. It was also argued that the temporary deployment of the dredgers in foreign waters provided experience which could help to increase efficiency and improve competitiveness in the domestic market.

The German Government also emphasised that Rukindo was not involved directly in any international tendering procedures, so that it was never in direct competition with other international dredging companies. Only twice had Rukindo requested tender documents, but in neither case had it participated in the tender. The vessels were hired out on a subcontract basis and only during slack periods when they would otherwise have been idle. Rukindo thus had no direct influence on the pricing of services by the main tendering contractor, especially since the usual practice was for the main contractor not to enter into negotiations with the various dredging companies until after being awarded the contract.

Finally, the German Government said it would take the necessary steps to make clear to the Indonesian Government the problems involved in using the vessels abroad.

VI

According to Article 4(7) of the Seventh Directive on aid to shipbuilding, aid granted as development assistance to a developing country is not subject to the ceiling set by the Commission under Article 4(2). It may be deemed compatible with the common market if it complies with the terms laid down for that purpose by OECD Working Party No 6 in its Agreement concerning the interpretation of Articles 6 to 8 of the Understanding on Export Credits for Ships or with any corrigendum to the said Agreement [1]. The Commission must be given prior notification of any such individual aid proposal. It is required to verify the particular development content of the proposed aid and satisfy itself that it falls within the scope of the Agreement.

The Court of Justice held in Case C-400/92 that 'it is precisely the examination of this particular content which enables the Commission to ensure that aid based on Article 4(7) and intended to reduce the cost of vessels for certain developing countries pursues, in the light of the specific conditions of its application, a genuine development objective and does not, despite the fact that it complies with the OECD criteria, constitute aid in favour of a shipyard in a Member State which must be subject to the ceiling ...' [2].

At this stage the Commission is taking a decision only regarding the vessel KK Aru II. The manner in which the two other vessels CD Bantang Anai and FF Bali II were used is still under investigation. The German Government has confirmed that KK Aru II has not been deployed exclusively in Indonesia, but has been used for more than 300 days outside Indonesia since it was delivered. Consequently, the vessel has not been used in accordance with the Commission's approval of the development project [3] and the aid has therefore been misused.

The vessel has been employed commercially in Malaysia under contracts put out to tender. It should be noted that Malaysia is not on the list of countries eligible for development aid.

Germany put forward a range of arguments to show that the development content of the aid was intact and that the aid had not been misused. The use outside Indonesia did not run counter to the primary objective of developing Indonesia's infrastructure. The deeper draught restricted the possibilities for alternative employment in other Indonesian harbours and waterways. The use outside Indonesia served to limit periods of inactivity and recoup a portion of the fixed costs. Such use occurred only during slack periods when the vessel would otherwise have been idle and was thus an effort to employ development funds as efficiently as possible.

Such arguments could perhaps have been accepted if it had been proven that the use outside Indonesia was absolutely exceptional, both in terms of the period of time covered and the commercial factors involved, and that it was due to developments beyond the control of the government and unforeseeable at the time when the aid was granted. However, KK Aru II has been employed outside Indonesia for more than 300 days since 1994. Such use cannot be considered to be exceptional. Furthermore, the vessel was utilised on a purely commercial basis

[1] Commission letters to Member States SG(89) D/311 and SG(97) D/4341.

[2] [1994] ECR I-4701, at paragraph 21.

[3] Letter SG(94) D/6533.

in a country which is not eligible for development aid, and there is no clear link between the employment outside Indonesia and the use of the vessel for the development of Indonesia. Furthermore, the substantial use of the vessel outside Indonesia may have generated considerable financial returns which in themselves would make the aid unnecessary. In addition, had the Commission known at the time of the notification that the vessel would be used on a commercial basis in Malaysia, it would not have approved the aid. For all these reasons, the Commission considers that the development aid is unnecessary.

The German authorities further argue that the vessels were hired out on a subcontracting basis. Rukindo was not involved directly in any international tendering procedures and was never in direct competition with other dredging companies. Rukindo had no direct influence on the pricing of services by the main tendering contractor. The German Government would take the necessary steps to make clear to Indonesia the problems involved in using the vessels abroad.

The Commission considers that these arguments are irrelevant since the commercial use of the vessel in a country which is not eligible for development aid is unacceptable regardless of the fact that Rukindo was not directly involved in such activity. Furthermore, it must be borne in mind that the German Government does not contest the fact that the vessels were provided at below market price. The conclusion remains that the use of the vessel does not justify development aid.

On these grounds, the Commission considers that the aid granted in relation to the construction of the dredger KK Aru II by Volkswerft Stralsund and its sale to Rukindo has been misused. Furthermore, the aid cannot be considered to be genuine development aid within the meaning of Article 4(7) of the Seventh Directive. The aid distorts or threatens to distort competition within the common market and affects trade between Member States in relation to shipbuilding to an extent contrary to the common interest within the meaning of Article 92(3) of the EC Treaty and in particular to Article 4(7) of the Seventh Directive,

HAS ADOPTED THIS DECISION:

Article 1

The aid granted by Germany for the construction of the dredger KK Aru II by Volkswerft Stralsund and its sale to Rukindo is incompatible with the common market since it has been misused in breach of the approval given by the Commission in its letter SG(94) D/6533. The aid cannot be considered to be genuine development assistance within the meaning of Article 4(7) of Directive 90/684/EEC.

Article 2

Germany shall revoke the aid referred to in Article 1 and shall ensure that it is recovered. Recovery shall be made in accordance with the procedures and provisions of German law with interest, based on the interest rate used as reference rate in the assessment of regional aid schemes, running from the date on which the aid was granted until such time as it is actually recovered.

Article 3

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

Article 4

This Decision is addressed to the Federal Republic of Germany.

Done at Brussels, 25 February 1998.

For the Commission

Karel VAN MIERT

Member of the Commission