COMMISSION DECISION

of 11 November 1998

on aid for the INMA SpA shipyard under Italian Law No 564/93, converted by Law No 132/94

(notified under document number C(1998) 3584)

(Only the Italian text is authentic)

(Text with EEA relevance)

(1999/379/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 given the interested parties notice to submit their comments, and having regard to those comments,

Whereas:

I

By letter dated 27 May 1997 from the Italian Permanent Representative's Office, registered by the Commission on 3 June 1997, the Italian Government notified the Commission of a plan to grant additional aid to the INMA shipyard for two liner conversion contracts. The notification was followed by a meeting between Commission staff and officials from the Ministry of Transport and Shipping and the sending of a letter by the Italian authorities on 8 July 1997.

The Italian shipyard INMA, situated at La Spezia, negotiated two liner conversion contracts in 1994. The first, concluded on 19 August, was for the *Regal Voyager*, owned by St Thomas Cruises Limited (Bahamas), involving a total of some ITL 20 billion, and the second, concluded on 4 October, was for the *Sally Albatros*, owned by the Finnish shipping company Sally AB, involving a total of some ITL 93 billion. The two contracts have already received 4,5 % aid each, in line with the ceiling set by the Commission in 1994 for ship conversions. The aid was also notified to the Commission as part of the monitoring of shipbuilding aid provided for in Article 11 of Council Directive 90/684/EEC [1], as last amended by Directive 94/73/EC [2], application of which was extended by Regulation (EC) No 3094/95 [3], as last amended by Regulation (EC) No 2600/97 [4].

The two shipping companies used the same broker, Simonship AB, to negotiate the contracts, and Simonship AB tendered widely among European shipyards, both within the Community and outside. The Community shipyards approached were:

— Germany: HDW and Lloyd Bremerhaven,

— Denmark: Reparationsvaerftet,

— Spain: Astilleros Españoles,

— Italy: INMA, Fincantieri and T. Mariotti,

— Netherlands: Wiltonfijenoord Drydock,

— Portugal: Lisnave and Estaleiros Navais de Viana do Castelo.

Two Finnish and two Polish shipyards were also approached.

Since, during the negotiations, the shipyard managers received letters from the broker Simonship informing them that the shipowners had lower tenders from the Finnish and Polish shipyards, an application was made to the competent Italian authorities for aid to be granted at a rate of 9 %.

The application for a higher rate of aid for the two contracts is based on Article 4(5) of Decree Law No 564/93, which was converted by Law No 132/94 (hereinafter 'Law No 132/94'). This states that if, in trying to obtain a ship conversion contract, a shipyard is in competition with one or more shipyards from countries not belonging to the European Community, the Minister may, with the prior agreement of the Commission of the European Communities, increase the rate of aid provided for in paragraph 1 (namely 4,5 %), without exceeding the rate provided for in Article 3(1) (namely 9 %), provided that the shipyard demonstrates that this increase in the level of aid is necessary to challenge the non-Community competition and to win the order.

[1] OJ L 380, 31.12.1990, p. 27.

[2] OJ L 351, 31.12.1994, p. 10.
[3] OJ L 332, 31.12.1995, p. 1.
[4] OJ L 351, 23.12.1997, p. 18.

When this provision was introduced into the Law, reference was made to a Commission statement entered in the minutes of the 1 450th meeting of the Council on 26 November 1990 when it adopted Directive 90/684/EEC, reading: 'where a Member State proves that its yards are in competition with non-European countries for the construction of specialised small vessels costing less than ECU 10 million or for ship conversion of any contract value, then, following appropriate prior notification by the Member State concerned, the Commission could authorise the granting of contract-related production aid up to the ceiling referred to in Article 4(1)'.

II

Having carried out a detailed examination of the information provided by the Italian authorities, the Commission would make the following points.

It queries the Italian authorities' interpretation of the phrase 'appropriate prior notification' which is included in the Commission statement entered in the minutes of the Council meeting in 1990. Any aid measure which does not comply with the criteria set out in Article 92(3) of the Treaty can be authorised by the Commission only if it does not distort or threaten to distort competition by favouring certain undertakings or the production of certain goods. Assessment of this aspect must be carried out before the aid takes effect. However, in the two cases in point, as is evident from the facts and from the following analysis, it is apparent that the shipyard acted on the assumption that the aid had already been agreed and the Italian authorities seem to have taken the view, in submitting their notification three years after the signature of the contracts, that the Commission's authorisation in the case related only to the release of the funds.

A chronological examination of the facts, as set out in the notification, shows that the INMA shipyard submitted its applications for a derogation under Article 4(5) of Italian Law No 132/94 on 1 September 1994 in the case of the *Regal Voyager* contract (signed on 19 August) and on 11 October 1994 in the case of the *Sally Albatros* contract (signed on 4 October). The two applications were therefore subsequent to the signing of the contracts, whose prices, as is apparent from an examination of the figures, were determined on the basis of an increase in the level of aid.

The shipyard thus failed to comply with the Law, which stipulates quite clearly that the Minister may grant an increase only after the Commission has given its prior agreement. By anticipating such agreement, solely on the basis of letters from the broker in charge of negotiating the contracts and putting it under pressure, the shipyard failed to take account of the detailed examination of the situation on the relevant market which the Commission has to carry out before authorising any such derogations, which in any event may not be regarded as automatic merely because all the conditions appear to have been met, since, in its statement entered in the minutes of the Council meeting, the Commission stated that it 'could' authorise an increase in the rate. The use of the conditional tense demonstrates clearly that a derogation could be granted only in really exceptional circumstances and provided that the Commission was certain that no other Community shipyard would be damaged.

The shipyard's attitude seems all the more doubtful as it was in possession of the list of Community shipyards invited to tender as from 20 June 1994, that is, two months before the first contract was signed. The reputation of those shipyards, which were entirely able to respond to the invitation to tender, shows that there was a genuinely competitive situation between Community shipyards and that, on the basis of the information available to the shipyard, an examination of the situation by the Commission, using the procedure provided for in Article 4(5) of Directive 90/684/EEC, could have taken place. In the absence of such examination, it may even be concluded that, by anticipating the granting of the aid, the shipyard was distorting competition from the very outset, since the other shipyards had not had the opportunity of tendering with a 9 % rate of aid.

Consequently, by letter of 18 August 1997, the Commission informed the Italian Government that it had decided to initiate proceedings under Article 93(2) of the EC Treaty in respect of the request for an increase in the rate of aid for conversion of the ships *Regal Voyager* and *Sally Albatros* at the INMA shipyard.

III

As part of those proceedings, the Commission gave the Italian Government notice to submit its comments; the other Member States and interested parties were informed via publication of the decision to initiate proceedings in the *Official Journal of the European Communities* [1].

The Italian authorities submitted their comments by letter of 17 October 1997.

Following publication of the decision, the shipyard concerned and Denmark submitted their comments to the Commission, respectively via a law firm (letter of 12 January 1998) and the Danish Permanent Representative's Office (letter of 2 January 1998).

In its comments, Denmark agreed with the Commission's decision to initiate proceedings.

By letter of 4 February 1998 the Commission forwarded these comments to the Italian authorities.

[1] OJ C 377, 12.12.1997, p. 4.

IV

In their comments both the Italian authorities and the shipyard concerned stress that the additional aid has not yet been granted and that the rules of notification, upheld by the Court of Justice, have been complied with, in that there was no breach of the obligation to give prior notification.

Since the aid has not yet been released, there has been no infringement of the rules. On the contrary, the shipyard has taken itself the risk of having the increase in aid refused. In this case, therefore, there is no adverse effect on competition. Furthermore, Directive 90/684/EEC does not expressly stipulate that an aid project must be notified before the contract is drawn up.

In their view, the fact that the application for an increase in aid was notified three years after the contract was concluded is irrelevant; on the contrary, it demonstrates that the Italian authorities carried out a thorough investigation of all the legal and factual conditions which could justify the granting of the aid. The technical department of the Ministry of Transport and Shipping assessed the contract prices submitted by INMA and found them appropriate and also noted that non-Community shipyards were interested in the order. Once they had completed their investigation and found that the justifying conditions did indeed exist, the authorities informed the Commission, at the same time requesting authorisation to grant the aid. During the course of the investigation no aid was granted, which meant that, if Community authorisation was not given, the shipyard would be forced to complete the order without the additional State aid.

Both parties also criticise the Commission for failing to analyse the merits of the case as a whole and concentrating simply on detecting an alleged distortion of competition. The Italian authorities maintain that distortion of competition can occur only when the aid is actually granted, and that in the case in question the Commission does not demonstrate in concrete terms how releasing the aid three years after the contract was signed can distort competition on the market at the time of signature.

Finally, the Italian authorities challenge the use of Article 4(5) of Directive 90/684/EEC which the Commission could have invoked if the notification had been made before the contract was signed, since no text or statement provides for its use where the derogation in question is applied.

V

With regard to the comments of the Italian authorities and the shipyard concerned, on the basis of the judgment of the Court of Justice of 18 May 1993 in Joined Cases C-356/90 and C-180/91 Belgium v. Commission ([1]), the Commission doubts the value, as a legal basis, of the Commission statement entered in the minutes of the 1 450th meeting of the Council on 26 November 1990. The Court in fact confirms that, 'as regards production aid for shipbuilding and ship conversion, the criterion chosen is that the aid does not exceed the common maximum ceiling provided for in Article 4(1) of the Directive. This ceiling constitutes what the Council regarded as the balance between the conflicting requirements of respect for the rules of the common market and the maintenance of a sufficient level of activity in European shipyards and also the survival of an efficient and competitive European shipbuilding industry (sixth recital in the preamble to the Directive).

Clearly, therefore, compliance with the ceiling at issue is the essential condition for aid to shipbuilding to be regarded as compatible with the common market and, where that ceiling is exceeded, the aid in question is automatically incompatible.

In this context, therefore, the Commission's role is limited to checking that that condition has been observed. If, as the Belgian Government contends, the Commission was further required to reassess the compatibility of the aids, case by case, in relation to the criteria set out in Article 92(1), that would not only deprive the Directive of any effectiveness: it would also be illogical, since any system of derogations necessarily presupposes that the aids referred to are at the outset incompatible with the common market' ([2]).

In view of this, even if the Commission statement in the minutes of the 1 450th Council meeting or the authorisation of the Italian aid scheme confirming it could be regarded as a legal basis, the Commission cannot consider the aid to be compatible with the common market.

Where aid which is an exception to the general rule is notified, the Commission must be in a position to verify that the additional aid, even if eligibility is based on a tangible factor, in this case competition from non-Community shipyards, does not cause distortion of competition between Community shipyards that is incompatible with the common market. Of course, such verification is made even more difficult by the fact that notification was made three years after the contract was signed. Given the number of Community shipyards approached by the agent, the Commission has reason to suppose that, if those shipyards had been able to submit bids on the basis of aid above the level normally authorised, or at any increased rate up to the 9 % requested by the shipyard, the possibility cannot be excluded that they might also have been in competition for the orders concerned.

([1]) [1993] ECR I-2323.

([2]) *Ibidem*, paragraphs 31, 32 and 33 of the judgment.

The parties concerned also say that the Commission has failed to analyse the facts of the case, but they do not offer any new evidence which would allow it to examine the case in more detail. On the contrary, the Italian authorities believe that the Commission does not in any way dispute that the conditions necessary for application of the derogation are met, since it does not mention the absence of clarification or information on that score. This would tend to suggest that the Commission could be content, as sole proof of the possible need to grant a derogation, with two brief letters in which the agent asks the shipyard to reduce its tenders in order to avoid losing the orders to non-Community yards.

No figures have been given to back up the case, and the only figures available to the Commission are the contract prices which, as the shipyard recognises, were set at a loss. When, in initiating proceedings, the Commission said that it was unable to analyse the market conditions, in particular under the procedure in Article 4(5) of Directive 90/684/EEC, it indicated very clearly that it had doubts whether the request was even valid. Furthermore, since in their comments neither the Italian authorities nor INMA provide any new figures to show that it was absolutely necessary to double the level of aid to avoid losing the orders to non-Community shipyards, the Commission is all the more convinced that, in reducing its prices, the shipyard was simply giving in to blackmail by the shipowners.

It is clear that aid has its effect at the time the contract is signed since, even for aid authorised under Article 4(1) of Directive 90/684/EEC, the Directive stipulates that, irrespective of when the Member State pays the aid to the shipyards, the aid ceiling applicable shall be that in force at the date of signature of the contract. Furthermore in the past, with the Directives on aid to shipbuilding in force, there have been several cases of Italian shipyards being unable to receive aid without a legal basis, either because of parliamentary delays or because the schemes had not yet been authorised by the Commission. This has never prevented Italian shipyards from winning orders while counting on the effect of the aid, since, when the laws entered into force, they were satisfied with receiving the aid without its affecting the price originally set.

It is therefore clear that the shipyard anticipated the aid and although, as its lawyers state, it took a risk by offering a price below cost without being certain of obtaining the aid, thus not distorting competition, the Commission cannot be sure that, at the time the contacts were signed, tenders by competing Community shipyards with prices calculated on the basis of aid of 9 % would not have allowed them to win the orders.

Since it could not verify this at the appropriate time, either when the contracts were signed or at present, on the basis of more specific information provided by the Italian authorities, namely figures for the tenders from Community and non-Community competitors, the Commission takes the view that the Italian authorities have not proved that the increase in the level of aid up to 9 % was necessary for the shipyard to keep the contracts in question within the Community.

VI

In the light of the above, the Commission cannot conclude that the doubling of the aid intensity to 9 % is compatible with the common market, in so far as the Italian Government has not demonstrated that the other Community shipyards that were in competition with the INMA shipyard would not have been able to win the orders with aid at an intensity of less than 9 %. It cannot therefore be ruled out that INMA won the contracts only because allowance had been made for aid at 9 %, thus putting it *de facto* in a more favourable position than its Community competitors. The Commission cannot therefore authorise the additional 4,5 % aid for the conversion of the *Regal Voyager* and *Sally Albatros* at the INMA shipyard,

HAS ADOPTED THIS DECISION:

Article 1

The increase in the rate of aid by 4,5 % of the contract price for contracts to convert the *Regal Voyager* and *Sally Albatros* at the INMA SpA shipyard, provided for by Law No 132/94 and notified by Italy by letter of 27 May 1997, is incompatible with the common market.

Article 2

Italy is not authorised to grant the aid referred to in Article 1.

Article 3

Italy shall inform the Commission within two months of the date of notification of this Decision of the measures it has taken to comply with it.

Article 4

This Decision is addressed to the Republic of Italy.

Done at Brussels, 11 November 1998.

For the Commission
Karel VAN MIERT
Member of the Commission