COMMISSION

COMMISSION DECISION

of 17 March 1999

on the measures, implemented and proposed, by the Federal State of Bremen, Germany, in favour of Lürssen Maritime Beteiligungen GmbH & Co. KG

(notified under document number C(1999) 756)

(Only the German text is authentic)

(Text with EEA relevance)

(1999/763/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 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 the provisions cited above [1] and having regard to those comments,

Whereas:

I. PROCEDURE

By way of an article in *Handelsblatt* on 9 September 1997, the Commission was informed that the *Land* Bremen, Germany, had implemented the financial measures with which this Decision is concerned, in favour of Lürssen Maritime Beteiligungen GmbH & Co. KG. The Commission requested information on the measures in its letter dated 15 September 1997, and Germany supplied the information by letter dated 24 October 1997.

By letter dated 30 March 1998, the Commission informed Germany of its decision to initiate the procedure laid down in Article 93(2) of the EC Treaty in respect of those measures. Germany submitted its comments by a letter dated 19 May 1998.

The Commission decision to initiate the procedure was published in the *Official Journal of the European Communities* [2]. The Commission invited interested parties to submit their comments on the measures.

The Commission has received comments from interested parties. It has forwarded them to Germany, which was given the opportunity to react; its comments were received by letter dated 21 October 1998.

II. DETAILED DESCRIPTION OF THE MEASURES

The Bremen Vulkan Verbund AG, the maritime industrial holding with subsidiaries mainly in the shipbuilding but also the machine-building and electronic equipment sectors based in the Federal State of Bremen (hereinafter referred to as 'BVV') fell into acute financial difficulties in late 1995. On 1 May 1996 the responsible Court initiated bankruptcy proceedings under the German Konkursordnung. BVV held a 100 % share in BVM Beteiligungs GmbH, which itself was the sole shareholder of Bremer Vulkan Marine Schiffbau GmbH (hereinafter referred to as 'BVM'), a small engineering company active in acquiring orders for the construction of naval vessels. It was founded mainly to participate in the tendering procedure for the German 'F 124' frigate programme, entailing a volume up to DEM 3 billion in cooperation with Preussag and Thyssen. This company was not subject to bankruptcy proceedings in connection with the breakup of the group.

Given the prospects of BVM for engagement in the construction of the new frigates, the Lürssen Maritime Beteiligungen GmbH & Co. KG (hereinafter referred to as 'LMB') decided to acquire the company's shares. LMB is the holding company for Friedrich Lürssen Werft GmbH (hereinafter referred to as 'Lürssen'), a shipyard located in the north of Bremen. Lürssen is a medium-sized shipyard, primarily active in naval shipbuilding, specialising in smaller naval vessels (minesweepers, combat boats and multipurpose boats) and occasionally in the construction of large yachts and commercial passenger ships. Between 1988 and 1998 [...] (*) of the turnover of Lürssen came from naval shipbuilding.

[1] OJ C 252, 11.8.1998, p. 4.
[2] See footnote 1.

(*) Parts of this text have been edited to ensure that confidential information is not disclosed; those parts are enclosed in square brackets and marked with an asterisk.

In the course of negotiations involving the Bremen authorities, LMB agreed to employ 100 former workers and up to 10 trainees. These consist of workers both of BVM and of workers employed in naval shipbuilding by the former Bremer Vulkan Werft GmbH (hereinafter referred to as 'BVW'). LMB claimed that these workers would only be needed to work on the F 124 project, which was postponed until 2000. Bremen then agreed to contribute DEM 4,6 million (EUR 2.3 million) towards the costs of employing them.

Furthermore, the Hanseatische Industrie Beteiligungen GmbH (hereinafter referred to as 'HIBEG'), a company solely controlled by the Federal State of Bremen, waived claims of DEM 5 million (EUR 2,5 million) plus interest of an unknown amount arising from a loan granted to BVM. The amount was used to increase the equity capital of BVM so as to reduce its over-indebtedness.

In addition, the Federal State of Bremen declared its willingness to grant aid of DEM 900 000 (EUR 450 000) for intended investments (15 % of the total investment of DEM 6 million).

The Commission concluded that the above financial measures taken by the Federal State of Bremen constitute state aid within the meaning of Article 92(1) of the EC Treaty and Article 1(d) of Council Directive 90/684/EEC of 21 December 1990 on aid to shipbuilding [3] (hereinafter referred to as 'the seventh directive'). The Commission considered the contribution of the State of Bremen towards the costs of the employment by LMB of workers of BVM and former workers of BVW, and HIBEG's waiving of its claims, to be operating aid, and regarded the intended contribution towards the costs of planned investments as investment aid. The aid was considered to benefit Lürssen, which through the acquisition of the shares in BVM had extended its shipbuilding capacity and enjoyed the prospect of involvement in future vessel construction for the German navy.

Operating aid may, pursuant to Article 5 of the seventh Directive, only be considered compatible with the common market if it does not exceed the maximum contract-related aid calculated in proportion to the turnover to the yard and if the Member State concerned furnishes evidence to the extent that the aid is necessary to maintain a shipyard in operation. In the present case no information to that extent was forwarded and the German authorities did not claim that the operating aid was intended to help Lürssen to maintain its operations.

Pursuant to Article 6 of the seventh Directive, investment aid can only be granted as part of a restructuring plan that does not involve any increase in capacity or if it is directly linked to a corresponding irreversible capacity reduction in the capacity of other yards in the same Member State. The intended investments were not part of a restructuring of Lürssen and there was no intended capacity reduction but an increase of capacity of Lürssen which may potentially be used for commercial shipbuilding falling under the seventh Directive.

For these reasons, the Commission doubted whether the aid measures might be considered compatible with the common market under the provisions of the EC Treaty and the seventh Directive on shipbuilding.

III. COMMENTS FROM INTERESTED PARTIES

LMB and BVM submitted joint comments to the Commission. They supported Germany's comments submitted in a letter dated 19 May 1998, and stated that all financial measures taken are to be considered measures that Germany can take in accordance with Article 223(1)(b) of the EC Treaty for the protection of the essential interests of its security. Naval shipbuilding is considered part of the essential security interests of Germany and, wherever Article 223 of the EC Treaty applies, neither the provisions of Article 92 of the EC Treaty nor those of the seventh Directive on shipbuilding are applicable.

IV. COMMENTS FROM GERMANY

As regards the DEM 4.6 million (EUR 2,3 million) contribution by the State of Bremen towards the employment costs, Germany explains that BVM is an undertaking that was, and indeed in future will be exclusively active in naval shipbuilding. The additional 100 workers were employed only with a view to the future participation in the building of three frigates for the German navy, the F 124 programme, and those workers were needed for carrying out the frigate order. The workers were taken over in October 1997.

Since the building of the frigates will not take place before 2000, these workers would be underemployed for a certain period of time. Bremen had paid the DEM 4,6 million EUR 2,3 million) to ensure the employment of those workers and to compensate for the costs resulting from their under-employment. However, this amount does not cover all the costs borne by the yard during the time when these workers are not, or not yet, fully employed by the frigate order.

To reduce the loss due to the idleness or underuse of those additional workers during the period when they could not, or not fully, be engaged in naval shipbuilding and especially by the frigate order, they were partly employed during 1997/1998 in the construction of special fast ferries for Indonesia. Had they not been available for this task, Lürssen would have needed to hire workers for the peak periods that could not have been covered by other, permanent workers of the yard. The costs for hiring workers are 50 % less than the full costs of workers that the yard has to bear for workers taken over.

[3] OJ L 380, 31.12.1990, p. 27; Directive as last amended by Directive 94/731/EC (OJ L 351, 31.12.1994, p. 10).

As regards the waiver of the DEM 5 million (EUR 2,5 million) loan, Germany explains that HIBEG had granted a loan of DEM 5 million to BVM at the end of 1997 so as to increase BVM's equity and thus make it possible for BVM to continue its participation in the F 124 programme. This amount was paid to BVM. The loan agreement provided that the loan, plus interest, would be deemed to have been forgiven if it was not paid back or, in the event of a third-party acquisition of BVM shares, where the sale proceeds were insufficient for full repayment. This was the case when LMB acquired the shares in BVM, since neither was the loan paid back nor was the sale amount enough for its repayment and consequently, according to the terms of the loan agreement, the loan repayment was waived.

As regards the investment aid, Germany explains that LMB had bought from the administrator of the former BVW yard in Bremer-Vegesack a complete site, consisting of a dockhall, piers and equipment. This site was designed to be used by BVM solely for naval shipbuilding, and the planned investments were to be used only for that purpose. According to Germany, LMB had expressly committed itself to not using the acquired dockhall and related area, either for the building, or for the repair or conversion of merchant vessels. LMB had also committed itself to carrying on naval shipbuilding in Bremer-Vegesack at least until 31 December 2002. Consequently, the entire capacity of the former BVW for the building, repair and conversion of merchant vessels has been closed down.

Germany refers to Commission Decision 97/616/EC of 21 May 1997 on the closure aid granted to Bremer Vulkan Werft GmbH [4], where it is stated that 'the bankruptcy administrator is currently engaged in selling the shares in Bremer Vulkan Marineschiffbau GmbH, a subsidiary of Bremer Vulkan Verbund AG, together with a dock owned by the yard, to Friedrich Lürssen Werft GmbH; Germany, on behalf of the bankruptcy, administrator has given assurances that this dock will only be used for activities not qualifying as shipbuilding activities pursuant to Directive 90/684/EEC. The dock is to be used by Friedrich Lürssen Werft GmbH for building naval vessels and yachts, which fall outside that Directive.... Even the fact that the dock is likely to be sold to Friedrich Lürssen Werft GmbH does not change the principle that the capacity reduction will be genuine and irreversible. The dock will be only used for naval shipbuilding and for yachts, activities not falling within the scope of Directive 90/684/EEC'.

Germany stresses that BVM is only active in naval shipbuilding. It also contests the Commission's opinion that the aid measures benefit Lürssen. In Germany's opinion, the financial measures benefit BVM only as an undertaking specialised in naval shipbuilding. These measures aim only to make it possible to continue activities in the field of naval shipbuilding, especially through participation in the F 124 frigate programme. For these reasons, Germany asserts that the financial measures in question constitute measures that Germany is permitted by Article 223(1)(b) of the EC Treaty to take, for the protection of the essential interests of its security.

Germany explains that the safeguarding of the essential security interests of the Federal Republic means that a minimum industrial capacity for the military core capabilities in the building of naval combat ships is to be guaranteed. This minimum capacity was achieved in 1994 through the inclusion of Lürssen. Germany refers to the letter from the Ministry of Defence of 26 May 1998 to the Freie Hansestadt Bremen, in which it is stated that 'there are security and defence interests involved in maintaining the existing core capabilities in naval shipbuilding as a basis for an autonomous and adequate fitting-out of the German navy. These naval shipbuilding capabilities are further relevant to the ability to cooperate with other NATO and EU Member States and also with other friendly and economically allied states'.

Consequently, according to Germany, naval shipbuilding is considered part of the essential security interests of Germany and in the context of Article 223 of the EC Treaty, whereas neither the provisions of Article 92 of the EC Treaty nor those of the seventh Directive on shipbuilding are applicable.

V. **ASSESMENT OF THE MEASURES**

The financial measures taken and to be taken by the Federal State of Bremen are measures granted through state resources favouring a particular undertaking engaged in business that is subject to trade between Member States. These measures relieve the undertaking of part of its operating and investment costs and thereby afford it an economic advantage over companies not receiving such financial support. Therefore the measures constitute state aid within the meaning of Article 92(1) of the EC Treaty and Article 61(1) of the EEA Agreement. The Commission notes that the measures were not notified to the Commission pursuant to Article 93(2) of the EC Treaty.

The Commission notes that not only Germany but also the interested parties, BVM and LMB, have in their comments argued that Article 223(1)(b) of the EC Treaty was applicable to the financial measures in question. Article 223(1)(b) reads as follows:

'1. The provisions of this Treaty shall not preclude the application of the following rules: ....

(b) any Member State may take such measures as it considers necessary for the protection of the essential interests of its security which are connected with the production of or trade in arms, munitions and war material; such measures shall not adversely affect the conditions of competition in the common market regarding products which are not intended for specifically military purposes'.

[4] OJ L 250, 13.9.1997, p. 10.

The Commission notes that according to the information submitted to it by Germany, Lürssen is a yard almost exclusively engaged in naval shipbuilding: [...] * of its turnover for 1988 to 1998 derives from naval construction. BVM, which became a subsidiary of Lürssen after acquisition by LMB, is a yard exclusively concerned with naval shipbuilding and is currently participating in the frigate programme for the German navy. The additional 100 workers taken over by LMB are former workers of BVM and workers formerly employed in naval shipbuilding in BVW, which implies that they have the experience and skills needed in this field. According to Germany and the interested parties, those workers were necessary for carrying out the frigate order. The loan granted to BVM by HIBEG was designed to enable BVM to continue its participation in the frigate programme. The investment aid planned for LMB is to be used exclusively for the upgrading of the dock bought by LMB from the former BVW in order to make it suitable for naval shipbuilding by 31 December 2002. Consequently, all the measures relate to naval shipbuilding, and especially the frigate programme of the German navy.

According to Germany, maintaining a minimum capacity in naval shipbuilding is part of safeguarding its essential security interests. This argument has been confirmed in the letter of the Ministry of Defence to the Freie Hansestadt Bremen. The Commission accepts this argument, provided that the financial measures in question do not adversely affect the conditions of competition in the common market regarding products which are not intended for specifically military purposes.

The Commission notes that according to information submitted to it by Germany, the only non-naval shipbuilding task that the workers employed for carrying out the frigate order have been involved in, and will in future be involved in, is the work on the three fast ferries for Indonesia in 1997/1998. This is a development aid project approved by the Commission on 27 March 1996 ([5]). Had these workers not been available for the task, Lürssen would have needed to hire workers outside at half the cost of the employers taken over from BVM and BVW: the aid in question covers less than the difference in cost. Consequently, Lürssen obtained no economic advantage in using these workers. Therefore, the measures taken do not adversely affect the conditions of competition in the common market regarding products which are not intended for specifically military purposes.

As far as the waiver of the loan granted to BVM by HIBEG is concerned, the Commission notes that the loan was granted to BVM, which is an undertaking engaged solely in naval shipbuilding, and the loan was granted to make it possible for BVM to continue its participation in the frigate programme for the German navy. Therefore, the measure taken does not adversely affect the conditions of competition in the common market regarding products which are not intended for specifically military purposes.

As regards the investment aid planned to be granted for upgrading the dock and the related area acquired from the former BVW, Commission Decision 97/616/EC of 21 May 1997 on the closure aid granted to Bremer Vulkan Werft GmbH ([6]) expressly states that the dock and the area related to it are to be used only for naval shipbuilding or building of vessels which do not fall under the seventh Directive on shipbuilding. The planned aid is only to be used for these activities. Consequently, as far as the investment concerns the use of the dock in naval shipbuilding, the measure is considered not to have any effect on competition as regards products not intended for military purposes.

Nevertheless, as far as the investment relates to the use of the dock and the surrounding area for building other vessels, the measure is considered to have an effect on competition as regards these vessels.

According to Germany, the dock in question will only be used for construction, conversion and repair of naval ships and large yachts. A notarial contract ensures that no commercial shipbuilding will be carried out in Bremen-Vegesack until at least 31 December 2003. After that date, any commencement of commercial shipbuilding in the area is subject to the approval of the Commission. This ensures that the closure of the former Bremer Vulkan Werft for commercial shipbuilding is final, in conformity with Decision 97/616/EC.

The Commission notes the undertakings of the German Government, according to which the dock in question will only be used for the construction, conversion and repair of naval ships and large yachts, which do not fall under the scope of the seventh Directive. Therefore, as far as the dock is used for yachts, the investment aid is to be assessed in accordance with the provisions of Article 92 of the Treaty.

The Commission further notes that the planned investment aid of DEM 900 000 (EUR 450 000) is based on the approved regional aid scheme known as Gemeinschaftsaufgabe Verbesserung der regionalen Wirtschaftsstruktur (GRW) ([7]), representing 15 % of the planned total investment of DEM 6 million. Therefore, as far as the investment aid relates to yachts, it is compatible with the common market within the meaning of Article 92(3)(c) of the EC Treaty.

For these reasons, the Commission concludes that the scope of Article 223(1)(b) of the EC Treaty covers the measures taken and to be taken by the Federal State of Bremen in favour of naval shipbuilding and in favour of Lürssen Maritime Beteiligungen GmbH & Co. KG. Therefore, Article 92(1) of the EC Treaty is not applicable to those measures.

([5]) Aid N 87/96, (OJ C 215, 25,7.1996).

([6]) See footnote 4.

([7]) OJ C 341, 11.11.1997, p. 4.

In this context, the Commission wishes to draw Germany's attention to Article 11(2) of Council Regulation (EC) No 1540/98 of 29 June 1998 establishing new rules on aid to shipbuilding ([8]). That provision provides that in case of shipyards engaged in both commercial and military shipbuilding, ship repair or ship conversion, the regular reports shall be accompanied by an attestation by the statutory auditor certifying the apportionment of the overheads to these two fields. In addition, separate information is to be submitted on the turnover in the commercial and military fields.

VI. **CONCLUSIONS**

The Commission finds that the financial measures taken and to be taken by the Federal State of Bremen, Germany, in favour of naval shipbuilding are measures necessary for the protection of the essential interests of Germany's security within the meaning of Article 223(1)(b) of the EC Treaty. Consequently, Article 223(1)(b) applies to these measures. Since application of Article 223 of the EC Treaty precludes application of other Articles, Articles 92 and 93 of the EC Treaty are not applicable to the measures.

The investment aid of DEM 900 000 (EUR 450 000), as far as it relates to the building, conversion or repair of yachts, is compatible with the common market pursuant to Article 92(3)(c) of the Treaty,

HAS ADOPTED THIS DECISION:

Article 1

The measures which Germany has implemented and will implement in favour of naval shipbuilding and in favour of Lürssen Maritime Beteiligungen GmbH & Co. KG, totalling DEM 10,5 million (EUR 5,25 million), are measures necessary for the protection of Germany's essential security interests within the meaning of Article 223(1)(b) of the EC Treaty. Accordingly, Articles 92 and 93 of the EC Treaty are not applicable to those measures.

The investment aid of DEM 900 000 (EUR 450 000), as far as it relates to building, conversion or repair of yachts, is compatible with the common market pursuant to Article 92(3)(c) of the Treaty.

Article 2

This Decision is addressed to the Federal Republic of Germany.

Done at Brussels, 17 March 1999.

For the Commission

Karel VAN MIERT

Member of the Commission

([8]) OJ L 202, 18.7.1998, p. 1.