COMMISSION DECISION

of 6 January 2004

terminating the examination procedure concerning the Brazilian Export Financing programme 'PROEX' as applied in the regional aircraft sector

(2004/13/EC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community,

Having regard to Council Regulation (EC) No 3286/94 of 22 December 1994 laying down Community procedures in the field of the common commercial policy in order to ensure the exercise of the Community's rights under international trade rules, in particular those established under the auspices of the Word Trade Organisation [1], and in particular Article 11(1) thereof,

Whereas:

(1) On 27 January 1999 the German manufacturer of regional aircraft Dornier Luftfahrt GmbH (hereafter referred to as 'Dornier'), lodged a complaint with the Commission pursuant to Articles 3 and 4 of the trade barriers Regulation. The complaint related to the Brazilian export financing programme 'Programa de Financiamentò às Exportacoes' (PROEX), which, for exports of aircraft, operates as an interest rate equalisation system.

(2) The complainant alleged that the application of PROEX to the Brazilian aircraft industry, and in particular to the regional jet manufacturer Embraer, allowed the latter to compete unfairly with Dornier on the 30-seat jet market. In particular, that PROEX allowed purchasers of Embraer aircraft to reduce their financing costs to levels below those offered in the financial markets, which led to a significant reduction of the aircraft price. The complainant contended that PROEX constituted a prohibited export subsidy under Article 3.1(a) of the WTO Agreement on Subsidies and Countervailing Measures (SCM Agreement). Dornier further claimed that Embraer's abuse of the PROEX programme caused material injury to it on the Community market as well as adverse trade effects on non EC markets and most notably the US and Switzerland.

(3) The Commission found that the complaint contained sufficient prima facie evidence of a trade barrier and announced the initiation of an examination procedure in a notice published on 17 April 1999 in the Official Journal [2]. The Commission's main findings are summarised below.

(4) PROEX acts as an interest rate equalisation system by virtue of which the Brazilian Government reimburses part of the interest rate which foreign purchasers of Embraer aircraft have to pay to finance their purchase. The reimbursement amounted to 3,8 percentage points per annum over a period of 15 years. PROEX allowed airlines to acquire aircraft at financing conditions that were far more favourable than those available on the market place, resulting in a net present value benefit in the range of 15 % of the aircraft's purchase price. As a result, Embraer was in a position to systematically undercut the price of Dornier's 30-seat jet and gain the lion's share of the Community and US 30-seat jet markets. In most fleet deals the PROEX financing terms were by far the most decisive factor for airlines to opt for the Brazilian jet.

(5) Under these circumstances the Commission considered that the complainant's allegations on the existence of an obstacle to trade were well founded and that PROEX resulted in adverse trade effects and injury within the meaning of Article 2(3) and (4) of the TBR.

(6) In the course of the TBR examination, a panel established, upon Canadian request by the Dispute Settlement Body (the DSB) of the World Trade Organisation (the WTO), concluded that PROEX payments constituted prohibited export subsidies inconsistent with Article 3 of the WTO Agreement on Subsidies and Countervailing Measures (the SCM Agreement). The conclusions and recommendations of the panel were upheld by the WTO Appellate Body and both reports were adopted by the DSB on 20 August 1999.

(7) On 19 November 1999, Brazil informed the DSB of changes introduced to PROEX (PROEX II) in order to implement the DSB recommendations. However, Canada considered that PROEX II continued to provide export subsidies contrary to the SCM Agreement and initiated a compliance procedure under Article 21.5 of the Dispute Settlement Understanding (DSU). The compliance panel and the Appellate Body upheld Canada's position and found PROEX II also to constitute an illegal export subsidy.

[1] OJ L 349, 31.12.1994, p. 71, as last amended by Regulation (EC) No 356/95 (OJ L 41, 23.2.1995, p. 3).
[2] OJ C 108, 17.4.1999, p. 33.

(8) On 6 December 2000, Brazil adopted a further revised version of PROEX (PROEX III) and Canada initiated a further compliance panel under Article 21.5 DSU to examine its WTO compatibility. This time, the panel report (adopted by the DSB on 23 August 2001) concluded that, unlike its previous versions, PROEX III as such was not in violation of Article 3.1(a) of the SCM Agreement as it did not require Brazil to provide export credits in such terms and conditions that they would constitute subsidies. The panel conclusions referred only to PROEX III as a law on its face and independently of its application and it was clearly stated that it would not necessarily follow that future applications of PROEX III would be consistent with the SCM Agreement.

(9) After the adoption of the Panel by the DSB the European Communities stated that it would remain vigilant to ensure that Brazil would respect its WTO obligations in its application of PROEX III to individual transactions. However, during the last two years of monitoring no further allegations have been made or evidence submitted against Brazil in that respect.

(10) In the absence of any evidence concerning unfair trade practices by Brazil after the adoption of the WTO Panel report on PROEX III, the European Communities considers that no action is required and that, therefore, in accordance with Article 11(1) of the Regulation, the procedure should be terminated.

(11) The Advisory Committee has been consulted on the measures provided for in this Decision,

HAS ADOPTED THIS DECISION:

Sole Article

The examination procedure concerning the Brazilian Export Financing programme 'PROEX' as applied in the regional aircraft sector initiated on 17 April 1999 is hereby terminated.

Done at Brussels, 6 January 2004.

For the Commission

Pascal LAMY

Member of the Commission