

II

(Non-legislative acts)

DECISIONS

COMMISSION DECISION

of 27 October 2010

on State aid No C 15/08 (ex N 318/07, N 319/07, N 544/07 and N 70/08) which Italy plans to implement for Cantiere Navale De Poli

(notified under document C(2010) 7253)

(Only the Italian text is authentic)

(Text with EEA relevance)

(2013/197/EU)

THE EUROPEAN COMMISSION,

the delivery deadline by 8 months for vessel C 241, 6 months for vessel C 242, 9 months for vessel C 243 and 10 months for vessel C 244.

Having regard to the Treaty on the Functioning of the European Union, and in particular the first subparagraph of Article 108(2) thereof,

- (2) The notifications related to aid granted by Italy to De Poli under the Italian aid scheme N 59/2004, approved by the Commission on 19 May 2004 ⁽³⁾ on the basis of Council Regulation (EC) No 1177/2002 of 27 June 2002 concerning a temporary defensive mechanism to ship-building ⁽⁴⁾, as amended by Council Regulation (EC) No 502/2004 ⁽⁵⁾ (hereinafter the "Italian TDM scheme" and the "TDM Regulation" respectively).

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 provision(s) ⁽¹⁾ cited above and having regard to their comments,

- (3) By letters dated 31 July 2007, 31 August 2007, 7 September 2007, 12 November 2007 and 25 January 2008, Italy provided the Commission with additional information in relation to these notifications.

Whereas:

- (4) By letter dated 16 April 2008, the Commission informed Italy that it had decided to initiate the procedure laid down in Article 108(2) of the Treaty on the Functioning of the European Union (TFEU) ⁽⁶⁾ in respect of the notified extension requests. The Commission decision to initiate the procedure was published in the *Official Journal of the European Union* ⁽⁷⁾. Interested parties were invited to submit comments.

I. PROCEDURE

- (1) By letters dated 6 June 2007, 24 September 2007 and 6 February 2008, Italy notified requests for the extension of the three-year delivery limit for four chemical tankers (denominated as vessels C 241, C 242, C 243 and C 244) to be built by the Italian shipyard Cantiere Navale De Poli (hereinafter "De Poli" or "the shipyard") ⁽²⁾. In particular, Italy requested the extension of

⁽³⁾ OJ C 100, 26.4.2005, p. 27.

⁽⁴⁾ OJ L 172, 2.7.2002, p. 1.

⁽⁵⁾ OJ L 81, 19.3.2004, p. 6.

⁽⁶⁾ With effect from 1 December 2009, Articles 87 and 88 of the EC Treaty have become Articles 107 and 108, respectively, of the TFEU. The two sets of provisions are, in substance, identical. For the purposes of this Decision, references to Articles 107 and 108 of the TFEU should be understood as references to Articles 87 and 88, respectively, of the EC Treaty where appropriate.

⁽⁷⁾ Idem 1.

⁽¹⁾ OJ C 208, 15.8.2008, p. 14.

⁽²⁾ The notifications were registered as N 319/07 for vessel C 243 (letter of 6 June 2007), N 318/07 for vessel C 244 (letter of 6 June 2007), N 544/07 for vessel C 242 (letter of 24 September 2007), and N 70/08 for vessel C 241 (letter of 6 February 2008).

- (5) Italy submitted comments on the decision to initiate the procedure by letter of 16 June 2008 (registered on 17 June 2008). The Commission received comments from De Poli by letter also dated 16 June 2008 (registered on 17 June 2008). Italy provided additional information by letter of 30 June 2008 (registered on the same date) and by letter of 29 October 2008 (registered on 3 November 2008).
- (6) By letter of 15 July 2008 (registered on 22 July 2008), Italy requested a second extension of the delivery deadline for two of the vessels, as follows: until 30 September 2008 for vessel C 242 and until 30 September 2008 for vessel C 244.
- (7) By letter of 20 January 2009 (registered on 22 January 2009), Italy requested a third extension of the delivery deadlines, namely until 31 December 2008 for vessel C 242 and until 28 February 2009 for vessel C 243. By letter of 14 April 2009 (registered on 15 April 2009), Italy requested a fourth extension of the delivery deadlines, namely until 30 June 2009 for vessel C 242, until 30 September 2009 for vessel C 243 and until 30 November 2009 for vessel C 244.
- (8) By letter of 8 May 2009 (registered on the same date) the Commission asked Italy to provide further information, with a reminder sent on 12 June 2009. Italy responded by letter dated 23 September 2009⁽⁸⁾ merely to inform the Commission that De Poli had been admitted to the collective insolvency procedure known as "concordato preventivo"⁽⁹⁾.
- (9) By letter of 28 January 2010 (registered on 1 February 2010), Italy formally withdrew the extension requests submitted with respect to vessels C 242 and C 243⁽¹⁰⁾.
- (10) By e-mail dated 2 March 2010, the Commission asked Italy to clarify the status of the notifications concerning vessels C 241 and C 244.
- (11) By e-mail of 10 June 2010 (registered on 17 June 2010), Italy informed the Commission that vessel C 241 had been completed on 31 August 2008 and delivered on

3 November 2008 and that the notification of the extension request for the delivery of this vessel was maintained.

- (12) By letter of 16 June 2010 (registered on 28 June 2010), Italy formally withdrew the extension requests for vessel C 244.

II. BACKGROUND

- (13) The following facts only concern vessel C 241, given the withdrawal by Italy of the extension requests for vessels C 242, C 243 and C 244.
- (14) De Poli is an Italian shipyard located in Pellestrina (Venice), which since the 1990s had specialised in the construction of chemical and product tankers. In 2007, the shipyard's workforce totalled 320 workers, including subcontractors, and its annual turnover was EUR 70 million. On 11 February 2010 the competent Italian court confirmed the arrangements for the collective insolvency procedure concerning the shipyard⁽¹¹⁾.
- (15) On 28 January 2005, De Poli concluded with Arcotur Srl a contract for the construction of vessel C 241. According to this contract, vessel C 241 was a chemical tanker with the following main technical characteristics: length overall 125 metres, moulded breadth 19 metres, deadweight tonnage approximately 7 300 tonnes and speed at 85 % of maximum continuous power 15 knots. The sales contract stipulated that the vessel C 241 was to be delivered to the purchaser Arcotur Srl by 31 December 2007 for a total sales price of EUR 30 million.
- (16) On 26 May 2006, the shipyard ordered from a supplier (hereinafter "the supplier") the gearbox for the vessel, an order, confirmed by the supplier, which was due to be delivered by 3 September 2007. According to the information submitted by De Poli, the gearbox for vessel C 241 was a made-to-measure model with unique characteristics, which differed in several technical aspects from the standard gearbox model produced by the same supplier.

- (17) On 6 July 2006, Arcoinc SpA (formerly Arcotur Srl) and De Poli amended the contract signed on 28 January 2005 to make the following modifications to the technical specifications for the vessel: length overall 112 metres, moulded breadth 16,8 metres, and deadweight tonnage 5 300 tonnes, with a reduction in the price to EUR 23 million.

⁽⁸⁾ This letter was only received and registered by the Commission on 19 February 2010.

⁽⁹⁾ The Italian insolvency proceedings called "concordato preventivo", i.e. an arrangement with creditors, governed by bankruptcy law, involve the debtor submitting a plan for restructuring the debts to the creditors. The proposal is then examined by the court in the place where the company has its registered office. The court may allow the procedure by issuing an order to that effect, or it may dismiss the application and formally declare the operator bankrupt. Where the arrangement procedure is accepted, the debtor retains control of the company's assets and activities under the supervision of a receiver.

⁽¹⁰⁾ These withdrawals were re-confirmed by letter of 13 May 2010 (registered on 15 May 2010).

⁽¹¹⁾ The company had asked to be placed in "concordato preventivo" since early 2009 (for a short explanation of what "concordato preventivo" is, see footnote 9 above).

- (18) On 20 July 2006, Arcoinc SpA transferred the contract for vessel C 241 to Elbana di Navigazione SpA.
- (19) On 3 September 2007, the date agreed for delivery, the gearbox ordered on 26 May 2006 was not ready. Indeed, by letter of 23 October 2007, the supplier informed De Poli that, due to a shortage of raw materials on the market and consequent late delivery by its subcontractors, the gearbox could not be delivered on time. The supplier confirmed on 18 January 2008 that the gearbox would instead be delivered in February 2008, i.e. six months later than the initial delivery deadline.
- (20) Italy therefore requested an extension to the delivery deadline for vessel C 241 until 31 August 2008, an extension of eight months from the contractual deadline for delivery of the vessel (31 December 2007).
- (21) Finally, on the basis of the information received, the Commission notes that vessel C 241 was delivered on 3 November 2008 ⁽¹²⁾.

III. THE AID

- (22) The TDM Regulation ⁽¹³⁾ laid down exceptional and temporary measures to assist EU shipyards in those segments that had at the time suffered serious adverse effects caused by unfair competition from South Korea ⁽¹⁴⁾.
- (23) The TDM Regulation provided that direct aid up to 6 % of the value of the shipbuilding contract before aid ⁽¹⁵⁾ for the building of specific categories of merchant vessels (container ships, chemical and product tankers and liquefied natural gas carriers ⁽¹⁶⁾) could be considered compatible with the internal market if the following conditions were met: there was competition for the same contract from a South Korean shipyard offering a lower price ⁽¹⁷⁾; the final contract was signed before the expiry of the TDM Regulation (31 March 2005) ⁽¹⁸⁾; and the ship was to be delivered within three years from the date of signing the final contract ⁽¹⁹⁾.
- (24) Article 2(4) of the TDM Regulation authorised the Commission to grant extensions to the three-year delivery limit when justified by "the technical complexity

of the individual shipbuilding project concerned or by delays resulting from unexpected disruptions of a substantial and defensible nature in a working programme of a yard due to exceptional circumstances, unforeseeable and external to the company".

- (25) In May 2004 the Commission, on the basis of the TDM Regulation, approved the Italian TDM scheme which made available aid for shipbuilding ⁽²⁰⁾ on conditions corresponding to those in the TDM Regulation. In particular, the Italian TDM scheme provided that aid up to 6 % of the value of the contract before aid could be granted in respect of ships delivered within three years of the date of signing the final contract, and that an extension to this period could be allowed only when the Commission found it justified "by the technical complexity of the individual shipbuilding project concerned or by delays resulting from unexpected disruptions of a substantial and defensible nature in a working programme of a yard due to exceptional circumstances, unforeseeable and external to the company" (paragraph 29 of the Italian scheme).
- (26) On 31 January 2005, De Poli applied to the Italian authorities for aid under the Italian scheme in relation to the construction of vessel C 241, for an amount of EUR 1,3 million.
- (27) On 25 January 2008, De Poli asked the Italian authorities for an extension to the delivery deadline for vessel C 241 from 31 December 2007 until 31 August 2008.
- (28) Italy confirmed that the aid has not been disbursed. It further noted that, following the Commission decision of 21 October 2008 ⁽²¹⁾, which did not find compatible the increase in the budget of the Italian TDM scheme by EUR 10 million, at present there are no funds available for providing this aid.

IV. THE DECISION TO INITIATE PROCEEDINGS

- (29) In the decision to initiate proceedings, the Commission doubted that the circumstances invoked by Italy and De Poli to justify the delay in the delivery of vessel C 241 (as well as vessels C 242, C 243 and C 244, no longer under assessment) qualified as "delays resulting from unexpected disruptions of a substantial and defensible nature in the working programme of the yard due to exceptional circumstances unforeseeable and external to the company" within the meaning of paragraph 29 of the Italian TDM scheme.

⁽¹²⁾ The date of completion of vessel C 241 which the Italian authorities note was 30 August 2008 is irrelevant, as the TDM Regulation and the Italian TDM scheme, refer solely to the delivery date.

⁽¹³⁾ See footnotes 4 and 5.

⁽¹⁴⁾ Recital 3 of the TDM Regulation.

⁽¹⁵⁾ Article 2(3) of the Regulation.

⁽¹⁶⁾ As defined in Article 1 of the Regulation.

⁽¹⁷⁾ Article 2(1) of the Regulation.

⁽¹⁸⁾ Articles 4 and 5 of the Regulation, as amended by Article 1 of Council Regulation (EC) No 502/2004 – see footnotes 4 and 5.

⁽¹⁹⁾ Article 2(4) of the Regulation.

⁽²⁰⁾ *Idem* 3.

⁽²¹⁾ Commission Decision of 21 October 2008 on state aid C 20/08 (ex N 62/08) which Italy is planning to implement through a modification of scheme N59/04 concerning a temporary defensive mechanism for shipbuilding, OJ L 17, 22.1.2010, p. 50 – currently under appeal (Cases T-584/08 and T-3/09).

- (30) Although the doubts expressed in the decision to initiate proceedings concerned four vessels (C 241, C 242, C 243 and C 244), they remain relevant for the assessment of vessel C 241 on its own.
- (31) In the decision, the Commission questioned first whether the contracts signed with Arcoinc SpA were final contracts or whether they were a means for De Poli to have the contracts secured before the final deadline for shipbuilding contracts to be eligible for aid, with a view to later finding final buyers for the ships.
- (32) Second, the Commission questioned whether the transfer of the sales contracts between shipowners was in itself another cause of the delay in delivery.
- (33) Third, the Commission deemed that De Poli might have taken more orders than its actual production capacity enabled it to deliver, since over the period 2005-2008 the shipyard planned to build 18 vessels, half of which were to be constructed on its two main slipways and the other half to be constructed in a smaller infrastructure.
- (34) Finally, the Commission doubted that the alleged delays in the supply of essential parts were indeed unforeseeable as claimed by Italy or whether they might constitute normal commercial risks which a diligent shipyard should anticipate in its working programme. In particular, the Commission considered that De Poli might have increased the risk of delay by ordering some parts of the vessels too late.
- (37) On this point, De Poli contends that the practice of transferring sales contracts during the construction of vessels, or even after finalising the work, is not uncommon in the shipbuilding industry.
- (38) In relation to the scheduling of the work for vessel C 241, De Poli observes that, due to the technical complexity of shipbuilding projects, it is normal practice for work to begin several months after the conclusion of the sales contracts. The shipyard argues that it is common for a certain period of time to elapse between the signature of the contract and the actual start of the works, and this period of time is necessary for preparatory operations, such as drafting the technical project and carrying out negotiations with the various suppliers.
- (39) According to the initial working programme submitted by De Poli to the Italian authorities ⁽²²⁾, the construction of vessel C 241 was scheduled to begin in the first quarter of 2006, and delivery was foreseen for the second half of 2007. However, according to the revised working programme, work on vessel C 241 was scheduled to begin on 28 September 2006 on the "Scalo Sud" (one of the shipyard's two slipways).
- (40) According to De Poli, delivery of the gearbox is an essential stage in the building of a vessel – it is followed by assembly of the gearbox with the engine, the fixing of the propeller and completion of the hull. Various assembly and preparation/construction operations can only be performed after installing the gearbox. De Poli claims that it is not normal practice to order the delivery of parts such as the gearbox in advance, to avoid outlays on storage and advance payment, and emphasises that the supplier it contacted is the sector leader with proven experience, so there was no reason to suspect that the gearbox would not be delivered on time.

Comments of the Member State and arguments of the interested parties

- (35) As far as vessel C 241 is concerned, in its comments on the decision to initiate proceedings of 16 June 2008, Italy argues that De Poli had the capacity to deliver the vessel within 36 months from the date of signature of the sales contract. The only reason that delivery was delayed was because of the late delivery of the gearbox by the supplier, a factor which Italy qualifies as substantial, exceptional, unforeseeable and external to the company within the meaning of paragraph 29 of the Italian TDM scheme.
- (36) In its submission of the same date, De Poli argues that the fact that both the shipyard and Arcoinc SpA belong to members of the De Poli family is not sufficient to doubt the authenticity of the contract initially signed on 28 January 2005. This argument is supported by the Italian authorities, which point out that, at the time when the contract for vessel C 241 was signed, there were no direct ownership links between the shipyard and Arcoinc SpA (other than the fact that Arcoinc SpA was held by members of the De Poli family, but not entirely the same ones as held stakes in De Poli).
- (41) De Poli insists that it had the capacity to deliver the 18 vessels ordered during the 2005-2008 period on time, since the total deadweight capacity relating to those orders amounted to 10 000 tonnes per year, whereas the shipyard's historical annual capacity was over 12 000 tonnes per year. Furthermore, it emphasised that 9 of the 18 vessels ordered over this period were small (of lengths overall of 20 metres and deadweight capacities of 25 tonnes), while only the other 9 vessels were of the same general size as vessel C 241. According to De Poli, this demonstrates that the shipyard had the capacity to deliver all the orders it took within the deadlines set and that it did not take on orders beyond its production capacity.

⁽²²⁾ A copy of this programme, together with the revised version, was submitted by Italy on 25 February 2008, in connection with notification N 70/08 for vessel C 241.

- (42) De Poli further notes that in the past the Commission had on several occasions – including for De Poli itself – approved requests for extensions to delivery deadlines arising from the late delivery of critical components.

VI. ASSESSMENT

- (43) As a preliminary point, in the light of the formal withdrawal by Italy of the notifications consisting of requests for extension to the delivery deadlines for vessels C 242, C 243 and C 244, and the fact that no monies were disbursed, the formal investigation procedure concerning the requests submitted by Italy in relation to the aforementioned three vessels has become devoid of purpose, and will be closed without any assessment being necessary.

- (44) The following assessment therefore relates only to vessel C 241 and any references to vessels C 242, C 243 and C 244 will be made only in so far as is relevant to this assessment.

Existence of state aid within the meaning of Article 107(1) of the TFEU

- (45) Under Article 107(1) TFEU, any aid granted by a Member State or through state resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between the Member States, be incompatible with the internal market. Article 107(1) TFEU therefore establishes the cumulative conditions under which a state measure qualifies as state aid: the measure confers a selective advantage, involves state resources, generates competition-distorting effects and has a negative impact on trade between Member States.

- (46) There is no dispute that the measure which Italy plans to implement to support the construction of vessel C 241 by De Poli, consisting of a financial contribution of up to 6 % of the value of the contract before aid (approximately EUR 1,3 million), constitutes state aid within the meaning of Article 107(1) TFEU. The measure is financed by the Italian Government. The monies confer an advantage on De Poli in so far as they are designed to cover costs normally borne by the shipyard when building a ship. The measure is selective since it benefits De Poli alone, and to the extent that it enhances the position of De Poli vis-à-vis its European competitors, it has the potential to distort competition in the European shipbuilding market and affect trade between Member States.

Compatibility of the aid with the TFEU

- (47) Two aspects of the case under consideration prompted the Commission to have doubts as to the compatibility

of the aid to De Poli with the internal market. Paragraph 29 of the Italian TDM scheme stipulates that aid can only be granted concerning vessels delivered within three years of the date of signing the final contract and paragraph 33 that the final contracts must have been signed before the expiry of the TDM Regulation (i.e. 31 March 2005).

- (48) With respect to the second point, the Italian authorities have explained that the transfer of contracts between shipowners after the expiry of the TDM Regulation cannot be interpreted as indicating that the original contract for vessel C 241, signed on 28 January 2005, was not the "final contract" within the meaning of paragraph 29 of the Italian TDM scheme.

- (49) The Commission acknowledges that the practice of transferring a contract to a third party appears to be a common one in the shipbuilding industry. For instance, in a previous decision⁽²³⁾ also concerning the extension of the three-year delivery limit for two ships, the Commission concluded that, despite the transfer of contracts, the first contract could be considered final, given that the product type remained the same and the new owner took over the rights and obligations from the previous owner. In that case the Commission thus concluded that the transfer of ownership had not in itself changed the nature of the contracts and therefore their eligibility for aid.

- (50) In the present case, the transfer of the contract between shipowners did not involve a change in the product type or the nature of the contract and the new owner essentially took on the same rights and obligations as the original contracting party. On this basis, the Commission holds that the original contract can be regarded as final, and thus eligible for aid under the Italian TDM scheme.

- (51) As for the doubts expressed in relation to the conditions for granting an extension to the three-year delivery deadline, the Italian TDM scheme stipulates that the Commission may grant an extension when justified by "the technical complexity of the individual shipbuilding project concerned or by delays resulting from unexpected disruptions of a substantial and defensible nature in the working programme of a yard due to exceptional circumstances, unforeseeable and external to the company".

- (52) The Commission must therefore assess whether Italy has satisfactorily demonstrated that the conditions for granting the exception stipulated in the Italian TDM scheme have been met in the case of the delays incurred in the delivery of vessel C 241.

⁽²³⁾ See Case C 33/2004, where, despite the transfer of contracts, the Commission considered that the first contract could be considered as the final contract.

- (53) Before assessing Italy's submissions, the Commission notes as a preliminary point that in the *Astilleros Zamacona* judgment of 16 March 2004 ⁽²⁴⁾, the Court of First Instance of the European Union ruled that the provision (concerning exceptional circumstances) establishing a system that is in derogation from the principles set out in the first subparagraph of that provision (the three-year limit) had to be given "a restrictive interpretation". According to the Court, the very wording "exceptional circumstances" in the provision shows that the Community legislature intended to reserve its application for very specific situations. The Court therefore held that it is for the Member State concerned to demonstrate that the alleged exceptional circumstances constituted a sufficient disruption as to affect the working programme of the yard and delay delivery of the vessel by establishing a causal link between the two events.
- (54) The Italian authorities contend that the delay in the delivery of vessel C 241 is due to the delay (6 months) in supplying the gearbox and the ensuing one-month delay in the assembly operations. The Commission notes that this is the only ground for delay invoked by Italy; in particular, the request for an extension does not refer to the new specifications deriving from the transfer of the contract.
- (55) According to established Commission practice ⁽²⁵⁾, the condition that the circumstances must be "exceptional" excludes common or at least normal events with which the shipyard should reasonably have reckoned in its working programme. Long delays in the delivery of critical parts could be considered exceptional, but minor delays are not necessarily viewed as exceptional in processes as long and complex as shipbuilding projects. Moreover, in the light of the restrictive interpretation to be given to the exception, the Commission assesses carefully whether indications exist that the shipyard concerned could have anticipated and avoided, or at least mitigated, these delays, looking for instance at the timing of orders in view of the relevant work programme. The condition that the event must be unforeseeable excludes any factor that the parties could reasonably have anticipated.
- (56) The Commission acknowledges that there may be a causal link between the late delivery of critical components for the production of the vessel and the request for extension of the delivery deadline ⁽²⁶⁾. However, in the specific circumstances of the present case, it is primarily the existence of the alleged exceptional and unforeseeable circumstances which the Commission doubts: the elements necessary to conclude that the delay invoked complies with the conditions laid down in paragraph 29 of the Italian TDM scheme do not appear to be present in this case.
- (57) As noted above, the Commission has, in the past, acknowledged that long delays in the delivery of critical parts could be considered exceptional. However, a request for extension must always be assessed in the specific circumstances of each case. To the extent that De Poli has encountered the same type of disruption on several occasions (not only has it been behind similar requests for extensions in the past ⁽²⁷⁾, the other three contracts which were signed on the same day as the contract for vessel C 241 were also the subject of repeated requests for extensions — see recitals 1, 6 and 7 above), the Commission concludes that such delays can no longer be considered to be genuinely exceptional. In so far as they occurred repeatedly, the disruptions resulting from such repeated delays cannot be viewed as entirely unforeseeable.
- (58) Indeed, it is in the light of these past disruptions that De Poli does not appear to have acted diligently in the planning of its production.
- (59) In the initial working programme, the production of vessel C 241 was scheduled to start in the first quarter of 2006 with delivery scheduled for the second half of 2007, a lead time of between 15 and 24 months.
- (60) In the revised working programme, however, production was only to start on 28 September 2006 and delivery of the vessel was to take place on 30 December 2007, that is just one month before the ultimate delivery deadline of 28 January 2008. This change in planning allowed for a lead time of only 15 months in all to produce the vessel according to the terms of the contract. According to the information provided by Italy, the planning of vessels of the same type or even of a smaller size to be produced on the same "Scalo Sud" (i.e. vessels C 229 and C 240) allowed for 22 months and 20 months respectively from the start of production to delivery.
- (61) In addition, the fact that production was only due to begin on 28 September 2006 and delivery of the vessel was planned for 30 December 2007, that is only one month before the ultimate delivery deadline of 28 January 2008, left no margin for any delays in the production process, when the shipyard had previous experience of delays occurring both in the supply of parts and in the production process itself, as evidenced by the other requests for extensions to deadlines made by De Poli.

⁽²⁴⁾ See Case T-72/98 *Astilleros Zamacona SA v Commission* ECR [2000] II-1683. This ruling refers to an identical provision that existed under former Council Regulation (EC) No 1540/98 concerning aid to shipbuilding carried over in the TDM Regulation.

⁽²⁵⁾ See for instance *Giacalone*, case N 69/08, paragraph 21.

⁽²⁶⁾ See for example cases N 586/03, N 587/03 and N 589/03, as well as cases N 68/08 and N 69/08.

⁽²⁷⁾ See cases N 586/03, N 587/2003 and N 589/03.

- (62) Furthermore, the fact that it was a period of high demand (Italy provided evidence concerning an increase of around 60 % in orders for diesel engines between 2003 and 2005) leads to the conclusion that it would have been reasonable to engage in some forward planning in the ordering and agreed delivery dates for critical parts such as the gearbox. The statement by De Poli that this is not normal practice is not sufficient, in particular given the high level of demand and previous experience of delays, to conclude that the behaviour of the shipyard was defensible, in that reasonable action was taken to avoid or mitigate delays.
- (63) Indeed, the Commission notes that the gearbox was ordered on 26 May 2006 for delivery in September 2007, leaving little, if any, margin for possible delays in view of the vessel's delivery deadline of 31 December 2007. De Poli itself emphasised that considerable work is required after delivery of the gearbox (see recital 39 above) and this would appear to confirm that a certain margin for delays in the delivery of critical parts should normally be factored into the production schedule of a shipyard.
- (64) As for the doubts expressed by the Commission in its decision to initiate the investigation procedure as to whether the fact that the contract was transferred to a new owner was in itself a cause of delay, the Commission notes in particular that the transfer of the contract between Arcoino SpA and Elbana di Navigazione SpA only took place on 20 July 2006, several months after work was originally scheduled to begin (first quarter of 2006). It cannot, therefore, be excluded in the present case that the transfer of contracts between shipowners was in itself a cause of delay in beginning production and of the ensuing late delivery of the vessel, especially bearing in mind that the transfer of the contract to another shipowner implied some modifications to the vessel's specifications.
- (65) To conclude, in the light of the restrictive interpretation which must be attributed to requests for exceptional extensions, Italy has not been able to substantiate coherently the reasons why the circumstances invoked could not have been avoided or why the adverse effects of those circumstances could not have been significantly limited by diligent planning and administration of orders by De Poli. The above considerations lead the Commission to conclude that the circumstances invoked in support of the extension request cannot be characterised as exceptional and unforeseeable such that the delay in delivering vessel C 241 was not unexpected or defensible within the meaning of paragraph 29 of the Italian TDM scheme.
- (66) In addition, Italy submitted a request for an eight-month extension to the delivery date of vessel C 241, from 31 December 2007 to 31 August 2008, but only provided some justification for seven of the eight months thereof.
- (67) In contrast to previous extension requests concerning vessels being built by De Poli⁽²⁸⁾, the length of the extension requested by Italy in the present case is longer than the delay invoked by the Italian authorities as the only reason for the request (the late delivery of the gearbox); the existence of a causal link between the delay which forms the basis for the extension request and the delay in the supply of critical parts cannot therefore be said to have been established.
- (68) De Poli only actually delivered the vessel on 3 November 2008. In other words, the delay was not only longer than that attributable to the factors invoked as grounds for an extension, but continued beyond the requested deadline. Italy has provided no explanations for this additional delay of more than two months in the delivery of the vessel and the Commission has received no extension request for the two months concerned.
- (69) Consequently, even if the initial delay had been justified and the extension requested had been granted by the Commission, construction of vessel C 241 would not have been eligible for aid under the Italian TDM scheme since even that extended deadline would not have been met.
- #### VII. CONCLUSION
- (70) As regards vessels C 242, C 243 and C 244, in the light of the formal withdrawal by Italy of the notifications consisting of requests for extension to the delivery deadlines and the fact that no monies were disbursed, the formal investigation procedure is devoid of purpose and shall be closed as such.
- (71) As regards vessel C-241, in the light of the above assessment, the conditions required for granting an extension to the three-year delivery limit have not been substantiated and, in any event, the actual delivery of the vessel took place beyond the deadline that would have resulted from granting the extension requested. The construction of vessel C 241 is therefore not eligible for aid under the Italian TDM scheme N 59/04, based on the TDM Regulation.
- (72) Given that the Italian authorities confirmed that the aid has not been paid out to De Poli, no recovery of incompatible aid will be necessary,
- (66) In addition, Italy submitted a request for an eight-month extension to the delivery date of vessel C 241, from

⁽²⁸⁾ See cases N 586/03, N 587/03 and N 589/03.

HAS ADOPTED THIS DECISION:

Article 1

The state aid which Italy is planning to implement for De Poli, namely the extension of the three-year delivery limit for vessel C 241 on the basis of the Italian scheme N 59/04, based on the TDM Regulation, is incompatible with the internal market.

The aid may accordingly not be implemented.

Article 2

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

Article 3

As regards vessels C 242, C 243 and C 244, in the light of the formal withdrawal by Italy of the notifications consisting of requests for extension of the delivery deadlines, the formal investigation procedure is devoid of purpose and shall be closed as such.

Article 4

This Decision is addressed to the Italian Republic.

Done at Brussels, 27 October 2010.

For the Commission

Joaquín ALMUNIA

Vice-President
