

## II

*(Acts whose publication is not obligatory)*

## COMMISSION

## COMMISSION DECISION

of 12 December 1990

concerning two aid projects of the German Government in favour of a shipyard  
in financial difficulties

C 54/89 (ex NN 27/89, N 140/89)

(Only the German text is authentic)

(91/306/EEC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Economic Community, and in particular the first subparagraph of Article 93 (2) thereof,

Having given the parties concerned notice to submit their comments in accordance with that provision,

Having regard to Council Directive 87/167/EEC of 26 January 1987 on aid to shipbuilding<sup>(1)</sup>,

Whereas :

## I

Pursuant to Article 4 (7) of Directive 87/167/EEC, the Commission approved by letter of 9 March 1988 a development aid project by the German Government for Senegal. The aid project concerned the granting of a loan with soft conditions (15 year 100 % loan, one year grace period and 3,375 % interest per year) for the purchase of a special-purpose ferry with a contract value of DM 23 million to be built by Schiffswerft Germersheim.

According to the German Government's notification of the aid the credit conditions represent a grant equivalent

under OECD (Organization for Economic Cooperation and Development) terms of 33,4 %.

Pursuant to Article 10 (2) of Directive 87/167/EEC the German Government by verbal note of 20 March 1989 notified the Commission of an aid project by the Federal Minister of Finance at the request of the Land Rheinland-Pfalz for the Schiffswerft Germersheim. This aid project of 7 December 1988 concerned a 90 % guarantee on a loan of DM 1,8 million to keep the company in operation. This loan eventually appeared to be connected with the completion of the construction of a gravel silo vessel for inland waters.

Pursuant to the same Article of Directive 87/167/EEC the German Government by verbal note of 9 May 1989 notified the Commission of an aid project by the Land Rheinland-Pfalz for the Schiffswerft Germersheim GmbH im Konkurs. This aid project of spring 1989 concerned a 95 % guarantee on a loan of DM 20,7 million for the in-between financing of the construction of the Senegal contract, made necessary by the financial difficulties which the yard in the meantime had met.

As it appeared that the Schiffswerft Germersheim was in a state of bankruptcy the Commission asked the German Government to confirm this legal situation and to specify details concerning the bankruptcy, the future prospects of the Germersheimer Werft and a breakdown of the yard's turnover figures for 1988 and 1989 to enable the Commission to calculate an aid equivalent.

<sup>(1)</sup> OJ No L 69, 12. 3. 1987, p. 55.

As it appeared that the German Government in its letter of 25 July 1989 stated that it withdrew the notification of the 95 % guarantee on the DM 1,8 million loan and did not provide sufficient information on the different activities that formed part of the total turnover of the yard, information which was also lacking in the German Government's verbal note of 3 August 1989, the Commission by letter of 8 September 1989 asked the German Government again to specify details on the state of bankruptcy and the content of ocean-going shipbuilding in the company's total turnover figures. In the German Government's verbal note of 3 August 1989 it was stated that the second aid project, i.e. the 95 % guarantee on the DM 20,7 million loan was to be considered as development aid.

The Schiffswerft Germersheim filed a claim for legal settlement with creditors on 25 November 1988, after which the Amtsgericht Landau declared the state of bankruptcy on 17 January 1989. It appears that from some stage in spring 1989 onwards sites and facilities of the yard were used by the Schiffswerft Germersheim im Konkurs as well as by the newly founded Auffangesellschaft Neue Schiffswerft Germersheim.

By teletypes of 24 and 31 May 1989, a competitor raised a complaint to the Commission, criticising the foundation of the new company by the trustee of the Schiffswerft Germersheim and the rescue aid granted to the yard which would not have been in line with Council Regulation (EEC) No 1101/89 of 27 April 1989 on structural improvements in waterway transport<sup>(1)</sup>.

Since in the German Government's verbal notes of 17 October and 27 November 1989 all the requested information about the shipbuilding activities of the company had not been given, the Commission initiated the Article 93 (2) procedure by letter SG(89) D/000014 of 4 January 1990 in respect of the two abovementioned guarantees for the companies using the site and facilities of the former Schiffswerft Germersheim.

No other Member State or interested party reacted on the publication of this decision in the *Official Journal of the European Communities*<sup>(2)</sup>.

In the verbal note of the German Government of 13 February 1990 it was stated that the 90 % guarantee on a DM 1,8 million loan concerned the fulfilment of a building contract for a gravel silo vessel for inland waters, guarantee which was returned four months after its provision. On the 95 % guarantee on a DM 20,7 million loan it was repeated that this guarantee was to be considered as

development aid and means to cover the risks not covered by the Hermes-guarantee approved by the Commission in its letter of 9 March 1988. In the verbal note of 2 May 1990 an overview was given of the activities comprised in the 1988, 1989 and 1990 turnovers of the Schiffswerft Germersheim im Konkurs.

## II

The fact that the German authorities have withdrawn their notification on the 90 % guarantee on the DM 1,8 million loan because the guarantee had not to be called in during the building process does not prevent the fact that had the notification been made before the guarantee was given, an assessment of this project would have been made under the provisions of Article 92 of the EEC Treaty. The withdrawal of the notification is due to the fact that the aid has served its purpose. Given the fact that the guarantee was necessary for the yard to continue its operation while in serious financial difficulties, the guarantee even has the character of a rescue aid.

Given the fact that the guarantee is related to the building process of a vessel for inland waters, which activity falls outside the scope of the definition of shipbuilding used in Article 1 of Directive 87/167/EEC the aid project of the provision of a 90 % guarantee on a DM 1,8 million loan has to be considered under the provisions of Article 92 of the EEC Treaty.

The provision of a 95 % guarantee on a DM 20,7 million loan in 1989 has to be assessed under the provisions of Directive 87/167/EEC and if this Directive does not apply, it then has to be appraised under the provisions of Article 92 of the EEC Treaty. The general principle of Chapter II of Directive 87/167/EEC is to ensure that aid granted to shipyards and shipowners directly related to contracts together with other operating aid granted to the shipyard can be deemed compatible with the common market as long as the grant equivalent of the aid does not exceed a common maximum aid ceiling expressed as a percentage of the contract value before aid.

However, it is true that according to Article 4 (7) of Directive 87/167/EEC aid related to shipbuilding and ship conversion granted as development assistance to a developing country is not to be subject to the ceiling and 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 OECD Council resolution of 3 August 1981. This agreement only provides for the grant of aid in the form of export credits on certain terms and does not envisage the grant of guarantees. The aim of Article 4 (7) of the Directive is to allow aid to reduce the price of ships to certain developing countries in specific circumstances and not to grant

<sup>(1)</sup> OJ No L 116, 28. 4. 1989, p. 25.

<sup>(2)</sup> OJ No C 52, 3. 3. 1990, p. 10.

rescue aid to yards in the Community. For this reason while the Commission approved on 9 March 1988 the aid element contained in the soft credit conditions in the ferry contract with Senegal it cannot consider that the grant of a guarantee comes under Article 4 (7) since a guarantee to a shipyard provides aid to that yard which should normally be assessed under Articles 4 (1) and 5 of the Directive.

The fact that a subsequent 95 % guarantee on a DM 20,7 million loan is needed during a period of financial difficulties to ensure the continuance of the yard's activities, including the building process of a development project, does not imply that development aid within the meaning of Article 4 (7) of Directive 87/167/EEC is concerned. The development aid notified and approved by the Commission for the ferry for Senegal only made reference to credit conditions for Senegal and not to possible production aid granted later to the yard in order to make it capable of completing the ship for the recipient in Senegal.

Since financing costs during the building process are a normal part of the cost price, for which part public support is not common practice, it is clear that this guarantee is ordinary production aid which became necessary on account of the financial difficulties of the yard. The fact that after no bank was found willing to grant the loan, as it was only covered by a 90 % guarantee, the guarantee had to be raised to the present 95 % conclusively proves the point that this 95 % guarantee on a DM 20,7 million loan represents operating aid.

Such rescue aid has, when granted under Article 5 (1) of the Directive, to be assessed in accordance with the prevailing maximum aid ceiling for production aid (1988 : 28 %, 1989 : 26 %). The aid intensity is to be quantified as a percentage of the aid recipient's annual turnover in shipbuilding and ship conversion. Aid granted as development assistance to shipbuilding according to Article 4 (7) of the Directive, however, is exempted from this ceiling. Such aid typically represents minimum grant equivalents already exceeding the ceiling. Therefore work in progress on such contracts is not included in the aid recipient's turnover in shipbuilding eligible for other operating aid under the Directive.

During the period of grant of the two guarantees concerned, respectively 1988 and 1989, the turnover of

the GERMERSHEIM yard was made up by the following activities :

Schiffswerft GERMERSHEIM iK	(million DM)	
	1988	1989
Ship newbuilding	—	9,342 (1)
Ship repair	0,515	—
Other (practically only construction and repair of inland waterway vessels)	17,627	7,344
Total turnover	18,142	16,686
Total newbuilding	—	9,342 (1)

(1) Senegal contract

Except for the Senegal contract all the shipbuilding turnover of the yard was, at the time when the rescue aid was granted, related to the building of inland vessels, which is not within the scope of Directive 87/167/EEC. Therefore there is no turnover to relate to the abovementioned aid measure under Article 5 (1). Therefore no aid is permissible under the Directive and the aid equivalent of the 95 % guarantee on a DM 20,7 million construction loan cannot be authorized under the Directive.

Given the absence of turnover to relate to the abovementioned aid equivalents of the 90 % guarantee on a DM 1,8 million loan and the 95 % guarantee on the DM 20,7 million loan, and therefore the absence of a basis for approval of this aid under the Directive, the aid will therefore also have to be assessed under Article 92 of the EEC Treaty.

### III

The rescue aid to Schiffswerft GERMERSHEIM therefore has to be judged on the basis of EEC policies on control and reduction of the Community fleet for inland waters. Against the background of the loss of employment in yards focused on inland vessel construction in recent years, such rescue aid is obviously likely to distort competition. The complaints made by a competitor in spring

1989 show that aid projects like those under consideration do affect other parties in the same field of activities. For these reasons both the operating aid as provided in 1988 by the 90 % guarantee on a loan of DM 1,8 million for working capital related to the construction of a vessel for inland waters and the 95 % guarantee in 1989 on a DM 20,7 million loan to keep the yard in operation are aid within the meaning of Article 92 (1) of the EEC Treaty.

Article 92 (1) lays down that in general State aid is incompatible with the common market.

By way of the rescue aid, Schiffswerft Germersheim could avoid the consequence of the EEC policies on control and reduction of the Community fleet for inland waters. Regulation (EEC) No 1101/89 was adopted against the background of the manifest structural overcapacity in every sector of the inland waterway transport market; only a scrapping scheme is expected to be able to bring about a substantial reduction in this overcapacity. Aid projects to maintain building capacity on the supply side of the market for inland vessels in general are not consistent with such a policy in a situation of substantial imbalance between offer and demand. Development aid projects could provide an exemption from this rule as long as the project is of a genuine developing character and the continued operation of the building capacity can be seen as a positive side-effect. Where on top of such aid additional rescue aid is needed without clear indications of a planned restructuring, the conclusion can be only that such cumulation of aid is not in the common interest.

#### IV

The aid projects for the continued operation of the yard in Germersheim do not qualify for any of the exceptions in Article 92 (3) of the EEC Treaty.

The region Ludwigshafen/Mannheim, in which Germersheim is situated, is not acknowledged as an aid beneficiary region under the common regional aid policy. For this reason the provisions of Article 92 (3) (a) do not apply.

The aid projects for the Germersheim yard cannot be seen as contributing to the realization of an important project of common interest or remedying a serious disturbance in a Member State's economy, given the size of the building projects and the sector they are in. Therefore the exception in Article 92 (3) (b) does not apply either.

The provisions of Article 92 (3) (c) where it is stated that aid projects can be compatible with the common market if the aid project is aimed at facilitating certain economic

activities or certain regional economies provided that these do not harm the common interest, do not apply either. No reference was made in the notifications to restructuring measures or new activities in possible new markets intended by the yard, whereas it has already been argued above that rescue aid only aimed at the continued operation in a market where already a prominent overcapacity exists is not consistent with the present common policy and therefore not in the common interest. The present common policy laid down in Regulation (EEC) No 1101/89 is designed to reduce the overcapacity that affects every sector of the inland waterway transport market by introducing a scrapping scheme as the only way to bring about a substantial reduction in overcapacity in the near future, thus improving the structures of inland waterway transport. Therefore, aid to an inland waterway transport producer which is not granted for the purposes of restructuring does not contribute to the Community objective of reducing overcapacity in this sector and is therefore contrary to the common interest. Therefore Article 92 (3) (c) does not apply either.

Since the aid is contrary to the common interest and has been paid without the prior authorization of the Commission, it is illegal and incompatible with the common market.

Therefore, the German authorities should be required to recover it from the beneficiary. In order to quantify the benefit of the aid, the Commission has drawn on the common agreement reached with Member States at a multilateral meeting, in which the German authorities also participated, where it was agreed that the aid equivalent of a guarantee granted in the shipbuilding sector would be deemed to be 10 % of the amount of the loan covered by the guarantee. Such assessment of guarantees has since become the practice in all aid projects where guarantees were involved. Therefore the Commission considers that the value of the guarantees which are the subject of this Decision should also be fixed at 10 %,

HAS ADOPTED THIS DECISION :

#### *Article 1*

The aid measures adopted by the German Government to provide a 90 % guarantee on a DM 1,8 million loan for working capital and a 95 % guarantee on a DM 20,7 million loan for working capital for the Schiffswerft Germersheim GmbH im Konkurs are incompatible with the common market within the meaning of Article 92 (1) of the EEC Treaty, having been granted contrary to the procedural rules set out in Article 93 (3) and moreover cannot qualify for the exceptions in Article 92 (3) of the EEC Treaty.

*Article 2*

Germany shall abolish the aid referred to in Article 1 by recovering the aid element contained in the public guarantees on part of the company's financing, i.e. 10 % of the 90 % guarantee on the DM 1,8 million loan which is DM 162 000 and 10 % of the 95 % guarantee on the DM 20,7 million loan which is DM 1 966 500 and by ordering the withdrawal of such of those guarantees mentioned in Article 1 as are still operational.

*Article 3*

Germany shall inform the Commission within two months from the notification of this Decision of the

measures it has taken in order to redress the illegal situation described above.

*Article 4*

This Decision is addressed to the Federal Republic of Germany.

Done at Brussels, 12 December 1990.

*For the Commission*

Leon BRITTAN

*Vice-President*