

II

(Acts whose publication is not obligatory)

COMMISSION

COMMISSION DECISION

of 3 March 1999

on the aid which Germany has granted by way of development assistance to Indonesia in connection with the construction of two dredgers by Volkswerft Stralsund and the sale of the dredgers to Pengerukan (Rukindo)

(notified under document number C(1999) 585)

(Only the German text is authentic)

(Text with EEA relevance)

(1999/657/EC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

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

Having regard to Council Directive 90/684/EEC of 21 December 1990 on aid to shipbuilding ⁽¹⁾, as last extended by Council Regulation (EC) No 2600/97 ⁽²⁾, and in particular Article 4(7) thereof,

Having called on interested parties to submit their comments pursuant to Article 93 of the EC Treaty cited above ⁽³⁾ and having regard to the comments received,

Whereas:

I. Procedure

The European Dredging Association informed the Commission that Germany had granted aid for the sale of three dredgers which were built in Germany, and that the aid appeared to be in breach of Directive 90/684/EEC (hereinafter referred to as 'the Shipbuilding Directive').

By letter dated 6 November 1996, Germany provided the Commission with further information.

By letter dated 15 April 1997, the Commission informed Germany that it had decided to initiate Article 93(2) proceedings in respect of the aid.

The Commission decision to initiate proceedings was published in the *Official Journal of the European Communities* ⁽⁴⁾. The Commission invited interested parties to submit their comments on the measures.

The Commission received comments from interested parties. They were forwarded to Germany, which was given the opportunity to react; its comments were received by letters dated 18 June and 9 October 1997.

By letter dated 24 March 1998, the Commission informed Germany that it had decided to close part of the proceedings, namely the proceedings regarding the vessel *KK Aru II*. By letter dated 24 June 1998, Germany provided the Commission with additional information regarding the other two dredger vessels, *CD Batang Anai* and *FF Bali II*.

II. Detailed description of the aid

In 1994 the Commission approved development aid to be granted in connection with the sale of three dredgers by Volkswerft Stralsund to the Indonesian public corporation Pengerukan (Rukindo), hereinafter referred to as 'Rukindo'. By letter SG(94) D/6533 of 17 May 1994, the Commission informed Germany of its approval. The development aid was

⁽¹⁾ OJ L 380, 31.12.1990, p. 27.

⁽²⁾ OJ L 351, 23.12.1997, p. 18.

⁽³⁾ OJ C 192, 24.6.1997, p. 9.

⁽⁴⁾ See footnote 3.

granted in the form of a loan from the *Kreditanstalt für Wiederaufbau*. The loan covered 90 % of the contract value for a period of 11 years at an interest rate of 3,5 %. The OECD aid equivalent was 25,35 %. Rukindo is a state limited-liability corporation, 100 % of its shares being owned by the Ministry of Finance, and the borrower of the loan is the Republic of Indonesia, represented by the Ministry of Finance.

In the notification of the proposed aid of 24 March 1994, it was stipulated in which locations in Indonesia the dredgers were to be used. In its letter of approval to Germany, the Commission stated that the dredgers were to be used only in Indonesia.

The European Dredging Association informed the Commission that the vessels were being used in Taiwan and Thailand. Apparently the operator of the vessels participated in international tenders in competition with other companies supplying dredging services. According to the Association, the aid enabled the supplier to charge a price which was below the market price.

Germany confirmed that one dredger had been used outside Indonesian waters, in Malaysia. However, it did not mention any operations in Taiwan or Thailand, as reported by the European Dredging Association.

Germany claimed that the dredger could not operate optimally in Indonesian waters due to delays in a number of large harbour-building projects for which the dredger had originally been acquired. Furthermore, the use of the dredger in Malaysia formed part of a subcontracting order for an Indonesian firm, and Rukindo had not participated directly in international invitations to tender. In addition, Germany undertook to draw the Indonesian Government's attention to the fact that the dredgers could properly be used only for the purpose for which they were originally acquired.

Germany could not provide information on Rukindo's financial situation, since this subordinated body did not draw up any certified and informative annual accounts and since no direct loan relationship existed with the company.

In the light of the answer given by Germany, the Commission took the view that the manner in which the dredgers had been used did not appear to comply with the Commission's approval of 17 May 1994. Furthermore, the Commission doubted whether the project could still be assumed to be in the nature of development aid, and it therefore questioned whether the measure was compatible with the conditions laid down in Article 4(7) of the Shipbuilding Directive.

The Commission therefore decided to initiate proceedings under Article 93(2) of the EC Treaty.

III. Comments from interested parties

Following publication of a notice on the initiation of proceedings, Denmark and the European Dredging Association submitted their comments. They took the view that the use of the dredgers was not in accordance with the conditions laid

down in the Commission's approval and was in breach of the Shipbuilding Directive.

IV. Comments from Germany

Germany made the following points.

The dredgers were acquired in connection with the development of the main Indonesian ports in Tanjung Priok, Batam, Bojonegara, Surabaya, Belawan, Semarang, Panjang and Ujung Padang, which have water depths of up to nine metres.

Due to unforeseeable financial difficulties, it proved impossible to make available all the funds required for the development work, and dredging work was carried out only to a limited extent in the ports of Belawan, Tanjung Priok and Surabaya. Since, furthermore, the maritime development projects are being carried out by private firms as well as by the Indonesian Government, delays are becoming less and less predictable. The delays affect projects for the development of ports or land reclamation in the following locations: Bojonegara, Benoa/Bali, Maruda/Jakarta, Situbondo, Kuala Namu, Ancol Barat, Ancol Timur, Surabaya, Kapuk Naga, Pantai Mutiara, Pelabuhan Ratu, Kerawang, Ring Road/Surabaya, Betio Benoa Bali and Bali Benoa Marina. In line with the availability of funds, all of Rukindo's dredgers, including *KK Aru II*, *FF Bali II* and *CD Batang Anai*, are being used to continue or complete the projects. However, Rukindo does not know what the results of the current Indonesian crisis might be in terms of further delays in carrying out projects.

At the time when the contracts were concluded for the dredgers and when the aid was granted, it was not known what other scope would exist for deploying the vessels outside Indonesia. The deferment of the planned Indonesian projects became clear only after the dredgers had been delivered; only at that point in time, which was long after the aid had been granted, did Rukindo try to find other ways of deploying the dredgers.

The dredgers were designed specially for the work in Indonesia, which required a deeper draught than the dredgers in service at the time. To be able to work effectively, the dredgers need a water depth of about eight metres. The deeper draught of these dredgers restricted the opportunities for alternative deployment in other Indonesian harbours and waterways. In order to limit periods of inactivity as far as possible and recoup at least a portion of the fixed costs (personnel costs, capital costs, etc.), Rukindo saw no option but to tender the services of the dredgers to other dredging firms, which then used the vessels outside Indonesia. Use abroad occurred only during slack periods when harbour extension projects were delayed. The leasing-out of the dredgers for use abroad should be seen as an effort to make efficient use of the development aid by generating additional capital for the project in the form of foreign currency. Furthermore, the use of the dredgers abroad made it possible to acquire and develop know-how during the periods when the dredgers could not be used in Indonesia.

The use of the dredgers abroad did not run counter to the primary objective of developing Indonesian transport infrastructure. The completion of work on domestic projects continued to have absolute priority. Rukindo used the dredgers for the project work that had to be carried out in Indonesia, while any use of the dredgers outside Indonesia was exceptional (CD *Batang Anai*: Taiwan 1995, 35 working days out of a total of some 130 days spent in Taiwan; FF *Bali II*: Malaysia 1995, 35 days, 1997, 120 days) and did not involve any economic profit. The exceptional use of the vessels in Taiwan and Malaysia is of negligible significance compared with the use made of the vessels in Indonesia and compared with the 11-year term of the credit or the total technical life of the dredgers.

Rukindo only twice requested tender documents, but in both cases it did not participate in the tender. Rukindo itself never participated directly in international tenders and never entered into direct competition with foreign firms. Rukindo thus had no direct influence on the pricing of services by the main tendering contractor, especially since the usual practice was for the main contractor not to enter into negotiations with the various dredging companies until after being awarded the contract. As a subcontractor or sub-subcontractor, Rukindo had to accept the prices specified.

The use of the dredgers abroad in fact resulted in actual losses and not in financial earnings. No income was earned that would have made the granting of aid unnecessary. The use of CD *Batang Anai* in Taiwan represented a real loss in terms of the total subcontracting period, a loss which exceeded the costs of any alternative idle or non-productive times in Indonesia.

Through the *Kreditanstalt für Wiederaufbau*, Germany has called on the Indonesian Ministry of Finance to ensure that the dredgers acquired on the basis of the aid are used solely within Indonesia. Germany notes that the loan agreement does not contain any particular provision regarding the places where the dredgers are to be used. However, in the discussions it was made clear to the relevant Indonesian ministries that the dredgers must be used only within Indonesia and that they must not be used abroad. Domestic use is therefore the unwritten commercial basis for the loan.

Finally, Germany requests that the effects of the economic and financial crisis in East Asia and in Indonesia in particular be taken into account.

V. Assessment of the aid

In 1994 the project was approved under Article 4(7) of the Shipbuilding Directive. According to Article 4(7), aid granted as development assistance to a developing country is not subject to the ceiling set by the Commission under Article 4(2). It 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 Understanding on Export Credits for Ships, or with any corrigendum to the said Agreement.

The Commission must be given prior notification of any such individual aid proposal. It will verify the particular development content of the proposed aid and satisfy itself that it falls within the scope of the Agreement.

In its judgment of 5 October 1994 the Court of Justice held in Case C-400/92 that: 'It is precisely the examination of this particular content which enables the Commission to ensure that aid based on Article 4(7) and intended to reduce the cost of vessels for certain developing countries pursues, in the light of the specific conditions of its application, a genuine development objective and does not, despite the fact that it complies with the OECD criteria, constitute aid in favour of a shipyard in a Member State which must be subject to the ceiling...' ⁽¹⁾.

The Commission's letter of 17 May 1994 stated on the basis of the German notification that the dredgers were to be used only in Indonesia.

Germany has confirmed that FF *Bali II* and CD *Batang Anai* have not been deployed exclusively in Indonesia, which means that the vessels have not been used in accordance with the conditions attached to the Commission's approval. Consequently, the aid has been misused.

Germany argues that these deployments of the dredgers were not foreseeable at the time when the vessels were ordered and the aid granted. The Commission cannot rule out the possibility that this was in fact the case; however, owing to the delays, the primary objective of the aid has not been fully achieved. It is uncertain to what extent the development aid has in fact enabled Indonesia to fully pursue the development objective.

The Commission takes note of the argument put forward by Germany that Rukindo might not have had any influence on the tender prices abroad and that the deployment abroad might not have been profitable to any great extent. However, it does not preclude that the vessels were deployed outside Indonesia in competition with other companies and that the prices offered were below the market price as a result of the aid. In fact, on the basis of the information made available to the Commission, it is not possible to distinguish between the use of the vessels within Indonesia and outside Indonesia in a way that ensures that the aid was beneficial only to Indonesia and not directly beneficial to countries that in principle should not benefit from development aid. Thus, the deployment outside Indonesia is problematic in any case. The Commission cannot accept Germany's argument that the use outside Indonesia did not explicitly run counter to the initial objective of the aid. The initial objective was to aid development inside Indonesia. By using the dredgers outside Indonesia, there was not only a reduction in the development contribution to Indonesia in the form of dredging carried out by the dredgers within Indonesia, but, in addition, there might have been distortion created on the dredging market in a country which is not on the list of countries eligible for development aid. Consequently, since the vessels which received development aid have been deployed outside Indonesia and in addition have been deployed on a purely commercial basis in Malaysia and Taiwan, which are not on the list of countries eligible for development aid ⁽²⁾, the development aid content of the project is put in doubt.

⁽¹⁾ [1994] ECR I-4701, paragraph 21.

⁽²⁾ Commission letters to Member States SG(89) D/311 and SG(97) D/4341.

Germany has argued that the deployment outside Indonesia has been negligible compared to that in Indonesia. Tables provided by Germany show, however, that, from 1994 to 1997, FF *Bali II* was used for 743 days in Indonesia and 155 days in Malaysia. From 1995 to 1997, CD *Batang Anai* was used for 357 days in Indonesia and 35 days in Taiwan, where the vessel was stationed for no less than approximately 130 days in 1995. The Commission does not share the view that use of the vessels outside Indonesia amounting over a period of three to four years to approximately 9 % and 17 % can be considered exceptional or negligible.

Furthermore, in view of the large number of islands making up Indonesia, the Commission is not convinced that it was impossible to deploy the vessels elsewhere in Indonesia, thereby ensuring a genuine development content and compliance with the Commission's approval. Moreover, the fact that the condition regarding the location of the vessels was not stated in the loan agreement obviously did not explicitly encourage the operator to seek such options. Although Germany informed the Indonesian parties that the vessels could be used only in Indonesia, in reality the Indonesians were not legally obliged to comply with this request given that no such condition was stated in the loan agreement.

Germany was obliged to ensure that the granting of the loan was in line with the conditions laid down in the Commission's approval of 17 May 1994. Therefore, the fact that Germany did not specify this important condition in the loan agreement and thus did not fully comply with the conditions of the Commission decision, cannot serve Germany as an excuse for the misuse of the aid or its inability to influence Indonesia in this matter. In addition, the omission of the condition in the loan agreement raises doubts as to whether the development objective was the main concern in the project.

Had the Commission known at the time of its approval decision (letter of 17 May 1994) that the vessels were not intended for exclusive use in Indonesia and that they would in fact be used on a commercial basis in Malaysia and Taiwan, it would not have approved the aid. Consequently, the Commission considers that the aid has been misused and that a genuine development objective was not pursued.

VI. Conclusions

The Commission finds that the aid granted by Germany in connection with the building of the dredgers FF *Bali II* and CD *Batang Anai* has been misused. The aid cannot be considered to be genuine development aid within the meaning of Article 4(7) of the Shipbuilding Directive. The aid distorts or threatens to distort competition within the common market and affects trade between Member States in relation to shipbuilding to an extent contrary to the common interest,

HAS ADOPTED THIS DECISION:

Article 1

The state aid which Germany has granted in the form of a credit facility in connection with the sale of the dredgers FF *Bali II* and CD *Batang Anai* to Pengerukan (Rukindo), Indonesia, has been misused and is incompatible with the common market.

Article 2

Germany shall recover from the recipient the aid referred to in Article 1.

Recovery shall be effected in accordance with the procedures and provisions of German law. The sums to be recovered shall bear interest from the date on which they were made available to the recipients until their actual recovery. Interest shall be calculated on the basis of the reference rate used for calculating the grant-equivalent of regional aid.

Article 3

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

Done at Brussels, 3 March 1999.

For the Commission

Karel VAN MIERT

Member of the Commission