

## 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 N 59/04 concerning a temporary defensive mechanism for shipbuilding**

(notified under document C(2008) 6015)

(Only the Italian text is authentic)

(Text with EEA relevance)

(2010/38/EC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community, and in particular the first subparagraph of Article 88(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 <sup>(1)</sup>,

Whereas:

## I. PROCEDURE

- (1) By letter dated 1 February 2008, registered as received at the Commission on the same day, Italy notified the Commission of State aid C 20/08 (ex N 62/08). By letter registered as received at the Commission on 18 March 2008, Italy provided the Commission with further information.
- (2) By letter dated 30 April 2008 the Commission informed Italy that it had decided to initiate the procedure laid down in Article 88(2) of the EC Treaty in respect of the aid. This decision was notified to Italy on 7 May 2008.
- (3) The Commission decision to initiate the procedure was published in the *Official Journal of the European Union* <sup>(2)</sup>. The Commission invited interested parties to submit their comments on the aid.
- (4) By e-mail of 4 June 2008, registered as received at the Commission on that day (i.e. within the deadline for the

submission of comments from Italy laid down in the decision to initiate the procedure), Italy asked for the period for submitting comments to be extended by one month. By letter dated 9 June 2008, the Commission granted the request and extended the deadline for the submission of comments to 7 July 2008. Italy eventually submitted its comments by letter dated 7 July 2008, registered as received at the Commission on the same day (i.e. within the extended time limit).

- (5) The Italian shipyard Cantiere Navale De Poli s.p.a. (hereinafter 'De Poli'), which claimed to be an interested party, submitted comments by letter dated 17 September 2008, registered as received at the Commission on 17 September 2008. De Poli is an Italian shipyard established in Venezia-Pellestrina. According to the information in the notification, it is one of two shipyards which could potentially benefit from State aid under the scheme mentioned in recital 6 below, provided that the notified aid is approved. However, the period within which interested parties could submit comments expired one month after the publication in the *Official Journal of the European Union* of the decision to initiate the procedure laid down in Article 88(2) of the EC Treaty, i.e. on 7 July 2008. De Poli's comments were submitted after the end of this period. De Poli claims that it had only belatedly become aware of the Commission's decision to initiate the procedure and of Italy's comments on this decision.

- (6) Article 88(2) of the EC Treaty requires the Commission to give the parties concerned notice to submit their comments. However, it does not require the Commission to notify interested parties individually, but to ensure that all potentially interested parties have the opportunity to submit comments. The publication of a notice in the *Official Journal* is an appropriate means of informing all the parties concerned that a procedure has been initiated <sup>(3)</sup>. Consequently, De Poli must be considered to have been given due notice of the decision to initiate the procedure and of the time limit set for submitting comments through the publication cited

<sup>(1)</sup> OJ C 140, 6.6.2008, p. 20.

<sup>(2)</sup> See footnote 1.

<sup>(3)</sup> Judgment of the Court Justice in Case 323/82 *Intermills v Commission* [1984] ECR 1984, p. 3809, paragraph 17.

above. Nevertheless, De Poli failed to comply with the prescribed period for the submission of comments provided for in Article 6(1) of Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 93 of the EC Treaty<sup>(4)</sup> (hereinafter 'the Procedural Regulation'). The Commission notes that De Poli did not request an extension of the period for submitting comments or indicate any particular reason why its comments should be taken into account despite being submitted after expiry of the deadline. The Commission will consequently disregard De Poli's belated comments.

## II. DETAILED DESCRIPTION OF THE AID

- (7) By letter C(2004)1807 final of 19 May 2004 the Commission decided not to raise any objections to an Italian State aid scheme concerning a defensive temporary mechanism for shipbuilding<sup>(5)</sup> (hereinafter 'the scheme'). The Commission considered the scheme to be compatible with the common market since it complied with the provisions of Council Regulation (EC) No 1177/2002 of 27 June 2002 concerning a temporary defensive mechanism to shipbuilding<sup>(6)</sup>, as amended by Council Regulation (EC) No 502/2004<sup>(7)</sup> (hereinafter 'the TDM Regulation').
- (8) The scheme as notified to and approved by the Commission was allocated a budget of EUR 10 million.
- (9) Italy has notified the Commission of its plans to allocate another EUR 10 million to the scheme's budget.

## III. REASONS FOR INITIATING THE FORMAL INVESTIGATION PROCEDURE

- (10) The Commission initiated the formal investigation procedure under Article 88(2) of the EC Treaty because it had doubts as to whether the notified aid was compatible with the common market for the reasons set out below.
- (11) In view of Article 1(c) of the Procedural Regulation and Article 4 of Commission Regulation (EC) No 794/2004 of 21 April 2004 implementing Council Regulation (EC) No 659/1999 laying down detailed rules for the application of Article 93 of the EC Treaty<sup>(8)</sup> (hereinafter 'the Implementing Regulation'), the Commission considered

that the notified budget increase constituted an alteration to the scheme and thus new aid to be notified to the Commission under Article 88(3) of the EC Treaty. The Commission further considered that the compatibility of the notified aid with the common market had to be assessed in the light of the rules currently applicable. The TDM Regulation ceased to apply on 31 March 2005 and consequently does not provide a legal basis for approving the aid.

- (12) The Commission also noted that the aid did not appear compatible with the common market under any relevant State aid provisions.

## IV. COMMENTS FROM ITALY

- (13) Italy has contested the Commission's doubts and made the following comments.
- (14) First of all, Italy contests the Commission's view that the notified measure constitutes new aid. Italy argues that under a proper construction of Article 4 of the Implementing Regulation, classification as new aid should be reserved for increases in the budgets of approved aid schemes that are accompanied by an extension of the time limits within which companies may have access to the relevant benefits, with consequent distortive effects on competition. Italy argues that this clearly does not apply in this case, which concerns completing initiatives for which a formal application was made while the TDM Regulation was still in force. In this connection Italy also argues that Article 4 of the Implementing Regulation is a procedural provision setting out the procedures for notification of certain alterations of existing aid, which has nothing to do with the assessment of compatibility, and that the Commission cannot therefore draw on this Article to assess the compatibility of the proposed State aid.
- (15) Italy then comments on the Commission's view that the TDM Regulation no longer provides a legal basis for the compatibility of the notified aid. Italy argues first that this position is inconsistent with the position adopted in the TDM Regulation, which, despite being intended to apply up to 31 March 2004 (later extended to 31 March 2005) had its legal basis in Council Regulation (EC) No 1540/98 of 29 June 1998 establishing new rules on aid to shipbuilding<sup>(9)</sup> (hereinafter 'the Shipbuilding Regulation'), which would already expire on 31 December 2003.

<sup>(4)</sup> OJ L 83, 27.3.1999, p. 1.

<sup>(5)</sup> State aid N 59/04 (OJ C 100, 26.4.2005, p. 27). The decision is available in the authentic language at [http://ec.europa.eu/comm/competition/state\\_aid/register/ii/by\\_case\\_nr\\_n2004\\_0030.html#59](http://ec.europa.eu/comm/competition/state_aid/register/ii/by_case_nr_n2004_0030.html#59)

<sup>(6)</sup> OJ L 172, 2.7.2002, p. 1.

<sup>(7)</sup> OJ L 81, 19.3.2004, p. 6.

<sup>(8)</sup> OJ L 140, 30.4.2004, p. 1.

<sup>(9)</sup> OJ L 202, 18.7.1998, p. 1.

- (16) In addition Italy considers that it is not clear why the TDM Regulation cannot justify 'updating' the aid scheme budget, this being simply a financial operation intended to put shipbuilders who made applications in line with the TDM Regulation when it was still in force, but who failed to benefit from the aid because of the budgetary shortfall, on an equal footing with shipbuilders who have already benefited from the aid, in keeping with the general principle of equal treatment. Italy argues that although the updating of public policy resources designed to correct the effects of time or of cost forecasts that have proved inadequate involves increasing the initial aid, it does not constitute new aid, or is compatible under the legal basis that justified the original aid. In short, for Italy, this is just a question of settling pending cases of requests for aid referring to contracts concluded before 31 March 2005, without this implying an extension of the scheme, a widening of its scope or a change in its fundamental structure. In support of this view, Italy cites the general principles of equal treatment, the need to give due consideration to the legitimate expectations of the beneficiaries and Court of Justice case law (judgments in Cases 223/85 <sup>(10)</sup> and C-364/90 <sup>(11)</sup>).
- (17) Finally, Italy argues that the notified aid would not conflict with a decision of the World Trade Organisation which found that the TDM Regulation does not comply with WTO rules.
- (21) In relation to the concept of new aid, which is covered by the notification obligation under Article 88(3) of the EC Treaty, the Commission applies the definitions set out in Article 1(c) of Regulation (EC) No 659/1999. One of the things defined as 'new aid' in Article 1(c) of this Regulation is 'alterations to existing aid'.
- (22) Article 4 of the Implementing Regulation further states that an 'alteration to an existing aid shall mean any change other than modification of a purely formal or administrative nature which cannot affect the evaluation of compatibility of the aid measure with the common market', including increases in the budget of an authorised aid scheme exceeding 20 %. In this connection, the Commission notes that Article 4 of the Implementing Regulation does not constitute the legal basis for assessing the compatibility of new aid, nor has the Commission, contrary to what is suggested by Italy (see recital 13), relied on this Article for that purpose; rather, this Article provides clarification on how the Commission should apply Article 1(c) of the Procedural Regulation concerning the concept of 'new aid'. The Commission further notes that Italy's argument that the measure is a simple 'updating' of costs that have proved inadequate, which does not change the fundamental structure of the scheme, does not detract from the fact that the present budget increase qualifies as an alteration of existing aid and is therefore new aid, pursuant to Article 1(c) of the Procedural Regulation and Article 4 of the Implementing Regulation.

## V. ASSESSMENT OF THE AID

### State aid classification

- (18) As the measure is of a purely budgetary nature, its compatibility with the common market should be assessed by reference to the measures that it is intended to finance, i.e. to aid under the scheme. For the reasons set out in the Commission's abovementioned letter of 19 May 2004, the scheme constitutes State aid within the meaning of Article 87(1) of the EC Treaty.
- (23) Similarly, the Commission cannot accept Italy's argument that under a proper construction of Article 4 of the Implementing Regulation, classification as new aid should be reserved for increases in the budgets of approved aid schemes that are accompanied by an extension of the time within which companies may have access to the relevant benefits, with consequent distortive effects on competition. The Commission notes that increases in the budget of an approved scheme (other than marginal ones of less than 20 %) are bound to have an impact on competition as they allow the Member State to provide more aid than originally approved. This change in the scheme's effects on competition requires the Commission to make a fresh assessment of its compatibility with the common market. It follows that a budget increase of the size notified by Italy cannot be considered to be of a purely formal or administrative nature or such as not to affect the evaluation of compatibility of the aid with the common market.

### New aid

- (19) Under Article 1(c) of the Procedural Regulation and Article 4 of the Implementing Regulation, increases in the budget of an approved aid scheme constitute new aid if they exceed 20 % of the original budget. In the present case the notified increase corresponds to 100 % of the original budget and must consequently be assessed as new aid under Article 87 of the EC Treaty.
- (20) Italy's objections in this respect do not change the Commission's assessment.
- (24) The Commission therefore confirms that the notified measure must be assessed as new State aid under Article 87(1) of the EC Treaty.

<sup>(10)</sup> *RSV v Commission* [1987] ECR 4617.

<sup>(11)</sup> *Italy v Commission* [1993] ECR I-2097.

### The TDM Regulation is no longer a valid legal basis

- (25) Concerning Italy's first remark in this respect, the Commission would first point out that the legal basis for the adoption of the TDM Regulation was not the Shipbuilding Regulation but the EC Treaty, and in particular Articles 87(3)(e), 93 and 133 thereof. Furthermore, the Commission can see no inconsistency between its position in the present case and the fact that the TDM Regulation referred, for some of its provisions, to the Shipbuilding Regulation. This was simply a matter of legislative technique whereby, to avoid repetition, the TDM Regulation did not reiterate certain definitions or rules already given in the Shipbuilding Regulation but simply incorporated the substance of these provisions by reference to them. The effect of this was not to make the application of the TDM Regulation on these points dependent upon the continued validity of the Shipbuilding Regulation but rather to create new, autonomous provisions in the TDM Regulation of similar substance to the provisions of the Shipbuilding Regulation to which they referred. This in no way contradicts the Commission's view in the present case that an act of the Community institutions must have a legal basis which is in force on the date on which the act is adopted.
- (26) As stated in the Commission's decision of 30 April 2008 opening the formal investigation procedure, the TDM Regulation is no longer in force and thus cannot serve as a legal basis for the assessment of the new aid. For the reasons indicated in the decision to initiate the investigation procedure (paragraphs 9 and 10), the notified aid is not compatible with the common market under the Framework on State aid to shipbuilding<sup>(12)</sup>, nor does it seem to be compatible with the common market on the basis of any other applicable State aid provisions. The Commission further notes that Italy has not proposed any alternative legal basis for assessing the compatibility of the aid, but rather argued that this is not 'new aid' which, as explained in points 18 to 22, the Commission cannot accept.
- (27) Similarly, the Commission cannot accept Italy's arguments concerning the general legal principles of legitimate expectation and equal treatment.
- (28) Italy contends that shipbuilders who applied for aid under the scheme when the TDM Regulation was still in force and who met the conditions for qualifying for the aid, but did not receive it because of a lack of budgetary resources, have a legitimate expectation in receiving the aid; it also contends that under the general principle of protection of legitimate expectation (and also for reasons of equal treatment with those shipbuilders who did receive aid from the available funds), they are entitled to receive the aid, irrespective of whether or not the TDM Regulation still applies.
- (29) According to settled case law the right to rely on the principle of protection of legitimate expectation extends to any individual who is in a situation in which it is clear that the Community authorities have, by giving him precise assurances, led him to entertain legitimate expectations. However, a person may not plead infringement of this principle unless he has been given precise assurances by the authorities<sup>(13)</sup>.
- (30) In the present case, the Commission considers that the scheme's potential beneficiaries could argue a legitimate expectation that any aid granted on the terms of the scheme as approved by the Commission, including the budgetary limitation to EUR 10 million, would be lawful. However, what Italy is arguing amounts to an expectation to benefit from aid after expiry of the scheme, and in particular to benefit from grants in excess of the approved budget, i.e. to an expectation to receive new State aid. An undertaking may not in principle entertain a legitimate expectation to receive aid which has not been approved by the Commission in accordance with the procedure provided for by the EC Treaty<sup>(14)</sup>. For the same reason, it may not invoke a general principle of equal treatment in order to be treated on an equal footing with the beneficiaries of an approved aid.
- (31) Italy further quotes case law which, it considers, reflects application of the principle *accessorium sequitur principale* (the decision on the main issue applies to associated issues) and supports the inference that even if the updating of public policy resources, designed to correct the effect of time or cost forecasts that have proved inadequate, involves increasing the initial aid, it does not constitute new aid, or is compatible with the legal basis that justified the original aid.
- (32) However, the case law cited does not support Italy's position.
- (33) In its judgment in Case C 223/85, the Court found that the Commission's failure to act within a reasonable time in conjunction with the fact that the aid was intended to cover the additional costs of an operation which had been in receipt of authorised aid had given the beneficiary a legitimate expectation that the aid would encounter no objection. However, the Commission does

<sup>(12)</sup> OJ C 317, 30.12.2003, p. 11.

<sup>(13)</sup> See, inter alia, the judgment of the Court of First Instance of 24 September 2008 in Case T20/03 *Kahla/Thüringen Porzellan*, not yet reported paragraph 146.

<sup>(14)</sup> See, for instance, the Court of Justice's judgment in Case C-5/89 *Commission v Germany* [1990] ECR I-3437, paragraph 14.

not see how this precedent supports Italy's view that the updating of the scheme's budget does not constitute new aid or, alternatively, that it is compatible according to the legal basis that justified the original aid, i.e. the TDM Regulation. On the contrary, the Commission notes that in this ruling the Court in no way questioned that 'aid ... intended to meet additional costs of an operation which had been in receipt of an authorized aid' required the Commission's approval under Article 87(1) (then 93) of the EC Treaty.

- (34) In addition, Italy has not shown that in the present case the Commission failed to act within a reasonable time. On the contrary, it was, rather, Italy that failed to notify an increase in the scheme while the TDM Regulation was still in force.
- (35) Case C-364/90 does not back up Italy's view either. In the part of the judgment to which Italy refers, the Court merely finds that the Commission failed to justify adequately a negative State aid decision and makes the point that certain documents submitted in the pre-litigation phase were sufficiently clear to make the same arguments admissible in the procedure before the Court. The Commission cannot see how these purely procedural points provide any authority for Italy's view that increasing the budget of the scheme should, as a matter of substantive law, be approved on the basis of the TDM Regulation. Finally, as regards Italy's comment according to which the notified aid does not conflict with a decision of the World Trade Organisation (WTO) which found that the provisions of the TDM Regulation did not comply with WTO rules, the Commission has already noted in previous decisions that, according to the settled case law of the Court of Justice, Community legislation must, as far as possible, be interpreted in the light of international law, including the EC's WTO obligations<sup>(15)</sup>. Therefore interpretation of the TDM Regulation must also be seen in the light of the Community's international obligations<sup>(16)</sup>.
- (36) In this context, the Commission recalls that Korea challenged the compatibility of the TDM Regulation with WTO rules. On 22 April 2005, a Panel issued a report concluding that the TDM Regulation and several national TDM schemes — in place at the time when Korea initiated the WTO dispute — were in breach of Article 23(1) of the Understanding on rules and procedures governing the settlement of disputes (DSU)<sup>(17)</sup>. On 20 June 2005, the WTO Dispute

Settlement Body (DSB) adopted the Panel report, which recommended that the Community should bring the TDM Regulation and the national TDM schemes into conformity with its obligations under the WTO Agreements<sup>(18)</sup>. On 20 July 2005, the Community informed the DSB that its rules were now in conformity with the DSB ruling and recommendations since the TDM Regulation had expired on 31 March 2005 and Member States could no longer grant operating aid under this Regulation.

- (37) The Panel report and the DSB ruling adopting that report condemned the TDM Regulation *per se* for being in breach of WTO rules and required the Community to stop applying it. The Community's obligation to implement the DSB ruling also applies to future decisions to grant new aid in application of the TDM Regulation<sup>(19)</sup>. The Community, by informing the DSB that its rules now complied with the DSB ruling and recommendations, since the TDM Regulation had expired on 31 March 2005 and Member States could therefore no longer grant operating aid under that Regulation, undertook no longer to apply the Regulation to grant new aid. Accordingly, approving the present aid would result in a breach by the Community of its international commitments.

## VI. CONCLUSION

- (38) For the reasons set out above, the Commission finds that the notified State aid is incompatible with the common market,

HAS ADOPTED THIS DECISION:

### Article 1

The State aid which Italy is planning to implement by altering scheme N 59/04 concerning a temporary defensive mechanism for shipbuilding, which entails an increase of EUR 10 million, is incompatible with the common market.

Therefore the aid may 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.

<sup>(15)</sup> Case C-53/96 *Hermes* [1998] ECR, I-3603, paragraph 28; Case C-76/00 P, *Petrotub* [2003] ECR, I-79, paragraph 57.

<sup>(16)</sup> Cases C 26/06 (ex N 110/06) (OJ L 219, 24.8.2007, p. 25) and C 32/07 (ex N 389/06) (OJ L 108, 18.4.2008, p. 23).

<sup>(17)</sup> See EC — *Measures affecting trade in commercial vessels*, WT/DS301/R, paragraphs 7.184-7.222 and 8.1(d).

<sup>(18)</sup> See WTO document WT/DS301/6.

<sup>(19)</sup> See EC — *Measures affecting trade in commercial vessels*, WT/DS301/R, paragraph 7.21.

*Article 3*

This Decision is addressed to the Italian Republic.

Done at Brussels, 21 October 2008.

*For the Commission*  
Neelie KROES  
*Member of the Commission*

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