

COMMISSION DECISION**of 20 October 2004****on the State aid No C 40/2002 (ex N 513/2001) concerning State aid to Hellenic Shipyards AE***(notified under document number C(2004) 3919)***(Only the Greek version is authentic)****(Text with EEA relevance)**

(2005/246/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 regard to Council Regulation (EC) No 1540/98 of 29 June 1998 establishing new rules on aid to shipbuilding ⁽¹⁾,

Having called on interested parties to submit their comments ⁽²⁾ pursuant to the provisions cited above and having regard to their comments,

Whereas:

I. PROCEDURE

- (1) By letter dated 16 July 2001 Greece notified the Commission pursuant to Council Regulation (EC) No 1540/98 of 29 June 1998 establishing new rules on aid to shipbuilding, a number of State aid measures intended for Hellenic Shipyards AE. The notification was received following a series of communications with the Greek authorities, after the Commission became aware of the measures at issue.
- (2) By letter dated 5 June 2002 ⁽³⁾, reproduced in the authentic language in the *Official Journal of the European Communities* ⁽⁴⁾, the Commission notified the Hellenic Republic of its decision to approve some of the State aid measures concerned, and to initiate the procedure laid down in Article 88(2) of the EC Treaty concerning some other measures (the contested measures), in particular the measures provided for in Articles 5(2) and 6(2) of Act 2941/2001 regulating issues relating to Hellenic Shipyards.
- (3) The Greek authorities replied to the Commission by letters dated 16 September 2002 and 13 December 2002. The Commission also received comments from one interested party, by letter dated 6 September 2002. These comments were communicated to the Greek authorities by letter dated 2 October 2002.
- (4) In their letter dated 16 September 2002, the Greek authorities requested an extension of the deadline to respond to the comments of interested parties, and informed the Commission that the Greek Government contemplated the abolition of the contested State aid measures, by law. They requested, however, an extension of the deadline for their response to the Commission's investigation procedure by three months.

⁽¹⁾ OJ L 202, 18.7.1998, p. 1.

⁽²⁾ OJ C 186, 6.8.2002, p. 5.

⁽³⁾ SG(2002) D/230101.

⁽⁴⁾ OJ C 186, 6.8.2002, p. 5.

- (5) By letter dated 30 January 2003, the Greek authorities informed the Commission that the Greek Government decided to abolish the two contested measures, and requested a further three-months' extension for the implementation of this decision. By letter dated 3 April 2003, the Greek authorities informed the Commission that the abolition of the two measures would be included in a 'forthcoming' draft Act.
- (6) By letter dated 1 August 2003, the Commission requested the Greek authorities to provide the text of the law abolishing the measures and the date when it was expected to be voted by the Greek Parliament. By letter dated 1 October 2003, the Greek authorities replied to the Commission that the contested measures would be abolished by law.
- (7) By letter dated 11 November 2003, the Commission reiterated its request to the Greek authorities regarding the text of the law abolishing the two measures and the date of its adoption. By letter dated 24 January 2004, the Greek authorities informed the Commission that the abolition of the two measures had been included in an Act due to pass before the Greek Parliament by 13 February 2004.
- (8) By letter dated 17 March 2004, the Commission requested Greece to provide information on the progress of the abolition of the measures. The Greek authorities informed the Commission, by letter dated 29 April 2004, that the abolition of the two measures was the intention of the 'new administration'. The Commission also took the opportunity to remind the Greek authorities of their commitment to abolish the contested measures on the occasion of a meeting between Commission officials and the Greek authorities, which took place in Athens on 28 June 2004.
- (9) According to the Commission's information, however, the Greek authorities have taken no steps, so far, to abolish the contested measures. For this reason, the Commission has decided to proceed with the closing by negative decision of the procedure laid down in Article 88(2) of the EC Treaty with respect to the two contested measures.

II. DETAILED DESCRIPTION OF THE AID

A. Legal basis

- (10) Act 2941/2001 (hereinafter referred to as the Act) which regulated, *inter alia*, issues regarding Hellenic Shipyards. The Act was adopted in August 2001 and published in volume A of the Greek Government Gazette on 12 September 2001.

B. Aid approved

- (11) By letter dated 5 June 2002 ⁽¹⁾, the Commission authorised aid amounting to EUR 29.5 million which Greece intended to grant, in accordance with the above referenced Act, to encourage employees involved in civil shipbuilding to voluntarily leave Hellenic Shipyards. The Commission found that this aid fulfilled the conditions of Article 4 of Regulation (EC) No 1540/98, and was therefore compatible with the common market.

C. Article 88(2) procedure of the Treaty

- (12) At the same time, the Commission decided to initiate the procedure of Article 88(2) of the EC Treaty and, in accordance with Article 6 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 ⁽²⁾, invited interested parties to submit comments ⁽³⁾. The Commission expressed doubts as to the compatibility of two aid measures with Regulation (EC) No 1540/98.

⁽¹⁾ SG(2002) D/230101.

⁽²⁾ OJ L 83, 27.3.1999, p. 1.

⁽³⁾ OJ C 186, 6.8.2002, p. 5.

(13) With regard to the application of Regulation (EC) No 1540/98 to the assessment of the contested measures, the Commission notes that these cannot be regarded as notified aid. Since the contested measures are provisions of an Act, which already entered into force on 12 September 2001, and to the extent that the measures were not in the meantime suspended, they are considered to be unlawful aid.

(14) Even though Regulation (EC) No 1540/98 expired on 31 December 2003, and it is not concerned by the Commission's notice on the determination of the applicable rules for the assessment of unlawful State aid ⁽¹⁾, in the interest of a consistent practice, the Commission will apply this Regulation in the present case. In any case, the Commission would have reached the same conclusion even if the measures were assessed on the basis of the current framework on State aid to shipbuilding ⁽²⁾.

a) *Article 5(2) of the Act*

(15) According to Article 5(2) of the Act, the State will cover some of the company's future pension obligations. According to Greek law, a retiring person receives a one-off lump sum which normally equals 40 % of the sum received when a person is made redundant. According to this provision, the State will cover the share of this cost in proportion to the amount of years that the employee has worked in Hellenic Shipyards before it is sold to its new shareholders. The relevant amount is disbursed to the company upon its request. This provision thus ensures that part of this one-off lump sum is paid by the State up to the year 2035, when the last employees, employed at the time before the transfer to the new shareholders, may retire.

b) *Article 6(4) of the Act*

(16) Article 6(4) of the Act concerns three items in the balance sheet of the company as in 31 December 1999: 'tax-free reserves', 'special reserves', and 'amounts intended to increase the share capital'. These are relieved from any tax or other duty obligation so that they can be set off against losses of previous years.

(17) According to the Greek authorities, the tax rate for capitalisation of tax exempt reserves by limited liability companies, which have no shares on the stock exchange, is 10 %. This means that netting tax-exempt reserves with old losses implied a 10 % tax on the amount involved. According to the Greek authorities, the tax free reserves amounted to EUR 112 million and the relevant tax would thereby amount to EUR 11.2 million.

III. COMMENTS OF THE HELLENIC REPUBLIC

(18) By letter dated 16 September 2002, the Greek authorities submitted their first observations with regard to the contested measures ⁽³⁾. In particular, the Greek authorities explained that, in accordance with Greek legislation ⁽⁴⁾, special reserves which are capitalised, are taxed separately at a rate of 5 % (to the extent that at the time they were established, they had already been taxed) and not at a rate of 10 %, as stated by the Commission. Therefore, the amount at issue was EUR 171 282 and not EUR 342 564.

(19) Moreover, the Greek authorities noted that, when capitalised, the amounts intended for the increase of capital, are only subject to capital duty at 1 %, and are thus not taxed at 10 % as stated in the Commission's letter. Therefore, the relevant amount was EUR 255 906 and not EUR 2.55 million, as calculated by the Commission in the opening of the investigation procedure.

⁽¹⁾ OJ C 119, 22.5.2002, p. 22.

⁽²⁾ Framework OJ C 317, 30.12.2003, p. 11.

⁽³⁾ In the same letter, the Greek authorities also requested the extension of the deadline for their full response, by three months due to the 'sensitivity, complexity, and seriousness' of the matter.

⁽⁴⁾ Article 13(6) of Act 2459/97.

- (20) The Greek authorities thus concluded that the total amount of EUR 11.2 million mentioned in the Commission's letter with regard to the tax free reserves should be corrected to EUR 8.69 million on the basis of the following calculation:

Capitalisation of tax free reserves	EUR 43 544 350 × 10 %	EUR 4 354 435
Special reserves	EUR 39 155 498 × 10 %	
For the sale of real estate	EUR 3 525 645 × 5 %	EUR 3 915 550 EUR 171 282
For the reserve that was taxed when it was established		
Shares above par ⁽¹⁾	Not taxed	—
Shareholders' deposit	EUR 25 590 609 × 1 %	EUR 255 906
Total		EUR 8 697 173

⁽¹⁾ According to the Greek authorities, this item consists of contributions by shareholders to a capital increase. Contributions towards capital increases are not normally taxed.

- (21) Notwithstanding the objections to the calculation of the relevant amounts, the Greek authorities informed the Commission in the same letter that the Greek Government was contemplating the abolition of the provisions of law on which the Commission initiated the procedure of Article 88(2) of the EC Treaty. In their letter dated 30 January 2003, the Greek authorities formally informed the Commission of their decision to abolish the two provisions. This information was confirmed in all subsequent communications of the Greek authorities dated 3 April 2003, 1 October 2003, 24 January 2004 and 29 April 2004.
- (22) The Commission can therefore imply that the Greek authorities agree with the conclusion that the contested measures constituted incompatible State aid.

IV. COMMENTS OF INTERESTED PARTIES

- (23) On 9 September 2002, the Commission received comments from the representatives of Elefsis Shipbuilding and Industrial Enterprises S.A., a direct competitor of Hellenic Shipyards, in response to the Commission's notice inviting interested parties to submit comments on the aid in respect of which the Commission initiated the procedure at issue. The comments were communicated to the Hellenic Republic by letter dated 2 October 2002.
- (24) Elefsis Shipyards considered that the findings of the Commission warranted further investigation with particular regard to the precise nature of Hellenic Shipyards' capital reserves, and the precise level of the capacity of Hellenic Shipyards for naval (75 %) and commercial (25 %) shipbuilding and ship repair works.
- (25) With regard to the capital reserves, which are the subject of the Commission's investigation in this case, Elefsis Shipyards noted that the Commission should investigate whether the tax rate, which under normal Greek legislation would have been applicable to the use of such capital reserves to offset losses, had Law 2941/2001 not been enacted, equates to 10 %.

V. ASSESSMENT OF THE AID

- (26) According to Article 87(1) of the EC Treaty, 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 Member States, be incompatible with the common market. Pursuant to the established case law of the European Courts the criterion of trade being affected is met if the recipient firm carries out an economic activity involving trade between Member States.

- (27) The Commission notes that shipbuilding is an economic activity involving trade between Member States. Therefore, the aid in question falls within the scope of Article 87(1) of the EC Treaty.
- (28) According to Article 87(3)(e) of the EC Treaty, categories of aid specified by a decision of the Council acting by a qualified majority on a proposal from the Commission may be considered compatible with the common market. The Commission notes that the Council adopted on this basis Regulation No 1540/98.
- (29) According to the Commission's Notice on the determination of the applicable rules for the assessment of unlawful State aid, the compatibility of unlawful State aid with the common market should be assessed on the basis of the instrument in force at the time when the aid was granted. Even though this Notice does not apply in this case, in the interest of a consistent approach, the Commission will apply this Regulation in the present case, especially since its assessment would not be altered even if it was based on the current framework on State aid to shipbuilding⁽¹⁾.
- (30) The Commission notes that according to Regulation (EC) No 1540/98, 'shipbuilding' means building of self-propelled seagoing commercial vessels. The Commission further notes that Hellenic Shipyards builds these ships and that consequently it is an undertaking covered by Regulation (EC) No 1540/98.
- (31) The Commission therefore had to assess the contested measures under Regulation (EC) No 1540/98 as far as they distort, or threaten to distort, competition in civil shipbuilding and civil ship-repair. As stated above, according to the Greek authorities, 75 % of the shipbuilding activities of Hellenic Shipyards concern military activities and this has consequences as regards State aid falling under Article 5(2) of the Act.
- a) *Article 5(2) of the Act*
- (32) According to this provision, the State will cover the share of the cost of the one-off retirement sum, in proportion to the amount of years that the employee has worked in Hellenic Shipyards before it is sold, compared to the amount of years worked thereafter. The provision thus ensures that some of the one-off lump sum paid to retiring employees will be paid by the State up until the year 2035, when the last employees currently employed may retire.
- (33) According to the information provided by the Greek authorities, the maximum cost of this measure would be around EUR 7 million but, due to the fact that some workers would not stay until retirement, the estimated cost would be EUR 4 million. Given that the Greek authorities stated that 75 % of the employees concerned by the measure are involved in military shipbuilding, it was estimated that the total amount of State aid under this measure for civil shipbuilding and ship-repair, would be approximately EUR 1 million (corresponding to 25 % of the employees concerned by the measure).
- (34) The Commission considers that this measure constitutes operating aid, as it would alleviate the company from normal costs of operating its activities. Given that Regulation (EC) No 1540/98 did not provide for such aid, the Commission concludes that this aid is not compatible with the common market.
- (35) The Commission notes that reference to the ratio of 75 % to 25 % with regard to military and civil shipbuilding and ship-repair respectively, is based on the statements of the Greek authorities. This ratio was not subject to the formal investigation procedure in this case. Nevertheless, the present decision is, on this aspect, without prejudice to any subsequent conclusion at which the Commission may arrive, in the context of other proceedings.

⁽¹⁾ It is noted that the application of the current Framework would not alter the final outcome of these proceedings, since in the same way as Regulation (EC) No 1540/98, it does not provide for operating aid.

b) *Article 6(4) of the Act*

- (36) According to this provision, the company can transfer a number of tax exempt reserves into share capital without paying the statutory 10 % tax, if they are set off against losses of previous years. These are exempted from any tax or other duty obligation so that they can be set off against losses of previous years.
- (37) Article 6(4) of the Act concerns three items in the balance sheet of the company: 'tax free reserves', 'special reserves', and 'amounts intended to increase the share capital'. According to the Greek authorities, the tax rate for capitalisation of tax exempt reserves by limited liability companies, which have no shares on the stock exchange, is 10 %. This means that netting tax-exempt reserves with old losses implied a 10 % tax on the amount involved. According to the Greek authorities, the tax-free reserves amounted to EUR 112 million and the relevant tax amounted to EUR 11.2 million, according to normal Greek tax rules.
- (38) The proposed tax exemptions for netting the concerned reserves with old losses benefit the company, and must therefore be regarded as State aid. Regulation (EC) No 1540/98 did not provide for such aid, and the Commission therefore concludes that this provision is not compatible with the common market. More particularly:

Tax-free reserves

- (39) The Greek authorities consider that the exemption from tax of one part of the tax free reserves of Hellenic Shipyards (approximately EUR 43 million) cannot be deemed to create a profit equal to 10 % of the amounts written off for the company. The reason is that Act 2367/95 on partial privatisation and reform of companies, on which a previous Commission Decision⁽¹⁾ on debt write-off from 1997 was based, provided for the writing off of 99 % of all existing debt of the company. The provision applied whether the debts were mentioned in the books or not, and also for debts which would be created up to 31 January 1996.
- (40) The Greek authorities claim that if Hellenic Shipyards had offset by 31 January 1996 the losses of past years with the tax exempt reserves, the resulting 10 % tax on the concerned EUR 43 million would generate a tax liability which would have been written off to 99 % on the basis of Act 2367/95. They further claim that the company could even now put forward the regularisation documents based on this provision. Consequently, the only advantage the company now obtains by offsetting 100 % of the tax exempt reserves with the losses of previous years is EUR 43 000 (1 % of 10 % of EUR 43 million).
- (41) In the opening of the formal investigation procedure, the Commission noted two problems with this argument. First, the relevant Commission decision of 1997 states the exact amount of the debt write-off authorised for Hellenic Shipyards. The Commission could not authorise further debt write-off based on the Commission decision of 1997, since the maximum amount stated in the decision cannot be exceeded. Moreover, the decision of 1997 does not state that any further debt could be written off later, even if it could be referred to the period before the end of 1996.
- (42) The Commission therefore, on the basis of the information available to it, concludes that the proposed tax exemptions for netting the concerned reserves with old losses has a value of EUR 4,3 million which benefits the company and therefore constitutes State aid. Regulation (EC) No 1540/98 did not provide for such aid, and the Commission concludes that it cannot be declared compatible with the common market.
- (43) For the other half of the 'tax-free reserves', of approximately EUR 39 million, the Greek authorities claimed that they have origins in a hotel sale in 1956, and were not taxed, in accordance with laws of that time. The tax exemption of EUR 3,9 million related to this amount also appears to be aid, which is not compatible with the common market.

⁽¹⁾ Case C 10/94, OJ C 306/5, 8.10.1997.

- (44) The Commission's formal investigation procedure also referred to another item of EUR 0,2 million which concerns the issue of shares above par value. The Greek authorities have informed the Commission that these contributions which are also intended for the increase of capital are not normally taxed.

Special reserves

- (45) For the special reserves of EUR 3,4 million, the Greek authorities claim that these have been taxed in accordance with the tax laws in force at the time of their creation, so that no tax advantage is to be gained when netting them with old losses. However, the Commission notes that the amount of special reserves is included in the balance sheet under reserves. The Commission therefore assumes that the netting of this amount with old losses also should be taxed by 10 % according to normal tax laws.
- (46) The tax exemption related to the extraordinary reserves, of a value of EUR 340 000, is also concluded to be aid, and therefore, on the same grounds as above, the Commission finds that it is incompatible with the common market.

Amounts intended for the increase in share capital

- (47) The 'amounts intended for the increase in share capital' of EUR 25,6 million represents, according to the Greek authorities, the amount that the Greek State paid to compensate Hellenic Shipyards for the cost of reducing staff by around 1 000 persons between 1996 and 1997. According to the Greek authorities, this amount is exempt from tax as it is used for netting the amount of old losses.
- (48) To the extent that the company should have been taxed by 10 % on the above-referenced amount, the Commission concludes that the aid amount of EUR 2,56 million in the form of a tax exemption for netting the amount involved with old losses, is not compatible with the common market.

Use of old losses for tax exemption purposes

- (49) The Commission notes that Article 6(4) of the Act authorises the use of old losses for accounting purposes without any limitation in time. Upon opening the investigation procedure in this case, the Commission requested information on whether this element in itself provides Hellenic Shipyards with an advantage compared to the normal Greek tax laws.
- (50) The Greek authorities have not provided relevant information. However, the fact that Greece has repeatedly stated to the Commission that it commits to abolish Article 6(4) of the Act in its entirety, provides sufficient evidence that this measure should also be considered as State aid, which is incompatible with the common market.
- (51) In general, the Commission's assessment of the contested measures as described in the letter to the Hellenic Republic dated 5 June 2002, has not been affected by the information provided by Greece. Moreover, Greece appears to have agreed with the Commission's analysis on the incompatibility of the contested measures with the common market, and for this reason repeatedly⁽¹⁾ committed to repeal the two contested measures by law.

⁽¹⁾ As described above in paragraphs 4 to 5.

VI. COMPLAINT ON ALLEGED AID TO HELLENIC SHIPYARDS

- (52) The Commission has received a formal complaint alleging State aid, which the Greek government may have granted to Hellenic Shipyards. The allegations contained in this complaint are currently under investigation. The Commission notes that the present decision does not prejudge the outcome of this or any other investigation it may have or will undertake with regard to alleged State aid to Hellenic Shipyards.
- (53) With regard to the complainant's claims on the calculation of the amounts of aid that could be granted under Article 6(4) of the Act⁽¹⁾, the Commission notes that these became devoid of purpose given that the present Decision orders the abolition of the this provision.

VII. CONCLUSION

- (54) The Greek authorities have implicitly agreed with the Commission's assessment concluding that the two contested measures constitute State aid, which is incompatible with the Treaty. Despite the commitment of the Greek authorities to abolish the two provisions by introducing a relevant amending Act before the Greek Parliament, they have not done so to this date. The Commission must therefore close the proceedings which were opened by the letter of 5 June 2002, by adopting a decision which orders the Hellenic Republic to repeal the two measures and recover any aid that may have been granted on their basis.
- (55) The Commission wishes to emphasize that these measures should be abolished in substance, so as to eliminate the element of State aid that they entail. More particularly, to the extent that the benefits which could be granted to Hellenic Shipyards under Article 5(2) and Article 6(4) of the Act may also derive from other legal instruments, Greece should ensure that these are equally repealed and that, if aid was granted on their basis, it is recovered from the beneficiaries.
- (56) The Greek authorities have indicated to the Commission that no aid has been granted under the two contested provisions. However, the Commission wishes to draw their attention to the fact that should any aid amount have been disbursed under the contested provisions, this should be recovered in full and without further delay.
- (57) Article 7(7) of Council Regulation (EC) No 659/1999 allows the Commission to take a negative decision once the time limit referred to in Article 7(6) has expired, on the basis of the information available to it. The information provided by the Greek authorities has not altered the Commission's finding that the contested provisions result to State aid which is incompatible with the common market.
- (58) The Commission therefore closes the investigation procedure opened on 5 June 2002, in respect of the measures whereby Hellenic Shipyards is exempted from taxes, in accordance with Article 6(4) of the Act and where the State covers part of the future pension costs for employees linked to civil shipbuilding, in accordance with Article 5(2). These measures constitute State aid that is not compatible with Regulation (EC) No 1540/98 and thereby with the common market.

⁽¹⁾ In a Memorandum submitted to the Commission, the complainant claims that the total amount of tax saved by Hellenic Shipyards, on the basis of the contested provision, is approximately EUR 34 million. In a recent submission, the complainant also notes that the amount of aid under Article 5(2) of the Act is higher than EUR 1 million while the tax benefits that Hellenic Shipyards could obtain under Article 6(4) of the Act could be calculated as follows: (a) EUR 14,625 million regarding the offset of the capital reserve of EUR 39 million; (b) EUR 4,66 million regarding the capital reserves of EUR 43 million, EUR 0,2 million and EUR 3,4 million (subject to the opinion of a Greek tax expert); and (c) an amount equal to the amount of capital reserves of EUR 85,6 million.

HAS ADOPTED THIS DECISION:

Article 1

Article 5(2) and Article 6(4) of Act 2941/2001 constitute State aid to Hellenic Shipyards AE which is incompatible with the common market.

The aid may, accordingly, not be implemented.

Article 2

In the event that State aid has been disbursed to Hellenic Shipyards AE under the provisions referred to in Article 1 of this Decision, Greece shall take all necessary measures to recover that aid.

In such a case, recovery shall be effected without delay and in accordance with the procedures under national law, provided these allow the immediate and effective implementation of this Decision.

The sums to be recovered shall bear interest throughout the period running from the date on which they were put at the disposal of the beneficiary until their actual recovery.

The interest shall be calculated in conformity with the provisions laid down in Chapter V of Commission Regulation (EC) No 794/2004 ⁽¹⁾.

Greece shall end the aid measure and cancel all payment of outstanding aid with effect of the date of notification of this Decision.

Article 3

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

Article 4

This Decision is addressed to the Hellenic Republic.

Done at Brussels, 20 October 2004.

For the Commission

Mario MONTI

Member of the Commission

⁽¹⁾ OJ L 140, 30.4.2004, p. 1.