

COMMISSION

COMMISSION DECISION

of 20 April 1989

concerning an aid project planned by the German Government in favour of a shipbuilding contract for which there is competition between yards in different Member States

(Only the German text is authentic)

(90/223/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⁽¹⁾ and, in particular, Article 4 (5) thereof,

Whereas :

I

Pursuant to Article 4 (5) of Directive 87/167/EEC, the Dutch Government by telex of 24 June 1987 requested the Commission to intervene in an aid case concerning competition between yards in different Member States for a shipbuilding contract concerning the construction of a 1 700-GRT wine tanker for the German shipowner Paul Häse KG.

At the same time as the above request, the Dutch Government informed the Commission that it envisaged to grant a direct contract-related production aid to the Dutch yard tendering for the contract.

As it appeared that the other Member State involved in the competition for the contract was Germany, the Commission asked this Member State to notify the aid planned to be granted in support of the national yard tendering for the contract, drawing to its attention that such an aid plan could not be implemented prior to the Commission's approval.

The German Government replied by verbal note of 2 July 1987 informing the Commission that it did not at that

stage envisage granting any aid to the German yard tendering for the contract.

In its declaration to the Minutes of the 1 136th Council of Ministers meeting of 22 December 1986 the Commission stated that when exercising its powers under Article 4 (5) of the Directive in connection with notifications of aid proposals for yards in different Member States competing for the same order it will, in applying the procedures of Article 93 of the Treaty, only permit the lowest aid level, unless a higher aid level within the ceiling appears necessary to ensure that the contract remains within the Community.

It was evident that the aid intensity notified by the Dutch Government exceeded that of the German Government the latter at that time not planning any aid.

For this reason the Commission by letter dated 3 August 1987 advised the Dutch Government of the aid level planned by the German Government. At the same time the German Government was asked to confirm finally that no aid would be granted to the contract.

Subsequently the Dutch Government on 20 August 1987 informed the Commission that it had aligned its aid level with that of the German Government, i. e. not providing any aid. The corresponding confirmation from the German Government was provided by verbal note of 26 August 1987.

Against this background the Commission by letter of 24 November 1987 informed the two Member States concerned that it had established that the particular contract concerned was not the object of any aid plan and that accordingly it had no grounds for further intervention under Article 4 (5) of the Directive.

By verbal note dated 10 June 1988 the German Government notified to the Commission that it planned to grant after all direct contract-related production aid to the German yard tendering for the contract constituting 16,6 % of contract value before aid. This time the

⁽¹⁾ OJ No L 69, 12. 3. 1987, p. 55.

German Government also referred to competition from a third country. Moreover, it advised the Commission that the German yard concerned had won the contract which had been concluded on 10 August 1987.

It was evident that the new notification by the German Government concerned a change of the circumstances prevailing during the time of competition for the contract, on which basis the Commission previously closed the case. Thus the engagement by the Dutch Government not to grant any aid to the contract was still valid.

Although the third country yard quoted a price lower than that of both the Dutch and the German yards, the Commission established that the application of an aid level by the German Government higher than that of the Dutch Government did not have the effect that the German yard's tender price was more competitive than that of the Dutch yard. Thus the higher aid level was not necessary to retain the contract within the Community.

By letter of 25 July 1988, the Commission, therefore, informed the German and the Dutch Governments that, pursuant to Article 4 (5) of the Directive, it had initiated the procedure provided for in Article 93 (2) of the EEC Treaty in respect of the aid project planned by the German Government at the same time inviting them to submit their comments.

The other Member States were asked to submit their comments by letter of 3 January 1989. Parties concerned other than Member States were notified of the decision by publication in the *Official Journal of the European Communities*⁽¹⁾.

II

The German Government submitted its comments on the Commission's decision by verbal note of 17 August 1988 arguing that there was not a situation of intra-Community competition under the terms of Article 4 (5) of the Directive as the ships offered by the two yards were not comparable due to significant differences in the technical specifications of the ships. The reason why the price quoted by the German yard was higher than that of the Dutch yard was that the performance of the ship offered by the former surpassed that of the latter.

By verbal note dated 13 December 1988 the German Government advised the Commission that the Dutch yard was not involved in the competition for the contract in the final stages of the tendering procedure.

By telex of 2 September 1988 the Dutch Government supported the Commission's decision to initiate the

procedure and stressed the importance of maintaining the aid level at nil.

In reply to a request from the Commission to comment on the assertion of the German Government that the Dutch yard was not involved throughout the tendering procedure for the contract, the Dutch Government by letter of 9 February 1989 reconfirmed that the Dutch yard was in contention for the contract up to the last.

The other Member States and parties concerned other than Member States have not submitted any comments on the Commission's decision.

III

The principle of Article 4 (5) of Directive 87/167/EEC is to prevent aid from distorting competition between yards in different Member States. In its declaration to Article 4 (5) of the Directive in the Minutes of the 136th Council of Ministers' meeting of 22 December 1986, the Commission stated that in exercising its powers in connection with aid notifications of aid proposals for yards in different Member States competing for the same order it will, in applying the procedure of Article 93 of the Treaty, only permit the lowest aid level, unless a higher aid level within the ceiling appears necessary to ensure that the contract remains within the Community, and at the same time it will not allow this particular contract to be included in the base for calculating other operating aid under Article 5 (1).

The aid level proposed by the German Government exceeds that of the Dutch Government. The fact that a third country quoted a price lower than that of both Community yards does not in the present case justify the application of a higher aid level as this does not have the effect that the tender price of the German yard concerned became more competitive than that of the Dutch yard.

The difference in the technical specifications of the ships offered does not lead to the conclusion that the yards were not competing for the same order. The offers of the yards were both based on the same invitation to tender from the German shipowner and it is only a natural consequence that different yards present designs with different specifications. Such differences together with quality, delivery time and market economy pricing, and not the level of state aid offered are the normal parameters on which the shipowner's choice should be based. To establish that the yards were not competing for the same contract would undermine the mechanism of Article 4 (5) and deprive the Commission of an essential instrument of pursuing the aid policy of Directive 87/167/EEC.

In view of the Dutch Government's express confirmation that the competition between the yards involved continued right up to the final stages of the tendering procedure and considering the fact that the German Government was the one which subsequently changed its aid plans in an upward direction and that the contract was

⁽¹⁾ OJ No C 336, 31. 12. 1988, p. 2.

subsequently won by a German yard, the Commission must conclude that the circumstances for treating the case under Article 4 (5) of Directive 87/167/EEC continue to be present.

In the case that the assertion by the German Government is correct it would not alter the above conclusion, it is an ordinary phenomenon that the shipowner at a certain stage of the tendering procedure singles out one yard for continued detailed negotiations. This does not rule out that there was initially competition for the contract and that the aid levels proposed by Member States involved have influenced the shipowner's choice of yard.

Pursuant to the Commission's above declaration to the Minutes of the Council of Ministers' meeting on 22 December 1986, the Commission will supervise under its monitoring powers laid down in Article 11 of Directive 87/167/EEC that the German Government does not grant any subsequent aid to cover losses suffered from taking the order below cost as contracts that have been subject to the procedure provided for in Article 4 (5) of the Directive may not be included in the base of calculating other operating aid under Article 5 (1),

HAS ADOPTED THIS DECISION :

Article 1

The project notified by the German Government on 10 June 1988 to grant aid for the building of a 1 700-GRT

wine tanker for the German shipowner Paul Häse KG, in the form of a direct grant to the constructing yard of 16,6 % of contract value before aid cannot be considered compatible with the common market.

Article 2

The German Government shall not put the aid project into effect.

It shall inform the Commission within two months from the notification of this Decision of the measures it has taken in order to abolish its aid plan.

Article 3

This Decision is addressed to the Federal Republic of Germany.

Done at Brussels, 20 April 1989.

For the Commission

Leon BRITTAN

Vice-President