Commission Decision of 25 September 2007 on the measures C 47/2003 (ex NN 49/2003) implemented by Spain for Izar (notified under document number C(2007) 4298) (Only the Spanish text is authentic) (Text with EEA relevance) (2008/141/EC)

COMMISSION DECISION

of 25 September 2007

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(2008/141/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[1] and having regard to their comments,

Whereas:

I. PROCEDURE

(1) In March 2000, the Commission learnt that three delivery guarantees had been granted by the Spanish public holding company Sociedad Estatal de Participaciones Industriales (SEPI) to Repsol/Gas Natural (Repsol) in relation to the construction and delivery of three LNG tankers contracted to two public shipyards belonging at the time to Astilleros Españoles (AESA), and subsequently transferred to the Izar group. AESA and Izar were wholly owned by SEPI.

(2) By letter dated 9 July 2003, the Commission notified Spain of its decision to initiate proceedings under Article 88(2) of the Treaty concerning the three non-notified measures.

(3) By letters dated 5 August 2003 and 22 October 2003, the Spanish authorities submitted their comments on the Commission's letter. The Commission received comments from one interested party (Repsol) in October 2003 and February 2004. It forwarded them to Spain, which was given the opportunity

to react. The comments from Spain were received in letters dated 12 January 2004 and 10 May 2004, respectively.

(4) In the context of two State aid decisions not related to the present procedure[(2)], adopted during 2004 (i.e. after the opening of the formal investigation concerning the LNG tanker guarantees), the Commission found State aid of EUR 864 million granted to Izar by Spain to be incompatible with the Treaty, and ordered its recovery.

(5) By letter dated 5 August 2004, Spain invoked Article 296 of the Treaty[(3)] with the objective of rescuing the military shipbuilding activities from a foreseeable bankruptcy of Izar, as a consequence of that recovery order. In subsequent correspondence, the Spanish authorities also explained to the Commission how the new military shipbuilding company formerly known as Bazán (Navantia) would function, outlined their commitments in relation to the competition concerns, and proposed a methodology for the follow-up of those commitments.

(6) In the meanwhile, the pending recovery orders on Izar, for a total of EUR 1,2 billion[(4)], had led the company to a situation of negative net worth, and technical bankruptcy. In view of this, on 1 April 2005 Spain put into liquidation the civil shipyards that remained in Izar (i.e., shipyards outside the perimeter of the newly created Navantia: Gijón, Sestao, Manises and Seville), and launched a privatisation procedure for those yards.

II. DESCRIPTION OF THE AID MEASURES

(7) In 1999, Repsol awarded three shipowners one contract each for the chartering of one LNG tanker each, plus the option for one extra tanker each, under a long-term time-charter arrangement.

(8) Subsequently, negotiations were undertaken between the shipowners and shipbuilders, including Korean yards, for the construction of the three LNG tankers. On 31 July 2000, two public Spanish shipyards that had just been transferred from AESA to Izar[(5)] were awarded the three contracts for the construction of the LNG tankers and the final shipbuilding contracts were signed.

(9) On the same day, AESA signed an additional clause to each shipbuilding contract whereby it committed to indemnify Repsol for all the costs Repsol would incur if the ships were not delivered according to the contractual terms for reasons for which the shipyards could be held liable.

(10) On the same day (31 July 2000), SEPI granted Repsol delivery guarantees for each of the three shipbuilding contracts, covering the same damages and prejudices for which AESA undertook to indemnify Repsol[(6)]. The losses were capped to a maximum of approximately EUR 180 million per ship, i.e. for a maximum aggregate total of approximately EUR 540 million. The guarantees

were granted for a period starting on 31 July 2000 until the end of the period terminating 12 months after the delivery of each ship[7].

III. REASONS FOR INITIATING THE PROCEDURE

(11) In its decision of 9 July 2003 to initiate the formal investigation procedure (the opening decision), the Commission concluded that the three aid measures constituted State aid within the meaning of Article 87(1) of the Treaty, and questioned their compatibility with the common market. The Commission considered that the beneficiaries of the aid were the yards, but did not exclude the possibility that Repsol could have also benefited from the aid, and decided that the Article 88(2) procedure should include Repsol, in order to allow for the submission of the additional information needed to dispel those doubts.

IV. COMMENTS RECEIVED AFTER THE INITIATION OF FORMAL PROCEEDINGS

(12) In its observations, Repsol insists on the distinction that must be drawn between its position as contractual beneficiary of the guarantees, and any alleged benefits deriving from the state aid. According to Repsol:

— The guarantees from SEPI covered benefits to which Repsol was entitled under Spanish civil and commercial law. The guarantees corresponded to Repsol's creditor position vis-à-vis the shipowners, Izar and the shipyards. Repsol was not due to pay any premium for the guarantees, as it is not market practice that companies obtaining a security for the respect of contractual obligations must pay for this security.

— In addition, the guarantees did not provide Repsol with any economic advantage within the meaning of Article 87(1) of the Treaty. Similarly to the guarantees received from the shipowner parent companies, SEPI's counter-guarantees only ensured that the contractual terms of the vessels' chartering contracts and shipbuilding contracts would be complied with, thereby enabling Repsol to comply with the LNG transportation contracts signed with other parties.

— Repsol would have required additional guarantees to those given by Izar, irrespective of whether they had been granted by SEPI or any other entity. Those guarantees are a requirement in accordance with market practice, in view of the size and risks of the investments and commercial commitments at stake.

(13) The submission from Spain concurred with the above arguments as regards the position of Repsol. The Spanish authorities therefore concluded that Repsol could not be deemed to be a beneficiary of State aid.

V. ASSESSMENT

The position of Repsol as a potential beneficiary of the aid

(14) One of the aims of the opening decision was to identify the beneficiary of any State aid involved in the delivery guarantees granted by SEPI.

(15) The Commission notes that, according to civil law, the provider of a good or service is liable for the performance of the contract signed with the buyer. This liability covers both the quality of the product and the agreed time of delivery. Thus, if a contractual agreement is not respected and the buyer suffers loss or damage as a result, the latter can claim compensation. In the case at hand, this compensation would have been borne by the yard or its parent company Izar.

(16) In view of this, it appears that Repsol, which rented the vessels produced by (yards that are owned by) Izar, was in a creditor position vis-à-vis the shipowners and Izar. Hence, it cannot be held liable under the charter and shipbuilding contracts, including the additional clause thereto.

(17) In consideration of the above, and in accordance with the observations from Repsol and Spain, the Commission concludes that Repsol cannot be regarded as a beneficiary of the aid, since it did not obtain any benefit to which it would not have been entitled on the basis of general civil or commercial law.

Conclusion

(18) The Commission considers that the voluntary liquidation of Izar's assets was an appropriate measure for the purpose of implementation by Spain of the three pending recovery decisions. In particular, it considers that the commitments and actions undertaken by Spain were sufficient to prevent distortion of competition.

(19) The Commission is also of the opinion that the tendering procedure for the sale of the four civil shipyards was carried out by Spain in a satisfactory manner, through an open, transparent and unconditional procedure. In particular, on 3 November 2006 the Spanish Council of Ministers authorised the sale of the Sestao, Gijón and Seville yards to the successful bidders. The privatisation contracts were signed on 30 November 2006. As regards the remaining yard (Manises), it was concluded that the option which maximised the liquidation value consisted in the closure of the yard, and the transfer of assets to SEPI.

(20) As a result of the liquidation and sale of Izar, the company definitively ceased all economic activity. The sole reason why Izar still exists is so that it can carry out the tasks relating to the cessation of its activities, in particular the termination of employee contracts. Once these tasks have been completed, Izar will be liquidated. These activities are not of a kind to justify applying the competition rules provided for in the Treaty. Consequently, even assuming that the measures in question had entailed a benefit for Izar and a distortion of competition, the Commission considers that any such distortion ceased at the moment when Izar ceased economic activities and closed its yards. Under these circumstances, a Commission decision on the classification of such measures as aid and on their compatibility would not have any practical effect.

(21) Consequently, the formal investigation initiated under Article 88(2) of the Treaty no longer serves any purpose.

VI. CONCLUSION

(22) On the basis of the above considerations, the Commission finds that Repsol cannot be deemed a beneficiary of the disputed aid, and that the procedure against the Izar yards no longer serves any purpose,

HAS ADOPTED THIS DECISION:

Article 1

The formal investigation procedure under Article 88 (2) of the Treaty is closed.

Article 2

This Decision is addressed to Spain.

Done at Brussels, 25 September 2007.

For the Commission

Neelie KROES

Member of the Commission

(**1**) OJ C 209, 4.7.2003, p. 24.

(**2**) Cases C 38/2003 and C 40/2000.

(**3**) This Article allows a Member State to 'take such measures as it considers necessary for the protection of the essential interests of its security which are connected with the production of or trade in arms, munitions and war materials'.

(**4**) In addition to the two 2004 decisions, an older decision from 1999 (Case C 3/99) also requested from Izar recovery of a further EUR 111 million.

(**5**) On 20 July 2000, AESA sold to Izar the two shipyards responsible for the construction of the LNG tankers. By letter dated 13 February 2003, the Spanish authorities confirmed that Izar had taken over responsibility for AESA's commitments in relation to the shipbuilding contracts.

(**6**) Under the terms of the guarantee, SEPI would indemnify Repsol at first request for all the direct and indirect costs and consequent losses Repsol would incur if the ships were not delivered according to the contract terms for reasons for which Izar could be held liable.

(**7**) Pursuant to the shipbuilding contracts, the vessels had to be delivered on 15 September 2003, 15 December 2003 and 15 March 2004, respectively.

Changes to legislation:
There are currently no known outstanding effects for the Commission Decision of 25 September 2007 on the measures C 47/2003 (ex NN 49/2003) implemented by Spain for Izar (notified under document number C(2007) 4298) (Only the Spanish text is authentic) (Text with EEA relevance) (2008/141/EC).