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II

(Acts whose publication is not obligatory)

COMMISSION

COMMISSION DECISION

of 25 November 1998

on State aid granted by Italy to Enirisorse SpA

(notified under document number C(1998) 3866)

(Only the Italian text is authentic)

(Text with EEA relevance)

(2000/334/EC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Background

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

Having called on interested parties to submit their comments pursuant to the provisions cited above⁽¹⁾,

Whereas:

By Decision 98/212/EC⁽²⁾ the Commission terminated proceedings concerning the injection of capital into Enirisorse by ENI between 1992 and 1996. The capital injections, which were part of a restructuring plan, amounted to a total of ITL 1 819 billion. The Decision was notified to Italy by letter of 2 May 1997.

In Decision 98/212/EC the Commission found that the capital injections amounting to ITL 1 819 billion were compatible with the common market and the EEA Agreement pursuant to Article 92(3)(c) of the EC Treaty and Article 61(3)(c) of the EEA Agreement, provided that the Italian Government complied with certain conditions. The main conditions, for the purposes of the present Decision, were as follows:

By letter dated 13 January 1996 the Commission informed the Italian Government of its decision to initiate the Article 93(2) procedure in respect of aid granted in the form of a capital injection by ENI to the sub-holding Enirisorse SpA (hereinafter referred to as 'Enirisorse'). Enirisorse was wholly owned by the Italian State holding company ENI, which in turn at the time of the events in question was controlled by the Italian Government through the Ministry of the Treasury, the majority shareholder.

— Italy was to honour the commitment to complete the restructuring plan by privatising the companies and production sites of Enirisorse and liquidating it completely by 31 December 1998,

— the income from privatisation was to be used to cover any further liquidation costs,

⁽¹⁾ OJ C 70, 6.3.1998, p. 5.

⁽²⁾ OJ L 80, 18.3.1998, p. 32.

- the Italian Government was to set up a procedure to monitor the implementation of the Decision.

The first half-yearly report reached the Commission on 11 November 1997. It showed that the sale of Pertusola Sud, one of the remaining companies owned by Enirisorse SpA which manages a zinc-production plant in Crotona, had not yet taken place, contrary to the restructuring plan notified by Italy and approved by the Commission.

The problems surrounding Pertusola Sud had been of major importance in Decision 98/212/EC. At the time, Italy had said that the company would be closed down or sold to an interested buyer by the end of 1997. In the second scenario, the buyer was to convert the production complex from zinc to nickel. These were the terms in which the closure or sale of Pertusola Sud appeared in the restructuring plan for Enirisorse, notified to the Commission and restated in Decision 98/212/EC.

Given that the Enirisorse's operating losses for 1997 were apparently attributable to the activities of Pertusola Sud, the Commission counted on the closure or sale of the company to a private buyer in order to achieve the ultimate aim of the restructuring plan, i.e. the final liquidation of Enirisorse.

The same report revealed that in 1997 ENI had given Enirisorse fresh capital injections amounting to ITL 133 billion. This new capital was used partly to cover the operating costs of Pertusola Sud and the cost of liquidating Enirisorse. The new capital injections were not provided for in the restructuring plan notified to the Commission and therefore were not taken into consideration in Decision 98/212/EC. The new capital injections were not notified to the Commission and were therefore made illegally.

The Commission therefore had to examine these new capital injections as new aid measures, illegal because granted in breach of the prior notification pursuant to Article 93(3) of the Treaty.

As it had on the basis of the information gathered in the first stage of its investigations, the Commission came to the conclusion that the capital injections carried out by ENI in 1997 were unlikely to yield a sufficient financial return, given that Enirisorse would be liquidated very soon. Therefore, it could not be claimed that ENI was acting as a private investor. In any case, Enirisorse had suffered serious losses for over five years; a private investor would have restructured or liquidated the company much sooner, in order to avoid prolonged losses.

The Commission had serious doubts as to the compatibility of the capital injections with the common market, since they did

not seem to qualify for the derogations under Article 92(2) and (3) of the Treaty. It therefore decided to initiate the Article 93(2) procedure in respect of the new capital injections.

II

Following publication of the notice on the initiation of the procedure⁽³⁾ by letter of 6 April 1998 the Government of the United Kingdom submitted its own comments in support of the Commission's arguments. The UK authorities said that, given the financial situation of Enirisorse, the new capital injections made by ENI were inconsistent with the action of a private investor.

By letter of 4 May 1998 the company Union Minière, a zinc producer and direct competitor of Pertusola Sud, submitted its comments, also in support of the Commission's arguments. Union Minière said that the new capital injections given to Enirisorse concerning the financial years 1997 and 1998 intended to cover the losses of its subsidiary Pertusola Sud constituted State aid which was not notified and therefore illegal. The new aid clearly and unduly distorted competition in the market in zinc, already suffering from structural overcapacity.

No other Member State or interested party submitted comments to the Commission. The comments of the United Kingdom and Union Minière were forwarded to the Italian Government by letter of 28 May 1998.

III

In its reply to the letter initiating the procedure and to the abovementioned comments by third parties, the Italian Government challenged both the Commission's Decision to initiate the procedure and the comments by the third parties, in so far as:

- the capital injection in question amounting to ITL 133 billion was notified to the Commission as part of the monitoring procedure provided for in Decision 98/212/EC,
- of the total ITL 134 billion, ITL 34 billion were intended to cover losses of Pertusola Sud, while the remaining ITL 99 billion served to cover costs relating to Enirisorse. The ITL 99 billion was used to help complete the restructuring plan approved by the Commission; this

⁽³⁾ See footnote 1.

further injection of ITL 99 billion should be considered as in effect authorised, even though it was not formally included in the aid provided for in the plan, given that the Commission had stipulated, in Article 3(b) of Decision 98/212/EC, that Italy should communicate any further liquidation costs,

- the amounts (ITL 99 billion) intended to cover the costs of liquidating and closing down an undertaking cannot possibly distort competition since the recipients are undertakings which are permanently ceasing their activities and leaving the market.

With regard to the ITL 34 billion paid to Pertusola Sud, the Italian Government recognises the fact that Enirisorse gave capital injections totalling ITL 34 billion to Pertusola Sud in 1997 in order to compensate the company's losses. However, it goes on to state that:

- when the Commission adopted Decision 98/212/EC, it knew that Pertusola Sud was to lose ITL 48 billion that year. Therefore, by imposing the sale or closure of Pertusola by the end of 1997, the Commission implicitly approved continuation of activities up to that date and the consequent compensation of losses accumulated in 1997,
- the Pertusola Sud plant is situated near Crotone in an area which qualifies for regional aid under Article 92(3)(a) of the Treaty; the aid in question should therefore be considered compatible with the common market in the light of those Treaty provisions.

IV

Enirisorse was set up in 1991 as a non-operating holding company, intended to optimise the economic and financial resources of the ENI Group and with the basic objective of entrusting the administration of the Group's holdings, mainly in mining activities, to a single centre of responsibility. In fact, ENI and its shareholder at the time (the Ministry of the Treasury) decided in 1991 to pull out of the non-core business so as to make the core business profitable again by separating it from loss-making activities. The ultimate aim was to privatise the holding company Enirisorse.

To that end, Enirisorse formulated a plan of one-off aid measures including, for the purposes of this Decision, closure of the Pertusola Sud plant by the end of 1997, or sale to an interested buyer who would turn the complex into a production unit for nickel.

At the end of the five-year period 1992 to 1996, Enirisorse had received from its sole shareholder, ENI, capital injections

of ITL 1 819 billion for the purpose of implementing the plan. In its Decision 98/212/EC the Commission found that this aid was compatible, subject to the terms and conditions set out in the notified restructuring plan. In the same period, Enirisorse also expected to receive about ITL 840 billion from the sale of companies and areas of business.

V

Whether the capital injections constitute State aid

In order to assess whether the capital injections totalling ITL 133 billion constitute State aid, the Commission examines the flow of capital between the Italian State, the main shareholder at the time, and Enirisorse in the light of the market economy investor principle as set out in the Commission's communication to the Member States on public undertakings in the manufacturing sector⁽⁴⁾. According to this principle, State aid is involved if the financial transaction would not have been undertaken by a private investor operating under normal market economy conditions.

As the time of the events in question, i.e. 1997, alongside the Italian State, which was by far the largest shareholder, other private investors held shares in ENI. Nevertheless the Ministry of the Treasury, which held most of the shares in ENI at the time, played a leading strategic role in determining the Group's business decisions.

The capital injection of ITL 133 billion, the subject of the initiation of the procedure, was financed by proceeds that would otherwise have benefited ENI's shareholders, in particular its controlling shareholder, the Italian State. Consequently, the funds which ENI made available to Enirisorse must be considered State resources within the meaning of Article 92(1) of the Treaty.

The Commission has good reason to suppose that the capital injections made by ENI totalling ITL 133 billion will yield an insufficient, or rather non-existent financial return, given that the measures consist basically in covering the losses of a company, Pertusola Sud, which should already have been liquidated, and unspecified liquidation costs which the Commission does not see why ENI should undertake, unless it has a specific legal obligation to do so.

If there is no such legal obligation, which it was up to the Italian State to prove, ENI's conduct does not conform to that of a private investor operating under market economy

⁽⁴⁾ OJ C 307, 13.11.1993, p. 3.

conditions, since it could not count on a profitable return in proportion to the amount of the capital injection, and in fact would have to give up hope of even the smallest return on the investment, given the decision to liquidate Enirisorse in any case by 31 December 1998.

It certainly cannot therefore be claimed that ENI acted as a private investor when it decided to make further, fresh capital injections of ITL 133 billion. A private operator would have liquidated Enirisorse, limiting the liquidation costs as much as possible and taking action only if it had a specific legal obligation to do so. From the evidence at its disposal, the Commission must conclude that ENI did not act in response to a legal obligation connected with the normal procedures for liquidating a company.

The measures in question therefore constitute State aid.

VI

The illegality of the State aid

As to the legality of the aid in question, in its reply to the initiation of the procedure the Italian Government maintains that the injection of ITL 133 billion was notified to the Commission as part of the monitoring procedure provided for in Decision 98/212/EC.

The Commission must point out in this regard that the information concerning the new capital injection, one among the many items of information sent to the Commission in the context of the monitoring procedure, should have been notified formally, since this was new aid, not included in the amounts authorised in Decision 98/212/EC. In any case, the Italian authorities did not comply with the obligation to give prior notice before implementing the aid, as stipulated by the Court of Justice, in particular in its judgment in Case 120/73 *Lorenz v Germany* ⁽⁵⁾.

The Italian authorities themselves agree that the new injection of ITL 133 billion was not included in the ITL 1 819 billion authorised by the Commission. However, they claim that, of the ITL 133 billion, ITL 99 billion was used to help complete the restructuring plan approved by the Commission. The further injection of ITL 99 billion should be considered as in effect authorised, even though it was not formally included in the aid provided for in the plan, given that the Commission had stipulated, in Article 3(b) of Decision 98/212/EC, that Italy should communicate any further liquidation costs.

⁽⁵⁾ [1973] ECR 1471.

The Commission cannot accept this argument in so far as Article 2 of Decision 98/212/EC expressly stipulated that the proceeds of privatisation of Enirisorse could not be used by ENI to invest in other companies owned by ENI, but had to be used to defray any further liquidation costs of Enirisorse. This means that, although the Commission might have foreseen further liquidation costs at the time it adopted its Decision, it was clear from the wording of this Article that, as far as the Commission was concerned, any such costs were to be met using revenue from the privatisation of Enirisorse's companies, certainly not using new State aid in the form of fresh capital injections, as was in fact the case.

There is also no basis to the claim by the Italian authorities that the Commission, knowing that Pertusola Sud would lose a further ITL 48 billion in 1997 and having accepted that it would close by 31 December 1997, implicitly authorised the compensation of those losses.

The fact that the Commission was aware that Pertusola Sud was to suffer further losses does not in any way imply that it approved new aid to cover such losses. It was entirely reasonable, as may be seen from Decision 98/212/EC, that Enirisorse should have compensated the losses of Pertusola Sud using revenue from privatisations carried out in the medium term, or at least using the holding company's own internal funds, without having recourse to a new and absolutely unplanned injection of capital, as was in fact the case.

The measures in question therefore constitute illegal State aid in so far as they were not notified by Italy to the Commission before being granted and, *a fortiori*, were not authorised by the Commission pursuant to Article 93(3) of the Treaty.

VII

Compatibility of the aid with the common market

As to the compatibility of the aid, the Italian Government maintains first of all that the amounts intended to cover the costs of liquidating and closing down an undertaking cannot possibly distort competition in the common market or affect trade between Member States, since the recipients are undertakings which are permanently ceasing their activities and leaving the market.

This claim has no basis in the present case. It is directly contradicted by the comments of Union Minière, a competitor of Pertusola Sud, which complains that the aid allowed the

company to remain active on the zinc market, thus distorting competition with other zinc producers.

In this case, the companies which benefited directly or indirectly from the aid in question are still active on the market, often still producing, as in the case of Portovesme and Pertusola Sud which, although put into liquidation a few months ago, is still an active zinc producer. Without the aid in question it would have had to be sold or closed down some time ago.

Therefore, the argument put forward by the Italian authorities cannot be accepted, since the liquidation costs in question have had direct or indirect repercussions on companies still active on the market.

Italy also claims that, in any case, the Pertusola Sud plant is situated near Crotone in an area which qualifies for regional aid under Article 92(3)(a) of the Treaty. The aid in question should therefore be considered compatible with the common market in the light of those Treaty provisions.

The Commission would point out in this regard that Article 92(3)(a) of the Treaty allows the Commission, in derogation from the ban on State aid which affects trade between Member States and distorts competition, to declare as compatible with the common market, 'aid to promote the economic development of areas where the standard of living is abnormally low or where there is serious underemployment, where such aid does not adversely affect trading conditions to an extent contrary to the common interest'.

In this context the Commission has authorised regional aid, having established the viability of the company involved. In other words, regional aid is authorised in so far as it can effectively bring an advantage to the region, almost always in terms of employment, linked to the viability over time of the undertaking receiving the aid. In any case it is clear, as confirmed by successive Court judgments (see, most recently, the judgment of the Court of First Instance in Joined Cases T-126/96 and T-127/96 *EFIM and BFM v Commission*)⁽⁶⁾ that the Commission cannot, even in the context of the application of Article 92(3)(a), waive consideration of the Community interest, i.e. it must never confine itself to verifying the regional specificity of the measures involved without assessing their impact at Community level.

In the case in point, Italy simply invokes a regional derogation for a company in liquidation, with no prospect of any viability even in the medium term. This means that the capital injection

can lead to no concrete advantage in terms of employment, since the Italian authorities themselves acknowledge that in any case Pertusola Sud, already in liquidation, will close by 31 December 1998.

Nor does the measure in question appear to serve any regional policy purpose, since aid to liquidate companies cannot be said to be aimed at 'promoting the economic development' of an area. It is, in fact, a further measure aimed at keeping Pertusola Sud active on the market at all costs for another few months, with no industrial, economic or regional logic behind it.

Therefore, as far as the cited provisions of Article 92(3)(a) are concerned, the Commission must conclude that the ad hoc aid measures in question were not taken as part of a government strategy effectively promoting regional development, such as would qualify for the derogation in question. The case file does not even show that the aid was granted to create jobs in an assisted area. On the contrary, all the evidence suggests that these are ad hoc measures aimed at the industrial survival at all costs of companies still controlled by Enirisorse, and in particular Pertusola Sud.

As to possible compatibility of the new aid under Article 92(3)(c) of the Treaty, the Commission would stress that this provision was not directly cited by the Italian authorities during the procedure. However, the Commission would repeat that State aid may qualify for this derogation provided that it does not adversely affect trading conditions to an extent contrary to the common interest. As for restructuring aid, the only aid which might possibly be cited in the present case, the Community guidelines on State aid for rescuing and restructuring firms in difficulty⁽⁷⁾ state that this type of aid is extraordinary and cannot be renewed, unless this is justified by exceptional circumstances. In this case the aid in question, which was new and in addition to the aid already authorised by Decision 98/212/EC, goes against the 'one-off' condition, since there are no new, exceptional circumstances which might justify authorisation by the Commission.

VIII

On the basis of the above considerations, the Commission concludes that the aid in the form of capital injections of ITL 133 billion, questioned in the decision to initiate the procedure, does not qualify for any of the derogations under Article 92(3)(a), (b) or (c) in so far as it is not intended to promote the economic development of areas where the standard of living is abnormally low or to restructure

⁽⁶⁾ Judgment of 15 September 1998; ECR II-3437, point 101.

⁽⁷⁾ OJ C 283, 19.9.1997, p. 2.

undertakings which are to be closed down soon and in any case before 31 December 1998.

When it initiated the procedure, the Commission reminded the Italian authorities that any aid granted illegally is liable to be followed by a Commission decision requiring the Member State in question to recover it, and, in this case, the Commission considers it necessary to recover the aid in order to restore the fair competition which prevailed before it was granted,

HAS ADOPTED THIS DECISION:

Article 1

The State aid granted by Italy in 1997 to Enirisorse SpA in the form of capital injections totalling ITL 133 billion is incompatible with the common market.

Article 2

1. Italy shall take all necessary measures to recover from Enirisorse SpA the aid which has already been unlawfully paid.

2. Recovery shall be effected in accordance with the procedures of Italian law. The amounts to be recovered shall include interest from the date on which the aid was paid to Enirisorse until the date on which it is effectively recovered. The interest shall be calculated on the basis of the reference rate used to calculate the net grant equivalent of regional aid.

Article 3

Italy 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 Italian Republic.

Done at Brussels, 25 November 1998.

For the Commission

Karel VAN MIERT

Member of the Commission

COMMISSION DECISION**of 8 December 1999****on the Directives promoting the rearing of she-goats (Lower Austria)***(notified under document number C(1999) 5210)***(Only the German text is authentic)**

(2000/335/EC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

II. DESCRIPTION

Having regard to the Treaty establishing the European Community, and in particular the first subparagraph of Article 88(2)(1) thereof,

Having regard to Council Regulation (EC) No 2467/98 of 3 November 1998 on the common organisation of the market in sheepmeat and goatmeat⁽¹⁾, and in particular Article 22 thereof, and Council Regulation (EEC) No 804/68 of 27 June 1968 on the common organisation of the market in milk and milk products⁽²⁾, amended for the last time by Council Regulation (EC) No 1587/96⁽³⁾, and in particular Article 23 thereof,

Having called on interested parties to submit their comments pursuant to Article 88(2)(1)⁽⁴⁾,

Whereas:

I. PROCEDURE

- (1) By letter dated 26 August 1997, Austria notified the Commission of the abovementioned aid. By letter(s) dated 13 July 1998 and 19 October 1998, Austria provided the Commission with further information.
- (2) By letter dated 21 January 1999, the Commission informed Austria that it had decided to initiate the procedure laid down in Article 88(2) of the EC Treaty in respect of the aid.
- (3) The Commission decision to initiate the procedure was published in the *Official Journal of the European Communities* ⁽⁵⁾. The Commission invited interested parties to submit their comments on the aid.
- (4) The Commission received no comments from interested parties.

(5) The measure in question concerns a general aid scheme providing for a direct grant of ATS 250 per she-goat per year in less-favoured areas of Lower Austria within the meaning of Article 21 of Council Regulation (EC) No 950/97 of 20 May 1997 on improving the efficiency of agricultural structures⁽⁶⁾ and ATS 200 per she-goat per year in other parts of the province.

(6) The objective of this scheme is to promote goat farming as an alternative to the tradition of dairy cattle farming. Austria also aims to make goat farming on grassland and in hill and mountain areas sustainable, extensive use of these areas being in the common interest.

(7) In principle, those eligible for the scheme are natural and legal persons keeping goats on a commercial scale in Lower Austria. To qualify for the premiums they must keep at least 10 she-goats on the holding all year round. The goats must be at least one year old or have kidded at least once.

(8) The annual budget set for this measure is ATS 500 000, i.e. EUR 36 350. The measure is of unlimited duration.

(9) After an initial examination of the information received, the Commission decided to open the procedure laid down in Article 88(2) of the EC Treaty in order to examine the scheme in greater detail. The Commission expressed doubts when opening the procedure as to whether the scheme was compatible with the common market since it appeared at first sight to constitute operating aid having no positive structural impact. Moreover, the scheme appeared to allow aid over and above, and similar to, those aids provided for under the

⁽¹⁾ OJ L 312, 20.11.1998, p. 1.

⁽²⁾ OJ L 148, 28.6.1968, p. 13.

⁽³⁾ OJ L 206, 16.8.1996, p. 21.

⁽⁴⁾ OJ C 113, 24.4.1999, p. 4.

⁽⁵⁾ See footnote 4.

⁽⁶⁾ OJ L 142, 2.6.1997, p. 1.

common organisation of the market concerned, which is exclusive within its particular sphere of activity.

III. COMMENTS FROM AUSTRIA

- (10) Austria confirmed that the aid in question was designed to promote goat farming as an alternative line of production. In that way it was intended to ensure that extensive use was made of grassland and mountain areas in Lower Austria.
- (11) Austria maintained that the argument that the aid in question was intended merely to cut the costs of goat farms and was therefore contrary to Article 87 of the EC Treaty did not hold water since the objective of the aid was in accordance with Article 87(3)(c) of the EC Treaty, whereby aid to facilitate the development of certain economic activities or of certain economic areas is compatible with the common market where such aid does not adversely affect trading conditions to an extent contrary to the common interest. The purpose of the aid in question was, they stated, not to assist certain breeders but, in accordance with Article 87(3)(c) of the EC Treaty, to make a tangible contribution to the development and establishing of goat breeding and rearing in the province of Lower Austria.
- (12) Austria pointed out that Lower Austria was currently not self-sufficient in goat products, which conclusively indicated that there was scarcely any trade in the products in question between the Member States. Nor were fears founded that there could be distortions of competition or that trade could be affected between the Member States.
- (13) According to Austria, Article 2(1) of Council Regulation (EEC) No 2078/92 of 30 June 1992 on agricultural production methods compatible with the requirements of the protection of the environment and the maintenance of the countryside⁽⁷⁾ was applicable to the aid in question since it provided for aid for rearing animals of local breeds in danger of extinction. Such was the aim of the planned aid for goats since it would promote a species under extreme threat, which would thus have a positive impact on the environment, thanks to utilisation of the mountain area for goat keeping, thus curbing degeneration of the landscape into karst and steppe.
- (14) Before the Article 88(2) procedure was opened, Austria had also argued that the legal basis for the scheme was the provisions governing the compensatory allowance provided for in Regulation (EC) No 950/97, amended by Council Regulation (EC) No 2331/98⁽⁸⁾.

IV. ASSESSMENT OF THE AID

Market organisations

- (15) Article 22 of Regulation (EC) No 2467/98 lays down that Articles 87, 88 and 89 of the EC Treaty apply to products covered by the Regulation. Under Article 23 of Regulation (EEC) No 804/68 Articles 87, 88 and 89 of the EC Treaty also apply to products covered by that Regulation.
- (16) The sector concerned by the aid scheme in question (i.e. goat's milk, [she-]goats and goatmeat) is therefore subject to the Community rules on granting State aids.

Prohibition of State aids under Article 87(1) of the EC Treaty

- (17) Under 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 is, in so far as it affects trade between Member States, incompatible with the common market.

Aids granted from State resources

- (18) In view of the fact that the aid is granted in the form of a direct provincial grant, the scheme appears beyond any doubt to constitute aid granted 'through State resources'. The Court of Justice has consistently ruled that aids granted by administrative bodies at a level below the federal level are covered by the ban on State aid⁽⁹⁾.

Selectivity of the measure

- (19) One effect of the measure is that certain undertakings or a certain line of agricultural production is assisted especially since the premiums are paid direct to the goat farmers. Austria has stated that this is intended to make a tangible contribution to the establishment and development of goat breeding and keeping in the province of Lower Austria⁽¹⁰⁾. Austria actually states in its letter of 19 October 1998 that the purpose of the aid is to promote a specific economic sector. Therefore the measure is selective in the sense that only one region in

⁽⁷⁾ OJ L 215, 30.7.1992, p. 85.

⁽⁸⁾ OJ L 291, 30.10.1998, p. 10.

⁽⁹⁾ Court of Justice judgment of 14 October 1987, Case C-248/84, ECR 1987, p. 4013.

⁽¹⁰⁾ See letter of 22 February 1999.

Austria is granted the aid and in the sense that a particular sector within agriculture — the keeping of she-goats — is promoted.

Distortion of competition

- (20) According to the case-law of the Court of Justice, improvement in the competitive position of an undertaking resulting from a State aid generally points to a distortion of competition compared with other competing undertakings not receiving such assistance⁽¹¹⁾. Neither the relatively low level of aid nor the relatively modest size of the beneficiary undertaking rules out the possibility of trade between Member States being distorted⁽¹²⁾. Application of the *de minimis* rule is excluded for the agricultural sector by the Commission communication on *de minimis* aids⁽¹³⁾.

Interference with trade

- (21) A measure affects trade between Member States if it hampers imports from other Member States or facilitates exports to other Member States; the deciding factor is whether there is a risk that intra-Community trade will develop differently or is liable to develop differently as a result of the measure in question.
- (22) The products to which the aid scheme in question relates are involved in trade between Member States and thus exposed to competition. In 1998 151 goats were imported into Austria, worth EUR 4 370. In the same year 1 518 goats, worth EUR 50 160 were exported from Austria to other Member States. Even aid of a relatively small amount is liable to affect trade between Member States where, as here, there is strong competition in the sector in which the recipient operates⁽¹⁴⁾. Furthermore, they are also in competition with products from other Member States which the consumer regards as more or less similar and as possible substitutes. The aid thus affects trade between Member States.

⁽¹¹⁾ See judgment of the Court of Justice of 17 September 1980, Case C-730/79, Philip Morris, ECR 1980, p. 2671, paragraphs 11 and 12.

⁽¹²⁾ Court of Justice judgments of 21 March 1990, Case C-142/87, Belgium v Commission, ECR 1990, I-959, paragraph 43, and of 14 September 1994, Cases C-278/92, C-279/92 and C-280/92, Spain v Commission, ECR 1994, I-4103, paragraphs 40 to 42.

⁽¹³⁾ OJ C 68, 6.3.1996.

⁽¹⁴⁾ See Cases 259/85 France v Commission [1987] ECR 4393, paragraph 24, and C-303/88 Italy v Commission, [1991] ECR I-1433, paragraph 27.

- (23) The conclusion of Austria that, given that Lower Austria is not self-sufficient in goat products, there is virtually no trade in the products in question between Member States does not hold water. Apart from the fact that there is insufficient evidence to support this claim, as stated above, for Article 87(1) to be applied, it is not necessary in principle for trade between Member States to attain a certain scale; on the other hand, there is the matter of product substitutability, so the market to be considered is broader in scope than the products directly concerned.

- (24) The argument put forward by Austria that, given the relatively low level of prices in Lower Austria compared with other Member States, there is no distortion of competition cannot be accepted because this price level could, on the contrary, encourage producers to seek outlets outside Lower Austria, and the aid would help them to do so by reducing their production costs.

- (25) The measure in question thus constitutes aid within the meaning of Article 87(1) of the EC Treaty.

Article 87(2) of the EC Treaty: exceptions

- (26) Exceptions to the prohibition laid down in Article 87(1) of the EC Treaty are set out in Article 87(2) and (3).
- (27) The exceptions listed in Article 87(2) are not applicable, given the nature of the aid measure and its objectives. Nor has Austria claimed that Article 87(2) is applicable.

Article 87(3) of the EC Treaty: exceptions at the Commission's appreciation

- (28) Article 87(3) lists aids which may be considered to be compatible with the common market. Their compatibility with the Treaty has to be studied from the point of view of the Community, not solely that of a given Member State. To ensure the proper operation of the common market and compliance with Article 3(1)(g) of the EC Treaty, the exceptions provided for in Article 87(3) must be interpreted in a strict manner.
- (29) As regards Article 87(3)(a), it is pointed out that the measure is not to be applied only in regions where the

economic situation can be described as extremely unfavourable in relation to the Community as a whole according to the Guidelines on national regional aid⁽¹⁵⁾ (having a per capita gross domestic product, measured in purchasing power standards, of less than 75% of the Community average).

- (30) As regards Article 87(3)(b), it is noted that the measure concerned is not intended to promote the execution of an important project of common European interest or to remedy a serious disturbance in the economy of Austria.
- (31) Nor is the aid designed or intended or appropriate to the objectives referred to in Article 87(3)(d).

Article 87(3)(c) of the EC Treaty

- (32) Aid to facilitate the development of certain economic activities or of certain economic areas may be deemed by the Commission to be compatible with the common market under Article 87(3)(c) of the EC Treaty if the aid does not adversely affect trading conditions to an extent contrary to the common interest.
- (33) The measure in question cannot, however, be regarded as serving the development of certain economic sectors or economic areas. Without making the aid conditional upon structural improvements to production, the effect and the declared purpose of the measure is to cut the production costs of beneficiaries for the duration of the aid. The effect of the measure is therefore limited in time and disappears as soon as the aid is no longer granted. It has been the consistent practice of the Commission to consider such aid as not meeting the criteria of Article 87(3)(c) of the EC Treaty and to regard it as operating aid and as such incompatible with the common market⁽¹⁶⁾.
- (34) Austria referred to Regulation (EEC) No 2078/92 as justification for the aid scheme in question. In the decision opening the procedure the Commission noted that it had received no details about the environmental aspect of the measure. Austria was requested to supply such information in their comments. The Commission notes that Austria's comments on the environmental aspect of the measure do not contain further details, apart from the brief remark that goat farming ensures utilisation of the mountain countryside, which curbs the formation of karst and steppe.

- (35) It should be pointed out, on the one hand, that the aid as it stands would not be granted solely in the mountain areas of Lower Austria. On the other hand, Austria has not, despite requests, stated what specific environmental benefit would result from continuing to keep goats when this is no longer economically viable or what costs would be linked to this keeping of goats. Therefore, there is no reason to grant aid as a compensation for environmental undertakings.

- (36) Regulation (EEC) No 2078/92 cannot therefore be regarded as a valid legal basis for deeming the aid to be compatible with the common market; it should also be stressed that, with the exception of permissible payments for reducing the number of livestock units and for endangered species (see Article 4 of Regulation (EEC) No 2078/92), support per production unit cannot be part-financed under the Regulation or be regarded as permissible under the system provided for in Articles 87 to 89 of the EC Treaty in conjunction with Article 10 of the Regulation.

- (37) In so far as Austria refers to the 'endangered breeds' aid category under Article 1(c) of Regulation (EEC) 2078/92, it should be pointed out the measure does not concern an aid for a particular breed of goats that is in danger of extinction. The measure grants aid for keeping (female) goats in general. Furthermore, the Commission only considers a breed to be in danger of extinction on the basis of scientific data showing trends in numbers of the breed concerned⁽¹⁷⁾. Austria has not submitted data indicating that a particular breed of goats is in danger in Lower Austria. Therefore, the measure cannot be considered an aid for endangered breeds under Regulation (EEC) 2078/92 as there is no information indicating that goats are in danger of extinction in Lower Austria and as the measure does not concern a goat breed but goats in general.

- (38) Before the main investigation procedure under Article 88(2) was introduced, Austria indicated that the provisions on the compensatory allowance served as a legal basis, without, however, giving any further explanation as to how the measure was geared to the criteria laid down in Article 17 et seq. of Council Regulation (EC) No 950/97. The requests to substantiate these arguments remained unanswered in the comments by Austria of 22 February 1999. The Commission's statements on opening the procedure thus remain undisputed: under Article 37(1) of the said Regulation the granting of State aids as a compensatory allowance within the meaning of Article 17 et seq. is excluded. The compensatory allowance scheme is thus not an appropriate legal basis for the measure in question.

⁽¹⁵⁾ OJ C 74, 10.3.1998, p. 9.

⁽¹⁶⁾ Judgment of the Court of First Instance of 8 June 1995, Case T-459/93, Siemens, ECR 1995, p. II-1675.

⁽¹⁷⁾ In the past the Commission has approved aids for goat breeds that were considered to be in danger of extinction in Austria. This concerned the breeds Gamsfarbige Gebirgsziege, Pinzgauer Ziege, Saanenziege, Toggenburgerziege, and Tauernschecken.

Legal implications of the market organisations

It is as such incompatible with the common market. It is, moreover, contrary to Council Regulation (EC) No 2467/98,

(39) As mentioned in recital 15, the relevant common organisations of the markets determine the applicability of Articles 87 to 89 of the EC Treaty to the products in question. In accordance with the consistent case-law of the Court of Justice, this is to be understood in such a way that the Member States may grant aid outside the scope of a common organisation of the market, provided that it is compatible with the abovementioned Articles. Within the scope of a market organisation, however, additional State aids are excluded since such aids would affect the operation of this market organisation⁽¹⁸⁾. Even if there were a possibility of an exception under Article 87(2) or (3) of the EC Treaty, it would have to be rejected by the Commission on the grounds of incompatibility with the common market organisation⁽¹⁹⁾.

HAS ADOPTED THIS DECISION:

Article 1

The aid scheme notified by Austria whereby it plans to grant ATS 250 per she-goat per year in the less-favoured areas of Lower Austria within the meaning of Article 21 of Council Regulation (EC) No 950/97 and ATS 200 per she-goat per year in other areas of Lower Austria, is according to Article 87(1) of the EC Treaty incompatible with the common market.

The aid scheme is furthermore contrary to Council Regulation (EEC) No 2467/98.

The aid scheme may accordingly not be implemented.

Article 2

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

Article 3

This Decision is addressed to the Republic of Austria.

Done at Brussels, 8 December 1999.

V. CONCLUSION

(42) The aid is therefore to be regarded as operating aid prohibited under Article 87(1) of the EC Treaty, while not qualifying as an exception under Article 87(2) or (3).

For the Commission

Franz FISCHLER

Member of the Commission

⁽¹⁸⁾ Judgment of the Court of Justice of 12 June 1990, Case 35/88, KYDEP, ECR 1990, p. I-3125.

⁽¹⁹⁾ Court of Justice judgment of 26 June 1979, Case 177/78, Pigs and Bacon Commission, ECR 1979, p. 2161.

COMMISSION DECISION**of 15 February 2000****on State aid implemented by Germany in favour of Kvaerner Warnow Werft GmbH***(notified under document number C(2000) 516)***(Only the German text is authentic)****(Text with EEA relevance)***(2000/336/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 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 93 of the EC Treaty, and in particular Article 14(1) thereof⁽¹⁾,

Having regard to Council Directive 90/684/EEC of 21 December 1990 on aid to shipbuilding⁽²⁾, as last amended by Directive 94/73/EC⁽³⁾, and Council Directive 92/68/EEC of 20 July 1992 amending Directive 90/684/EEC on aid to shipbuilding⁽⁴⁾,

Having called on interested parties to submit their comments pursuant to the provisions cited above⁽⁵⁾ and having regard to their comments,

Whereas:

I. PROCEDURE

- (1) Commission staff conducted a monitoring visit to Kvaerner Warnow Werft GmbH (KWW) on 25 March 1999 with an external expert in order to verify the amount of excess production in 1998. It was concluded during the visit that production in 1997 had been 93 862 cgt, thereby exceeding the capacity limitation of

85 000 cgt by 8 862 cgt. This figure of excess production in 1997 was based on the revised production figures for 1998, which were confirmed by Germany in its letter of 19 March 1999. Since Germany did not provide a revised report as regards 1997 production, the figure of 93 862 cgt was considered final.

- (2) By letter dated 20 July 1999, the Commission informed Germany that it had decided to initiate the procedure provided for in Article 88(2) of the EC Treaty in respect of this exceeding of the capacity limitation.
- (3) The Commission decision to initiate the procedure was published in the *Official Journal of the European Communities*⁽⁶⁾. The Commission invited interested parties to submit their comments on the measure.
- (4) The Commission received comments from interested parties. It forwarded them to Germany, which was given the opportunity to react.

II. DETAILED DESCRIPTION OF THE AID

- (5) By its decisions communicated to Germany by letters of 3 March 1993 (N 692/D/91), 17 January 1994 (N 692/J/91), 20 February 1995 (N 1/95), 18 October 1995 (N 637/95) and 11 December 1995 (N 797/95), the Commission approved restructuring aid for KWW in accordance with Directive 90/684/EEC to allow the comprehensive restructuring of the former East German shipyard. The aid was approved subject to a capacity restriction of 85 000 cgt per year, compliance with which is monitored by the Commission.

- (6) The Warnow Werft shipyard, situated in Rostock-Warnemünde in Mecklenburg-Western Pomerania, Germany, was sold by the Treuhandanstalt to Norwegian

⁽¹⁾ OJ L 83, 27.3.1999, p. 1.

⁽²⁾ OJ L 380, 31.12.1990, p. 27.

⁽³⁾ OJ L 351, 31.12.1994, p. 10.

⁽⁴⁾ OJ L 219, 4.8.1992, p. 54.

⁽⁵⁾ OJ C 245, 28.8.1999, p. 24.

⁽⁶⁾ See footnote 4.

industrial group Kvaerner in October 1992. Pursuant to clause 27 of the sales contract, which Germany sent to the Commission under cover of a letter dated 30 October 1992 for scrutiny and approval, Kvaerner undertook until 31 December 2005, with regard to the Warnow yard, not to exceed its annual building capacity of 85 000 cgt unless the requirements based on the EC Treaty became less restrictive.

- (7) Directive 90/684/EEC, as amended by Directive 92/68/EEC, contains a derogation from the rules on operating aid applicable to other Community yards for the shipyards in the new *Länder* in order to create the possibility for these yards to undergo urgent and comprehensive restructuring and to become competitive. After the privatisation of Warnow Werft the Commission approved the restructuring aid for the yard in four tranches in accordance with the provisions of the abovementioned Directive. The total amount of aid approved by several decisions was as follows:

N 692/D/91 — Commission letter of 3 March 1993 (SG (93) D/4052):

- DEM 45,5 million operating aid,
- DEM 82,4 million operating aid in the form of an exemption from previous liabilities,
- DEM 127,5 million investment aid,
- DEM 27,0 million closure aid,

N 692/J/91 — Commission letter of 17 January 1994 (SG (94) D/567)

- DEM 617,1 million operating aid,

N 1/95 — Commission letter of 20 February 1995 (SG (95) D/1818)

- DEM 222,5 million investment aid,

N 637/95 — Commission letter of 18 October 1995 (SG (95) D/12821)

- DEM 66,9 million investment aid,

N 797/95 — Commission letter of 11 December 1995 (SG (95) D/15969)

- DEM 58,0 million investment aid.

Consequently, the total amount of aid concerned by these decisions was EUR 372,5 million operating aid (DEM 745 million), EUR 237,45 million investment aid (DEM 474,9 million) and EUR 13,5 million closure aid (DEM 27,0 million). This results in total aid of EUR 623,45 million (DEM 1 246,9 million).

- (8) The aid was approved on condition that the yearly new building capacity did not exceed 85 000 cgt. The capacity limitation was included both in the notified sales contract (clause 27) concerning the privatisation of Warnow Werft and in the abovementioned Commission decisions authorising the aid. In the Commission decisions communicated to Germany by the letters of 17 January 1994, 20 February 1995, 18 October 1995 and 11 December 1995 it was clearly stated that the Commission would be obliged to demand the recovery of the aid if the restriction of capacity was not complied with.

- (9) In initiating the procedure the Commission noted that the main condition for the approval of the aid was an annual capacity limitation of 85 000 cgt. Such a limit was set in order to offset the distortive effect of the aid on the shipbuilding industry. According to the findings of the 25 March 1999 monitoring visit to KWW, the yard exceeded its annual new building capacity limitation of 85 000 cgt in 1997 by producing 93 862 cgt. This information indicated that an essential condition under which the aid was approved was not being complied with.

- (10) For this reason the Commission doubted whether the aid approved by it to allow the restructuring and continued operation of the former East German shipyard Warnow Werft (the relevant decisions being communicated to Germany by the letters of 3 March 1993 (N 692/D/91), 17 January 1994 (N 692/J/91), 20 February 1995 (N 1/95), 18 October 1995 (N 637/95) and 11 December 1995 (N 797/95)) was compatible any longer with the common market.

III. COMMENTS FROM INTERESTED PARTIES

- (11) The Commission has received comments from KWW, a Member State (Denmark) and the Association of Danish Shipbuilders (Foreningen af Jernskibs- og Maskinbyggerier i Danmark).

A. KWW's comments

- (12) KWW's comments concentrate on five main arguments. KWW's first argument is that an obligation to limit actual production to a certain level was not imposed on it and that such an obligation cannot be derived from the Commission decisions either. The Commission decisions approving the aid imposed, not a production limitation, but a limitation of technical capacity.
- (13) KWW explains in its comments that the Commission was of the opinion that the capacity limitation was to be

achieved by technical measures and arrangements. The only condition imposed on KWW when the aid was approved was that the new yard to be built would allow a possible production of 85 000 cgt and that certain layout-related criteria (bottlenecks) of the yard which limit production should not be changed. This can be seen from the Commission decisions, which lay down the technical arrangements to be made in the yard in order to limit capacity.

- (14) According to KWW, the information on actual production which was communicated regularly to the Commission in the production reports was meant only to be additional information that was supposed to be used in order to decide, in case there were deviations, whether in fact the technical capacity limitation was breached or evaded.
- (15) KWW also explains in its comments that it has complied with the limitation of technical capacity as required by the Commission decisions approving the aid by carrying out the measures relating to the layout and the facilities of the yard and by keeping to them accordingly. No changes were carried out that had or would have changed this technical capacity.
- (16) Secondly, KWW argues that it had not increased its approved technical capacity but rather was able to achieve a higher actual production within the framework of the limitations of technical capacity owing to increased productivity and to a serial effect caused by building series of similar ships. KWW was obliged only to adhere to the technical capacity restrictions but was free to produce as much as it could within those parameters.
- (17) According to KWW, capacity limitation and production limitations are different concepts that should not be equated. Whereas capacity limitation in the sense of limitation of a technical installation is a static concept that cannot be changed, actual production is characterised by fluctuations and can change over time owing to increased productivity. Moreover, all yards strive constantly for increased productivity. Yards that develop better and more intelligent methods, being competitive as a result, are in the interests of the Community.
- (18) The third point raised by KWW in its comments is that not all the aid authorised by the Commission was in fact paid to the company. KWW argues that the only non-cash aid granted to it was DEM 82,4 million granted in the form of release from previous liabilities. The yard had not received any other non-cash aid. Only the amount of DEM 549,559 million had been received by the yard in cash. Consequently, if the Commission decided that the yard had not complied with the Commission decisions approving the aid and therefore considered part of the aid incompatible with the common market, only the aid in fact paid to the yard

should be taken as the basis for calculating the amount of aid to be repaid.

- (19) KWW's fourth comment is that the Commission must respect the principle of equal treatment in cases where it requires repayment of aid. In the case of MTW and Volkswerft⁽⁷⁾, the Commission calculated the amount of aid to be recovered because of the exceeding of the capacity limitation on the basis of the total amount of operating aid alone without taking into account the investment aid. This manner of proceeding should be applied to KWW as well. In addition, in this case the yard in question was allowed to reduce its future production.
- (20) KWW also explains that, in the Commission decision on the reallocation of capacity of Elbwerft Boizenburg⁽⁸⁾, the annual capacity of 22 000 cgt was valued at DEM 242 000 cgt. Since KWW's actual production exceeded the annual capacity limitation of 85 000 cgt by only 8 862 cgt in 1997, the value expressed in the decision on reallocation of the capacity of Elbwerft Boizenburg should apply to the present decision as well.
- (21) The fifth point raised by KWW is that, if the Commission were to consider part of the aid incompatible with the common market, the interest rate applicable to the repayment of the aid should be calculated from the time when the alleged breach began, i. e. from the time when the aid was subsequently rendered incompatible.

B. Denmark's comments

- (22) Denmark stresses in its comments the importance of respecting the conditions and requirements linked to the approval of aid. These conditions are often the only protection against State aid being used merely to shift the employment problem from one Member State to another.
- (23) According to Denmark, in the present case the conditions linked to the approval of aid are such that the concrete assessment possibilities of the Commission are limited to checking the observance of capacity limitation. When the yard has obviously produced amounts exceeding the capacity limitation consistently over a period of years, this condition is undoubtedly not respected. It should be ensured that the aid recipient will not gain any economic benefit from the exceeding of the capacity limitation when this whole period of time is taken into account.

⁽⁷⁾ OJ C 344, 14.11.1997, p. 2.

⁽⁸⁾ State aid N 325/99, communicated to Germany by letter dated 5 August 1999 [SG(99) D/6192].

C. Comments of the Association of Danish Shipbuilders

- (24) The Association of Danish Shipbuilders (Foreningen af Jernskibs- og Maskinbyggerier i Danmark) explains in its comments that KWW's production has a direct impact on a market that is important to the Danish yards. According to the Association, account should be taken in this connection of the fact that the yard has consistently exceeded its capacity limitation from the outset, i.e. from 1995 onwards. Not only was the capacity limitation exceeded year after year, but the amount of the excess has also increased: in 1996 it was less than 1%; in 1997 already more than 10%; and in 1998 more than 44%⁽⁹⁾.
- (25) The exceeding of the capacity limitation in 1997 is, in the opinion of the Association of Danish Shipbuilders, especially serious since the yard was supposed to reduce its production that year following the slight excess in 1996. On the contrary, it exceeded its capacity limitation and hid this excess production from the Commission, which was constantly monitoring the yard's production. For this reason it was discovered only in March 1999 during an investigation into the exceeding of the capacity limitation in 1998. Neither the German authorities nor the yard reported the exceeding of capacity to the Commission. This constant breaching of the capacity limitation should be taken into account in assessing the case and steps must be taken to ensure that the yard does not gain any economic advantage from the situation.
- (26) The Association of Danish Shipbuilders also refers to the trend since 1992 which has led to the closure of many yards and to considerable job losses in the sector. It is therefore crucial for European yards that effective steps be taken globally to reduce the negative effects of overcapacity. Since this is not possible without the active support of the Community, it is important that the latter maintains its international credibility. An international initiative to reduce overcapacities would not be consistent with a simultaneous accepting of the exceeding by a considerable margin of the Community's own capacity limitation, as is the case here.
- (27) According to the Association of Danish Shipbuilders, the capacity limitations of the former East German yards are, among other factors, a basis for the investment and production planning of other yards. Consequently, the arrangements made by other yards are affected by the exceeding of the capacity limitations. These limitations were to remain in place for 10 years and a flexible application of them was never planned.

IV. GERMANY'S COMMENTS

- (28) Germany's comments concentrate on the same points as KWW's.
- (29) Firstly, Germany states in its comments that the Commission decisions approving the aid imposed, not a production limitation, but a limitation of technical capacity. The capacity limitation was to be achieved by technical measures and arrangements. The only condition imposed on KWW when the aid was approved was that the new yard to be built would allow a possible production of 85 000 cgt and that certain layout-related criteria (bottlenecks) of the yard which limit production should not be changed. The information on actual production which was communicated regularly to the Commission in the production reports was meant only to be additional information that was supposed to be used in order to decide, in case there were deviations, whether in fact the technical capacity limitation was breached or evaded. This was clear from the Commission decisions, which laid down the technical arrangements to be taken in the yard in order to limit capacity.
- (30) Germany explains that KWW had complied with the limitations of technical capacity as required by the Commission decisions approving the aid. No changes were carried out in the yard that had or would have changed this technical capacity and therefore the yard had exactly the layout and technical capacity required by the Commission.
- (31) Secondly, Germany argues that KWW had not increased its approved technical capacity but was instead able to achieve a higher actual production within the framework of the limitations of technical capacity owing to increased productivity and to the serial effect caused by building a series of similar ships. In Germany's view, KWW was obliged only to adhere to the technical capacity restrictions but was free to produce as much as it could within those parameters.
- (32) According to Germany, an obligation to limit actual production to a certain level was never imposed on KWW and such an obligation cannot be derived from the Commission decisions either. The yards should be allowed to take part in the general progress of improved productivity. All Community yards should compete freely with each other, and in doing so the east German yards should not change their handicap, namely the restrictions on technical installations, but surely their productivity can develop. Yards that develop better and more intelligent methods, being more competitive as a result, are in the Community's interest.

⁽⁹⁾ Commission Decision 1999/675/EC of 8 July 1999 on KWW's exceeding of its capacity limitation in 1998 (OJ L 274, 23.10.1999, p. 23).

- (33) Germany explains in its comments that capacity limitation and production limitations are different concepts that should not be equated. Whereas capacity limitation in the sense of limitation of a technical installation is a static concept that cannot be changed, actual production is characterised by fluctuations and can change over time owing to increased productivity. The improvement in KWW's productivity is based, not on the granting of aid, but on the technical know-how of the Kvaerner group.
- (34) The third point raised by Germany is that the actual amount of aid paid to KWW is in fact much lower than the DEM 1,2 billion approved by the Commission. According to Germany, only the investment aid paid in cash is directly linked to the present yard and the capacity limitation imposed on it.

V. ASSESSMENT OF THE AID

- (35) The Commission notes that the aid approved on the basis of Council Directive 90/684/EEC was considered compatible with the common market as it complied with Article 87(3)(e) of the EC Treaty. However, this applies only so long as the conditions laid down in the Commission decisions approving the aid in accordance with the abovementioned Directive are respected. Should the conditions for approving the aid not be complied with, the aid falls under the general prohibition in Article 87(1) of the EC Treaty and may therefore be considered incompatible with the common market, unless it can be declared compatible for other reasons.
- (36) Article 10a of Directive 90/684/EEC as amended by Directive 92/68/EEC contains a derogation from the rules on operating aid applicable to other Community shipyards for the yards in the former GDR in order to make it possible for these yards to undergo urgent and comprehensive restructuring and to become competitive. According to Article 10a(2), until 31 December 1993, operating aid for the shipbuilding and ship conversion activities of the yards situated in the former GDR may be considered compatible with the common market under certain conditions relating to the amount of aid and subject to an annual reporting obligation on the part of the German Government. One of the conditions laid down in this provision is the agreement of the German Government to carry out before 31 December 1995 a genuine and irreversible reduction of 40% of the shipbuilding capacity of 545 000 cgt existing on 1 July 1990.
- (37) Investment aid is regulated in Article 6 of Directive 90/684/EEC and closure aid in Article 7. According to Article 6(1), investment aid may not be granted for investment in existing yards unless it is linked to a restructuring plan which does not involve any increase in the shipbuilding capacity of the yard or unless it is directly linked to a corresponding irreversible reduction of capacity of other yards in the same Member State over the same period. Article 6(3) provides that investment aid may be deemed compatible with the common market provided that the amount and intensity of such aid is justified by the extent of the restructuring involved. According to Article 7, aid to defray the normal costs resulting from the partial or total closure of shipbuilding or ship-repair yards may be considered compatible with the common market provided that the capacity reduction resulting from such aid is of a genuine and irreversible nature.
- (38) In the Commission proposal for Council Directive 92/68/EEC amending the seventh Directive on aid to shipbuilding⁽¹⁰⁾, it is stated that, taking into account the impact of the restructuring on conditions of competition in the Community, a balance has to be found between the restructuring of the former GDR shipbuilding industry, which is only possible with the support of a substantial amount of State aid, and the possible negative influence on the competition conditions of other Community yards resulting from this aid. The grant of any extra aid above the current ceilings has to be accompanied by appropriate restructuring measures and capacity reductions.
- (39) One of the conditions laid down in Article 10a(2) of Directive 90/684/EEC for the compatibility of the operating aid with the common market is the agreement of the German Government to carry out before 31 December 1995 a genuine and irreversible reduction of 40% of the shipbuilding capacity of 545 000 cgt existing on 1 July 1990. The corresponding maximum overall capacity for the shipyards situated and operating in the territories of the former German Democratic Republic amounts therefore to 327 000 cgt. Germany distributed this total capacity among the five remaining new building yards. In this context the capacity for KWW was set at 85 000 cgt⁽¹¹⁾.
- (40) In its letter of 27 November 1992 to the Commission on the privatisation of Warnow Werft, Germany states that Kvaerner had contractually committed itself not to exceed the capacity of 85 000 cgt set for KWW before 1 January 2006. It is noted that clause 27 of Warnow Werft's privatisation contract, entitled 'Limitation on Future Building Capacities', reads as follows: 'Kvaerner undertakes up until 31 December 2005 with regard to Warnow yard not to exceed its annual building capacity

⁽¹⁰⁾ OJ C 155, 20.6.1992, p. 20.

⁽¹¹⁾ The Commission would point out that the Court of First Instance confirmed, on 22 October 1996 the importance of the allocation of capacities to the individual yards for the legality of the aid decision in Case T-266/94, Skibsværftsforeningen and Others v Commission [1996] ECR II-1399, paragraphs 151 to 198.

of 85 000 cgt unless the requirements based on the EEC Treaty are less restrictive from time to time'.

(41) The Commission notes that the subsequently notified aid programme for the restructuring of the Warnow Werft yard was based on this annual capacity.

(42) The total amount of EUR 623,45 million (DEM 1 246,9 million) of restructuring aid was approved in four tranches in five separate Commission decisions. The first decision releasing the first tranche of aid was communicated to Germany by letter dated 3 March 1993 (N 692/D/91). In this decision it is stated that, although the independent technical study carried out on the Commission's instructions had established that the new building capacity of Warnow Werft was unlikely to exceed the 85 000 cgt set by the German Government as the contribution of this yard to the maximum available east German capacity of 327 000 cgt, future monitoring was deemed necessary during the implementation of the investment programme in order to ensure that the reduction of the shipbuilding capacity was carried out.

(43) The second decision was communicated to Germany by letter dated 17 January 1994 (N 692/J/91). In this decision the same provision as the one mentioned above was laid down, with the difference that further monitoring was deemed necessary in order to ensure that the restriction of shipbuilding capacity was complied with. In addition, the German Government was reminded that non-compliance with the capacity limitation would oblige the Commission to request reimbursement of all aid.

(44) In the third decision, communicated to Germany by letter dated 20 February 1995 (N 1/95), it was again stated that further monitoring of compliance with the capacity limitation was still needed. In addition, it was stated that the German Government had given an assurance that the yard would comply with its capacity limitation. The German Government was again reminded that non-compliance with the capacity limitation would oblige the Commission to request reimbursement of all aid.

(45) The fourth decision was communicated to Germany by letter dated 18 October 1995 (N 637/95) and the fifth by letter dated 11 December 1995 (N 797/95). In both decisions it was provided that further monitoring would be necessary to ensure that the actual and planned production complied with the capacity limit. The same remarks as above on Germany's assurance that the capacity limitation would be complied with by the yard and on the possibility of recovery of all aid in case of non-compliance were repeated in the decisions.

(46) The Commission notes that the annual capacity limitation of 85 000 cgt was one of the main conditions

for the approval of the aid. The aid was approved on the basis of the restructuring notified to the Commission. This annual limitation was incorporated in Warnow Werft's privatisation contract, which was approved by the Commission as part of the restructuring programme. In addition, the obligation to comply with the capacity limitation of 85 000 cgt was expressly mentioned in all other Commission decisions approving the aid except the first one, dated 3 March 1993. In these decisions it was also expressly stated that, in case of non-compliance with this capacity limitation, the Commission would be obliged to request the reimbursement of all aid.

(47) During the monitoring visit to the yard on 25 March 1999 it was confirmed that KWW's production was 93 862 cgt in 1997. This figure of excess production in 1997 was based on the revised production figures for 1998, which were confirmed by Germany in its letter of 19 March 1999. Since Germany did not provide a revised report as regards 1997 production, the figures are considered confirmed and uncontested. This means that KWW exceeded its annual capacity limitation of 85 000 cgt by 8 862 cgt in 1997.

(48) The Commission notes that an essential condition for the approval of aid, i.e. compliance with the annual capacity limitation of 85 000 cgt as laid down in the Commission decisions approving the aid in accordance with Directive 90/684/EEC as amended by Directive 92/68/EEC, was not met in 1997.

(49) The objective of amending Directive 90/684/EEC by Directive 92/68/EEC was to allow the urgent and comprehensive restructuring of the shipbuilding industry in the former GDR in order for it to become competitive. The Commission acknowledges that capacity limitations were introduced in this context in order to offset the distortive effect the State aid granted to the East German shipyards has on competition in this sector. It also stresses that, when this capacity limitation, as a compensating factor and as an essential condition for approval of the aid and hence for the compatibility of the aid with the common market, is not complied with, the aid is rendered incompatible with the common market.

(50) In its decision concerning aid to MTW-Schiffswerft and Volkswerft Stralsund⁽¹²⁾ the Commission concluded that MTW had slightly exceeded its capacity limitation in 1996. The compensation for this excess was determined on the basis that MTW had to reduce its production correspondingly the following year and the amount of the operating aid to be granted to it the following year was reduced by an amount that corresponded to the excess. The consequences of the excess were accordingly determined on the basis of the scale of the excess production in question, matching the financial consequences of this breach to the gravity of it, that is to the amount of the excess.

⁽¹²⁾ See footnote 7.

- (51) The Commission notes that the purpose of the concept of recovery of aid in case of non-fulfilment of the conditions laid down for the approval of aid in the Commission decision is to remind the aid recipient of its obligation to comply with these conditions and to make the consequences of non-compliance clear. The aim and actual effect of the recovery of aid is to seek to recreate the *status quo ante* by annulling the negative effect on competition caused by the illegal aid, the illegality of which is caused by the non-compliance with the conditions set for the approval of the aid and hence for its compatibility with the common market. In this case the condition breached is the capacity limitation. Consequently, and following the reasoning of the Commission decision concerning aid to MTW-Schiffswerft Stralsund⁽¹³⁾ the scale of exceeding the capacity limitation indicates the scale of distortion of competition in question.
- (52) Since the scale of exceeding the capacity limitation indicates the scale of distortion of competition in question, the Commission considers that the amount of aid which corresponds to the exceeding of the capacity limitation is to be considered incompatible with the common market.
- (53) The Commission notes that aid which is incompatible with the common market must be recovered.
- (54) The Commission notes that in its decisions communicated to Germany by letters of 17 January 1994, 20 February 1995, 18 October 1995 and 11 December 1995 it stated that the Commission will be obliged to request the recovery of all aid if the restriction of capacity is not complied with.
- (55) Following the reasoning in the judgment of the Court of First Instance of 15 September 1998 in Case T-140/95 Ryanair Limited v Commission⁽¹⁴⁾ it should be examined whether, by declaring only the amount of aid which corresponds to the exceeding of the capacity limitation incompatible with the common market and hence subject to recovery, the Commission departs from the scope of its previous decisions on granting the aid in which it is stated that the Commission will be obliged to request the recovery of all aid if the restriction of capacity is not complied with.
- (56) The aim and actual effect of the recovery of aid is to seek to recreate the *status quo ante* by annulling the negative effect on competition caused by the illegal aid. Following the reasoning of the Commission decision concerning aid to MTW-Schiffswerft and Volkswerft Stralsund⁽¹⁵⁾, the scale of exceeding the capacity limitation indicates the scale of distortion of competition in question.
- (57) Since the amount of aid which corresponds to the exceeding of the capacity limitation is declared incompatible, it is subject to recovery. The recovery seeks to annul the negative effects of the exceeding of the capacity limitation on competition, whereby the purpose and actual effect of the recovery are fulfilled.
- (58) The Commission therefore considers that, by declaring the amount of aid which corresponds to the exceeding of the capacity limitation incompatible with the common market in this case, it does not depart from the scope of the conditions of its previous decisions in a way that would have an effect on the aim, purpose and effect of those conditions, namely annulment of the negative effect on competition.
- (59) The Commission therefore concludes that the part of the aid of EUR 623,45 million (DEM 1 246,9 million) granted to Kvaerner Warnow Werft and approved by the Commission in four tranches by its decisions communicated to Germany by its letters of 3 March 1993 (N 692/D/91), 17 January 1994 (N 692/J/91), 20 February 1995 (N 1/95), 18 October 1995 (N 637/95) and 11 December 1995 (N 797/95) which corresponds to the exceeding of the annual capacity limitation of 85 000 cgt by 8 862 cgt is no longer compatible with Article 87(3)(e) of the EC Treaty and is therefore incompatible with the common market pursuant to Article 87(1) of the EC Treaty.
- (60) In their comments, both Germany and KWW contest the Commission's observation that an annual capacity limitation of 85 000 cgt was the main condition for approval of the aid. They claim that the approval was conditional only on the approved and examined production facilities being retained in accordance with the restructuring programme and investment plans.
- (61) The Commission notes that compliance both with the investment programme and with the capacity limitation were conditions for approval of the aid. It is a constant practice of the Commission in all restructuring aid cases to approve the investment plan and monitor its compliance. Nevertheless, this does not alter the fact that another essential condition for the approval of the aid was compliance with the annual capacity limitation. The total amount of aid was approved in five separate Commission decisions, in four of which it is expressly mentioned that monitoring is necessary in order to ensure that the restriction of the shipbuilding capacity is respected. In addition, in four of these five decisions Germany is reminded that, in case of non-compliance with the capacity limitation, the Commission would be obliged to request reimbursement of the aid in question. In three of these decisions it is stated that the German Government had given an assurance that the

⁽¹³⁾ See footnote 7.

⁽¹⁴⁾ [1998] ECR II-3327.

⁽¹⁵⁾ See footnote 7.

yard would comply with its capacity limitation. Consequently, there is no doubt about the capacity limitation of 85 000 cgt being a condition for the approval of the aid and for the compatibility of the aid with the common market.

exceeding of its capacity limitation in 1996 from its capacity for 1997.

- (62) The second argument raised by both KWW and Germany is that the capacity gains due to productivity increases should be conceded to the yards. Capacity limitation and production limitation are different concepts and KWW was bound, not by a production limitation, but by a capacity limitation based on a limitation of technical capacity which allowed the yard to increase its productivity within the technically fixed parameters.
- (63) The Commission notes that KWW titled its production report for the first half of 1995, submitted to the Commission by Germany under cover of a letter dated 16 August 1995, 'Report on compliance with the capacity limitation'. It titled its report for 1996, submitted to the Commission by Germany under cover of a letter dated 17 February 1997, 'Production limitation by EU Commission'. Moreover, the Commission, in its letters of 18 and 19 November 1996 to Germany, requested the latter to inform the yards to comply strictly with their capacity limitations in 1996 and subsequent years.
- (64) In its letter of 3 March 1997 to Germany the Commission points out that KWW exceeded its capacity limitation slightly in 1996 and that the planned production for 1997 was also very close to the limit. It asks Germany to take the necessary measures to correct the situation. In its letter of 14 April 1997 to Germany the Commission once again asks Germany to intervene to see that the yard changes its production plan in order not to exceed its capacity limit.
- (65) In its letter to the Commission of 1 April 1997, Germany states that the Bundesanstalt für vereinigungsbedingte Sonderaufgaben (BvS) had asked KWW to respect its capacity limitation of 85 000 cgt when planning its production for 1997. As a result, KWW would submit a new plan for 1997 in which the capacity limit was respected. Further, in its letter of 6 June 1997 to the Commission, Germany explains that KWW's capacity in 1997 will be reduced by the amount of the slight excess in 1996, i.e. 92 cgt, so that in 1997 it would have a reduced capacity limit. Germany stressed that this was a non-recurring situation and, in general, division of capacity between different years to compensate for excess was not possible. This had been clearly explained to the yard as well. Germany also states that it had explained to the yard that even a slight exceeding of capacity limitations could not be accepted in the future and that KWW had committed itself to deducting the 92 cgt
- (66) Considering the above, the Commission notes that there is no doubt that KWW was fully aware of the nature and meaning of the capacity limitation of 85 000 cgt imposed on it.
- (67) The third argument advanced by both KWW and Germany was that the aid in fact received by KWW was less than the total amount of aid approved by the Commission. Only the amount of aid actually received should be taken as a basis for calculating the potential recovery.
- (68) The Commission notes that, in the case of the restructuring of KWW, the major part of the operating aid for loss compensation was non-cash aid transferred to the yard as assets at the time of privatisation and that KWW had indeed received these assets. The Commission continuously monitored the restructuring of the yard and twice a year until the end of 1995 (end of restructuring) received an auditor's report on the restructuring of KWW, the so-called 'spill-over report'⁽¹⁶⁾. The auditor's report of December 1995⁽¹⁷⁾ sets out in detail the aid received up to 31 December 1995. It shows that by 31 December 1995 the yard had received all other aid approved by the Commission, except that, instead of the approved amount of DEM 73 million of 'Wettbewerbshilfe', it had at that date only received DEM 62,5 million, that is DEM 10,5 million less 'Wettbewerbshilfe' than approved by the Commission.
- (69) The auditor's report on the actual use made of the restructuring aid as per end of 1996, which was submitted by Germany at the Commission's request on 30 June 1999, confirms the final losses relating to the restructuring. According to this report, the final amount of 'Wettbewerbshilfe' paid for loss compensation was indeed DEM 62,5 million.
- (70) Consequently, the Commission notes that KWW has received DEM 10,5 million less 'Wettbewerbshilfe' as operating aid approved for loss compensation than authorised by the Commission. The total amount of aid received by KWW is accordingly EUR 367,25 million
- ⁽¹⁶⁾ This obligation to submit the 'spill-over' reports is based on Article 10a(2)(d) of Directive 90/684/EEC. The last report submitted to the Commission covered the period until the end of 1995, that is until the restructuring of the yard was completed.
- ⁽¹⁷⁾ Arthur Andersen Wirtschaftsprüfungsgesellschaft Steuerberatungsgesellschaft mbH: Stellungnahme zu den Angaben der Kvaerner Warnow Werft GmbH in Zusammenhang mit bis zum 31. Dezember 1995 erhaltenen Beihilfen.

(DEM 734,5 million) of operating aid, EUR 237,45 million (DEM 474,9 million) of investment aid and EUR 13,5 million (DEM 27 million) of closure aid, or EUR 618,2 million (DEM 1 236,5 million) all told.

- (71) KWW's fourth argument is that the Commission must respect the principle of equal treatment in cases where it requires repayment of aid. It refers to the Commission decisions concerning MTW and Volkswerft⁽¹⁸⁾ and Elbwerft Boizenburg⁽¹⁹⁾.
- (72) As regards the fact that in the case of MTW the aid repayment was calculated on the basis of operating aid alone, the Commission notes that the two yards MTW and KWW are not directly comparable since their situation and the factors relating to their restructuring programmes are very different. The financing programmes of the two yards were structured differently, since in the case of MTW the new investments were financed mainly by credits. For this reason, the distortion of competition caused by the slight exceeding of the capacity limitation by 1 637 cgt in 1996 could be neutralised by the reduction of operating aid only. This is not so in the case of the restructuring of KWW. In addition, in the present case KWW has exceeded its capacity limitation by some 10% (= 8 862 cgt), which corresponds to the production capacity of half of a medium-sized container ship. With this order of magnitude, the investment aid is also covered by the excess so that in accordance with Article 6 of Directive 90/684/EEC, unlike in the case of MTW Schiffswerft GmbH, it is necessary also to include the investment aid in the aid calculation.
- (73) As regards the reduction of future production, the Commission notes that in the case of MTW it allowed the yard to compensate for its slight exceeding of its capacity limitation in 1996 the following year due to the exceptional circumstances that had caused this excess. The exceeding of the capacity limitation by 1 637 cgt in 1996 was caused by the fact that the size of the ship changed following a change in the ship's design required by the customer. This situation is of a very different nature from that in the present case, where KWW has in the Commission's opinion deliberately exceeded its capacity limitation by a very considerable amount.
- (74) As regards the value given to the cgt in the case of the reallocation of the capacity of the former Elbwerft Boizenburg yard, the Commission notes that here too the situation and the facts of the two cases are not directly comparable. In the case of the reallocation of the capacity of the closed Elbwerft yard to the other east German yards, the question was to establish whether the allocation of these capacities to the other east German

yards against payment of DEM 242 000 was to be considered aid. Consequently, the case concerned assessing the compensation for allocation of capacities. The present case, on the other hand, concerns calculation of the amount of aid that needs to be reimbursed owing to the exceeding of the capacity limitation. Consequently, the criterion in the present case is not the value of the capacity as in the case of reallocation, but the total amount of aid received. Since, moreover, in this case the facts are not comparable, there is no breach of the principle of equal treatment.

- (75) The fifth point raised by KWW is that, if the Commission were to consider part of the aid incompatible with the common market, the interest rate applicable to the repayment of aid should be calculated from the time the alleged breach began, i.e. from the time the aid was subsequently rendered incompatible.
- (76) Pursuant to Regulation (EC) No 659/1999 the Commission is required to order the recovery of incompatible, unlawful aid. The Commission notes that, according to Article 14(2) of Regulation (EC) No 659/1999, interest is to be payable from the date on which the unlawful aid was at the disposal of the beneficiary. It is the opinion of the Commission that the breach of an essential condition for the approval of the aid leads automatically to the incompatibility of the aid with the common market throughout the period during which the aid recipient was bound by this condition – in this case the capacity limitation.
- (77) The Commission stresses that four of the five Commission decisions approving the aid explicitly state that, if the capacity limitation is not complied with, all aid is to be paid back. In the Commission's opinion, this implies that a breach of an obligation to comply with the capacity limitation abolishes retroactively the legal basis for the granting of the aid. For this reason this case is to be considered similar to a case where the unlawfulness of the aid exists from the beginning and therefore it is to be dealt with accordingly.
- (78) For the reasons stated in points 35 to 77 above, the Commission concludes that the part of the aid of EUR 618,2 million (DEM 1 236,4 million) granted to Kvaerner Warnow Werft and approved by the Commission in four tranches by its decisions communicated to Germany by letters of 3 March 1993 (N 692/D/91), 17 January 1994 (N 692/J/91), 20 February 1995 (N 1/95), 18 October 1995 (N 637/95) and 11 December 1995 (N 797/95) which corresponds to the exceeding of the annual capacity limitation of 85 000 cgt by 8 862 cgt is no longer compatible with Article 87(3)(e) of the EC Treaty. As no other basis of compatibility exists or has indeed been invoked by Germany or KWW, this part of the aid is incompatible with the common market pursuant to Article 87(1) of the EC Treaty.

⁽¹⁸⁾ See footnote 7.

⁽¹⁹⁾ See footnote 8.

(79) The Commission has considered various options in determining the amount of the incompatible aid and has come to the following conclusion.

1995 as an essential condition for approval of a total of EUR 623,45 million (DEM 1 246,9 million) of aid in accordance with Directive 90/684/EEC, as amended by Directive 92/68/EEC, and hence for the compatibility of the aid with the common market pursuant to Article 87(3)(e) of the EC Treaty.

(80) The Commission notes that the duration of KWW's annual capacity limitation of 85 000 cgt is 10 years. It has calculated the amount to be recovered by using the proportional approach. Consequently, the Commission has calculated the proportion of the excess of 85 862 cgt in relation to the total of the capacity limitation during the 10-year period (85 000 cgt), which gives the proportion of 1,04% as the amount of unlawful aid.

(85) Since it is the opinion of the Commission that the scale of the exceeding of the capacity limitation determines the scale of distortion of competition in question, the Commission considers that the amount of aid which corresponds to the exceeding of the capacity limitation of 85 000 cgt by 8 862 cgt in 1997 no longer fulfils the conditions of Article 87(3)(e) of the EC Treaty and is therefore incompatible with the common market pursuant to Article 87(1) of the EC Treaty.

(81) Consequently, the amount of incompatible aid corresponds to the proportion of the excess in relation to the total capacity limitation calculated on the basis of operating aid of EUR 367,25 million (DEM 734,5 million) and investment aid of EUR 237,45 million (DEM 474,9 million), i.e. EUR 604,7 million (DEM 1 209,4 million) in total, paid to KWW. Consequently, the amount of aid which is considered incompatible with the common market on the basis of KWW's exceeding of its capacity limitation in 1997 is EUR 6,3 million (DEM 12,6 million). This aid must be recovered.

(86) The aid amount of EUR 6,3 million (DEM 12,6 million) is therefore incompatible with the common market and must be recovered. The sum to be recovered must bear interest from the date on which it was made available to the recipient until its actual recovery,

(82) The Commission notes that in its decision to initiate the procedure in this case⁽²⁰⁾ it stated that the closure aid of EUR 13,5 million (DEM 27 million), approved by the Commission in its decision communicated to Germany by its letter of 3 March 1993, has been paid to finance the redundancy pay and other social measures in favour of former workers. As the yard has passed on these monies to its former employees, the Commission will not seek the recovery of this amount. For this reason the closure aid is not included in the above calculation.

HAS ADOPTED THIS DECISION:

Article 1

Aid which Germany has implemented in favour of Kvaerner Warnow Werft GmbH amounting to EUR 6,3 million (DEM 12,6 million) is incompatible with the common market pursuant to Article 87(1) of the EC Treaty.

(83) The Commission stresses that the sums to be recovered must bear interest from the date on which they were made available to the recipient until their actual recovery. The recovery must be effected in accordance with the procedures of national law and the interest must be calculated on the basis of the reference rate used for calculating the grant equivalent of regional aid.

Article 2

1. Germany shall take the necessary measures to recover from the recipient the aid amounting to EUR 6,3 million (DEM 12,6 million).

VI. CONCLUSIONS

(84) The Commission concludes that in 1997 KWW exceeded its annual capacity limitation of 85 000 cgt by 8 862 cgt. This annual capacity limitation was set by the Commission in its decisions communicated to Germany by letters of 3 March 1993, 17 January 1994, 20 February 1995, 18 October 1995 and 11 December

2. Recovery shall be effected without delay and in accordance with the procedures of German law, provided that they allow the immediate and effective execution of the Commission's decision. To this end and in the event of proceedings before the German courts, Germany shall take all necessary steps which are available under its law, including provisional measures, without prejudice to Community law.

3. The sum to be recovered shall bear interest from the date on which it was made available to the recipient until its actual

⁽²⁰⁾ See footnote 4.

recovery. Interest shall be calculated on the basis of the reference rate used for calculating the grant equivalent of regional aid.

Article 4

This Decision is addressed to the Federal Republic of Germany.

Article 3

Done at Brussels, 15 February 2000.

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

For the Commission
Mario MONTI
Member of the Commission
