COMMISSION DECISION

of 8 July 1999

on state aid implemented by Germany in favour of Kvaerner Warnow Werft GmbH

[notified under document number C(1999) 2266]

(Only the German text is authentic)

(Text with EEA relevance)

(1999/675/EC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Communities, 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 Directive 90/684/EEC [1] of 21 December 1990 on aid to shipbuilding and Council Directive 92/68/EEC [2] of 20 July 1992 amending Directive 90/684/EEC on aid to shipbuilding,

Having called on interested parties to submit their comments pursuant to the provisions cited above [3] and having regard to their comments,

Whereas:

I. **Procedure**

(1) By receiving on 4 September 1998 the regular monitoring report of 30 June 1998 on the shipbuilding capacity of Kvaerner Warnow Werft GmbH (hereinafter referred to as KWW), the Commission was informed that KWW would exceed its annual newbuilding capacity limitation of 85 000 cgt in both 1998 and 1999. The foreseen production indicated in the report was 106 945 cgt for 1998 and 104 560 cgt for 1999. The Commission services sent a letter to the German authorities on 25 September 1998 requesting them to take the necessary measures to make the undertaking comply with the capacity limitation and to inform the Commission of the contents and the result of these measures. Germany replied with its letter dated 20 October 1998.

(2) By letter dated 16 December 1998, the Commission informed Germany of its decision to initiate the procedure laid down in Article 93(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* [4]. The Commission invited interested parties to submit their comments on the matter.

(4) The Commission has received comments from interested parties. It has forwarded them to Germany, which was given the opportunity to react. Germany submitted its comments with a letter dated 18 February 1999.

(5) The Commission services conducted a regular monitoring visit to the yard with an external expert on 14 January 1999. It was discovered that the actual production of KWW in 1998 was much greater than indicated in the monitoring report of 30 June 1998. The Commission requested Germany to comment on the findings of the visit in a letter dated 4 February 1999. Germany submitted its comments with a letter dated 18 February 1999.

(6) On the further request of the Commission with the letter of 1 March 1999, Germany confirmed the findings of the Commission as regards the production figures of 1998 in its letter of 19 March 1999 and indicated a revised production figure of 122 414 cgt.

(7) The Commission services conducted a further monitoring visit to the yard on 25 March 1999 with an external expert in order to verify the amount of excess production in 1998. It was confirmed that the production of KWW in 1998 was 122 414 cgt and its production in 1997 was 93 862 cgt, also exceeding the capacity limitation. The foreseen production for 1999 was indicated to be 109 134 cgt.

(8) This decision concerns only the exceeding of KWW of its capacity limitation in 1998. The Commission intends to open the procedure pursuant to Article 88(2) of the EC Treaty as regards the exceeding of the capacity limitation in 1997. This opening of procedure is subject to a separate Commission decision.

---

(1) OJ L 380, 31.12.1990, p. 27. Directive as last amended by Directive 94/73/EC (OJ L 351, 31.12.1994, p. 10).
(2) OJ L 219, 4.8.1992, p. 54.
(3) OJ C 41, 16.2.1999, p. 23.
(4) OJ C 41, 16.2.1999, p. 23.

II. **Detailed description of the aid**

(9) The Commission approved restructuring aid in accordance with Directive 90/684/EEC on aid to shipbuilding and Directive 92/68/EEC amending Directive 90/684/EEC on aid to shipbuilding, to allow the comprehensive restructuring of the former East German shipyard Kvaerner Warnow Werft GmbH with its decisions communicated to Germany with 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). The aid was approved subject to a capacity restriction of 85 000 cgt per year, the compliance of which the Commission monitors.

(10) The shipyard Warnow Werft, situated in Rostock-Warnemünde in Mecklenburg-Vorpommern, Germany, was sold by the Treuhandanstalt to the Norwegian industrial group Kvaerner a.s. in October 1992. According to paragraph 27 of the sales contract, sent to the Commission for scrutiny and approval by Germany with a letter dated 30 October 1992, Kvaerner undertook until 31 December 2005, with regard to Warnow yard, not to exceed its annual building capacity of 85 000 cgt unless the requirements based on the EC Treaty became less restrictive.

(11) Directive 92/68/EEC amending Directive 90/684/EEC contains a derogation from the rules on operating aid applicable to other Community yards for the shipyards in the former GDR 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 Directives 90/684/EEC and 92/68/EEC. 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 — 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).

(12) The aid was approved on the condition that the yearly newbuilding capacity does not exceed 85 000 cgt. The capacity limitation is included both in the notified sales contract (paragraph 27) concerning the privatisation of Warnow Werft and in the above mentioned Commission decisions authorising the aid. In the Commission decisions communicated to Germany by the Commission letters of 17 January 1994, 20 February 1995, 18 October 1995 and 11 December 1995 it was clearly stated that the Commission will be obliged to demand the recovery of the aid if the restriction of capacity is not complied with.

(13) In the opening of 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 regular monitoring report of 30 June 1998 on the shipbuilding capacity of Kvaerner Warnow Werft GmbH, the yard would exceed its annual newbuilding capacity limitation of 85 000 cgt in 1998, by producing 106 945 cgt and in 1999, by producing 104 560 cgt. This information indicated that an essential condition under which the aid was approved, was not being complied with.

(14) For this reason the Commission doubted whether the aid approved by the Commission to allow the restructuring and the continued operation of the former East German shipyard Warnow Werft by its decisions communicated to Germany with 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 any longer compatible with the common market.

III. **Comments from interested parties**

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

(16) The comments of KWW concentrate on five main arguments. The first argument of KWW is that an annual production limitation of 85 000 cgt was never imposed on it. 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 at 31 December 1995 and that certain lay-out-related criteria (bottle-necks) of the yard which limit the production should not be changed. These bottle-necks in the course of production were considered decisive for the production possibilities of the yard.

(17) Only in its decision of 18 October 1995 does the Commission refer for the first time to the production of the yard as follows: 'Further monitoring will be necessary to ensure, as evidenced by the two production monitoring reports received so far by the Commission, that the actual and planned production respects the capacity limit. The German Government gave an undertaking that the yard will comply with the capacity limitation'. According to KWW, the first sentence implies that during the capacity limitation the lay out of the yard cannot be changed. That sentence also mentions for the first time the actual and planned production that shall respect that capacity limit. KWW understood at the time the undertaking of the German Government, according to which the yard will comply with the capacity limitation, in a sense that only the compliance with the investments plans is ensured. In any case, this first reference to the monitoring of production is not worded as a condition.

(18) Consequently, according to the first two Commission decisions the concept of capacity limitation means that the lay out and facilities of the yard should be designed in a certain way and that they could not be changed. Such a construction of the yard leads to limited production of the yard. In addition, it is not correct that the capacity limitation of 85 000 cgt was a condition for the approval of the aid. A condition for the approval was only that the approved and examined production facilities would be kept in accordance with the investment plans.

(19) Secondly, KWW argues that according to the wording of Article 10a(2)(c) of Directive 90/684/EEC [5] and the Commission decisions approving the aid, the capacity gains due to productivity increases above the level foreseen by the Commission expert as until the end of the restructuring period, should be possible and permitted to the yards.

(20) Article 10a(2) of the Directive 90/684/EEC lays down conditions for the compatibility of operating aid granted to former GDR shipyards with the common market. Its provision (c) provides that the German government shall carry out a genuine and irreversible reduction of capacity of 40 % net of the capacity existing on 1 July 1990.

(21) The Court of First Instance has interpreted the notion of 'irreversibility' in its judgment of 22 October 1996 in Case T-266/94 [6], Skibsvaerfstforeningen and others v. Commission, as meaning that, with the Commission's agreement, capacity may be increased five years after the end of restructuring and in the absence of such agreement, it may be increased ten years thereafter. In the opinion of KWW this interpretation means that the production facilities which were agreed and defined together with the Commission and the technical bottle-necks approved by the Commission, as well as the production bottle-necks resulting from them can only be changed after the defined periods of time. According to KWW the Court did not consider and decide on the legal situation where the productivity is increased due to the general economic and technical progress so that capacity gains are created on top of the existing, by 40 % reduced production capacities.

(22) It is the opinion of KWW that irreversible reduction of capacity in the meaning of Article 10a(2)(c) is only to be understood as a prohibition to change the approved investment arrangements and not as a limitation of production possibilities of the yard.

(23) According to KWW, capacity limitation and production limitations are different concepts that should not be equated. Whereas production limitation concerns the product, the production of which is limited, the capacity limitation is a more open concept, which allows, with the same facilities, a higher production when productivity is increased due to general economic and technical progress. Especially when looked at in the time period of 10 years, it is possible that the productivity develops in a way which allows that more can be produced with the same facilities than at the beginning of this period. Using pre-prepared parts produced by subcontractors with delivery 'just in time' has lead in the last couple of years to productivity increases world-wide in the shipbuilding sector. In 1995 this progress was not yet available to KWW, which has after this date increased its productivity through internal reforms and its own efforts.

(24) The production capacity of KWW at 31 January 1995 was established in 1992 by an independent expert commissioned by the Commission (A. & P. Appledore International Ltd) who concluded that the yard would achieve a good or even very good European productivity level by 31 December 1995.

[5] As amended by Directive 92/68/EEC.

[6] Case T/266/94, Skibsvaerftsforeningen and others v. Commission, ECR 1996 II, p. 1399.

(25) In 1992 KWW could understand and have in fact understood the Commission approval of the aid in a sense that capacity gains based on increased productivity above the good/very good European productivity level can benefit KWW. This assumption was based among others on the following:

— the wording of the Commission decisions approving the aid does not mention production limitation;

— the Commission commissioned an independent expert to examine the investment plans and the production volumes of the yard at 31 December 1995 under certain productivity assumptions, which would not have been necessary if the Commission intended to impose a production limitation;

— Germany explained in 1993 that it will ensure that the investment plans for the yards would not be changed, which would not have been necessary if the Commission intended to impose a production limitation from 1995 onwards. The capacity gains following the increased productivity when maintaining the approved investment and construction plans were not subject to the 'capacity limitation'.

(26) In its third argument, KWW explains that the high production volume of KWW in 1998 is caused by acceptance of offers to build three large 5 000 TEU container ships and a drilling rig. KWW acquired these offers in competition with Asian competitors; no other European yard applied for these offers. This indicates that KWW's exceeding of its production limitation, as the Commission sees it, does not as such mean a disadvantage to other yards. Moreover, carrying out these offers would mean that KWW will not compete in the European market and bid for contracts on products, which other European yards build for a time period of almost two years. The switching of KWW to a special market segment in which other European yards were not active in fact promotes the European state aid policy and should not be punished.

(27) The fact that KWW proves its competitiveness on the world market and thereby improves the position of the EU-shipbuilding industry without thereby impairing in any apparent way intra-Community competition, indicates that this is not a behaviour that would be incompatible with the common market. As far as other European yards do not compete with KWW for certain specific contracts, like in this case, there is no Community interest at stake. On the contrary, the behaviour of KWW fortifies the position of the EU-shipbuilding industry as a whole in the world market.

(28) The fourth point raised by KWW in its comments is that the capacity limitation, if it is seen as production limitation, should be considered as an average production of several years. According to KWW, the three large container ships (production with cgt-value) and the drilling rig (production with no cgt-value) cannot be built in parallel because of the time needed for occupation of the dock for both projects. Consequently, the production with cgt-value will remain considerably under 85 000 cgt during the construction of the drilling rig whereas it will exceed this limit during the previous years. On the average, anyway, the limit of 85 000 cgt will not be exceeded during these years. This technical aspect was not taken into consideration when the Directive was adopted and the decisions on approval of the aid were taken. For this reason it seems appropriate to consider the capacity limitation, if it is seen as production limitation, as a long-term average production. This would take into account the fact that KWW, as a recipient of aid, entered successfully into competition in the world market and also entered into a new market segment, thereby proving that it has become a competitive yard. This would be in line with the European state aid policy and its objectives. Considering the capacity limitation as an average of several years would also be meaningful due to the changed economic situation and technical requirements in the shipbuilding sector and would correspond to the reality and circumstances of this sector much better than annual limitation.

(29) The fifth argument of KWW is that there is no legal basis for laying down the maximum capacity limit for individual yards. The German Government is, according to Article 10a(2) of the Directive 90/684/EEC, only obliged to carry out, before 31 December 1995, a genuine and irreversible reduction of capacity of 40 % net of the capacity existing at 1 July 1990. This has lead to the maximum capacity of 327 000 cgt for all yards active in the new German *Länder* per 31 December 1995. KWW refers to the already abovementioned judgment of the Court of First Instance of 22 October 1996 [7] and concludes that according to this judgment, allocation of the capacity between the East German yards is purely an internal German matter that cannot be made a prerequisite for permissibility of a decision on approval of aid. The Commission did not qualify this matter as such in its decisions either.

(30) Denmark explains in its comments that in the context of adoption of Directive 92/68/EEC Germany committed itself to reduce in a genuine and irreversible way the shipbuilding capacity of yards situated in former East Germany to 327 000 cgt. The state aid now in question was granted to KWW under a condition that it complies with an annual capacity limitation of 85 000 cgt.

[7] Case T/266/94, Skibsvaerftsforeningen and others v. the Commission, ECR 1996 II, p. 1399.

(31) Since 1990 the global shipbuilding capacity has increased much more than originally anticipated, which is mainly due to increase of capacities of Japanese and Korean yards. This has led to a world-wide overcapacity and a considerable fall in prices in the world market. This development has affected also Denmark strongly so that many yards have been obliged to cut their activities in a way which has led to a considerable loss of workplaces in the sector. This development took place in Denmark without any state aid having being paid in this context.

(32) It is emphasised that the production programmes of German shipyards are comparable with Danish shipyards since these are more or less identical as regards location, state of technological development and competition in the world market. It is noted that three TEU 5 000 container ships that have partly caused the exceeding of the capacity limitation are the kind of ships also being built by Danish yards. The actual contract won by KWW has therefore had a direct impact on the market in which also Danish yards operate. The considerable amount of aid received by KWW has thus created a competitive advantage for the German yards and affected the competitiveness of Danish yards.

(33) The Commission states in the opening of the procedure that according to Germany, the exceeding of capacity shall be compensated in years 2000 and 2001 when the building of the drilling rig will reduce the possibilities of KWW to bid for new contracts. Denmark supports the position of the Commission according to which the existing rules do not foresee any possibility of relaxing the capacity limitation and that such flexible application of them is thereby not possible. Making concessions in this respect would mean a danger of creating a constantly increasing production and the capacity limit exceeding production without ever compensating it with lower production.

(34) Further, it referred to the German comments on the opening of the procedure according to which the capacity limitations should be re-examined. The German Government stipulates that in 1992 the development of the world capacity was not foreseen and consequently the flexible application of the existing limitations is the only way to increase the international competitiveness of former East German yards. Denmark states that the international development with a considerable increase of capacity above all in the Asian market makes it necessary to consider the maintenance of the existing rules. Nevertheless, this is a problem that concerns the whole European shipbuilding industry and therefore it should not be solved on the basis of problems of one individual yard. It is essential that the EU actively seeks for a global solution to the capacity problem since this is the only way the EU can maintain its credibility internationally. Unilateral increasing of capacity of yards in certain regions would not only be harmful for European shipbuilding but would also destroy the possibilities to achieve results in the international forum in the long run.

(35) Both the Federation of Danish Industry and the Association of Danish Shipbuilders state in their comments that they support fully the Commission position and remarks as expressed in the opening of the procedure.

(36) In addition, the Association of Danish Shipbuilders explains in its comments that the container ships being built by KWW and partly causing the excess are ships also being built by Danish yards. The contract of KWW has consequently a direct impact on the market, which is very important for Danish yards. It also refers to the development since 1992 which has led to closure of many yards and to a loss of a considerable amount of jobs in the sector. Therefore it is decisive for the European yards that effective steps to reduce the negative effects of the overcapacity are taken globally. Since such are not possible without an active support from the EU, it is important that the EU maintains its international credibility. An international initiative to reduce overcapacities would not be coherent with a simultaneous accepting of a considerable exceeding of the EU's own capacity limitation, like in this case.

(37) According to the Association of Danish Shipbuilders, the capacity limitations of the former East German yards are, among other factors, a basis for investment and production planning of other yards. Consequently, the dispositions of other yards are affected by the exceeding of the capacity limitations. These limitations should stay in place ten years and a flexible application of them was never foreseen.

(38) The German Government stipulates that the capacity limitation should be re-examined in order to be able to react to the special situation in world shipbuilding, the unforeseeable increase of productivity. The Association of Danish Shipbuilders comments on this point that the considerable amounts of state aid were supposed to contribute exactly to increased productivity. If the East German yards have not become internationally competitive under the conditions laid down in 1992 and in spite of productivity increases exceeding all expectations, the restructuring of the yards must be considered as failed. Yet this should not lead to the conditions being adapted to the disadvantage of the rest of the European shipbuilding industry.

(39) The German Government also explained in the opening of the procedure that it was necessary for KWW to accept the contracts that have led to the excess in order to secure jobs and to be able to conduct business. The Association of Danish Shipbuilders notes that a state based on the rule of law cannot refrain from its legal obligations only on the grounds that economic advantage is gained or economic loss avoided. Accepting this argument of the German Government would mean that each Member State could grand state aid and even contrary to Community law, if it considered this necessary under these circumstances.

(40) The German Government has known and accepted since 30 June 1998 that KWW would exceed its capacity limitation both in 1998 and 1999. There was a lot of time to take the appropriate measures to change the production plans to avoid the exceeding of the capacity limitation. Yet nothing was done in due time.

(41) According to the Association of Danish Shipbuilders, it is clear that both the German Government and KWW are bound to respect the capacity limitation. The maximum capacity limit was set by the Council as a condition for approval of the aid and according to Directive 92/68/EEC. The Commission shall monitor that the capacity limitations set for the former East German yards are respected. In this context the Commission established in 1997 that two yards had exceeded their capacity limitations in 1996, the MTW yard by 1 637 cgt and KWW by 92 cgt. Consequently, a corresponding reduction of production was imposed on both yards in 1997. Therefore there is no doubt about the fact that the management of KWW knew very well that it cannot without any consequences accept orders that would lead to exceeding of the capacity limitation.

IV. **Comments from Germany**

(42) Germany concentrates in its comments on four main arguments. Firstly, it states that the method of cgt-calculation served originally the purpose of collecting national data comparable in economic terms. It is an inadequate method for measuring a capacity limitation of an individual yard. This becomes particularly evident when the production of KWW is looked at more closely. To the disadvantage of the yard, the so-called serial-effect is not taken into account in the conventional cgt-calculation. Building sister-ships uses in fact less capacity than calculated, since less working hours are needed to build the second, similar ship. In the years 1997 to 1999 KWW built among others two series of ships and altogether the serial-effect reduced the actual working hours in a way, which reduced the cgt-values considerably. In addition, in the context of the restructuring a considerable amount of work was sub-contracted. This results in 34 000 cgt having in fact being produced by the sub-contractors and not by the yard.

(43) Secondly, Germany contests the Commission's observation that an annual capacity limitation of 85 000 cgt was the main condition for approval of the aid. Germany explains that the basis of the approval was much more the restructuring concept linked with the privatisation, which is meanwhile successfully carried out by KWW. The successful execution of the restructuring has led to a considerable increase of productivity, which in general will also be achieved worldwide by other yards.

(44) Germany stipulates that in its decisions on releasing the tranches of aid, the Commission only imposed on the yard restrictions as regards the layout of the new yard. The Commission examined which new building capacity according to the restructuring plans was possible for the new yard. The expert opinion that the Commission commissioned showed that the capacity of the future yard would not exceed 85 000 cgt. The yard was constructed according to these plans and its layout has not been changed afterwards. The unforeseeably high increase of productivity during the last couple of years cannot change this assessment.

(45) An exclusively formal position as regards the capacity limitation would mean, taking into account the unforeseeably high increase in productivity, that the yard could not operate the whole year. An artificial idle running of the undertaking would question the economic success of the restructuring. Due to the productivity and the production mix (large container ships), a temporary exceeding of the capacity limitation is unavoidable, but this excess will be equalised during the period of several years.

(46) The third argument of Germany is that the successful bidding of KWW for the offshore contract (drilling rig) has caused the temporary exceeding of capacity limitation, since building the rig would block the dock for a long time and the ships under construction would therefore need to be built ahead of schedule. This exceeding of the capacity limitation, though, has no negative effect on the European shipbuilding market since KWW has achieved the offshore contract without any European competition. In addition, the capacity limitation concerns only the shipbuilding sector and not offshore business and therefore the Commission's reference to the possibility of other yards to penetrate into the offshore market is irrelevant. The application of provisions as regards the shipbuilding sector cannot be extended to other economic sectors only on the basis of assumed or factual behaviour of other participants on the market.

(47) The fourth argument of Germany points out that as laid down in its letter of 23 December 1998 to the Commission, KWW was allocated an additional capacity of 22 000 cgt for year 1998, so that, taking into account the serial-effect, KWW will not exceed the total capacity of 107 000 cgt allocated to it for 1998. As a countermove, KWW was earlier demanded by *Bundesveranstalt für vereinigungsbedingte Sonderaufgaben* (hereinafter referred to as BvS) to repay part of the aid granted to it for fresh equity capital and investments in the context of the privatisation. Consequently, KWW paid on 23 December 1998, without recognising thereby any legal obligation, a partial amount of DEM 12 million to a blocked account until the final Commission decision.

V. **Assessment**

(48) The Commission notes that the aid approved in compliance with the provisions of Council Directive 90/684/EEC on aid to shipbuilding and Directive 92/68/EEC amending Directive 90/684/EEC is considered as being 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 above Directives are respected. Should the conditions for approving the aid not be complied with, the aid falls under the general prohibition of 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.

(49) Directive 92/68/EEC amending Directive 90/684/EEC contains a derogation from the rules on operating aid applicable to other Community yards for the shipyards in the former GDR in order to create the possibility for these yards to undergo urgent and comprehensive restructuring and to become competitive. According to Article 10a(2) of Directive 90/684/EEC as amended by Directive 92/68/EEC, 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 an annual reporting obligation 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.

(50) Investment aid is regulated in Article 6 of Directive 90/684/EEC and closure aid in its 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.

(51) In the Commission proposal for Council Directive 92/68/EEC providing changes to the Seventh Directive on aid to shipbuilding, it is stated that taking into account the impact of the restructuring on conditions of competition in the Community, 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 possibility of giving extra aid above the current ceilings has to be met by accompanying restructuring and capacity reductions.

(52) 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 amount therefore to 327 000 cgt. Germany distributed this total capacity to the five remaining new building yards. In this context the capacity for KWW was set at 85 000 cgt [8].

(53) 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 foreseen for KWW before 1 January 2006. It is noted that paragraph 27 of the privatisation contract of Warnow Werft, titled '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 of 85 000 cgt unless the requirements based on the EEC Treaty are less restrictive from time to time.'

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

---

[8] The Commission recalls that the Court of First Instance confirmed the importance of the allocation of capacities to the individual yards for the legality of the aid decision in case T-266/94 of 22 October 1996 (paragraphs 151 to 198).

(55) 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 a letter of 3 March 1993 (N 692/D/91). In this decision it is stated that although the independent technical study mandated by the Commission had established that the new building capacity of Warnow Werft is 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 is deemed necessary during the implementation of the investment programme in order to ensure that the reduction of the shipbuilding capacity is carried out.

(56) The second decision was communicated to Germany in the 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 the shipbuilding capacity is respected. In addition, the German Government was reminded of the fact that non-compliance with the capacity limitation would oblige the Commission to request reimbursement of all aid.

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

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

(59) 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 taken into the privatisation contract of Warnow Werft, 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 for the reimbursement of all aid.

(60) In the monitoring visit to the yard on 24 March 1999 it was confirmed that the production of KWW was 122 414 cgt in 1998. The production figures were discussed with the management of the yard in the presence of German authorities and these figures, as being based on the cgt-calculation method, were not contested by any of the parties. Consequently, the figures are considered as confirmed and incontestable. This means that KWW has exceeded its annual capacity limitation of 85 000 cgt by 37 414 cgt in 1998.

(61) The Commission notes that the overall capacity limitation set by Article 10a of Directive 90/684/EEC for all former East German yards is 327 000 cgt. According to Article 10a(2)(c), the reduction of the overall capacity is to be 'genuine and irreversible'. The Court of First Instance has confirmed the Commission's interpretation of the notion of 'irreversibility' in its judgment of 22 October 1996 [9] as meaning that, with the Commission's agreement, capacity may be increased five years after the end of restructuring and in the absence of such agreement, it may be increased ten years thereafter. The Court stated that this notion shall be interpreted in the light of other provisions of Directive 90/684/EEC, such as its Article 7. Since the restructuring ended end 1995, the period of this capacity limitation is until end 2000 and 2005 respectively.

(62) Germany allocated the overall capacity of 327 000 cgt between the five former East German yards as follows: KWW — 85 000 cgt; Volkswerft Stralsund — 85 000 cgt; MTW-Schiffswerft — 100 000 cgt; Peene-Werft 35 000 cgt and Elbewerft Boizenburg — 22 000 cgt. According to the monitoring report dated 22 February 1999 the production of Volkswerft was 84 805 cgt in 1998 and that of MTW-Schiffswerft 99 997 cgt. According to the results of the monitoring visit to Peene-Werft on 26 March 1999, the production of this yard was 34 037 cgt in 1998. As regards Elbewerft Boizenburg, the yard was closed end 1997. Germany informed the Commission with its letter of 17 November 1998 that they withdrew their notification as regards restructuring aid to the yard and closed it permanently. It is noted that Elbewerft Boizenburg produced 0 cgt in 1998. Consequently, the production of yards other than KWW in 1998 amounts to 218 839 cgt.

(63) The Commission notes that the total unused capacity of other yards within their respective capacity limits was 23 161 cgt. Yet KWW has exceeded its annual capacity limitation of 85 000 cgt by 37 414 cgt in 1998. Consequently, due to the considerable exceeding by KWW of its capacity limitation in 1998, Germany has exceeded the overall capacity limitation of 327 000 cgt set for all former East German yards by 14 253 cgt in 1998.

---

[9] Case T/266/94, Skibsvaerftsforeningen and others v. the Commission, ECR 1996 II, p. 1399.

(64) According to the judgment of the Court of Justice of 18 May 1993 in joined cases C-356/90 and C-180/91 (Belgium/Commission) [10], the compliance with the ceiling set pursuant to the provisions of the Council Directive setting the criteria for derogation from the prohibition of aid in Article 92 of the Treaty is the essential condition for aid to shipbuilding to be regarded as compatible with the common market and, where that ceiling is exceeded, the aid in question is automatically incompatible. In this context the Commission's role is limited to checking that that condition has been observed.

(65) The Commission notes that an essential condition for the approval of aid, that is the 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, has not been respected in 1998. In addition, the Commission also notes that as regards 1998, Germany was in breach of Article 10a(2) of Council Directive 90/684/EEC laying down the overall capacity limitation for all former East German yards as a condition under which operating aid for the shipbuilding and ship conversion activities may be considered compatible with the common market.

(66) The Commission notes that this decision addresses firstly, the breach of the individual capacity limitation of 85 000 cgt and secondly, the breach of overall capacity limitation of 327 000 cgt. The Commission stresses that the individual annual capacity limitation of 85 000 cgt was set in the five Commission decisions approving the aid as a condition for the compatibility of that aid with the common market. This annual limit was also acknowledged by Kvaerner as part of the privatisation contract and its compliance is both subject to monitoring by the Commission and to an annual reporting obligation by the yard. Moreover, the state aid concerned in this case is the lawfulness of the very aid approved by the Commission in its five decisions under the condition of the annual capacity limitation and the distortive effect of this aid on the shipbuilding sector.

(67) For these reasons the Commission considers the considerable breach of the individual annual capacity limitation of 85 000 cgt as the main subject of this decision and therefore the consequences of exceeding the capacity limitation are decided on this basis. The exceeding of the overall capacity limit is a subsidiary consequence, even if a serious one, of the exceeding of the individual limit.

(68) The objective of Council Directive 92/68/EEC was to allow the urgent and comprehensive restructuring of the shipbuilding industry in 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 thereby for the compatibility of the aid with the common market, is not complied with, the aid is rendered incompatible with the common market.

(69) The Commission notes that in its decision concerning aid to MTW-Schiffswerft and Volkswerft Stralsund [11] 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. Consequently, the consequences of the excess were 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.

(70) The Commission notes that the purpose of the notion on the recovery of aid in case of non-respect of the conditions set for the approval of aid in the Commission decision is to remind the recipient of the aid of its obligation to comply with these conditions and to make the consequences of the non-compliance clear. The aim and actual effect of recovery of aid is to seek to re-create the status quo *ex-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 thereby 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 and Volkswerft Stralsund [12], the scale of exceeding the capacity limitation indicates the scale of distortion of competition in question.

(71) 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.

(72) The Commission notes that aid which is incompatible with the common market shall be recovered.

(73) The Commission notes that in its decisions communicated to Germany with letters of 17 January 1994, 20 February 1995, 18 October 1995 and 11 December 1995 it stated that the Commission will be obliged to demand the recovery of all aid if the restriction of capacity is not complied with.

[10] ECR 1993 I, page 2323.

[11] OJ C 344, 14.11.1997, p. 2.

[12] OJ C 344, 14.11.1997, p. 2.

(74) Following the reasoning in the judgment of the Court of First Instance in case T-140/95 of 15 September 1998 ([13]) (Ryanair/Commission), it should be examined whether by declaring only the amount of aid, which corresponds to the exceeding of the capacity limitation, as incompatible with the common market and thereby subject to recovery, the Commission departs from the scope of its previous decisions on granting the aid in which it stated that the Commission will be obliged to demand the recovery of all aid if the restriction of capacity is not complied with.

(75) The Commission notes that the aim and actual effect of recovery of aid is to seek to re-create the status quo *ex-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 ([14]), the scale of exceeding the capacity limitation indicates the scale of distortion of competition in question.

(76) Since the amount of aid which corresponds to the excess 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 the competition, whereby the purpose and actual effect of the recovery are fulfilled.

(77) Therefore the Commission considers that by declaring the amount of aid, which corresponds to the exceeding of the capacity limitation, as 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 aim, purpose and effect of those conditions, the seeking to annul the negative effect on competition.

(78) Therefore, the Commission 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 with its decisions communicated to Germany with 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 37 414 cgt, is no longer compatible with Article 87(3)(e) of the EC Treaty and therefore incompatible with the common market pursuant to Article 87(1) of the EC Treaty.

(79) 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 a condition for the approval was only that the approved and examined production facilities would be kept in accordance with the restructuring programme and investment plans.

(80) The Commission notes that both the compliance with the investment programme and respecting the capacity limitation are 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 change the fact that another essential condition for the approval of the aid was the 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 of the fact 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 ensured that the 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.

(81) The second argument raised by KWW in its comments is that according to the wording of Article 10a(2)(c) of Directive 90/684/EEC and the Commission decisions approving the aid, the capacity gains due to productivity increase above the level foreseen by the Commission expert as until the end of the restructuring period, should be allowed to the yards. Capacity limitation and production limitation are different concepts and KWW did not understand the limitation as a production limitation.

(82) The Commission notes that KWW had titled its production report of first half of 1995, submitted to the Commission by Germany with its letter of 16 August 1995, as 'Report on respecting the capacity limitation' (*Bericht über Einhaltung der Kapazitätsbeschränkungen*). It titled its report of 1996, submitted to the Commission by Germany with its letter of 17 February 1997, as 'Production limitation by EU-Commission' (*Produktionsbeschränkung durch EU-Kommission*). Moreover, the Commission had in its letters of 18 and 19 November 1996 to Germany requested it to inform the yards to strictly respect their capacity limitations in 1996 and in the following years.

(83) In its letter of 3 March 1997 to Germany the Commission points out that KWW had exceeded its capacity limitation slightly in 1996 and that the planned production for 1997 is 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.

(84) In its letter to the Commission of 1 April 1997, Germany states that BvS has demanded KWW to

([13]) ECR 1998 II, page 3327.
([14]) OJ C 344, 14.11.1997, p. 2.

respect its capacity limitation of 85 000 cgt when planning its production of 1997. As a result of this, KWW would submit a new plan for 1997 where the capacity limit is respected. Further, in its letter of 6 June 1997 to the Commission, Germany explains that the capacity of KWW in 1997 will be reduced by the amount of the slight excess of 1996, 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 excess was not possible. This was clearly explained to the yard as well. Germany also states that it had explained to the yard that even slight excesses of capacity limitation cannot be accepted in the future and that KWW had committed itself to deduct the 92 cgt exceeding of its capacity limitation in 1996 from its capacity of 1997.

(85) Considering the above, the Commission notes that there is no doubt about the fact that KWW has been very well aware of the nature and meaning of the capacity limitation of 85 000 cgt imposed on it.

(86) The fourth point raised by KWW is that the capacity limitation, if seen as a production limitation, should be considered as an average production of several years.

(87) The Commission notes that an annual capacity limitation was an essential condition for approval of the aid. This limit was set in order to offset the distortive effect of the aid on the shipbuilding industry and cannot be interpreted as an average annual target since this would deprive the limit of its purpose and effect. Moreover, the annual capacity limitation is clearly laid down in point 27 of the privatisation contract of the yard and accepted by KWW who is under the obligation to plan its production accordingly. The obligation to respect the annual capacity limit and the fact that dividing capacity between several years is not possible was clarified to KWW by Germany in 1997, according to Germany's letter on 6 June 1997 to the Commission.

(88) The last argument of KWW is that there is no legal basis for laying down the maximum capacity limit for individual yards.

(89) The Commission notes that it has in its decisions on the approval of restructuring aid to KWW laid down an annual capacity limitation of 85 000 cgt as a condition for the approval of the aid. It is normal practice for the Commission to attach to its decision on state aid conditions that would ensure the compatibility of that aid with the common market pursuant to Article 87 of the EC Treaty. By doing so the Commission acts in accordance with the Articles 87 and 88 of the EC Treaty, and in this present case the relevant specific rules on aid to shipbuilding.

(90) Germany argues in its comments that the cgt-calculation method is an inadequate method for measuring a capacity limitation of an individual yard.

(91) The Commission notes that the capacities of the East German yards before the restructuring were defined using cgt-calculation. In 1992 when the proposal for Directive 92/68/EEC [15] was discussed at the Council and the whole restructuring of the East German shipyards and its modalities were examined in detail, the capacity reductions of these yards were defined using cgt-calculations as well. Consequently, the Council has in 1992 confirmed this calculation method as a basis of defining the capacities in the context of the restructuring of the East German yards.

(92) The Commission also notes that cgt-calculation was agreed between Germany and the Commission as a basis of the reporting in context of the monitoring of former GDR yards. Germany confirms this in its letters of 12 July 1994 and 3 April 1995 to the Commission. In the letter of 3 April 1995 Germany states that 'Germany and the Commission have reached agreement on the fact that the monitoring of production will be based on cgt-calculation based on coefficients in force before 1 January 1994'. This method has been used from the beginning of the restructuring and during the whole monitoring period and as regards all monitored yards. Germany has agreed on its application without ever contesting its application. The Commission sees no reason to speculate on the adequacy of this method on the basis of one yard breaching its capacity limitation.

(93) Both Germany and KWW argue in their comments that the exceeding by KWW of its capacity limitation has no negative effect on competition.

(94) The Commission notes that the very purpose of the capacity limitation is to offset the distortive effect the aid has on the European shipbuilding industry. Consequently, exceeding this limit already implies a distortion of competition.

(95) The Commission also notes that KWW operates in the market where other European yards operate. KWW itself confirms this in its comments by stating that due to building of the drilling rig it cannot compete in the European market and bid for contracts on products which other European yards build for a time period of two years. Consequently, by exceeding its capacity limitation set to offset the distortion of competition KWW has acted detrimentally to other yards in this market.

[15] SEC (92) 991 final.

(96) This position of the Commission is reinforced by the comments of interested parties. These indicate in their comments that the large container ships being built by KWW and partly causing the excess are the kind of ships also being built by other European yards. Consequently, the excess of KWW has a direct impact on the market where other European yards operate. They also stipulate that the capacity limitations of former East German yards are, among other factors, a basis for investment and production planning of other yards. Therefore the dispositions of other yards are affected if these limits are exceeded.

(97) The last point raised by Germany in its comments is that KWW was allocated an additional capacity of 22 000 cgt for 1998, so that taking into account this factor and the serial-effect, KWW's capacity does not exceed 107 000 cgt allocated for it for 1998.

(98) The Commission notes that any changes of allocation of capacity would need the consent of the Commission since the capacity limits are linked with the restructuring aid granted to the respective yards. In this case, the Commission has not approved an allocation of additional capacity of 22 000 cgt for KWW for 1998. In its letter of 4 December 1998 the Commission has communicated to Germany, that a capacity of 22 000 cgt of the Elbewerft yard cannot be reallocated as regards year 1998 since that capacity was not available for reallocation for the whole year but only from 17 November 1998 onwards when the notification for aid to the yard was withdrawn. In addition, it was the Commission's constant practice not to accept a retroactive reallocation of capacity. This was further confirmed by the Commission's letter of 8 January 1999 to Germany on the issue.

(99) For these reasons, and because there is no legal basis for retroactive reallocations, the statement of Germany according to which the additional capacity of 22 000 cgt has been allocated to KWW for 1998 has no legal effect and is of no relevance for this procedure.

(100) For the reasons explained above in points 48 to 77, the Commission concludes that since 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 with its decisions communicated to Germany with 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), which corresponds to the exceeding of the annual capacity limitation of 85 000 cgt by 37 414 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.

(101) The Commission has considered various options in determining the amount of the incompatible aid and has concluded the following.

(102) The Commission notes that the duration of KWW's annual capacity limitation of 85 000 cgt is 10 years. Considering that the capacity limitation was exceeded in one year, in 1998, the Commission could have decided to determine the amount of unlawful aid solely on this basis. That would have led to the result that 1/10 of the aid would have been considered incompatible with the common market. On the other hand, it would also have been possible to calculate the proportion of the excess of 37 414 cgt to the total of the capacity limitation during the 10-year period (850 000 cgt) which would have given the proportion of 4,4 % as the amount of illegal aid.

(103) The Commission has come to the conclusion that both the above methods are insufficient in order to determine the amount of unlawful aid, since they do not take into account the proportion in which the annual capacity limitation of 85 000 cgt is exceeded. In order to take this element into account the Commission has based its calculation on the combination of the pure proportional approach and a supplementary part which addresses the aggravated distortion of competition caused by the considerable amount of exceeding the annual capacity limitation in this case.

(104) Since the duration of KWW's annual capacity limitation of 85 000 cgt is ten years, the proportion of the excess of 37 414 cgt to the total of the capacity limitation during this period (850 000 cgt) has been calculated, leading to the proportion of 4,4 %. In addition to this, the considerable exceeding of the capacity limitation in 1998 needs to be addressed since the Commission considers that the distortion of competition caused by the excess increases the greater the excess. Since the amount of excess of 37 414 cgt exceeds the yearly capacity limitation by more than 20 %, this additional element having impact on the level of distortion of competition has been taken into account in the calculation as well. This has been done by calculating the proportion of the amount of excess exceeding 20 % of the annual limitation (20 414 cgt) to the total of the capacity limitation (850 000 cgt), which gives the proportion of 2,4 %.

(105) Consequently, the amount of the incompatible aid is the proportion of the total of the excess and the additional element linked to the greater distortion of competition caused by the excess of more than 20 % of the annual capacity limitation, to the total of the

capacity limitation calculated on the basis of all operating aid EUR 372,5 million (DEM 745 million) and investment aid EUR 237,45 million) (DEM 474,9 million), altogether EUR 609,95 million (DEM 1 219 ,9 million) paid to KWW. Consequently, the amount of the aid which is considered incompatible with the common market on the basis of KWW's exceeding of its capacity limitation in 1998 is EUR 41,5 million (DEM 83,0 million). This aid shall be recovered.

(106) The Commission notes that in its decision to open the procedure ([16]) in this case, it stated that the closure aid of EUR 13,5 million (DEM 27 million), approved by the Commission in its decision communicated to Germany with 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 had passed such monies to its former employees, the Commission would not seek the recovery of this amount. For this reason the closure aid is not included in the above calculation.

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

VI. **Conclusions**

(108) The Commission concludes that Kvaerner Warnow Werft GmbH has in 1998 exceeded its annual capacity limitation of 85 000 cgt by 37 414 cgt. This annual capacity limitation was set by the Commission in its decisions communicated to Germany with the letters of 3 March 1993, 17 January 1994, 20 February 1995, 18 October 1995 and 11 December 1995 as an essential condition for approval of a total of EUR 623,45 million (DEM 1 246,9 million) aid in accordance with Directive 90/684/EEC on aid to shipbuilding and 92/68/EEC amending Directive 90/684/EEC on aid to shipbuilding and thereby for the compatibility of the aid with the common market pursuant to Article 87(3)(e) of the EC Treaty.

(109) Since it is the opinion of the Commission that 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 of 85 000 cgt by 37 414 cgt in 1998, is no longer compatible with Article 87(3)(e) of the EC Treaty and thereby incompatible with the common market pursuant to Article 87(1) of the EC Treaty.

(110) Therefore, the aid of EUR 41,5 million (DEM 83,0 million) is incompatible with the common market and shall be recovered. The sums to be recovered shall bear interest from the date on which they were made available to the recipient until their actual recovery,

HAS ADOPTED THIS DECISION:

Article 1

The state aid, which Germany has implemented in favour of Kvaerner Warnow Werft GmbH in an amount of EUR 41,5 million (DEM 83,0 million), is incompatible with the common market pursuant to Article 87(1) of the EC Treaty.

Article 2

1. Germany shall take the necessary measures to recover from the recipient the aid of EUR 41,5 million (DEM 83,0 million).

2. Without prejudice to any order of the Court of Justice of the European Communities pursuant to Article 242 of the Treaty, recovery shall be effected without delay and in accordance with the procedures under German law, provided that it allows the immediate and effective execution of the Commission's decision. To this effect and in the event of a procedure before German courts, Germany shall take all necessary steps which are available in its legal system, including provisional measures, without prejudice to Community law ([17]).

3. The sums to be recovered shall bear interest from the date on which they were made available to the recipient until their actual recovery. Interest shall be calculated on the basis of the reference rate used for calculating the grant-equivalent of regional aids.

([16]) OJ C 41, 16.2.1999, p. 23.

([17]) See Article 14(3) of Council Regulation (EC) 659/1999, OJ L 83, 27.3.1999, p. 1.

Article 3

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

Article 4

This Decision is addressed to the Federal Republic of Germany.

Done at Brussels, 8 July 1999.

For the Commission

Karel VAN MIERT

Member of the Commission