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 similiar 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 hat 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 Elbewerft 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 Elbewerft 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.

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[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.

([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).

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.

(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 contex 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, Skibsvaerftsforeningen 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 addiction, 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 uncontestable. 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 footote 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.

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

(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 Elbewerft 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 cgts in the case of the reallocation of the capacity of the former Elbewerft 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 Elbewerft 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.

(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.

(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.

(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 Commision 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.

(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.

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 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.

(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.

(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,

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.

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).

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 3

Germany 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 Federal Republic of Germany.

Done at Brussels, 15 February 2000.

For the Commission

Mario MONTI

Member of the Commission