II

(Acts whose publication is not obligatory)

COMMISSION

COMMISSION DECISION

of 29 March 2000

on state aid implemented by Germany in favour of Kvaerner Warnow Werft GmbH (1999) and amending Decision 1999/675/EC

(notified under document number C(2000) 1008)

(Only the German text is authentic)

(Text with EEA relevance)

(2000/416/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 Directive 90/684/EEC of 21 December 1990 on aid to shipbuilding [1], as last amended by Directive 94/73/EC [2], and Council Directive 92/68/EEC of 20 July 1992 [3] amending Directive 90/684/EEC on aid to shipbuilding,

Having called on interested parties to submit their comments pursuant to the provisions cited above [4] 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 new-building capacity limitation of 85 000 cgt in both 1998 and 1999. The forecast 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 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* [5]. The Commission invited interested parties to submit their comments on the matter.

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

(5) Commission staff visited the shipyard with an external expert on 15 October 1999. On this occasion, the shipyard presented its amended production plan, which took account of the restriction of production to 91 000 cgt in 1999. The revised production figure for that year was 90 912 cgt.

[1] OJ L 380, 31.12.1990, p. 27.
[2] OJ L 351, 31.12.1994, p. 10.
[3] OJ L 219, 4.8.1992, p. 54.
[4] OJ C 41, 16.2.1999, p. 23.
[5] See footnote 4.

(6) Commission staff again visited the shipyard on 25 January 2000 with an external expert in order to verify production. It was confirmed that the KWW's output in 1999 was 90 831 and that the capacity limitation of 91 000 cgt had therefore been complied with.

(7) This Decision is concerned with whether the capacity limitation was exceeded in 1999. The Commission issued a negative Decision concerning the exceeding of capacity in 1998 on 8 July 1999 (Decision 1999/675/EC) [6]. The procedure opened in respect of 1998 and 1999 has thus already been partly closed.

II. **Detailed description of the aid**

(8) The Commission approved restructuring aid in accordance with Directive 90/684/EEC to allow the comprehensive restructuring of the East German shipyard KWW 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 aid was approved subject to a capacity restriction of 85 000 cgt per year, compliance with which is monitored by the Commission.

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

(10) 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 former German Democratic Republic 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 said 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 in operating aid,

— DEM 82,4 million in operating aid in the form of an exemption from previous liabilities,

— DEM 127,5 million in investment aid,

— DEM 27,0 million in closure aid;

N 692/Jl91 — Commission letter of 17 January 1994 (SG (94) D/567)

— DEM 617,1 million in operating aid;

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

— DEM 222,5 million in investment aid;

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

— DEM 66,9 million in investment aid;

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

— DEM 58,0 million in investment aid.

(11) Consequently, the total amount of aid concerned by these Decisions was EUR 372,5 million in operating aid (DEM 745 million) EUR 237,45 million in investment aid (DEM 474,9 million) and EUR 113,5 million in 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 new-building capacity did not exceed 85 000 cgt. The capacity limitation was 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 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 capacity limitation were not complied with.

(13) When opening 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 KWW's shipbuilding capacity, the yard would exceed its annual new-building capacity limitation of 85 000 cgt in both 1998, by producing 106 945 cgt, and 1999, by producing 104 560 cgt. This meant that an essential condition on which the aid was approved was not being complied with.

[6] OJ L 274, 23.10.1999, p. 23.

(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 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) could still be deemed compatible with the common market.

(15) On 21 July 1999, the Commission decided on the reallocation of the 22 000 cgt capacity of the closed Elbewerft Boizenburg. This capacity was distributed among the four remaining shipyards in the former German Democratic Republic, and the Commission approved this reallocation in its Decision on State aid measure N 352/99, of which it notified Germany by letter of 5 August 1999 (SG(99) D/6192). Under this Decision, KWW was allocated an additional 6 000 cgt, which increased its capacity limitation to 91 000 cgt from 1999.

III. **Comments from interested parties**

(16) 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 of Jernskibs- og Maskinbyggerier i Danmark).

(17) These comments relate solely to the exceeding of the capacity limitation in 1998 and are presented in detail in the relevant Commission Decision ([7]). They are therefore not relevant to this Decision.

IV. **Comments from Germany**

(18) Germany's comments, which relate solely to the exceeding of the capacity limitation in 1998, are presented in detail in the relevant Commission Decision ([7]), and are therefore not relevant to this Decision.

V. **Assessment**

(19) The Commission notes that the aid approved in compliance with the provisions of Council Directive 90/684/EEC is considered compatible with the common market as it complies with Article 87(3)(e) of the EC Treaty. However, this applies only in so far as the conditions laid down in the Commission decisions approving the aid in accordance with the above Directives are met. 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 must therefore be considered incompatible with the common market, unless it can be declared compatible for other reasons.

(20) Article 10(a) of Directive 90/684/EEC, inserted by Directive 92/68/EEC contains a derogation from the rules on operating aid applicable to other Community yards for the shipyards in the former German Democratic Republic in order to create the possibility for these yards to undergo urgent and comprehensive restructuring and to become competitive. Under Article 10(a)(2) of Directive 90/684/EEC, as amended by Directive 92/68/EEC, operating aid for the shipbuilding and ship conversion activities of the yards situated in the former German Democratic Republic may, until 31 December 1993, be considered compatible with the common market under certain conditions relating to the amount of aid and an annual reporting obligation on the part of the German Government. One of the conditions laid down in this provision is the German Government's undertaking 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.

(21) Investment aid is regulated in Article 6 and closure aid in Article 7 of Directive 90/684/EEC. Under 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. Under 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.

(22) In the Commission proposal for Directive 92/68/EEC ([8]), it is stated that taking into account the impact of restructuring on conditions of competition in the Community, a balance has to be struck between the restructuring of the former German Democratic Republic 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.

(23) One of the conditions laid down in Article 10(a)(2) of Directive 90/684/EEC for the compatibility of the operating aid with the common market is the German Government's undertaking 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 terntories of the former German Democratic Republic is therefore 327 000 cgt. Germany distributed this total capacity among the five remaining newbuilding yards. In this context, the capacity for KWW was set at 85 000 cgt ([9]).

([7]) See footnote 6.

([8]) OJ C 155, 20.6.1992, p. 20.

([9]) It should be noted 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 Skibsvaerftsforeningen and Others v Commission [1996] ECR II-1399 (paragraphs 151 to 198).

(24) The total of EUR 623,45 million (DEM 1246,9 million) in 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 of 3 March 1993 (N 692/D/91), the second by letter of 17 January 1994 (N 692/J/91), the third by letter of 20 February 1995 (N 1/95), the fourth by letter of 18 October 1995 (N 637/95), and the fifth by letter of 11 December 1995 (N 797/95).

(25) 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 plan notified to the Commission. This annual limitation was incorporated into the privatisation contract for 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 the event of non-compliance with this capacity limitation, the Commission would be obliged to require the reimbursement of all aid.

(26) On 21 July 1999, the capacity of the closed Elbewerft Boizenburg of 22 000 cgt was reallocated among the four remaining shipyards in the former German Democratic Republic. The Commission approved this reallocation by its Decision on State aid measure No N 325/99, which was notified to Germany by letter of 5 August 1999 (SG(99) D/6192). KWW was allocated an additional 6 000 cgt, increasing its capacity limitation from 85 000 cgt to 91 000 cgt with effect from 1999.

(27) The Commission notes that the comments contained in recitals 16 to 25 apply even with the new capacity limitation of 91 000 cgt.

(28) During a visit to the shipyard on 25 January 2000, it was confirmed that KWW's output in 1999 had been 90 831 cgt. KW W had thus not exceeded the annual capacity limitation of 91 000 cgt in 1999.

(29) Consequently, one of the essential conditions for the granting of aid, i.e. the capacity limitation laid down in the Commission Decision approving the aid adopted on the basis of Directive 90/684/EEC, in the wording of Directive 92/68/EEC, was complied with in 1999.

(30) On 15 February 2000, the Commission issued a negative Decision on the exceeding of the capacity limitation in 1997 [10]. Both KWW and Germany had argued in this case that the shipyard had not received all of the restructuring aid approved by the Commission. On the basis of the auditor's report concerning the actual use of the restructuring aid up to the end of 1996, which Germany transmitted to the Commission at the latter's request on 30 June 1999, the Commission concluded that KWW had received only DEM 62,5 million of the approved DEM 73 million in Wettbewerbshilfe. It had thus received DEM 10,5 million less than had been approved by the Commission.

(31) The Commission accordingly found in its Decision of 15 February 2000 that KWW had received DEM 10,5 million less in *Wettbewerbshilfe* as approved operating aid for loss compensation than had been authorised by the Commission. The amount of aid received by KWW was thus EUR 367,25 million (DEM 734,5 million) in operating aid, EUR 37,45 million (DEM 474,9 million) in investment aid and EUR 13,5 million (DEM 27 million) in closure aid, i.e. a total of EUR 618,2 million (DEM 1 236,4 million). This amount was then taken as a basis for calculating the amount of incompatible aid.

(32) In the Decision of 8 July 1999 on the exceeding of the capacity limitation in 1998, the amount of incompatible aid was calculated on the basis of the amount of aid authorised [11]. Since the amount of aid received was less than the amount authorised by the Commission, the Commission is hereby amending its Decision of 8 July 1999 in such a way as to calculate the amount of incompatible aid on the basis of the amount of aid actually received by the shipyard.

(33) On the basis of the method of calculation used in the Decision of 8 July 1999, the amount of incompatible aid in 1998 resulting from the fact that the capacity limitation was exceeded corresponds to the proportion of the excess — in this case, more than 20 %, which represents a significant distortion of competition — to the total capacity limitation, on the basis of the total aid received by KWW, i.e. EUR 604,7 million (DEM 1 209,4 million), made up of EUR 367,25 million (DEM 734,5 million) in operating aid and EUR 237,45 million (DEM 474,9 million) in investment aid. The amount of aid which, in 1998, cannot be deemed compatible with the common market as a result of the fact that KWW exceeded the authorised capacity is thus EUR 41,5 million (DEM 82,2 million). This amount should be recovered.

[10] State aid case C 46/99.
[11] See footnote 6.

(34) As the Commission stated in its Decision of 8 July 1999 on the exceeding of capacity in 1998 ([12]) and its Decision of 15 February 2000 on the exceeding of capacity in 1997 ([13]) the extent to which competition is distorted depends on the extent to which the authorised capacity is exceeded. The Commission accordingly takes the view that the amount of aid corresponding to the extent to which the capacity limitation was exceeded should be deemed incompatible with the common market.

(35) Since the capacity limitation was complied with in 1999, none of the aid granted for that year can, according to the same reasoning, be deemed incompatible with the common market.

(36) The Commission thus notes that of the aid of EUR 618,2 million (DEM 1 236,4 million) received by KWW which was approved in four tranches in Commission Decisions notified 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 portion which corresponds to compliance with the capacity limitation in 1999 meets the conditions of Article 87(3)(e) of the EC Treaty and is compatible with the common market pursuant to Article 87(1) of the EC Treaty.

VI. **Conclusions**

(37) The Commission concludes that KWW did not exceed the annual capacity limitation of 91 000 cgt in 1999. This annual capacity limitation was laid down by the Commission in Decisions notified by letters of 3 March 1993, 17 January 1994, 20 February 1995, 18 October 1995 and 11 December 1995 as an essential condition for the approval of aid totalling EUR 23,95 million (DEM 1 246,9 million) pursuant to Directive 90/684/EEC, as amended by Directive 92/68/EEC, and thus for the compatibility of the aid with the common market under Article 87(3)(e) of the EC Treaty.

(38) In the Decision of 8 July 1999 on the exceeding of capacity in 1998 and of 15 February 2000 on the exceeding of capacity in 1997, the Commission based its assessment on the premise that the extent to which competition was distorted depended on the extent to which the capacity limitation was exceeded, and that the amount of aid corresponding to this exceeding of capacity should be deemed incompatible with the common market. The amount of aid corresponding to compliance with the capacity limitation meets the conditions of Article 87(3)(e) of the EC Treaty and is compatible with the common market pursuant to Article 87(1) of the EC Treaty,

HAS ADOPTED THIS DECISION:

Article 1

Kvaerner Warnow Werft GmbH (KWW) complied in 1999 with the capacity limitation compliance with which is, pursuant to the Decision on State aid measure N 325/99, notified by letter of 5 August 1999, a condition for the compatibility of the aid with the common market.

Article 2

Article 1 of Decision 1999/675/EC shall be worded as follows:

'*Article 1*

The State aid which Germany has implemented in favour of Kvaerner Warnow Werft GmbH in an amount of EUR 41,1 million (DEM 82,2 million) is incompatible with the common market pursuant to Article 87(1) of the EC Treaty.'.

Article 3

This Decision is addressed to the Federal Republic of Germany.

Done at Brussels, 29 March 2000.

For the Commission

Mario MONTI

Member of the Commission

([12]) See footnote 6.
([13]) State aid case C 46/99.