

COMMISSION DECISION
of 20 October 2004
on a State aid measure implemented by Germany for Kvaerner Warnow Werft

(notified under document number C(2004) 3921)

(Only the German text is authentic)

(Text with EEA relevance)

(2005/374/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⁾ in the version of Directive 92/68/EEC⁽²⁾,

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) The German press reported on 12 June 1999 that Kvaerner Warnow Werft GmbH (hereinafter referred to as KWW) had given a loan of around EUR 205 million⁽⁴⁾ to its parent company Kvaerner a.s.
- (2) The Commission requested detailed information from Germany on the origin of the transferred funds in order to ensure that these funds did not originate from excess payments of restructuring aid paid to the company in 1993 to 1995, or any other aid elements, with the letter dated 16 of June 1999. A meeting was held in Brussels on 22 June 1999 with representatives of Germany and KWW to clarify the matter. The Commission requested additional information from Germany by letters dated 23 June 1999, 12 July 1999 and 8 October 1999. Germany replied by letters of 30 June 1999 and 16 September 1999.

⁽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 134, 13.5.2000, p. 5.

⁽⁴⁾ Amounts in EUR are indicative and rounded. Only figures in DEM represent exact amounts.

- (3) By letter dated 29 February 2000, the Commission informed Germany that it had decided to initiate the procedure laid down in Article 88(2) of the EC Treaty in respect of the aid.

- (4) The Commission decision to initiate the procedure was published in the *Official Journal of the European Communities*⁽⁵⁾. The Commission invited interested parties to submit their comments on the aid. Germany replied by letter dated 31 March 2000. KWW sent its comments by fax dated 6 June 2000.

- (5) The Commission received comments from interested parties. It forwarded them to Germany, which was given the opportunity to react; its comments were received by letters dated 6 July 2000 and 4 August 2000.

II. DETAILED DESCRIPTION OF THE MEASURE

- (6) In October 1992, the German Treuhandanstalt (THA) sold the predecessor of KWW, the East German shipyard Neue Warnow Werft GmbH (hereafter WW) to the Norwegian industrial group Kvaerner a.s.
- (7) On 20 July 1992, the Council amended by Directive 92/68/EEC the Directive 90/684/EEC (seventh Directive on aid to shipbuilding) in a way that it introduced a derogation from the rules applicable to other Community yards for the shipyards in East Germany in order to create the possibility for those yards to undergo urgent and comprehensive restructuring. In particular, this exception enabled the East German yards to receive high amounts of operating aid until 31 December 1993.
- (8) On adoption of this derogation, the Commission gave an undertaking to the Council that it would use its monitoring and investigative powers to ensure that the yards in East Germany only receive the aid necessary to restructure.

⁽⁵⁾ See footnote 3.

- (9) By letter dated 30 October 1992, Germany informed the Commission about the privatisation of WW via an Acquisition Agreement. In various letters Germany supplied additional explanatory information on the Acquisition Agreement, the restructuring and the intended aid measures.
- (10) The Acquisition Agreement provides that in order to privatise the yard, WW would incorporate KWW and transfer certain assets and liabilities to it. The restructuring period was to end at the end of 1995.
- (11) According to point 7 of the Acquisition Agreement, THA should support the privatisation with additional measures. Its participation was negotiated on the basis of the projected balance sheet on 1 October 1992. As part of the funding, the company should dispose of an aggregate equity of about EUR 53,7 million (DEM 105 million). Further, the projected balance sheet was to reflect a special accrual in the amount of EUR 223,2 million (DEM 436,5 million) meant to finance catch-up investments and about EUR 230,08 million (DEM 450 million), hereafter 'loss cover', meant to finance losses incurred by KWW during the restructuring period due to shortfalls in productivity or lacking competitiveness.

— EUR 42,1 million (DEM 82,4 million) operating aid in the form of takeover of old liabilities by THA,

— EUR 65,2 million (DEM 127,5 million) investment aid,

— EUR 13,8 million (DEM 27,0 million) closure aid.

In total, this decision authorised State aid of EUR 144,4 million (DEM 282,4 million).

- (14) Before approving any further instalment, the Commission requested Germany, by letters dated 2 April 1993, 12 July 1993 and 11 October 1993, to provide further information on the expected and incurred losses under the shipbuilding contracts handled during the restructuring as well as further information on the planned investments. In the letter of 11 October 1993 the Commission also requested Germany to justify, why from the 12 shipbuilding contracts, which were envisaged for the loss cover and *Wettbewerbshilfe*, the losses from the first six shipbuilding contracts would only amount to 29,4 % of the envisaged total losses including *Wettbewerbshilfe*.

The aid measures

- (12) By letter dated 27 November 1992, in order to facilitate the privatisation and restructuring of the yard, Germany proposed in total aid measures about EUR 720,5 million (DEM 1 409,2 million).
- (13) The Commission, by taking into account the monitoring provision of Directive 90/684/EEC, as well as the fact that operating aid could only be approved until 31 December 1993, decided to approve the aid measures for the yard in five instalments. In total, the aid amounts approved were lower than the amounts requested by Germany in November 1992. By its decision on the first instalment the Commission approved the following aid:
- N 692/D/91 — Communicated to Germany by a letter of 3 March 1993 (SG (93) D/4052)*
- EUR 23,3 million (DEM 45,5 million) operating aid, being EUR 6 million (DEM 11,7 million) to cover part of the losses on contracts signed after 1 July 1990, EUR 3,1 million (DEM 6,1 million) *Wettbewerbshilfe* and EUR 14,2 million (DEM 27,75 million) injection of fresh equity capital,
- (15) In its reply dated 28 May 1993, Germany informed the Commission that the EUR 230,08 million (DEM 450 million) for loss cover are the compromise result of negotiations between the seller and the buyer. Germany pointed out that the risk or the benefit of additional losses/savings was to be carried by KWW.
- (16) The German authorities also indicated that the loss cover of EUR 230,08 million (DEM 450 million) does not include an amount of EUR 17,7 million (DEM 34,6 million) for future losses, which resulted from pending contracts on cash carriers taken over by THA in the context of privatisation. It does also not include an aid amount of EUR 42,1 million (DEM 82,4 million) in the form of takeover of old current liabilities by THA in the context of privatisation.
- (17) By letter dated 16 November 1993, Germany forwarded a letter dated 29 October 1993 from KWW explaining that the loss cover of about EUR 230,08 million (DEM 450 million) relates not to 12 but 16 shipbuilding contracts for ships. The letter indicated that the losses seemed somewhat higher than the figures earlier presented.

- (18) At the end of 1993, the Commission approved the second aid instalment:

N 692/J/91 — Communicated to Germany by letter of 17 January 1994 (SG (94) D/567)

— EUR 315,5 million (DEM 617,1 million) operating aid of which EUR 58,0 million (DEM 113,5 million) would be paid in cash being EUR 34,2 million (DEM 66,9 million) *Wettbewerbshilfe* and EUR 23,8 million (DEM 46,6 million) to cover a part of the losses on contracts signed after 1 July 1990,

— the decision explains that the operating aid of EUR 315,5 million (DEM 617,1 million) constitutes the maximum operating aid to be paid to the yard related to shipbuilding contracts signed by 31 December 1993.

- (19) The last three instalments were approved with the following Commission decision:

N 1/95 — Communicated to Germany by letter of 20 February 1995 (SG (95) D/1818)

— EUR 115,3 million (DEM 225,5 million) investment aid, from which EUR 10,2 million (DEM 20 million) was non-cash,

N 637/95 — Communicated to Germany with a letter of 18 October 1995 (SG (95) D/12821)

— EUR 34,2 million (DEM 66,9 million) investment aid;

N 797/95 — Communicated to Germany with a letter of 11 December 1995 (SG (95) D/15969)

— EUR 29,6 million (DEM 58,0 million) investment aid.

- (20) The total amount of aid approved by these decisions was about EUR 380,9 million (DEM 745 million) operating aid (earmarked as EUR 37,3 million (DEM 73 million = DEM 66,9 million + DEM 6,1 million) for *Wettbewerbshilfe*, EUR 23,8 million (DEM 46,6 million) to cover a part of the losses on contracts signed after 1 July 1990 and EUR 42,1 million (DEM 82,4 million) in the form of an exemption of old current liabilities), EUR 242,8 million (DEM 474,9 million) investment aid and EUR 13,8 million (DEM 27 million) closure aid. This results in total aid of about EUR 637,5 million (DEM 1 246,9 million).

Monitoring the necessity of aid

- (21) In all the Commission decisions approving the several instalments of aid, it is recalled that on amending Directive 90/684/EEC with regard to the mentioned derogation, the Commission gave an undertaking to the Council that the Commission would use its monitoring and investigative powers to ensure that the East German yards only receive the aid necessary for restructuring.
- (22) The Commission underlined that, in the light of this undertaking, it could only approve the granting of aid as far as the necessity is clearly shown and the conditions laid down in the mentioned Council Directive as counterpart for the aid are being closely adhered to.
- (23) In each decision the Commission reminds Germany that, in order to obtain further release of the envisaged total aid under Directive 92/68/EEC the German authorities must supply the following information:
- (a) showing, to the satisfaction of the Commission, the further necessity of such aid;
- (b) showing, to the satisfaction of the Commission, that the investments are being carried out along the detailed investment plan submitted to the Commission and will result in the capacity limitation required;
- (c) providing reports to be received by the Commission to sufficiently demonstrate that any risk of spillover of aid to other yards is being eliminated (spillover reports). These reports were to be provided by an independent chartered accountant. In 1995, at the end of the restructuring period the reporting obligations to the Commission came to an end.

Reporting of KWW

- (24) The last spillover report for the period until 31 December 1995 was submitted to the Commission by letter dated 9 July 1996. It explains that the losses from shipbuilding contracts incurred before 31 December 1995 amounted to about EUR 230,08 million (DEM 450 million) (calculated without taking into account the *Wettbewerbshilfe* received). According to the German authorities, at the time of drafting the report the calculation of final losses was not yet possible since some of the vessels had not yet been delivered and financial risks originating from charter guarantees were still pending.

- (25) It was only on 18 June 1999 that the Commission received, following its own request of 16 June 1999, the full annual reports of KWW certified by the auditors for 1992 to 1997 and the provisional accounts for 1998. On 30 June 1999, Germany sent to the Commission a letter from KWW's auditor (dated 25 April 1997) on the actual use of the restructuring aid as per end of 1996. The report shows that the actual losses for the relevant shipbuilding contracts, without deducting *Wettbewerbshilfe*, amounted to about EUR 178 million (DEM 348,095 million) until 31 December 1995. Additional losses of about EUR 23,1 million (DEM 45,121 million) were encountered in 1996 so that the total actual losses until 31 December 1996 amounted to EUR 201,05 million (DEM 393,216 million).
- (26) As it appeared that the actual losses were lower than the losses envisaged (EUR 262 million (DEM 512,5 million) including *Wettbewerbshilfe* of EUR 31,9 million (DEM 62,5 million)), the Commission requested Germany by letter dated 23 June 1999 to explain the transfer of EUR 204,5 million (DEM 400 million) from KWW to its mother company.
- (27) According to its reply, by letter dated 30 June 1999, Germany did not recover the difference from KWW. Germany further explained that the amount for loss cover was granted and approved as a lump sum so that any difference could be kept by KWW.

Opening of procedure

- (28) In its decision to open the formal investigation procedure the Commission noted that KWW had received EUR 262 million (DEM 512,5 million) operating aid for loss compensation (including the compensation for *Wettbewerbshilfe* of EUR 32 million (DEM 62,5 million) while the actual losses amounted only to EUR 201,05 million (DEM 393,216 million). This indicated that KWW had received about EUR 61 million (DEM 119,284 million) excessive operating aid for loss compensation. This appeared not to be in compliance with the provision in the Commission decisions, according to which yards in East Germany shall only receive the aid necessary for their restructuring. The Commission also noted that in all of its decisions granting the aid it was clearly stated that the Commission shall use its investigating and monitoring powers to ensure that the yards only receive the aid necessary for their restructuring. Consequently, since according to the Commission decisions approving the aid the yards shall only receive the aid necessary for their restructuring, and the Commission had committed itself to monitor the compliance of this provision, only the compensation of actual losses can be considered as being compatible with the Commission decisions granting the aid.
- (29) Therefore, the Commission raised doubts whether the operating aid of the amount of about EUR 61 million

(DEM 119,284 million) was compatible with the common market.

III. COMMENTS FROM INTERESTED PARTIES

- (30) The Commission received comments dated 9 June 2000 and 13 June 2000 from the Association of Danish Shipbuilders (Foreningen av Jernskibs- og Maskinbyggerier i Danmark — Skibsvaerftsforeningen). It received further comments from the Confederation of Danish Industry (Dansk Industri) dated 9 June 2000 and 28 June 2000. KWW submitted comments dated 6 June 2000.

Comments from the Association of Danish Shipbuilders

- (31) The Association of Danish Shipbuilders recalls the importance for the Commission to constantly monitor the compliance with existing rules. Since 1992, several yards needed to be closed or to reduce their workforce in Denmark and the number of jobs in this sector has decreased by half. The subcontractors and suppliers of the yards have lost a significant number of jobs. Limiting the negative effects of the aid on the other Member States' shipbuilding industry is therefore as equally important as before. For this reason it is impossible to set less strict requirements at this point in time on the assessment of the aid and its conditions, than in the period from 1992 to 1994.
- (32) The preparatory documents of Directive 92/68/EEC show that a very detailed analysis of the need for aid, as established by the Commission, was presented to the Council. As for other yards, the aid was subdivided into old liabilities, fresh capital and loss compensation. Although the Council established a ceiling for the different aid amounts in total, it did not establish aid amounts for each of the yards. There were no doubts on the amounts for old liabilities and fresh capital. However, regarding loss compensation, an amount was discussed, which the Commission should fix within a certain framework. When establishing this amount the Commission naturally needed to make sure that the aid could only be used for the proposed purpose. The Commission had also to make sure, using subsequent monitoring, that the amounts had indeed only been used for these purposes. The Council laid down these conditions for the aid in June and July 1992 with the participation of Germany. Therefore Germany cannot refer to other agreements with possibly different contents that it had subsequently made with the buyer of the yard.
- (33) Spillover reports were requested to avoid that third parties benefit from the aid. If the aid in question had been granted independent from the beneficiary's cost, the spillover reports would have been unnecessary to prevent the transfer of excess aid to the current owners of the enterprise benefiting from State aid.

(34) The EUR 262 million (DEM 512,5 million) of aid granted for loss compensation was in fact not used for this purpose in its totality. This is the logical consequence of the fact that the losses were in fact lower than this amount. Therefore the aid must have been used for another purpose. Even if the Commission has not explained what has happened to these amounts, the granting of a loan to the mother company implies that the aid has, in any case, partly benefited the mother company. According to the conditions set by the Council, the Commission should have prevented this. The amount, which was not used for loss compensation and which was not authorised to be transferred to the mother company, has to be considered as an injection of fresh capital, which means that a greater amount than that accepted by the Council for this particular purpose was in fact used for it. The use of the aid contravenes not only the conditions set out by the Commission but also Directive 92/68/EEC.

(35) Finally, the Association of Danish Shipbuilders concludes that according to the information available, KWW had received a greater amount of aid than that corresponding to its actual losses. Apparently, neither the Council nor the Commission at any stage accepted that operating aid for loss compensation could be higher than the actual losses.

(36) In addition, the Association of Danish Shipbuilders takes the view that, if the Commission approves subsidies within the limits established by the Council of Ministers in such a way that beneficiaries are guaranteed a given sum under given conditions, such approval cannot, provided that these conditions are fulfilled, be rescinded at a later stage, regardless of whether the Commission changes its views on the earlier interpretation. On the other hand, neither the Commission nor the Member States can legitimately approve aid, which goes beyond what is accepted by the Council of Ministers or laid down in the Treaty, even if the beneficiary has acted in good faith.

Comments from the Confederation of Danish Industry

(37) According to the Confederation of Danish Industry, it is a natural legal obligation of the Community to make sure that the Commission verifies the use of State aid that it has approved or will approve. Since the beginning of the 1990s the Danish shipbuilding industry has been confronted with several closures of yards and a significant decrease of jobs in this sector. The European shipbuilding and its subcontractors react in a sensitive way to market interventions, above all to State aid.

(38) If KWW uses, in this particular case, the difference between its actual losses and the promised loss compen-

sation for other purposes than directly to its restructuring, the amount of this difference will have the effect of an operating aid and thereby aggravate the already difficult competition conditions between the European yards.

(39) According to the Confederation of Danish Industry, it is against the general principles of Community law to allow the aid recipient to claim for loss compensation in case its losses remain below the maximum amount of the promised compensation. However, the Confederation would not know whether such use had been authorised in a non-published protocol or similar paper when Directive 92/68/EEC was agreed.

(40) The Confederation of Danish Industry notes that the aid beneficiary takes the view that the Commission, in approving the restructuring aid, accepted the privatisation agreement in its entirety and thereby the principle that the use to which the restructuring aid was to be put was not subject to any conditions. Subsequently, the Confederation of Danish Industry says that aid approved by the Commission, in accordance with the mandate conferred on it by the Council and the Treaty, cannot be altered at a later stage once the Commission has already approved an aid measure, even if it changes its attitude later. Such agreements are binding for the Commission. However, even where they are in good faith, beneficiaries cannot derive any rights from the acceptance of an aid measure if the Commission or a Member State has infringed the rules laid down by the Council or enshrined in the Treaty.

Comments from KWW

(41) It is noted that the individual points raised by KWW in its comments are in majority identical to the points raised by Germany in its comments. The points are therefore only listed briefly below.

(42) KWW argues that there is no legally valid reason why the Commission would question the legality of the restructuring aid seven years after approving it. In the privatisation agreement between Treuhandanstalt and Kvaerner, the loss compensation was agreed as a lump sum and these documents did not impose any obligation on Kvaerner to repay the difference in case the contract related losses would turn out to be lower than estimated. The Commission was aware of the contents of these documents. Under these circumstances the Commission decided on the necessity of the aid in question and its decisions on approval of the aid do not contain any condition or clause on possible repayment of the difference between the estimated and real losses.

- (43) KWW claims that the contested amount of EUR 60,988 million (DEM 119,284 million) is part of the total operating aid approved by the Commission in its decisions of 1993. Therefore it is existing aid of which the compatibility cannot be subsequently reassessed.
- (44) The next point raised by KWW is that only part of the contested amounts is aid. Only EUR 29,812 million (DEM 58,309 million) operating aid was paid in cash. The positions in the balance sheet also used to cover the restructuring costs cannot be considered as aid, since they were assets of the yard which were sold as a result of an open and unconditional bidding procedure.
- (45) KWW argues that the Commission decisions approving the aid are the legal basis for the assessment of the case. It is the opinion of KWW that it has fully complied with the Commission decisions approving the aid, since:
- (a) the Commission approved the lump sum of aid being fully aware that the privatisation contract did not provide for any possible repayment obligations. The decisions do not mention a specific amount earmarked to cover losses;
 - (b) the Commission decided on the necessity of the aid before releasing the tranches;
 - (c) the Commission decided on the necessity of the aid without laying down in its decisions approving the aid any conditions, which would justify reassessment of the aid later;
 - (d) the funds for restructuring were used pursuant to their objectives. Other restructuring costs than loss compensation, were higher than the estimated.
- (46) As regards point (a), KWW argues that the concept of the privatisation agreement was to make Kvaerner liable for any greater losses than those estimated. As a counterpart, the situation where the losses would be lower than estimated should benefit Kvaerner. From Kvaerner's point of view, compensation of all restructuring costs without any possibility of repayment was the essential condition for Kvaerner to take over the yard. In case of possible repayment obligations, Kvaerner would never have taken over the yard. This is illustrated by paragraph 12 of the privatisation agreement, in which it is stated that in case individual payments would be prohibited under EEC law, Kvaerner has the right to rescind the privatisation agreement.
- (47) According to KWW, the Commission was aware of the agreement between Kvaerner and Germany and the way the loss compensation was intended to be paid, namely as a lump sum. If the Commission objected to this approach, it should have opened a procedure and made a clear condition on a possible repayment in its decisions.
- (48) As regards points (b) and (c), KWW argues that the decisions of the Commission contain no clauses that would justify reassessment of the approved aid. The aid was approved in its totality. Especially as there are no conditions or indications in the decisions on the fact that only the loss compensation corresponding to the real losses would be covered by the decisions approving the aid. There was no restriction in the decisions that would justify later control. The only sentence in the decisions to this effect is the one stating that Commission gave its commitment to the Council to use its monitoring and investigating powers to ensure that the yards only receive the aid necessary for their restructuring.
- (49) According to KWW, this sentence is only an introduction, which stresses that the investigating and controlling powers were used in the context of the approval of the aid in order to check the necessity of the aid before releasing the tranches. This sentence was meant only to justify why the Commission approved the restructuring aid in several tranches.
- (50) Consequently, according to KWW the Commission's decisions approving the aid could only be understood in that the aid was released in accordance with the provisions of the privatisation agreement, without later repayment obligations in case the real losses would turn out to be lower than estimated.
- (51) As regards point (d) KWW argues that the Commission decisions did not approve aid particularly for loss compensation. Only operating aid in general was approved. In accordance with the concept of the Acquisition Agreement between Kvaerner and THA aid was meant to cover part of the costs of the restructuring. The aid was used for the restructuring of the yard and therefore in accordance to its objectives.
- (52) A further argument of KWW is that the Commission has known since 1996 that the real losses were significantly lower than the estimated ones. According to Kvaerner, the facts were presented in a way, which corresponded to the time of drafting the report. Kvaerner and Germany were under no obligation, after submitting the last spillover report covering the period until the end of 1995, to submit any further documentation to the Commission on the further development of the losses.

(53) In any case, the Commission should have already noticed, on the basis of the 1995 spillover report, that the losses were lower than estimated. The difference between the amount of losses in the 1995 spillover report (31 December 1995 — EUR 224,861 million (DEM 439,791 million)) and the auditor's report of 25 April 1997 (31 December 1996 — EUR 201,048 million (DEM 393,216 million)) results from the fact that in individual cases risk estimates were not fully realised.

(54) KWW requests that the EUR 31,955 million (DEM 62,5 million) of *Wettbewerbshilfe* should not be calculated within the loss compensation. This would lead to a smaller difference between estimated and real losses.

IV. COMMENTS FROM GERMANY

(55) Germany explains that EUR 60,988 million (DEM 119,284 million) subject to the present procedure is existing aid forming part of the operating aid approved by the Commission decisions of 3 March 1993 and 17 January 1994. Therefore it is not understandable that the Commission initiated the procedure concerning non-notified aid, meaning new aid. Without an explicit provision in its decision, the Commission cannot assess anew the compatibility of aid that it had, years before, already declared as being compatible with the common market. This is against the principles of legal security and legitimate expectations.

(56) Further, Germany says that not all the amounts that the Commission dealt with in its decisions approving the aid in fact were aid. The Commission approved the full coverage of the restructuring costs. In this context it did not examine, to what extent the restructuring was carried out by using the own resources of the yard. The prognosis for losses resulting from contracts signed after 1 July 1990 was EUR 230,08 million (DEM 450 million). To cover this amount, there was not only the amount of EUR 29,812 million (DEM 58,309 million) operating aid paid in cash, as indicated in the paying schedule (Zahlungsplan) submitted to the Commission, but also own resources of the yard which appeared as positions in the balance sheet. These own resources cannot be considered as aid, since they were assets of the yard, which were sold as a result of an open and unconditional bidding procedure.

(57) Germany stresses that the yard could not have been restructured without the aid laid down in the privatisation contract and approved by the Commission, since Kvaerner, as the best bidder, was only willing to carry out the restructuring at its own risk if it received this aid. In case the Commission doubted the plausibility of the

loss prognosis in the business plan at the time, it should not have approved the aid as a lump sum but should have inserted a provision in its approval stating that the approval only covered aid that corresponded to the actual losses. However, the wording of the decisions does not contain such provisions and this was not even the intention of the Commission at the time. Under these circumstances the lump sum agreed upon was indeed meant to be final. The risks and benefits linked with possible exceeding or undercutting of this amount were left for KWW as an incentive to restructure the yard as quickly and efficiently as possible.

(58) Germany refers to its letter of 28 May 1993 to the Commission, which reminds the Commission, that the compensation of the actual losses against a proof of the losses submitted by the company is not provided for in the privatisation contract. The buyer of the yard bears the risk for any additional costs. As a counterpart the buyer can benefit from the, according to the experience, minor chances for achieving any savings. Thereby the operating aid as established in a lump sum and agreed upon with the buyers is necessary for the privatisation of the Eastern German yards.

(59) Germany also refers to its letter of 16 October 1993, in which is written that the continuous monitoring of the future loss provisions is not envisaged. This would also correspond to the contractual agreement with the buyer, according to which KWW bears the full risk of the losses being higher than those provided for when the contract was signed.

(60) Consequently, the Commission approved in 1993 all the operating aid without any restrictive conditions, being fully aware of the circumstances. The aid was then immediately paid to the yard as planned, long before it could be established how high the actual losses would finally be.

(61) A further point raised by Germany is that the Commission did not reserve itself the right to later examine the necessity of the aid. Neither did the decision of March 1993 nor the one of January 1994 indicate that the aid was approved only to cover the actual losses and that the final assessment would only be carried out later once the final amount of the actual losses was known. Neither do the Commission decisions indicate that the amount of the actual losses should be demonstrated or that the aid that would subsequently be proven as being 'not necessary', should be paid back. The Commission should have inserted an express provision in its decisions in order to be able to legally enforce such right.

- (62) Germany refers to the approving Commission decisions, in which it is stated that 'The Commission can, in the light of the undertaking given to the Council described above, only approve the granting of aid for as far as the necessity is clearly shown ...'. Since the Commission then approved the aid without attaching any conditions to it, this can only be interpreted as meaning that the Commission was convinced about the necessity of aid before approving it.
- (63) According to Germany, the decisions cannot be interpreted in a way that the Commission would use its monitoring and investigating authority for a later assessment of the necessary amount of aid. Neither did the Commission reserve itself the right of such control.
- (64) In the Commission decisions approving the aid it is only stated that the Commission gave its commitment to the Council to use its monitoring and investigating powers in order to ensure that the yards only receive the aid necessary for their restructuring. This statement was put in the decisions in order to explain why the Commission did not approve all the aid with one decision but released it in several tranches. In addition, this phrase indicated that the Commission took the final decision, each time, on the necessity of the aid before releasing a tranche.
- (65) Germany also explains that to the contrary of what the Commission claims in the opening of procedure, its letter of 28 May 1993 does in no way indicate that Germany should ensure that the Commission verify the use of the aid after it had been granted and released. In fact, Germany had in its letter referred to the fact that the Commission can verify how the aid should be used before releasing the tranches. Therefore in the letter of 28 May 1993 a reference was made to the document on the proof of the use of the aid (Verwendungsnachweis) prepared by the yards at the time. The information given by KWW on 26 May 1993 on the use of aid was attached to the letter. The invitation to verify the use of the aid concerned only this information.
- (66) Germany refers to the Commission decision releasing the second tranche of aid, which stipulates that the authorised amount is the highest operating aid that can be paid to the yard. This would only mean that the yard should not receive any other operating aid than that provided for in the privatisation contract, in particular no additional aid under the approved schemes.
- (67) Germany explains that the fact of submitting the Commission information after the approval of the aid, in particular the spillover reports, does not result in a competence for the Commission to verify the necessity of the aid. The spillover reports were submitted in order to demonstrate that no spillover of aid took place from the yard to other undertakings. Contrary to what the Commission claims, the meaning and purpose of the reports was not to show the actual amount of losses. The information on the use of aid contained in these reports was only meant to help in presenting in a transparent way, considering the purpose of the spillover controls, that no aid was transferred to the investor or to the other yards.
- (68) Germany states that it had fulfilled all its reporting obligations in time. The last spillover report concerning the period until 31 December 1995 was submitted to the Commission by letter of 6 July 1996. On the basis of the information contained in this last report the Commission was, at the latest from July 1996, aware that the actual losses were significantly less than EUR 262,037 million (DEM 512,5 million).
- (69) Germany explained the difference between the actual losses in the 1995 report and the report submitted later by Arthur Andersen to Germany by letter of 25 July 1997 concerning the situation at 31 December 1996. They are due to the fact that the risk estimations were not fully realised and that the situation proved to be different in 1996 due to the time factor. Some risks that were envisaged did not materialise. Therefore, the actual losses turned out to be less than those estimated at 31 December 1995.
- (70) However, Germany explains that contrary to what the Commission claims in the opening procedure, it was not to be expected in summer 1996 that the actual losses would turn out to be higher than those indicated in the last spillover report. The yard's balance sheet was carefully drafted taking into consideration the rules on maintaining sufficient capital. Therefore the losses were estimated in such a way that greater losses were not to be expected. For this reason the Commission was already fully aware of the difference between the original loss estimation and the actual losses since July 1996. However, it only started asking for information on the actual losses in summer 1999 and only opened the procedure in February 2000.

(71) Germany further argues that in case the Commission should come to the conclusion that the difference between the estimated and actual losses has State aid relevance, the difference would be smaller than claimed by the Commission. The Commission claims that the amount of aid received for loss compensation was EUR 262,037 million (DEM 512,5 million). This amount consists of the estimated loss compensation (EUR 230,081 million (DEM 450 million)) and the *Wettbewerbshilfe* (EUR 31,955 million (DEM 62,5 million)). However, *Wettbewerbshilfe* was not meant for loss compensation but, as usual, for compensating for the disadvantages suffered by all the German yards due to their location in Germany and in Europe. This was a scheme approved by the Commission. Therefore the amount of the actual losses can only be compared with the original loss estimation of EUR 230,081 million (DEM 450 million). The difference is thereby only EUR 29,033 million (DEM 56,784 million).

V. ASSESSMENT OF THE AID

Legal basis of the aid

(72) Directive 90/684/EEC in the version as amended by Directive 92/68/EEC provides for a derogation from the abolition of operating aid applicable to shipbuilding in favour of the shipyards in the former GDR. This operating aid should enable these yards to undergo urgent and comprehensive restructuring and to become competitive. According to Article 10a(2) of Directive 90/684/EEC, operating aid for the shipbuilding and ship conversion activities of the yards situated in the former GDR may be considered, under certain conditions, compatible with the common market until 31 December 1993. These conditions include an annual reporting obligation for Germany. In addition, the Commission shall ensure that the aid referred to in this Article does not affect trading conditions to an extent contrary to the common interest.

(73) Based on Directive 90/684/EEC as amended by Directive 92/68/EEC, the Commission adopted, in two decisions in 1993, certain measures in favour of shipyards in the former GDR. Among these measures were also grants of operating aid, which were considered compatible with the common market pursuant to Article 87(3)(e) of the EC Treaty.

(74) These Commission decisions approving the aid refer to the obligation of the Commission to ensure that the yards in the new *Länder* only receive aid, which is necessary for their restructuring. The aim of Directive 92/68/EEC providing a derogation from the general

prohibition of operating aid applicable to shipbuilding, was to allow 'the continued operation of the yards' during their restructuring. Aid granted on the basis of this exceptional derogation had to be strictly limited to this purpose, namely the restructuring of the yards. Therefore, the Commission only approved aid on the condition that it was necessary for the above, namely the continued operation during restructuring. This is clearly stated in the fourth paragraph of the decision communicated to Germany by letter of 3 March 1993 (SG (93) D/4052) and in the fourth paragraph of the decision communicated to Germany with the letter of 17 January 1994 (SG (94) D/567) ⁽⁶⁾.

(75) In addition, the decision on the releasing of the second tranche of aid communicated to Germany by letter of 17 January 1994 underlines that this operating aid constitutes the maximum operating aid to be paid to the yard related to contracts signed until 31 December 1993. That makes it evident that the concept of the decision was made clear to Germany and the beneficiary: the aid approved is a maximum amount, which is to be granted only insofar as it is strictly necessary for the success of the restructuring process.

Loss prognosis and the concept of 'lump sum'

(76) Germany and KWW claim that the Commission decided in a final manner on the necessity of the aid before releasing the tranches. In its decisions it did not lay down any conditions, which would justify a later reassessment of the aid. In addition, being fully aware that the privatisation contract did not provide for any possible repayment obligations, the Commission approved the lump sum of aid. If the Commission doubted the plausibility of the loss prognosis submitted to it at the time, it should have inserted a provision in its decisions stating that the approval only covered aid that corresponded to the actual losses.

(77) As explained in the decision to open the procedure ⁽⁷⁾, the Commission notes that in cases where aid is granted for restructuring, which is to be carried out after the decision on the compatibility of aid is taken, the approval has to be based on estimations. Estimations on the elements of the operating aid were especially needed in this case since Article 10a(2)(a) of Directive 90/684/EEC required that this aid was to be paid by 31 December 1993. The above decisions take into consideration this urgency, when they stress that '[it] is clear to the Commission that a decision is urgently needed in order not to inhibit the possibilities of the yard to restructure'.

⁽⁶⁾ The second sentence in the fourth paragraph of the latter decision reads as follows: 'However, the Commission can, in the light of the undertaking to the Council described above, only approve the granting of aid for as far as the necessity is clearly shown and the conditions laid down in the Council Directive as counterpart for the aid are being closely adhered to.'

⁽⁷⁾ See footnote 3.

- (78) The Commission had to adopt its decisions concerning operating aid on the basis of the information submitted in advance by the German government. That is why appropriate conditions concerning the necessity had to be and were in fact inserted expressly into the decisions. When the decisions were taken, the Commission did not doubt the plausibility of the loss prognosis, but it had to ensure, that should the losses not be as high as estimated, granted loss compensation would become incompatible aid and consequently has to be recovered.
- (79) That is also why all Commission decisions releasing the tranches of aid recall that on adoption of this derogation from the rules on operating aid applicable to other Community yards, the Commission gave an undertaking to the Council that the Commission would use its monitoring and investigative powers to ensure that the yards in the new *Länder* only receive the aid 'needed in order not to inhibit the possibilities of the yard to restructure'. It cannot be put into question that the concept of aid, to be granted as a lump sum presented by Germany after the restructuring was finalised, does not correspond to the provisions either of the Council directives or the Commission decisions.

Misinterpretation of State aid rules

- (80) Before the decisions for aid were taken, Germany provided the Commission with a copy of the Acquisition Agreement between the THA and Kvaerner Warnow Werft. According to Germany, this document fully informed the Commission about the provisions on aid, which was granted as a lump sum. Germany does not explain in which way such an agreement concluded between the THA and Kvaerner Warnow Werft could bind a third party, namely the Commission.
- (81) Further to this, Germany refers to its letter to the Commission, by which it submitted on 28 May 1993 additional information concerning the privatisation of East German shipyards to the Commission. The main issue of this communication was to explain the need for operating aid in order to cover losses from contracts and underemployment. Germany also recalled that according to the Acquisition Agreements a refund of incurred losses against proof of payment was not envisaged in order to avoid uneconomic management of the enterprise. It would have been the THA's objective to assign the financial risk of additional losses to the purchaser. Therefore, the expected losses for the shipyards, including Warnow Werft, had to be determined, in advance, as exactly as possible.
- (82) Germany further explained that in a countermove it was agreed that the purchaser would benefit from the unlikely development of making savings. This mechanism should encourage purchasers to carry out the transition of shipyards into the conditions of a market economy as quick as possible.
- (83) This is precisely the reason why the Commission had to repeat, in its decision of 17 January 1994, the undertakings given by Germany, which were actually already set out unequivocally in the first decision communicated to Germany by letter of 3 March 1993. In addition, the Commission decided to reply in a decision, i.e. in an attackable legal act, capable of becoming definitive. Taking into account Germany's knowledge of State aid rules and background information of the case, the Commission cannot understand the misinterpretation of the Commission's authorising decisions in 1993 and 1994 by Germany. These decisions clearly underlined that the Commission would use its investigating and monitoring powers to ensure that the yards only receive the aid necessary for their restructuring.

Aid amounts received by KWW

- (84) In its comments both Germany and KWW argue that the contested amount of EUR 60,988 million (DEM 119,284 million) is part of the total operating aid approved by the Commission decisions communicated to Germany in March 1993 and January 1994 and therefore existing aid, of which the compatibility cannot be subsequently reassessed. They further comment that not all the amounts the Commission approved as aid were in fact aid. A part of the restructuring costs was covered by the yard's own resources, which appeared as items in the balance sheet. Only EUR 29,812 million (DEM 58,309 million) operating aid was paid in cash.
- (85) The Commission notes that the total aid includes cash and non-cash aid. This non-cash aid consists in the transfer of assets to the new company, a transfer of certain fixed and current assets, joined with a less than proportional transfer of financial liabilities. However, the form of payment of the aid is not decisive as regards the nature of a payment as aid. The Commission approved, in its two decisions, a total of EUR 380,9 million (DEM 745 million) of operating aid and a part of this aid was paid in cash, another part non-cash. Neither Decision has been challenged by Germany or by the beneficiary. Consequently, they are binding for Germany, for the beneficiary and for the Commission itself. At this stage, it has also to be stated that according to the decisions the total amount of aid granted in cash is clearly higher than the contested amount of EUR 60,988 million (DEM 119,284 million). The beneficiary should have contested these decisions within two months if it found that the assessment was wrong, as provided for in Article 230(5) of the EC Treaty.

- (86) Point 7.6.2 of the Privatisation Agreement reads as follows: 'The projected balance sheet was to reflect a special accrual in the amount of DEM 435 500 000,00 meant to finance catch-up investments to be effected by the Company during the restructuring period and a special accrual in the amount of DEM 450 000 000,00 meant to finance losses incurred by the companies during the restructuring period due to shortfalls in productivity of the company and for other losses due to the presently lacking competitiveness of the company.' From this it follows that the payment of DEM 450 million to cover losses was a condition to acquire Warnow Werft, which was taken into account in the projected balance sheet. Therefore, the projected balance sheet included positions, which were not direct elements of the transferred assets but which KWW received to cover losses from shipbuilding contracts; such positions constitute State aid.
- (87) The fact that part of the aid was paid non-cash is made clear in the Commission decision communicated to Germany on 17 January 1994, which releases the second tranche of operating aid and which reads as follows: '... 617,1 m DEM operating aid of which 113.5 m DEM would be paid in cash being 66.9 m DEM *Wettbewerbshilfe* and 46.6 m DEM to cover a part of the losses on contracts signed after 1.7.1990' This indicates that most part of the operating aid approved by this decision, namely the amount of EUR 257,4 million (DEM 503,6 million), was approved as non-cash aid.
- (88) KWW cannot pretend that it never attacked the decisions in the parts concerning non-cash aid because the Commission provided a positive decision. Qualifying the transfer of assets as State aid weighted on KWW in a way that an application against the decision was admissible if KWW had not agreed to this. The Commission classified the measures as aid and examined the compatibility with the common market. It meant that the Commission was able to impose conditions respectively to accept Germany's undertakings directly affecting the beneficiary's operations. In such a situation, an application for the annulment of the decision is considered to be admissible⁽⁸⁾.
- (89) The Commission carried out an in-depth analysis of the aid amounts, which KWW received after the approval of the aid based on all information available. Following the screening of the pre-privatisation balance sheet, the takeover balance sheet, spillover reports from the auditor Arthur Anderson, the privatisation procedure and the privatisation contract, it appears that the shipyard did not receive operating aid equivalent to the waiver of old current liabilities of EUR 42,1 million (DEM 82,400 million) as authorised in the Commission decision of 3 March 1993.
- (90) Indeed, such a waiver would only constitute payment of State aid if the beneficiary accordingly kept at his disposal assets freed of financial liabilities (or received these assets if a new company were created as in the current case). However, KWW's takeover balance sheet does not include such assets transferred free of financial liabilities corresponding to this waiver, which would represent this operating aid. Since the loan waived just before privatisation was a liability of WW (a public owned company), the State, as the previous shareholder, was the only beneficiary and did not transfer the advantage to the new company. It appears that the shipyard did not benefit from this operating aid that the Commission formerly approved.
- (91) Finally, according to the spillover report, shipbuilding contracts for special ships called 'cash carriers' were not transferred to KWW. Although a loss compensation for those contracts was included in the operating aid of EUR 315,5 million (DEM 617,1 million) as approved by the Commission on 17 January 1994, KWW was not in charge to carry out the contracts. Accordingly KWW could not receive a compensation for envisaged losses resulting from those contracts. There is therefore no reason to compensate KWW for not having received this aid of EUR 17,7 million (DEM 34,6 million). As mentioned in recitals 12 to 20, this last amount was not included in the loss cover of EUR 230,08 million (DEM 450 million) indicated in the spillover report.
- (92) KWW received EUR 8 million (DEM 15,6 million) less investment aid from the Land Mecklenburg-Vorpommern.
- (93) KWW and Germany further comment that if the Commission came to the conclusion that the difference between the actual and estimated losses was of State aid relevance, then in any case the difference would be smaller than claimed by the Commission. The EUR 31,955 million (DEM 62,5 million) *Wettbewerbshilfe* was not meant for loss compensation but, as usual, for compensating for the disadvantages suffered by all the German yards due to their location in Germany and in Europe.

'Wettbewerbshilfe'

⁽⁸⁾ Case T-296/97 *Alitalia v Commission* [2000] ECR II-3871, paragraph 74.

- (94) The Commission notes that as explained earlier, the privatisation contract and explanatory notes on the privatisation of Warnow Werft contained detailed aid budgets for the restructuring of the yard. As explained earlier, these documents lay down the total amount of aid for loss compensation during the restructuring at EUR 285,096 million (DEM 557,6 million). This amount included EUR 230,091 million (DEM 450 million) loss compensation, EUR 37,32 million (DEM 73 million) *Wettbewerbshilfe* and EUR 17,69 million (DEM 34,6 million) for losses, which resulted from a pending contract taken over by Treuhandanstalt.
- (95) As regards *Wettbewerbshilfe*, KWW received only EUR 31,955 million (DEM 62,5 million) instead of the approved EUR 37,3 million (DEM 73 million). The amount of *Wettbewerbshilfe* was approved in order to cover losses during restructuring. For this reason the Commission has included the compensation for *Wettbewerbshilfe* not paid of EUR 31,955 million (DEM 62,5 million) in the total aid approved for loss compensation.
- (96) Even if one could follow the arguments of KWW they could not have any influence on the assessment of the Commission. It is not disputed that KWW received aid classified as *Wettbewerbshilfe*. Whether it is earmarked for loss compensation or not, *Wettbewerbshilfe* constituted an income and diminished losses. Consequently, the need for operating aid to compensate losses was lower. The argument of KWW to completely disregard *Wettbewerbshilfe* is not supported by any serious argument and must be dismissed.

Monitoring and investigative powers

- (97) Germany also questions the monitoring powers of the Commission to establish whether the aid was used for the purposes for which it was granted. The Commission notes that it is clearly stated in the Commission decisions approving aid for loss compensation that the Commission would use its investigating and monitoring powers to ensure that the yards in the new *Länder* only receive the aid necessary for their restructuring.
- (98) The Commission does not agree with Germany that the sentence in the Commission decisions referring to the monitoring and investigating powers of the Commission only relates to the time at which the estimations were assessed and the aid tranches released. In this context both the specific circumstances of the case, above all the wording of Directive 92/68/EEC according to which the operating aid needed to be paid out before end 1993, and the fact that the same Directive imposed reporting obligations on Germany, should be recalled. Considering this, the Commission's commitment to the Council can only be understood as a requirement to monitor that the aid is limited to that strictly necessary for restructuring.
- (99) As regards the monitoring obligations, it is noted that in accordance with Article 10a(2)(d) of Directive 90/684/EEC, Germany was to provide evidence to the Commission, in the form of annual reports by an independent chartered accountant, that aid payments are strictly limited to the activities of yards situated in the former GDR. These spillover reports were submitted to the Commission until the end of restructuring period (end of 1995) to monitor whether the aid had been used exclusively for KWW. Further to this information, the reports included information on the use of aid.
- (100) Germany argues that the fact that Germany submitted to the Commission information after the approval of the aid, in particular the spillover reports, does in no way constitute a competence for the Commission to verify the necessity of the aid. The spillover reports were submitted in order to demonstrate that no spillover of aid took place from the yard to other undertakings. However, the meaning and purpose of the reports was not to show the actual amount of losses. The information on the use of aid included in these reports was only meant to help the transparent presentation, with regard to the purpose of the spillover controls, that no aid was transferred to the investor or to the other yards.
- (101) Germany disregards the fact that both approving decisions set out undertakings for granting of operating aid to cover losses, which should exclude overcompensation. In the light of these provisions further discussion on the monitoring powers of the Commission appear to be unnecessary, given that it cannot be seriously questioned that the Commission is empowered and even obliged to draw consequences from the non-compliance with crucial conditions of an approving State aid decision. In such cases, the Commission has to insist on the recovery of such aid, which has to be seen as incompatible and illegal, i.e. granted without Commission approval.
- (102) The Commission agrees with Germany on the point that the purpose of the spillover reports was to demonstrate that no aid for the restructuring of the yard was transferred or was spilled over to other undertakings, like the mother company of the yard. However, the monitoring of the use of the aid according to the approving decisions included a monitoring for the purposes it was earmarked for in order to ensure that all aid has been strictly used for the restructuring of the yard.

(103) The orderly use of aid for the purposes it was granted for was an essential part of the monitoring. This is also illustrated by the structure and contents of the spillover reports, in which the explanation on the use of the aid received is an important part. It was considered as important to include this information in the reports to provide to the Commission all information necessary to monitor the orderly use of the aid in compliance with the authorising decisions and the commitment to the Council.

Timing of the Commission's investigation

(104) A further common argument made by both KWW and Germany is that the Commission has been aware since 1996, the time when the last spillover report was submitted to the Commission, that the actual losses were significantly lower than the estimated ones. Nevertheless, the Commission only started investigating the matter in 1999.

(105) The Commission notes that, as explained in the decision opening the procedure, the last spillover report submitted covers the period until 31 December 1995. Annex 2, page 1 of the report contains a table of the aid received by 31 December 1995. According to this table, the aid used for loss compensation by that date is indicated as being EUR 256,817 million (DEM 502,291 million) whereas the aid received was EUR 262,0 million (DEM 512,5 million). Since it was possible that the missing EUR 5 million could have been necessary after the date of 31 December 1995 because not all the losses from the contracts signed by 31 December 1993 had been realised by that date, the Commission saw no reason to interfere.

(106) The Commission had no indication at the time of the last spillover report that the difference between the actual and the estimated losses was in fact significantly higher than the one indicated in the last spillover report: EUR 60,988 million (DEM 119,284 million) instead of EUR 5 million. Since neither Germany nor KWW informed the Commission about this change of circumstances in 1997 when they received the auditors' report confirming the final figures, the Commission was not aware of the real situation. The Commission only became aware of this in July 1999 when, following its own request, the Commission received by the letter dated 30 June 1999 from Germany, the auditor's statement of 25 April 1997. Since this statement was addressed only to Germany but was never submitted to the Commission, the Commission was not aware of the real situation before July 1999. In this regard, the Commission wishes to stress that Germany presented no evidence that the Commission was informed as alleged by Germany.

The use of aid according to its purposes

(107) KWW argues that the funds for restructuring were used pursuant to their objectives since the Commission decisions did not approve aid particularly for loss compensation; only operating aid in general was approved. The aid would have been used for the restructuring of the yard and therefore in accordance with its objectives.

(108) The Commission notes that the Commission decisions communicated to Germany in March 1993 and January 1994 both mention amounts that were approved as being designated for loss compensation. The first decision expressly approves EUR 6 million (DEM 11,7 million) operating aid to cover part of the losses on contracts signed after 1 July 1990, and the second decision expressly approves EUR 23,82 million (DEM 46,6 million) to cover part of the losses on contracts signed after 1 July 1990. These amounts are determined to compensate particular losses, whilst the use of all other operating aid was not specified to cover losses mentioned expressly, but this cannot mean that it was intended for other purposes. In the notification by Germany the purpose of granting these amounts was clearly defined as loss compensation.

(109) The Commission notes that the Privatisation Agreement and its explanatory documents included detailed listings of different categories of aid. The amount earmarked for loss compensation in this document for the restructuring period is EUR 285 million (DEM 557 million). The same classification of aid into different categories is maintained in the spillover reports, which formed the basis of the Commission's monitoring of the use of the aid for different purposes of the restructuring, as approved by the Commission. Its decisions communicated to Germany in March 1993 and January 1994 approved operating aid, which was specifically earmarked for loss compensation during the restructuring.

(110) The Commission takes into account that a cash effective utilisation of accruals for charter guarantees of EUR [...] (*) (DEM [...]) and equity guarantees of EUR [...] (DEM [...]), together EUR [...] (DEM [...]) — were not considered in the spillover report. These expenses, which were not correctly attributed to the shipbuilding contracts, were realised only after the end of 1995. However, even if these costs of guarantees are taken into account, losses during restructuring were substantially lower than the aid approved to cover them.

(*) Business secret.

- (111) Although the Commission can accept to take into account the costs caused by charter and equity guarantees because they are by nature linked to specific contracts and take place by definition after the ships are delivered, the same reasoning can not apply to restructuring cost incurred by the company after December 1995. Indeed the privatisation contract clearly specified that the company had, as a minimum, to employ a precise number of workers until the end of 1995. If this undertaking was not respected and fewer workers were employed, severe fines were envisaged. All the closure aid and aid to cover losses authorised by the Commission could only cover the restructuring period finishing in December 1995. Therefore, it was clear from the beginning that if KWW wanted to lay off certain surplus workers, it would need to wait for the end of 1995 and that these costs would not be covered by closure or operating aid. This timing was very clear from the date of the privatisation. Firstly, it is not possible to change this logic and reattribute the restructuring costs incurred after December 1995 to the contracts executed before that date. Secondly, this restructuring that took place after 1995 by its nature did not lead to lower losses on contracts executed before that date. Thirdly, the provision of the privatisation contract forcing the company to employ a certain number of workers constitute an exogenous and separate undertaking that can not be linked to certain contracts.
- (112) As regards the allegation of KWW that the aid was used for the restructuring of the yard and therefore in accordance with its objectives, the Commission notes that since the actual losses during the restructuring were lower than the aid paid to cover them, these surplus funds may have been used for a different purpose. However, according to the information in the Commission's possession, all other categories of aid for which aid for restructuring was approved were exhausted since all aid approved for these purposes was accordingly used in full. Since the amounts and categories were strictly limited by the Commission decisions, no room was left to use additional aid for restructuring purposes.
- (113) In the absence of further explanations by KWW or by Germany on the actual use of the remaining EUR 55,423 million (DEM 108,399 million) and according to the information in its possession, the Commission concludes that the aid of EUR 55,423 million (DEM 108,399 million) was not used for the purposes for which it was approved by the Commission.
- (114) According to the Commission decisions approving the aid, the yards shall only receive the aid necessary for their restructuring, and the Commission had committed itself to monitor the compliance of this provision. For this reason, only the compensation of actual losses can be considered as being compatible with the Commission decisions approving the aid.
- (115) The Commission notes that only the aid that has been granted in accordance with those decisions approving the aid and that fulfil the conditions under which the aid was granted, including the purpose for which the aid was supposed to be used, can be considered compatible with the Commission decisions and thereby with the common market. Therefore, the aid, which fails to fulfil these conditions automatically falls outside the scope of the approving decisions and is rendered incompatible.
- (116) Considering the above, the Commission concludes that the total of the aid approved by the Commission for KWW for its restructuring was EUR 637,5 million (DEM 1 246,9 million). Regarding the operating aid, the Commission takes note that KWW has not received EUR 42,1 million (DEM 82,4 million) corresponding to the waiver of old current liabilities and that KWW has received EUR 5,4 million (DEM 10,5 million) less *Wettbewerbshilfe* than approved.
- (117) Since KWW did not carry out the contracts for the cash carriers it could apparently not receive a compensation for losses resulting from those contracts. As explained, we therefore do not take into account the non-payment of this aid.
- (118) The Commission notes that according to the auditor's report on aid received by KWW by 31 December 1995, KWW had received EUR 230,08 million (DEM 450 million) directly for loss compensation and EUR 31,95 million (DEM 62,5 million) as compensation for not having received *Wettbewerbshilfe*, resulting in a total of EUR 262 million (DEM 512,5 million) for compensation of losses during the restructuring period.
- (119) The Commission further notes that the documents submitted by Germany by letter of 30 June 1999, including the statement of the auditor of 25 April 1997, indicate that the losses to be covered by the approved aid amounted only to EUR 201,048 million (DEM 393,216 million) at 31 December 1996. Taking into account aforementioned additional losses from certain guarantees, this amount should be increased by EUR [...] (DEM [...]) to EUR 206,613 million (DEM 404,101 million).

Resulting excess aid

- (114) According to the Commission decisions approving the aid, the yards shall only receive the aid necessary for

(120) Considering the aforementioned points, the Commission notes that information in its possession shows that KWW had received EUR 262,037 million (DEM 512,5 million) aid for loss compensation during restructuring, whereas the actual losses during the restructuring only amounted to EUR 206,613 million (DEM 404,101 million). This indicates that KWW had received EUR 55,423 million (DEM 108,399 million) excessive operating aid for loss compensation.

(121) However, the Commission takes into account that Kvaerner has not received EUR 42,1 million (DEM 82,4 million) operating aid for restructuring earlier approved by the Commission, which it considers deductible from the excess aid for loss compensation. Compensating excess aid for losses by non-received operating aid appears in line with the Commission's commitment of the authorising decisions to ensure that the beneficiary only receives the aid necessary to restructure. Following this reasoning, only the aid amount of EUR 13 293 077 (DEM 25 999 000) should be recovered.

Explanation of the alleged DEM 400 million (EUR 205 million) loan granted by KWW to Kvaerner a.s.

(122) Finally, although the Commission has not opened the procedure on this point, KWW has given the following explanation for the cash movement of around DEM 400 million (EUR 205 million) which was reported by the German press on 12 June 1999 and was at the origin of the Commission request for information (see recital 1).

(123) The Kvaerner group had introduced a system of cash pooling, under which all incoming cash from the different companies was consolidated, and out of which all cash payments to be effected (for liabilities or otherwise) have been made. KWW became part of that cash pooling in 1998. Contributions from KWW to the cash pool took the form of repayable loans from KWW to its parent, Kvaerner a.s.

(124) It should be noted that [...]

(125) The cash pooling showed a peak for KWW of EUR 172,877 million in June 1999 (a higher, incorrect figure of EUR 200 million was somehow leaked to the press), of which EUR [...] served as collateral for the guarantees. Liabilities of KWW were paid out of the cash concentration immediately thereafter, thus reducing the amount in the cash concentration by EUR [...], leaving some EUR [...] as 'free' cash.

(126) Total cash available in June 1999 stemmed from the positive cash flow generated from 1996 to 1998, payments made by shipowners for deliveries in 1998

and early 1999 and substantial down payments on account of very large shipbuilding contracts (such payments between mid-1998 and June 1999 amounted to EUR [...]). The temporary nature of the cash peak in June 1999 and the correlation with down payments is also shown by the fact that at the end of 1999, the total cash concentration showed only EUR [...] in favour of KWW, compared with down payments on account of new orders which, at that time, amounted to EUR [...].

(127) These elements show that the cash movement reported by the German press in 1999 does not seem to result from excess aid granted during the restructuring period that ended in 1995.

VI. DURATION OF THE PROCEDURE

(128) As explained in the opening decision of the Commission, the German press reported on 12 June 1999 that Kvaerner Warnow Werft had given a loan of around DEM 400 million to its parent company Kvaerner a.s. With a letter dated 16 June 1999 the Commission requested detailed information from Germany of the origin of the transferred funds in order to ensure that these funds did not contain residues of restructuring aid paid to the company in 1993 to 1995, or any other aid elements. Germany finally delivered all necessary information by letter dated 16 September 1999. Further information on the preliminary procedure is included in points I.1 and I.2 of the opening decision.

(129) By means of a letter dated 29 February 2000, the Commission notified Germany of its decision to initiate the procedure laid down in Article 88(2) of the EC Treaty concerning the aforementioned aid⁽⁹⁾. As the Court of Justice of the European Communities held in Joined Cases C-74/00 P and C-75/00 P⁽¹⁰⁾ 'in the absence of any provision in that regard, the fundamental requirement of legal certainty has the effect of preventing the Commission from indefinitely delaying the exercise of its powers'. For the present procedure, this does not seem to be relevant, since Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 93 of the EC Treaty⁽¹¹⁾ includes a provision on duration of the investigation. Pursuant to Article 7(6) and (7) '[t]he Commission shall as far as possible endeavour to adopt a decision within a period of 18 months from the opening of the procedure. (...) Once the time limit referred to in paragraph 6 has expired, and should the Member State concerned so request, the Commission shall, within two months, take a decision on the basis of the information available to it.' The Commission states that Germany did not ask for the application of this provision.

⁽⁹⁾ See footnote 3.

⁽¹⁰⁾ *Falck SpA and Acciaierie di Bolzano SpA v Commission* [2002] ECR I-7869, paragraph 140, referring to Case 59/62 *Geigy v Commission* [1972] ECR 787, paragraph 21.

⁽¹¹⁾ OJ L 83, 27.3.1999, p. 1. Regulation as last amended by the 2003 Act of Accession.

(130) In addition, both Germany by letter of 4 June 2003 and the mother company of the beneficiary, supported by a letter from the Norwegian Minister of Industry and Trade of 5 January 2004, asked the Commission to delay the decision until the Court gives its judgment in Case C-181/02 P⁽¹²⁾. KWW cannot, for that reason, claim that 'the fundamental requirement of legal certainty' has been infringed, given that it also continued negotiations with the Commission and even presented new but not pertinent documents in May 2004.

VII. CONCLUSION

(131) The Commission emphasises that, not only were the decisions authorising aid to Kvaerner Warnow Werft specific and unique but also the accompanying framework conditions arising from the German reunification. First of all, the decisions were taken on a specific legal basis, that is Article 10a of Directive 90/684/EEC, authorising exceptionally large amounts of aid; at the same time the Council set out a short deadline to pay out the aid (until 31 December 1993). Since the aid amounts envisaged were based only on rough estimations the authorising decisions underlined that the Commission would ensure that the yards in the new *Länder* would only receive the aid necessary to restructure. Such specific provision for an *ex post* monitoring on the compatibility of aid amounts, which are unusual and exceptional, became operational via the spillover reports, which not only ensured that no other enterprises such as KWW would benefit from the aid but also provided for specific reporting on aid amounts received by Kvaerner and its losses from certain ship-building contracts, for which compensation by State aid was authorised.

(132) Since the authorising decisions made clear that only the aid necessary for restructuring would constitute compatible aid and that a specific monitoring was established to control the development of losses from ship-building contracts, the beneficiary cannot claim that it had legitimate expectations to keep any excess aid. The Commission never communicated that, despite the wording of the decisions, its undertakings to the Council and the specific monitoring that was carried out, aid for loss compensation could be considered as a lump sum. KWW was aware that for such large aid amounts which were based on rough cost estimations and calculated at short notice, a lump sum system could not be in line with strict State aid control.

(133) The Commission finds that EUR 13 293 077 (DEM 25 999 000) operating aid granted by Germany to KWW did not comply with the provision of the

Commission decisions communicated to Germany by letters of 3 March 1993 and 17 January 1994, according to which the yards in the new *Länder* shall only receive the aid necessary for their restructuring. Since only the aid that complies with the Commission decisions taken in accordance with Directive 90/684/EEC can be considered compatible with the common market pursuant to Article 87(3)(e) of the EC Treaty, the Commission concludes that EUR 13 293 077 (DEM 25 999 000) aid is incompatible with the common market pursuant to Article 87(1) of the EC Treaty.

(134) According to article 14(1) of Regulation (EC) No 659/1999 concerning negative decisions in cases of unlawful aid, the Commission decides that the Member State concerned shall take all necessary measures to recover the aid from the beneficiary. The aid to be recovered shall include interest from the date on which it was at the disposal of the beneficiary until the date of its recovery,

HAS ADOPTED THIS DECISION:

Article 1

State aid granted by Germany for the benefit of Kvaerner Warnow Werft GmbH amounting to EUR 13 293 077 (DEM 25 999 000) is incompatible with the common market.

Article 2

1. Germany shall take all necessary measures to recover from the beneficiary the aid referred to in Article 1, which was unlawfully available to the beneficiary.

2. Recovery shall be effected without delay and in accordance with the procedures of national law provided that they allow the immediate and effective execution of this decision.

3. The sums to be recovered shall bear interest throughout the period running from the date on which they were first put at the disposal of the beneficiary until their actual recovery.

4. The interest rate to be applied will be the reference rate used for calculating the grant equivalent of regional aid and that is applicable on the date on which the aid was first put at the disposal of the beneficiary.

⁽¹²⁾ *Commission v Kvaerner Warnow Werft* (not yet published in the ECR).

5. The interest rate referred to in paragraph 4 will be applied on a compound basis throughout the entire period referred to in paragraph 3.

However, if more than five years have elapsed between the date on which the aid was first put at the disposal of the beneficiary and the date of recovery, the interest rate shall be recalculated at five yearly intervals, taking as a basis the reference rate in force at the time when the rate is recalculated.

Article 3

Germany shall inform the Commission, within two months of notification of this decision, of the measures planned and already taken to comply with it. This information must

include the information required by the form attached in the Annex.

Article 4

This decision is addressed to the Federal Republic of Germany.

Done at Brussels, 20 October 2004.

For the Commission

Mario MONTI

Member of the Commission

ANNEX

Information regarding the implementation of Commission Decision 2005/374/EC1. *Calculation of the amount to be recovered*

- 1.1. Please provide the following details on the amount of unlawful State aid that has been put at the disposal of the beneficiary:

Date(s) of payment (*)	Amount of aid (**)	Currency	Identity of beneficiary

(*) Date(s) on which (individual instalments of) the aid has been put at the disposal of the beneficiary (in so far as a measure consists of several instalments and reimbursements use separate rows).

(**) Amount of aid put at the disposal of the beneficiary (in gross aid equivalents).

Comments:

- 1.2. Please explain in detail how the interest to be paid on the amount of aid to be recovered will be calculated?

2. *Measures planned and already taken to recover the aid*

- 2.1. Please describe in detail what measures have already been taken and what measures are planned to effect an immediate and effective recovery of the aid. Please also explain what alternative measures are available under national law to effect recovery? Please also indicate where relevant the legal basis for the measures taken/planned.

- 2.2. By what date will the recovery of the aid be completed?

3. *Recovery already effected*

- 3.1. Please provide the following details on the amounts of aid that have been recovered from the beneficiary:

Date(s) (*)	Amount of aid repaid	Currency	Identify of beneficiary

(*) Date(s) on which the aid has been repaid.

- 3.2. Please attach information documenting the repayment of the aid amounts specified in the table under point 3.1 above.