JUDGMENT OF THE COURT (Fifth Chamber)
29 April 2004 *

In Case C-181/02 P,

Commission of the European Communities, represented by K.-D. Borchardt and V. Kreuschitz, acting as Agents, with an address for service in Luxembourg,

appellant,

APPEAL against the judgment of the Court of First Instance of the European Communities (Fourth Chamber, Extended Composition) of 28 February 2002 in Joined Cases T-227/99 and T-134/00 *Kvaerner Warnow Werft* v *Commission* [2002] ECR II-1205, seeking to have that judgment set aside,

the other party to the proceedings being:

Kvaerner Warnow Werft GmbH, established in Rostock-Warnemünde (Germany), represented by M. Schütte, Rechtsanwalt, with an address for service in Luxembourg,

applicant at first instance,

* Language of the case: German.

THE COURT (Fifth Chamber),

composed of: C.W.A. Timmermans, acting as President of the Fifth Chamber, A. La Pergola (Rapporteur) and S. von Bahr, Judges,

Advocate General: P. Léger,
Registrar: M. Arzamendi, Principal Administrator,

having regard to the Report for the Hearing,

after hearing oral argument from the parties at the hearing on 10 July 2003,

after hearing the Opinion of the Advocate General at the sitting on 27 November 2003,

gives the following

Judgment

1 By application lodged at the Court Registry on 15 May 2002, the Commission of the European Communities brought an appeal under Article 49 of the EC Statute of the Court of Justice against the judgment of the Court of First Instance of

28 February 2002 in Joined Cases T-227/99 and T-134/00 *Kvaerner Warnow Werft* v *Commission* [2002] ECR II-1205 ('the contested judgment'), by which the Court of First Instance annulled Commission Decision 1999/675/EC of 8 July 1999 on State aid implemented by the Federal Republic of Germany in favour of Kvaerner Warnow Werft GmbH (OJ 1999 L 274, p. 23), as amended by Commission Decision 2000/416/EC of 29 March 2000 on State aid implemented by the Federal Republic of Germany in favour of Kvaerner Warnow Werft GmbH (1999) (OJ 2000 L 156, p. 39), and Commission Decision 2000/336/EC of 15 February 2000 on State aid implemented by the Federal Republic of Germany in favour of Kvaerner Warnow Werft GmbH (OJ 2000 L 120, p. 12).

The legal background

2 Article 92(3)(e) of the EEC Treaty (now, after amendment, Article 87(3)(e) EC) provides:

> The following may be considered to be compatible with the common market:
>
> ...
>
> (e) such other categories of aid as may be specified by decision of the Council acting by a qualified majority on a proposal from the Commission.'

3 On that basis, the Council adopted Directive 90/684/EEC of 21 December 1990 on aid to shipbuilding (OJ 1990 L 380, p. 27). This provides for the possibility, subject to certain rules, of granting State aid to shipbuilding undertakings for operating, investment, closure, and research and development.

4 Article 6 of Directive 90/684 provides:

'1. Investment aid ... may not be granted for the creation of new shipyards or 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 in the capacity of other yards in the same Member State over the same period.

...

3. ... investment aid may be deemed compatible with the common market provided that

— the amount and intensity of such aid are justified by the extent of the restructuring involved,

— it is limited to supporting expenditure directly related to the investment.'

5 According to Article 10a(2)(c) of Directive 90/684, as amended by Council Directive 92/68/EEC of 20 July 1992 (OJ 1992 L 219, p. 54), operating aid for the shipbuilding and ship conversion activities of yards operating in the territories of the former German Democratic Republic on 1 July 1990 may, until 31 December 1993, be considered compatible with the common market provided that the German Government agrees to carry out, before 31 December 1995, a genuine and irreversible reduction of capacity of 40% net of the capacity of 545 000 compensated gross tonnes ('cgt') existing on 1 July 1990.

6 The first three recitals to Directive 92/68 state in this regard that:

'... the shipbuilding industry is important for the structural development of the coastal region of the territories of the former German Democratic Republic;

... the shipbuilding industry, as it existed in those territories at the time of their incorporation into the Community, requires urgent and comprehensive restructuring in order to become competitive; ... the direct application of the common maximum ceiling for production aid does not allow for such measures and a special transitional arrangement should therefore be introduced to enable the shipbuilding industry in those territories to operate during the period of gradual restructuring which should enable it to comply with the State aid rules applicable throughout the Community;

... moreover, competition considerations dictate that the sector of the shipbuilding industry of the territories in question should contribute significantly to the reduction of the excess capacity which, worldwide, continues to impede the restoration of normal market conditions for the shipbuilding industry;'.

Background to the dispute

7 Paragraphs 4 to 14 of the contested judgment read as follows:

'4 In 1992 Warnow Werft, an East German shipyard, was sold by the Treuhandanstalt, the [public-law] body with the task of restructuring the undertakings of the former German Democratic Republic, to the Norwegian industrial group Kvaerner. According to the sales contract sent by Germany to the Commission, Kvaerner undertook until 31 December 2005, with regard to the Warnow yard, not to exceed an annual building capacity of 85 000 cgt unless that restriction under Community legislation was relaxed. The 85 000 cgt capacity restriction was the amount allocated to the applicant by the Federal Republic of Germany in pursuance of Article 10a(2)(c) of Directive 90/684.

5 By decisions communicated to the Federal Republic of Germany by letters of 3 March 1993, 17 January 1994, 20 February 1995, 18 October 1995 and 11 December 1995 ("the authorising decisions"), the Commission authorised, in accordance with Directive 90/684 and Directive 92/68, planned aid from the

Federal Republic of Germany to Kvaerner totalling DEM 1 246.9 million, on condition that the capacity restriction of 85 000 cgt per year was complied with. The authorised aid was broken down as follows:

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

— DEM 45.5 million operating aid;

— DEM 82.4 million operating aid in the form of an exemption from previous liabilities;

— DEM 127.5 million investment aid;

— DEM 27 million closure aid;

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

— DEM 617.1 million operating aid;

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

— DEM 222.5 million investment aid;

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

— DEM 66.9 million investment aid;

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

— DEM 58 million investment aid.

6 In 1997, the applicant's actual production was 93 862 cgt. In 1998, its actual production was 122 414 cgt.

7 The Commission took the view that the restriction of 85 000 cgt per year had been exceeded for 1998 and, by letter dated 16 December 1998, it informed the Federal Republic of Germany of its decision to initiate the procedure laid down in Article [88](2) of the EC Treaty. This letter was the subject of a communication published on 16 February 1999 in the *Official Journal of the European Communities* (OJ 1999 C 41, p. 23).

8 The German authorities submitted their observations on 18 February 1999.

9 On 14 January and 25 March 1999, Commission representatives visited the yard with an independent ... expert.

10 By Decision 1999/675 ..., the Commission decided as follows:

"*Article 1*

The State aid, which Germany has implemented in favour of Kvaerner Warnow Werft GmbH in an amount of EUR 41.5 million (DEM 83 million), is incompatible with the common market pursuant to Article 87(1) of the EC Treaty.

Article 2

1. Germany shall take the necessary measures to recover from the recipient the aid of EUR 41.5 million (DEM 83 million)

...

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

..."

11 The Commission took the view that the capacity limit had also been exceeded in 1997 and, by letter dated 20 July 1999, notified the Federal Republic of

Germany that it had decided to initiate the procedure provided for in Article 88(2) EC. This letter was the subject of a communication published on 28 August 1999 in the *Official Journal of the European Communities* (OJ 1999 C 245, p. 24).

12 The German authorities submitted their observations on 4 October 1999.

13 By Decision 2000/336 ..., the Commission decided as follows:

"*Article 1*

Aid which Germany has implemented in favour of Kvaerner Warnow Werft GmbH amounting to EUR 6.3 million (DEM 12.6 million) is incompatible with the common market pursuant to Article 87(1) of the EC Treaty.

Article 2

1. Germany shall take the necessary measures to recover from the recipient the aid amounting to EUR 6.3 million (DEM 12.6 million).

...

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

calculated on the basis of the reference rate used for calculating the grant equivalent of regional aid.

..."

14 By Decision 2000/416 ..., the Commission decided as follows:

"*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.'"

...'

The proceedings before the Court of First Instance

8 By applications lodged at the Registry of the Court of First Instance on 11 October 1999 and 18 May 2000, Kvaerner Warnow Werft GmbH ('KWW') brought actions seeking the annulment of Decisions 1999/675 and 2000/336, registered as T-227/99 and T-134/00 respectively.

9 Following the adoption by the Commission, during the proceedings, of Decision 2000/416 amending Decision 1999/675, the applicant, by separate document, amended its pleas in law and forms of order sought in Case T-227/99.

10 Before the Court of First Instance it put forward eight pleas in law in support of its actions for annulment, of which the second and third pleas are based on errors of fact and of law in the application of Articles 87 and 88 EC and Directive 90/684.

11 It claimed, in particular, that the concept of a capacity restriction as used in the authorising decisions did not impose a limit on actual production but simply required compliance with a series of technical restrictions relating to the production installations. Thus, inasmuch as they stated that this concept had to be interpreted to mean that KWW's production could not exceed the limit of 85 000 cgt per year fixed by the authorising decisions, Decision 1999/675, as amended by Decision 2000/416, and Decision 2000/336 ('the contested decisions') were vitiated by errors of fact and of law.

The contested judgment

12 First of all, the Court of First Instance observed in paragraph 91 of the contested judgment that Directive 90/684, as amended by Directive 92/68, does not define the concept of 'capacity' and that, consequently, the Commission has a measure of discretion when interpreting that concept. However, it noted at the outset that KWW, rather than disputing the Commission's interpretation within the scope of that discretion, complains principally that the Commission failed to have regard in the contested decisions to the concept of capacity as imposed by it previously in the authorising decisions.

13 In that regard, as stated in paragraph 92 of the contested judgment, the Court considered that it was required to take into account the rule that the Community institutions must comply with the principle that they may not alter measures which they have adopted, so that the legal certainty of the persons affected by those measures may be ensured.

14 It adopted a two-stage approach for that purpose. Firstly, it considered the legal context in which the authorising decisions were made. Next, it ascertained whether, in the contested decisions, the Commission had not used a more limited interpretation of a 'capacity restriction' than that appearing in the authorising decisions.

15 As regards consideration of the legal framework behind the authorising decisions, paragraphs 94 to 96 of the contested judgment state that:

> '94 As regards, first, the legal framework within which the authorising decisions were taken, it must be observed that the objective of the capacity reduction laid down by Article 10a(2)(c) of Directive 90/684 ("the

German Government agrees to carry out ... a genuine and irreversible reduction of capacity of 40% net of the capacity of 545 000 cgt existing on 1 July 1990"), of which the capacity restriction of 85 000 cgt per annum imposed on the applicant forms part ..., is to restore a normal market situation within the shipbuilding sector and the competitiveness of the shipyards of the former German Democratic Republic, while reducing excess capacity.

95 As the reason for inserting the new Article 10a into Directive 90/684, the Council stated in the third recital to Directive 92/68 that "competition considerations dictate that the sector of the shipbuilding industry of the [former German Democratic Republic] should contribute significantly to the reduction of the excess capacity which, worldwide, continues to impede the restoration of normal market conditions for the shipbuilding industry".

96 The wording of Directive 90/684 also reveals its objective of eliminating the structural overcapacity of shipyards in the European Community in order to make them more efficient and competitive. That objective may be deduced, in particular, from Article 6 of Directive 90/684 ... and from the third, sixth, eighth and ninth recitals [to] that directive. According to the third recital, "although since 1989 there have been significant improvements in the world market for shipbuilding, a satisfactory equilibrium between supply and demand has still not been established and the price improvements which have taken place are still insufficient in the overall context to restore a normal market situation within the sector ...". According to the sixth recital, "[an agreement between the most important shipbuilding nations] must ensure fair competition at an international level among shipyards through a balanced and equitable elimination of all existing impediments to normal competition conditions ...". The eighth recital states "a competitive shipbuilding industry is of vital interest to the Community ...". Lastly, according to the ninth recital, "a tight and selective aid policy should be continued in order to support the present trend in production towards more technologically advanced ships and in order to ensure fair and uniform conditions for intra-Community competition".'

16 As regards the interpretation of the authorising decisions, paragraphs 97 to 104 of the contested judgment read as follows:

'97 It must be observed, next, that the reduction of excess capacity through the introduction of a capacity restriction is in essence ensured by the fixing of technical restrictions, known as "technical bottlenecks". That emerges clearly from the authorising decisions ... .

98 First of all, in its letter of 3 March 1993, which constitutes the first authorising decision, the Commission states that, "although the independent expert's report ordered by the Commission has shown that the construction capacity [of the Warnow shipyard] will hardly exceed 85 000 cgt — the quota granted to the shipyard by the German Government out of the total of 327 000 cgt granted to the East German shipyards — monitoring of the carrying out of the investments is deemed necessary in order to ensure that the capacities will actually be reduced. The reduction is dependent upon the investments being carried out according to the plans and designs presented to the consultant. Kvaerner acknowledged that the following restrictions would have to be placed on the yard:

— the new steel cutting shop to stay as developed with no additions except for a mechanical edge preparation machine (milling machine type);

— the number of work stations on the large panel line and the double bottom line to be fixed at eight respectively six as defined in the designs in the consultant's report EECI:0001A;

— any increase in length of these lines should be allowed only if the commensurate area is deducted from the 600 tonne super unit shop. The converse must also be applied, that is, any reduction in large panel/double bottom line area could be accompanied by an increase of the super unit shop area equal to the reduction in the large panel/ double bottom line area;

— the number of work stations on the curved panel line to remain at six as defined in the consultant's report EECI:0001A;

— the number of work stations on the small panel line to remain at a maximum of three as defined in the consultant's report EECI:0001A;

— only one 600 tonne crane to be fitted over the dock. The dockside cranes (two identified) to be of the jib type with a maximum lifting capacity of 50 tonnes."

99 It is clear from that passage that the objective set out in it, namely an actual reduction of capacity, was to be achieved essentially through compliance with a series of technical restrictions concerning the production plant of the shipyard.

100 The Commission's letter of 17 January 1994, which comprises the second authorising decision, is to the same effect. The Commission states in it that "the capacity restriction depends on the investments being made in accordance with the plans and designs presented to the consultants, in particular with regard to the adherence to the maximum steel consumption of 73 000 tonnes and in accordance with the restrictions provided for in the consultant's report." The fact that the capacity restriction of 85 000 cgt was based on a body of specific technical restrictions is also corroborated by the explanation in the same letter that "in the event of a failure to comply with the capacity restrictions, the Commission will be obliged to require all the aid to be repaid" and in particular by the use of the plural ("capacity restrictions") in that sentence.

101 In that context it should be added that if the Commission had really wished to impose on the applicant, when it authorised the aid, an annual ceiling on actual production, it would have sufficed for it to use the terms "production limit" or to specify that the capacity restriction referred, in the present case, to maximum production in optimum conditions. In the absence of such explanations, the applicant cannot be criticised for having exceeded the capacity restriction of 85 000 cgt per annum, since it is common ground that it complied, throughout the period in question, with all the technical restrictions.

102 However, in the authorising decisions there is no explanation of that kind. In particular, interpretation of the capacity restriction expressed in cgt per annum as being a restriction of actual production cannot be inferred from the following sentences in the letters of 20 February, 18 October and 11 December 1995 (the third, fourth and fifth authorising decisions respectively): "Furthermore, the first production monitoring report sent to the Commission shows that it is also necessary to monitor compliance with the capacity restrictions at the time of the planning of production and of production itself ... In the light of the two production monitoring reports sent to the Commission to date, monitoring clearly remains necessary in order to ensure compliance with the maximum capacity

authorised in the framework of the planned production as in that of actual production ... In accordance with the production monitoring reports sent to the Commission to date, monitoring remains necessary in order to ensure compliance with the maximum capacity in the framework of actual production as in that of planned production". Those sentences [merely] indicate that the applicant must, in the planning and actual production phases, comply with the technical restrictions on capacity. If, for example, the applicant receives two orders which would lead it to produce more than 85 000 cgt in one year, it is permissible for it to accept and perform those orders within that year if it is able to do so while complying at the same time with the technical restrictions on capacity laid down (such as those set out in paragraph 98 above relating inter alia to the number of work stations on the curved panel line and to the presence of only one 600 tonne crane over the dock).

103 Furthermore, in the same letters some sentences clearly indicate that compliance with the capacity restriction of 85 000 cgt per annum is treated in the same way as compliance with the technical restrictions on the installations. Thus in the letter of 20 February 1995 (third authorising decision) the Commission explains that "in carrying out the investment plan it is appropriate to monitor compliance with the capacity restriction applicable to shipbuilding. Such compliance is ensured only if the investment plan presented to the consultants is scrupulously observed; that applies in particular with regard to the maximum permissible output of 73 000 tonnes of steel, the double bottom line and the two panel lines. The German Government has given an assurance that the shipyard will comply with the capacity restriction." In its letters of 18 October and 11 December 1995 (the fourth and fifth authorising decisions), the Commission observes, in almost identical terms, that the double bottom assembly line and the large panel line limit the shipyard's capacity to [process] steel and by that very fact restrict the shipyard's production capacity to 85 000 cgt per annum. The Commission adds in those two letters that for the duration of that capacity restriction it is indispensable that the layout of the shipyard should not be [altered] and that the "optional" equipment which has not yet been installed should comply with the specifications which the shipyard submitted for an opinion by the consultant.

104 Directives 90/684 and 92/68 and the authorising decisions are therefore consistent in showing that, in line with the Commission's administrative practice as shown by another case on which the applicant relies (*Skibsværftsforeningen and Others* v *Commission* [Case T-266/94 [1996] ECR II-1399], paragraph 177), the capacity restriction laid down in those authorising decisions corresponded to the production achievable under favourable normal conditions, given the facilities available. When accepting and executing orders for the construction of ships, the applicant therefore had to comply with the technical restrictions on its installations, restrictions which had been calculated and laid down in such a way that under favourable normal conditions it would not produce more than 85 000 cgt per annum. However, the authorising decisions did not prohibit the applicant from producing, under exceptionally favourable conditions such as those which might result from the receipt of orders which could be executed more quickly than normal, more than 85 000 cgt per annum, but merely required compliance with the technical restrictions set out in particular in the authorising decisions, such as those limiting the number of work stations on the curved panel line to six and the number of work stations on the small panel line to three.'

17 In support of this line of argument and as an additional point, the Court referred to several judgments in paragraphs 105 and 106 of the contested judgment:

'105 Moreover, it has already been held by the Court of Justice and the Court of First Instance that although construction capacity — in the present case 85 000 cgt per annum — is by its nature capacity for production purposes, that concept is not in itself the same as "actual production" (*Alpha Steel* v *Commission* [Case 14/81 [1982] ECR 749], paragraph 22; Joined Cases 311/81 and 30/82 *Klöckner-Werke* v *Commission* [1983] ECR 1549, paragraph 23; Joined Cases T-164/96 to T-167/96, T-122/97 and T-130/97 *Moccia Irme and Others* v *Commission* [1999] ECR II-1477,

paragraph 138) or "maximum production achievable under optimum conditions" (*Skibsværftsforeningen and Others* v *Commission*, paragraph 174).

106 According to that case-law, a capacity restriction may, as is apparent in the present case from the wording of the authorising decisions, relate to "production achievable under favourable normal conditions, given the facilities available" and not express an actual maximum production which may not be exceeded even under exceptionally favourable conditions. The Commission cannot convincingly argue that the capacity restriction imposed on the applicant, even though relating to "the production achievable under favourable normal conditions, given the facilities available", nevertheless indicates a maximum actual production which may not be exceeded in any event ... . If the capacity restriction reflects production achievable under favourable normal conditions, that in itself implies that the figure indicated by that restriction may be exceeded in periods of optimal conditions. Contrary to the Commission's assertions, that finding is not incompatible with the objective of Directive 90/684. That objective, reduction in excess capacity, is achieved by restricting the applicant's capacity at the level of its assembly lines, which ensures that in normal conditions 85 000 cgt per annum will not be exceeded.'

18 At paragraphs 107 to 109 of the contested judgment the Court relied on the documents produced by KWW:

'107 Lastly, several documents submitted by the applicant confirm that the capacity restriction imposed on it relates to the production achievable under favourable normal conditions, given the facilities available.

108 Thus, the minutes of a meeting held on 1 June 1993 concerning privatisation of the shipyards in the former German Democratic Republic state as follows:

"The Danish, Italian and UK delegates were expressing their worry that the actual production would exceed the assigned capacity after the investments would be implemented. The Commission was confident that future production would not exceed the agreed capacity limits because of the technical bottlenecks in the investment plans, because of the present and future monitoring of the investment plans together with the contractual capacity limits in the privatisation contracts, because of the German Government's undertaking to respect the limits and because all aid payments are conditional on respect of the capacity limits."

That discussion between the Danish, Italian and UK delegations, on the one hand, and the Commission, on the other, would be meaningless if the capacity restriction of 85 000 cgt were to be understood as an absolute limit on actual production. In such a case it would have sufficed for the Commission to explain that the 85 000 cgt limit per annum was a ceiling on actual production and that the applicant was quite simply prohibited from producing above that ceiling. The position adopted by the Commission at that meeting indicates, on the contrary, that its confidence that production would be lower or equal to 85 000 cgt [per annum] was based simply on the calculation that the technical restrictions on the applicant's installations would normally prevent it from producing more than that tonnage per annum.

109 Likewise, the Commission's report on the monitoring of the privatisation of shipyards in the former German Democratic Republic annexed to the

letter of 6 May 1993 addressed to the Permanent Representative of the Federal Republic of Germany states that, in the Commission's view, the capacity restriction was constituted by the entirety of the technical restrictions imposed:

"... the significant technical restrictions contained in the investment plans ensure compliance with the capacity restrictions for each shipyard, even though it seems necessary to maintain detailed monitoring when the investments are implemented. The main technical bottlenecks and conditions guarantee the capacity restriction ...".'

19 The Court of First Instance concluded in paragraphs 110 and 111 of the contested judgment that:

'110 It follows from the whole of the foregoing that the applicant has duly proved that the Commission committed a manifest error of appraisal in treating in the contested decisions, contrary to its approach in the authorising decisions, the concept of a capacity restriction as a limit on actual production. Since the Commission based the contested decisions on the mere fact that the applicant's actual production in 1997 and 1998 exceeded 85 000 cgt (see, in that regard, points 60 and 108 of Decision 1999/675 and points 47 and 84 of Decision 2000/336), the operative parts of those decisions are vitiated in their entirety by that error of appraisal.

111 It should be observed in that regard that the sole basis for the contested decisions is the simple fact that actual production exceeded 85 000 cgt per annum. The Commission neither examined, nor alleged, that the excess production during the years in question is the result of a failure to comply with the restrictive conditions laid down in the authorising decisions.'

20 As a result, the Court of First Instance annulled the contested decisions.

Forms of order sought

21 In the appeal the Commission seeks the annulment of that judgment and the referral of the case back to the Court of First Instance.

22 KWW seeks the dismissal of the appeal and an order that the Commission pay the costs of the proceedings.

The request that the oral procedure be reopened

23 By a document lodged at the Court Registry on 23 January 2004, KWW asked the Court to order that the oral procedure be reopened under Articles 61 and 118 of the Rules of Procedure.

24 In support of that request, it submitted that if the Court were to follow the Opinion of the Advocate General, it would be forced to depart from the principle laid down in the judgment of 30 September 2003 in Joined Cases C-57/00 P and C-61/00 P *Freistaat Sachsen and Others* v *Commission* [2003] ECR I-9975,

according to which an interpretation by the Court of First Instance of a Commission decision constitutes an assessment of fact and not a question of law and cannot therefore be the subject of appeal.

25 In this regard, it should be noted that the Court may of its own motion, or on a proposal of the Advocate General, or at the request of the parties order that the oral procedure be reopened, in accordance with Article 61 of its Rules of Procedure, if it considers that it has insufficient information or that the case should be settled on the basis of an argument which was not sufficiently dealt with by the parties (see the order of 4 February 2000 in Case C-17/98 *Emesa Sugar* [2000] ECR I-665, paragraph 18, and the judgments in Case C-309/99 *Wouters and Others* [2002] ECR I-1577, paragraph 42, Case C-209/01 *Schilling and Fleck-Schilling* [2003] ECR I-13389, paragraph 19, and Case C-147/02 *Alabaster* [2004] ECR I-3101, paragraph 35).

26 In the present case, however, having heard the Opinion of the Advocate General, the Court considers that it has all the elements necessary for it to deal with the questions raised in this case and that those elements were discussed before it. As a result, the request to reopen the oral procedure must be rejected.

The appeal

The parties' arguments

27 The Commission submits that the contested judgment is vitiated by an error of law, claiming that the Court of First Instance did not fully consider the legal background against which the authorising decisions were made and that it

misinterpreted those decisions. It was a breach of Community law for the Court of First Instance to hold that the 'capacity restriction' upon which the authorisation given to the Federal Republic of Germany to grant aid to KWW was conditional referred solely to the technical capacity of the installations and not to the effective production of the shipyard concerned.

28 Firstly, the Commission maintains that the Court of First Instance incorrectly defined, in paragraphs 94 to 96 of the contested judgment, the legal background to the authorising decisions. According to the Commission, Article 10a(2)(c) of Directive 90/684 governs in a legally binding manner the undertaking given by the Federal Republic of Germany to carry out, before 31 December 1995, a genuine and irreversible reduction of capacity of 40% net of the capacity of 545 000 cgt existing on 1 July 1990. The provision has two aims. It is intended both to reduce the excess capacity in the Community shipbuilding sector and to compensate for distortions of competition caused by the grant of large sums in aid to the East German shipyards. However, although the first of those aims is attainable by means of a restriction on the technical capacity of the installations, the second, by contrast, can be attained only by a restriction on the shipyards' actual production.

29 Secondly, the Commission alleges that in paragraphs 97 to 104 of the contested judgment the Court of First Instance interpreted 'capacity restriction' solely on the basis of the wording of the first and second authorising decisions, whereas the five authorising decisions, if read together, show that this concept refers both to a restriction on the technical installations and to a restriction on the actual production of the shipyard in question. In shipbuilding, unlike other sectors, there is no 'technical bottleneck applicable to the installations' allowing production to be regulated by a simple reduction in capacity. This is why, in addition to the technical restrictions on the installations, a limit ought to have been imposed on actual production in the authorising decisions. Although it was not necessary to place particular emphasis on that restriction on actual production in the first two authorising decisions, which applied exclusively to the investment phase, it was important to draw particular attention to that restriction in the third, fourth and

fifth decisions, which applied to the production phase which began on 1 January 1996. The Commission points out that the three latter decisions contained a monitoring clause according to which, despite the technical restrictions put into place by the defendant, monitoring remained necessary 'in order to ensure compliance with the maximum capacity authorised in the framework of the planned production as in that of actual production'. The clause would be rendered pointless if it were to be interpreted, as the Court of First Instance did, as meaning that the technical restrictions were also to be observed during the production phase.

30 Finally, the Commission alleges that, in paragraphs 105 to 109 of the contested judgment, the Court of First Instance misread the case-law and the documents in the case-file. Contrary to the Court's finding there was nothing in them to support the view that the capacity restriction applied only to the shipyards' technical installations.

31 For KWW, which submits that the appeal is in part inadmissible, the Court of First Instance in no way misinterpreted the aims of Directive 90/684. The directive makes no mention of a restriction on production. Article 10a(2)(c) is intended to re-establish a normal market situation and the competitiveness of the yards of the former German Democratic Republic, while at the same time reducing the excess capacity in the shipbuilding sector. The distortions of competition associated with the aid are rectified by the reduction resulting from the technical restrictions on capacity imposed on the shipyards.

32 It is apparent from a detailed analysis of the wording, origin, broad logic and the meaning and purpose of Directive 90/684 that 'capacity restriction' as used in the authorising decisions cannot be equated precisely with a limit on production.

Furthermore, in its early practice in taking decisions, set out in the guidelines on aid for restructuring, the Commission's interpretation of capacity restriction did not include actual production. The Court of First Instance, which considered in detail the chain of logic linking the five authorising decisions, held rightly that the capacity restriction imposed could not be regarded as a restriction on actual production. Moreover, a restriction of that type could have been imposed only after a formal investigation procedure conducted under Article 88(2) EC.

33 According to KWW, the monitoring of production provided for by the last three authorising decisions is merely a means of ensuring compliance with the capacity restriction. It enables any bypassing of the technical restrictions to be detected, as confirmed by the documents produced by the parties during the proceedings. The Court of First Instance therefore interpreted the concept of capacity restriction in accordance with case-law (*Skibsværftsforeningen and Others* v *Commission*, cited above, paragraph 174).

The Court's assessment

34 A preliminary observation to be made is that by the five authorising decisions the Commission authorised, in accordance with Directives 90/684 and 92/68, the aid that the Federal Republic of Germany proposed to grant to KWW in the total sum of DEM 1 246.9 million provided that the capacity restriction of 85 000 cgt per annum was complied with. That limit corresponded to the share of cgt allotted to the shipyard in question by the Federal Republic of Germany under Article 10a(2)(c) of Directive 90/684. According to that provision, operating aid for the shipbuilding and ship conversion activities of yards operating on 1 July 1990 in

the former German Democratic Republic could, until 31 December 1993, be considered to be compatible with the common market, provided that the Federal Republic of Germany agreed to carry out, before 31 December 1995, a genuine and irreversible reduction in capacity of 40% net of the capacity of 545 000 cgt existing on 1 July 1990.

35 It is, moreover, established that, for the years 1997 and 1998, to which the contested decisions refer, the technical restrictions imposed on the shipyard's installations were not breached and that only its actual production was taken into account by the Commission as justification for those decisions.

36 In those circumstances, the Court need only ascertain whether the Court of First Instance erred in law by finding that the authorising decisions which set a capacity restriction could not be interpreted as including a condition relating to a restriction on actual production.

37 It should be observed, in this regard, that neither Directive 90/684 nor Directive 92/68 contains a definition of capacity or capacity restriction. In addition, the actual production of an undertaking is not the same notion as production capacity (see, to that effect, Case 244/81 *Klöckner-Werke* v *Commission* [1983] ECR 1451, paragraphs 22 and 23).

38 It is true that to justify the insertion of the new Article 10a into Directive 90/684 the Council stated, in the third recital to Directive 92/68, that the competition

situation required the shipbuilding sector in the former German Democratic Republic to make a large contribution to the reduction of 'excess capacity' which, worldwide, continued to impede the restoration of normal market conditions for the shipbuilding industry. Nevertheless, it cannot be deduced from that aim of reducing 'excess capacity', which applies to the means of production which the shipyards are likely to use and not to their production itself, that a capacity restriction laid down in the decisions taken on the basis of those directives implies of itself a restriction on production.

39 Furthermore, it may be accepted that, as the Commission claims, by requiring the Federal Republic of Germany to make a 'genuine and irreversible reduction of capacity of 40% net of the capacity existing on 1 July 1990', the Community legislature sought to obtain a counterpart to the large amounts of State aid allotted to the shipyards of the new *Länder*, in order to ensure fair and uniform conditions of competition within the Community as stated in the ninth recital to Directive 90/684. The aid enabled them quickly to obtain efficient technical installations, making high production possible. High production was likely to distort appreciably competition with other shipyards, which had been able to achieve that technical standard only over a long period and from their own funds. However, neither Article 10a nor any other provision of Directive 90/684 states that the required reduction in the global capacity of the yards operating in the new *Länder* is to take the form of a limit on the actual production of each of those yards.

40 The Community legislature thus refrained from laying down itself in the directive how the notion of capacity of shipyards was to be defined and the means by which the reduction in their excess capacity was to be achieved. The Commission therefore had a certain measure of discretion in setting the conditions to which the proposed aid was to be subject in order to ensure that it remains compatible with

the common market within the framework of the derogation scheme put into place by Directive 90/684 in favour of the shipyards and does not prejudice the aim cited above set out in Article 10a of the directive.

41 However, assuming that within the limits of its discretion the Commission was able to take the view that compliance with the requirement laid down in Article 10a(2)(c) of Directive 90/684 required the authorisations of aid to be subject to the condition that not only the technical capacity of the yard but also its actual production should not exceed 85 000 cgt per annum, it should have stated that clearly and unequivocally in its authorising decisions.

42 However, it is established, firstly, that none of the five authorising decisions mentions specifically that the capacity restriction of 85 000 cgt constitutes a yearly ceiling on actual production.

43 Secondly, the Commission does not deny that its first two authorising decisions set conditions only in respect of technical restrictions imposed on KWW, as the Court of First Instance found in paragraphs 97 to 100 and 103 of the contested judgment and as the Advocate General observed in point 51 of his Opinion.

44 Finally, as regards the third, fourth and fifth authorising decisions, the Court of First Instance did not err in law when it found in paragraph 102 of the contested judgment that it was not possible to deduce from the passages of those decisions

cited in that paragraph that the capacity restriction expressed in cgt per annum was to be interpreted as a limit on actual production.

45 By considering in those passages that it was necessary to monitor compliance with the capacity restrictions not only when the investment plans were drawn up but also when production was planned and during production itself, the Commission, which thus set the methods and in particular the stages of the monitoring required for compliance with those capacity restrictions, cannot be regarded as having explicitly made its authorisations subject to a condition entailing a limit on production. As the Court of First Instance held in paragraph 103 of the contested judgment, the Commission specified in particular, in its fourth and fifth authorising decisions, that during the validity of the capacity restriction it was vital that the shipyard equipment should not be modified. On that basis it may reasonably be deduced from that concern that, contrary to the Commission's submissions in paragraph 28 of the appeal, monitoring the installations in the context of the technical capacity restrictions would still have a purpose 'at the time of production', without such monitoring during production implying that the authorisations were subject to a condition related to a limit on actual production.

46 In those circumstances, neither the wording nor the broad logic of the authorising decisions supports the conclusion that the capacity restriction of 85 000 cgt referred to KWW's actual production.

47 Furthermore, even if the technical restrictions provided for by the authorising decisions proved to be inappropriate for the purpose of avoiding distortions of competition between shipyards, that circumstance, which arose after the authorising decisions and merely shows that the means used were not suitable

to achieve the intended aim, is not sufficient to justify the view that the capacity restriction in those decisions was, in reality, a limit on production.

48 It follows from all the above that the Court of First Instance did not err in law in finding that the capacity restriction referred to in the authorising decisions could not be interpreted as a limit on KWW's production.

49 In paragraphs 105 to 109 of the contested judgment, the Court of First Instance also sought to confirm its interpretation of those decisions by relying on its own case-law and that of the Court and by making reference to other documents from the case-file submitted to it. However, the reasoning of that part of the judgment is superfluous having regard to that which, in paragraphs 91 to 104, formed the basis of that interpretation. Therefore, and since the Court of First Instance did not err in law in arriving at that interpretation, the Commission's complaints directed against the reasoning in paragraphs 105 to 109 of the judgment are immaterial. In accordance with settled case-law, those complaints, which cannot serve as the basis for setting aside the judgment of the Court of First Instance, must be rejected (see, inter alia, Case C-35/92 P *Parliament* v *Frederiksen* [1993] ECR I-991, paragraph 31, Case C-244/91 P *Pincherle* v *Commission* [1993] ECR I-6965, paragraph 25, and Case C-264/95 P *Commission* v *UIC* [1997] ECR I-1287, paragraph 48).

50 It follows from all those considerations that the appeal must be dismissed.

Costs

51 Under Article 69(2) of the Rules of Procedure, which apply to the procedure on appeal by virtue of Article 118 of those rules, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since KWW applied for the Commission to be ordered to pay the costs and the Commission has been unsuccessful, it must be ordered to pay the costs.

On those grounds,

THE COURT (Fifth Chamber)

hereby:

1. **Dismisses the appeal;**

2. **Orders the Commission of the European Communities to pay the costs.**

Timmermans La Pergola von Bahr

Delivered in open court in Luxembourg on 29 April 2004.

R. Grass

Registrar

V. Skouris

President