OPINION OF ADVOCATE GENERAL JACOBS
delivered on 16 March 1995 *

1. In this case the College van Beroep voor het Bedrijfsleven (Administrative Court for trade and industry) of the Netherlands has referred to the Court several questions concerning the interpretation of Council Regulation (EEC) No 1101/89 of 27 April 1989 on structural improvements in inland waterway transport [1] and the interpretation and validity of Commission Regulation (EEC) No 1102/89 of 27 April 1989 laying down certain measures for implementing Council Regulation (EEC) No 1101/89 on structural improvements in inland waterway transport. [2] I shall refer to those regulations as 'the Council Regulation' and 'the Commission Regulation' respectively.

The legislation

2. The Council Regulation seeks to reduce the structural overcapacity in the fleets operating on intra-Community inland waterway networks. For that purpose, it provides for the establishment of a scrapping scheme coordinated at Community level and also for supporting measures to avoid aggravation of existing overcapacity, the so-called 'old-for-new' rules. In its judgment in *Driessen*, [3] following a reference by the College van Beroep voor het Bedrijfsleven, the Court examined and upheld the validity of the transitional provisions of the 'old-for-new' rules. The present case concerns the coordinated scrapping scheme set up by the Council Regulation. I shall first discuss the relevant legislation and the events which gave rise to the main proceedings. I shall then turn to examine the questions referred.

3. The Council Regulation provides that each of the Member States whose inland waterways are linked to those of another Member State and the tonnage of whose fleet is above 100 000 tonnes must set up a Scrapping Fund. [4] Each Fund is to be administered by the competent national authorities with the involvement of the national organizations representing inland waterway carriers. [5]

* Original language: English.

1 — OJ 1989 L 116, p. 25.

2 — OJ 1989 L 116, p. 30 as amended by Commission Regulation (EEC) No 3685/89, OJ 1989 L 360, p. 20.

3 — Joined Cases C-13 to C-16/92 *Driessen & Others* [1993] ECR I-4751.

4 — Council Regulation, Article 3(1).

5 — Article 3(2).

Article 3(3) states: 'Each Fund shall consist of two separate accounts, one for dry-cargo carriers and pusher craft, the other for tanker vessels'. For each vessel covered by the Council Regulation the owner must pay a contribution into one of the Funds. As a general rule, the contribution must be paid to the Fund of the Member State where the vessel is registered. [6]

4. Article 5(1) provides that any owner scrapping a vessel shall receive a scrapping premium from the Fund to which his vessel belongs in so far as the financial means are available, subject to the conditions set out in Article 6. That article provides that the Commission shall lay down separately for dry-cargo carriers, for tankers and for pusher craft the following: [7]

— the rate of the annual contributions to the Fund for each vessel,

— the rate of the scrapping premiums,

— the period covered by the scrapping schemes during which scrapping premiums will be paid and the conditions under which the premiums may be obtained,

— the adjustment coefficients for each type and category of inland waterway vessel.

5. The rates of the annual contributions to the Funds and of the scrapping premiums must be the same for each Fund. [8] Under Article 6(4), contribution rates must be fixed 'at a level allowing the Funds sufficient financial resources to make an effective contribution to reducing the structural imbalance between supply and demand in the inland waterway transport sector, taking into account the difficult economic position of this sector'. The Commission is to lay down the period during which scrapping premiums may be obtained and the conditions for granting those premiums on the basis of the objectives to be attained, the categories of vessels and the financial resources of the Funds. [9]

6. The Commission Regulation was adopted with a view to giving effect to Article 6 of the Council Regulation. The Commission took the view that fleet capacity should be

6 — Article 4.
7 — Article 6(1).
8 — Article 6(2).
9 — Article 6(5).

reduced by 10% in respect of dry-cargo vessels and pusher craft and by 15% in respect of tanker vessels. [10] The Commission Regulation fixes the annual contributions, the scrapping premiums and the conditions under which they may be obtained accordingly. Article 1(2) states that a total budget of ECU 130.5 million is considered necessary. It divides that sum into three separate accounts as follows: ECU 81.2 million for dry-cargo vessels, ECU 44.3 million for tanker vessels, and ECU 5 million for pusher craft.

7. Article 3 lays down the rates of the annual contributions to be paid by owners for the various types and categories of vessels. Article 5 lays down the rates of the scrapping premium for the various types and categories of vessels. Article 6(2) provides that applicants for scrapping premiums must indicate in their applications the percentage of the rate which they wish to receive as a scrapping premium. That percentage may vary from 70% to 100% of the applicable rate. Article 6(3) states that valid applications for scrapping premiums amounting to 70% of the applicable rate shall be deemed to be accepted by the Fund within the limits of the financial resources available in the various accounts, as provided for in Article 1(2). The authorities of the national Funds must send to the Commission each month a list of the applications which they have received for scrapping premiums amounting to 70% of the applicable rate. The Commission must ensure that those applications do not exceed the financial resources referred to in Article 1(2).

8. With a view to scrapping as much overcapacity as possible, a procedure is provided whereby applications for a lower percentage of the applicable rate take precedence over applications for a higher percentage. Article 8(1) provides that, if the finances required to cover valid applications for scrapping premiums exceed the financial resources available in the various accounts provided for in Article 1(2), applications for lower percentages shall be given priority over those for higher percentages. In order to facilitate the operation of that procedure, Article 8(2) provides that the Commission, assisted by the authorities of the national Funds, must draw up a joint list of valid applications. Applications must be listed in order, starting with the application for the lowest premium rate-percentage. Separate lists must be drawn up for dry-cargo vessels, tanker vessels and pusher craft. Under Article 8(3), the national Funds must continue to grant scrapping premiums in accordance with the lists, until the financial resources available in the various accounts provided for in Article 1(2) are exhausted. If more than one application requesting the same premium-rate percentage is submitted, priority is to be given to the first one received.

9. Article 8(4) states that if the financial resources required to cover valid applications

10 — Commission Regulation, Article 1(1).

are less than the funds available in the various accounts referred to in Article 1(2), the applications for scrapping premiums shall be deemed to be accepted in respect of the premium percentages applied for.

10. The Council Regulation and the Commission Regulation are based on the premise that the cost of the coordinated scrapping scheme must be borne by the inland waterway transport undertakings which will in effect benefit from that scheme. In order to make possible the operation of the scheme without delay, Member States are required to give interest-free loans to the Fund situated in their territory. [11] Repayment of the loans, which is financed by the annual contributions paid to the Funds by vessel owners, must be made within ten years. [12] The Council Regulation provides that there must be mutual financial support between the Funds with regard to the separate accounts provided for in Article 3(3) in order to ensure that the time-limit for the repayment of the interest-free State loans to the Funds is the same for all Funds. [13] The Commission Regulation contains specific rules for that purpose. [14]

11. The Council and the Commission Regulations have been amended a number of times. [15] The amendments made are not directly relevant to the present proceedings since they were not in force at the material time.

The facts

12. On 27 April 1990 Mr F. D. Teirlinck submitted two applications for a scrapping premium to the Dutch Minister of Transport and Water Resources ('the Minister'), who is the authority responsible for administering the coordinated scrapping scheme in the Netherlands. By one of the applications, Mr Teirlinck requested a premium amounting to 97% of the rate provided for in Article 5 of the Commission Regulation for the scrapping of his pusher craft named 'Tonny'. By the other application, he requested a premium for the scrapping of his lighter (a dry-cargo vessel) named 'Neptunus III'. By a decision of 2 July 1990, the Minister accepted the application relating to 'Neptunus III' but, by a decision of 19 September 1990, he rejected the application relating to 'Tonny'. It is that decision which has given rise to the present proceedings.

11 — Council Regulation, Article 7.

12 — See Commission Regulation, Article 3(3) and see also Council Regulation, Article 6(4).

13 — Council Regulation, Article 5(2) and Article 6(6).

14 — Commission Regulation, Article 10.

15 — For amendments to the Council Regulation, see Council Regulation (EEC) No 3572/90, OJ 1990 L 353, p. 12, Article 6; Council Regulation (EC) No 844/94, OJ 1994 L 98, p. 1; Commission Regulation (EC) No 2812/94, OJ 1994 L 298, p. 22. See also Council Resolution of 24 October 1994 on structural improvements in inland waterway transport, OJ 1994 C 309, p. 5. For amendments to the Commission Regulation, see Commission Regulation (EEC) No 317/91, OJ 1991 L 37, p. 27; Commission Regulation (EEC) No 3690/92, OJ 1992 L 374, p. 22; Commission Regulation (EC) No 3433/93, OJ 1993 L 314, p. 10; Commission Regulation (EC) No 3039/94, OJ 1994 L 322, p. 11.

13. The decision of 19 September 1990 stated that the application for a scrapping premium in relation to the vessel 'Tonny' fulfilled the conditions laid down in Article 5(1) of the Council Regulation. However, in accordance with Article 8 of the Commission Regulation, an application for a scrapping premium could be accepted only if there were sufficient financial resources in the respective account referred to in Article 1(2) of the Commission Regulation. The decision stated that the resources available in the account for pusher craft were not sufficient to cover the premium requested in relation to the vessel 'Tonny'. It referred in support to a letter dated 29 June 1990 addressed by the Commission to the Dutch authorities.

14. It appears from the Commission's letter that, on 15 June 1990, representatives of the Member States concerned, [16] of Switzerland, and of the Funds met to examine the lists of applications for scrapping premiums received by the Funds. On the basis of those lists, it was established that, with regard to dry-cargo vessels and tanker vessels, the amount required to cover all valid applications for scrapping premiums was lower than the financial resources available in the accounts provided for those categories of vessel. Therefore, in accordance with Article 8(4) of the Commission Regulation, all valid applications for scrapping premium were accepted in respect of the premium percentages applied for. By contrast, with regard to pusher craft, the funds required to cover the scrapping premiums applied for exceeded the financial resources available in the account provided for that category of vessel. Accordingly, the priority procedure provided for in Article 8(1), (2) and (3) of the Commission Regulation was applied. The Commission, in cooperation with the authorities of the Funds, drew up a joint list of valid applications, which is annexed to the letter. Given the limits of the financial resources available, only applications for a premium of 70% of the rate applicable were accepted. All applications for higher premiums were rejected. Two applications for a 70% rate premium, one submitted to the French Fund and one submitted to the Dutch Fund, were also rejected so as not to exceed the resources available. Rejection of those applications was based on the criteria provided for in Article 8(3) of the Commission Regulation.

15. Mr Teirlinck challenged the Minister's decision of 19 September 1990 rejecting his application for a scrapping premium in relation to the vessel 'Tonny' in the College van Beroep voor het Bedrijfsleven, which made the present reference.

16. In the main proceedings, Mr Teirlinck stated that his application was rejected on the ground that there were insufficient financial resources in the account for pusher craft provided for in Article 1(2) of the Commission Regulation. However, Article 3(3) of the Council Regulation provides for the estab-

16 — That is to say, the Member States which are under an obligation to set up a Scrapping Fund under the Council Regulation, see above, paragraph 3.

lishment of a common account for dry-cargo carriers and pusher craft. To the extent that Articles 1(2) and 8 of the Commission Regulation provide for the establishment of a separate account exclusively for pusher craft, they are invalid because they run counter to the Council Regulation. Mr Teirlinck argued that the scrapping premium that he requested in relation to his pusher craft 'Tonny' should have been charged to the common account provided for by Article 3(3) of the Council Regulation for dry-cargo carriers and pusher craft, especially since that vessel was used, in combination with his vessel 'Neptunus III', exclusively for the transport of dry cargo. Mr Teirlinck also argued that the Minister's decision rejecting his application was invalid on the ground that it was issued on 19 September 1990 and therefore infringed Article 6(4) of the Commission Regulation. According to that article, in the case of applications for scrapping premiums exceeding 70% of the applicable rates, the Fund authorities must notify the applicants in writing whether their applications have been accepted or rejected before 1 September 1990.

The questions referred

17. In the order for reference, the referring court states that the only ground on which Mr Teirlinck's application was refused was that there were insufficient financial resources in the account for pusher craft. The application was valid and complied with all other conditions imposed for the granting of a scrapping premium. The referring court also states that, according to a letter dated 31 March 1992 addressed by the Commission to the Minister, the financial resources available at the material time in the account provided for dry-cargo vessels were sufficient to pay scrapping premiums for all pusher craft for which applications were rejected on the ground that the resources available in the account provided for pusher craft had been exhausted.

18. In the light of those considerations, the referring court has referred the following questions:

'(1) Must the provisions of Article 5(1) of Regulation (EEC) No 1101/89 be interpreted as meaning that a valid application for a premium for the scrapping of an inland-waterway vessel to which that Regulation applies cannot be refused so long as the limit on the total available funding for the coordinated scrapping schemes has not yet been reached?

(2) If question (1) is answered in the negative, must the provisions of Article 5(1) of Regulation (EEC) No 1101/89 be interpreted as meaning that a valid application for a scrapping premium for a pusher craft cannot be refused so long as the limit on the total financial

resources at the disposal of the Funds in the joint account for dry-cargo carriers and pusher craft, as provided for in Article 3(3) of that Regulation, has not been reached?

(3) Must the provisions of Article 1(2) of Regulation (EEC) No 1102/89, in conjunction with the provisions of Article 8 of that Regulation, be interpreted as meaning that a valid application for a scrapping premium for a pusher craft must be refused if the financial resources needed to accept the application exceed the amount of ECU 5 million referred to in Article 1(2) for pusher craft from the Member States concerned, notwithstanding the fact that the amount referred to therein for dry-cargo vessels and/or tanker vessels is not used up after approval of all applications for scrapping premiums in those two categories?

(4) If questions (2) and (3) are answered in the affirmative, are the abovementioned provisions of Regulation (EEC) No 1102/89 compatible with Community law, in particular the provision in Article 3(3) of Regulation (EEC) No 1101/89 that each Fund is to consist of two separate accounts?

(5) Is letter No 56765 from the Commission of 29 June 1990, signed on behalf of the Director-General for Transport and addressed to the Kingdom of the Netherlands, to be considered a valid act?

(6) If the time-limit set out in Article 6(4) of the Commission Regulation is not complied with, must an application for a scrapping premium be deemed to have been accepted?'

19. Written observations have been submitted by the Government of the Netherlands and by the Commission. Mr Teirlinck presented oral argument to the Court.

20. I will examine the first and second questions together. I will then examine the other questions referred.

The first and second questions

21. The first and second questions concern the interpretation of Article 5(1) of the Council Regulation, which states that any owner scrapping a vessel 'shall receive a scrapping premium from the Fund to which

his vessel belongs in so far as the financial means are available, subject to the conditions set out in Article 6'. The referring court is uncertain as to the meaning of the expression 'in so far as the financial means are available'. By the first question, it seeks to ascertain whether Article 5(1) must be interpreted as meaning that a valid application for a scrapping premium must be accepted provided that the total financial resources in the Funds of the Member States concerned are sufficient. In the event that the first question is answered in the negative, the referring court wishes to know whether Article 5(1) must be interpreted as meaning that a valid application for a scrapping premium in relation to a pusher craft must be accepted provided that the total resources available in the common account for pusher craft and dry-cargo vessels referred to in Article 3(3) of the Council Regulation are sufficient.

22. Mr Teirlinck takes the view that the first question must be given a negative reply and that the second question must be given an affirmative one. He argues that Article 5(1) makes a clear distinction between 'the financial means available', on the one hand, and 'the conditions set out in Article 6', on the other hand. Article 6 leaves it to the Commission to determine the rate of the annual contributions, the rate of the scrapping premiums and the conditions under which they may be obtained. However, it does not leave it to the Commission to determine the limits of the available financial resources. Those limits are provided for by Article 3(3) of the Council Regulation which states that each Fund shall consist of two separate accounts, one for dry-cargo carriers and pusher craft, the other for tankers.

23. It follows, according to Mr Teirlinck, that the resources available for dry-cargo vessels and pusher craft are separate from those available for tankers. The first question should therefore be answered in the negative. By contrast, since Article 3(3) provides for a common account for dry-cargo vessels and pusher craft, the financial resources available for those types of vessel are the same and, consequently, the second question should be answered in the affirmative.

24. I do not find that reasoning persuasive. Article 3(3) of the Council Regulation provides for a common account for dry-cargo vessels and pusher craft but, as the Commission points out, that does not mean that scrapping premiums for dry-cargo vessels and pusher craft must be financed by the same resources. The Council Regulation provides only for the framework of the coordinated scrapping scheme, leaving a number of decisions which are essential in order for that scheme to come into operation to be taken by the Commission. In particular, it is clear from the provisions of the Council Regulation that it is for the Commission to determine the financial resources which must be made available for the payment of scrapping premiums in relation to each category of vessel.

25. Article 6(1) of the Council Regulation mandates the Commission to lay down *separately* for dry-cargo carriers, for tankers and for pusher craft the rate of the annual contributions, the rate of the scrapping premiums, the period covered by the scrapping schemes, and the conditions for granting scrapping premiums. Since the scrapping premiums are to be financed by the annual contributions of vessel owners to the Funds, it is clear that the level of scrapping premiums is determined by the level of the annual contributions. The Commission must balance two conflicting considerations. [17] On the one hand, it must fix contribution rates at a level allowing the Funds sufficient financial resources to make an effective contribution to reducing the structural imbalance between supply and demand in the inland waterway transport sector. On the other hand, in fixing the rates of the annual contributions to the Funds, it must take into account the difficult economic position of the inland waterway sector.

26. It follows from Article 6 that the Commission is responsible for determining the financial resources which must be made available for the payment of scrapping premiums in relation to each category of vessel.

27. The Council Regulation refers to the need to bring about 'a substantial reduction in overcapacity in the near future' [18] but does not set any specific target. After consulting the Member States and the organizations representing inland waterway carriers at Community level, the Commission took the view that fleet capacity should be reduced by 10% in respect of dry-cargo vessels and pusher craft and by 15% in respect of tanker vessels. [19] The Commission Regulation fixes the annual contributions, the scrapping premiums and the conditions under which they may be obtained for each category of vessel accordingly. As we have seen, Article 1(2) of the Commission Regulation states that a total budget of ECU 130.5 million is considered necessary. The separate amounts into which that total is divided under Article 1(2) (ECU 81.2 million for dry-cargo vessels, ECU 44.3 million for tanker vessels, and ECU 5 million for pusher craft) are the maximum resources available for paying scrapping premiums for each category of vessel.

28. Mr Teirlinck argues that an owner who applies for a premium in relation to the scrapping of a pusher craft has the right to have his application accepted if there are sufficient financial resources in the common account for dry-cargo vessels and pusher craft provided for in Article 3(3) even if the resources available in the account

17 — See Article 6(4) of Council Regulation, above, paragraph 5.

18 — Council Regulation, preamble, third recital, and Article 6(7).

19 — Commission Regulation, preamble, second recital, and Article 1(1).

earmarked for pusher craft under Article 1(2) of the Commission Regulation have been exhausted. That runs counter to the objectives of the coordinated scrapping scheme. It would mean that the capacity of pusher craft scrapped would be likely to exceed the target of 10% provided for in the Commission Regulation. It would also mean that contributions made by the owners of dry-cargo vessels would finance the payment of scrapping premiums to owners of pusher craft. Further, a Fund would be unable to use remaining resources in the account earmarked for dry-cargo vessels to grant premiums to owners of those vessels in order to attain the reduction in overcapacity by the percentage sought.

29. There is another reason why the Council Regulation does not give an owner who applies for a premium in relation to the scrapping of a pusher craft the right to have his application accepted if there are sufficient financial resources in the common account for dry-cargo vessels and pusher craft provided for in Article 3(3). Article 6 of the Council Regulation not only provides that the Commission must lay down the rate of the annual contributions and the rate of the scrapping premiums *separately* for dry-cargo carriers, for tankers and for pusher craft. It also provides that, whereas contributions and premiums are to be calculated on the basis of deadweight tonnage for cargo-carrying vessels, they must be calculated on the basis of the motive power of the vessel for pusher craft. [20] Given that the method of calculation of the rates of contributions and premiums is different for dry-cargo carriers and pusher craft, it is not easy to see how funds contained in the account for dry-cargo could be used to finance scrapping premiums for pusher craft and vice versa.

30. The purpose of Article 3(3) of the Council Regulation is not to specify the limits of the available resources for financing scrapping premiums but rather, as the Commission points out, to facilitate mutual financial support between the national Funds. The reason why Article 3(3) provides for separate accounts for dry-cargo vessel and for tankers is that in economic terms the market for the transport of dry cargo is different from the market for the transport of liquid cargo. [21] The establishment of separate accounts implies that there is no financial solidarity between them. Article 5(2) states that there will be mutual financial support between the Funds only with regard to the separate accounts. A national Fund whose account for tankers does not have sufficient financial resources to reimburse the State loans that it has received within the time-limit provided for in the Commission Regulation can only count on the support of the corresponding

20 — Article 6(3).

21 — See Council Regulation, preamble, eighth recital.

accounts of the other Funds. It cannot have recourse to any financial resources available in the common account for dry-cargo vessels and pusher craft and vice versa.

31. In its observations, the Commission explains why Article 3(3) provides for a common account for pusher craft and dry-cargo vessels. Pusher craft do not transport cargo. Their function is to tow or to push barges used for the transport of dry cargo or liquid cargo. The Council considered the possibility of establishing a separate account exclusively for pusher craft but finally decided not to do so on the ground that the market for pusher craft was too small to justify a distinct financial mechanism. The Council decided to include pusher craft in the account provided for dry-cargo vessels because pusher craft are generally used with barges carrying dry cargo. Also, a considerable number of pusher craft are owned by undertakings which own dry-cargo barges. By contrast, it is rare for undertakings which own barges for the transport of liquid cargo to own pusher craft.

32. According to the Commission, the common account established by Article 3(3) of the Council Regulation for dry-cargo vessels and pusher craft serves only administrative purposes. The revenue and expenses relating to dry-cargo vessels and to pusher craft must be entered into the same account. That gives rise to financial solidarity among the various national Funds. The manner in which the common account of dry-cargo vessels and pusher craft is financed and is used in order to finance the scrapping premiums is a different question which is not governed by Article 3 but by Articles 5(1) and 6 of the Council Regulation. In accordance with those provisions, it is up to the Commission to fix the amount of financial resources available to finance scrapping premiums and the conditions for the allocation of those resources for each type of vessel.

33. I conclude that the term 'the financial resources available' in Article 5(1) of the Council Regulation does not refer to the accounts provided for in Article 3(3) but to the financial resources to be specified by the Commission in accordance with the provisions of Article 6. The Council Regulation leaves it to the Commission to determine the maximum financial resources available for the payment of scrapping premiums in relation to each category of vessel. It follows that the Council Regulation does not give an applicant for a premium for the scrapping of an inland waterway vessel a right to have his application accepted provided that the total financial resources in the Funds of the Member States concerned are sufficient. Nor does the Council Regulation give an applicant for a premium for the scrapping of a pusher craft a right to have his application accepted provided that the total financial resources available in the common account for dry-

cargo vessels and pusher craft referred to in Article 3(3) of that regulation are sufficient. Consequently, the first and second questions referred must both be given a negative reply.

The third question

34. By the third question, the referring court seeks to ascertain whether Articles 1(2) and 8 of the Commission Regulation must be interpreted as meaning that a valid application for a scrapping premium in relation to a pusher craft must be rejected if the financial resources needed to accept it exceed the amount of ECU 5 million referred to in Article 1(2) for pusher craft notwithstanding the fact that the amount referred to therein for dry-cargo vessels and/or tanker vessels is not used up after approval of all applications for scrapping premiums in those categories.

35. It is clear from the provisions of the Commission Regulation that the third question must be given an affirmative reply.

36. As we have seen, Article 1(1) of the Commission Regulation fixes the annual contributions, the scrapping premiums and the conditions under which they may be obtained in the light of the need to reduce fleet capacity by 10% in respect of dry-cargo vessels and pusher craft and by 15% in respect of tankers. Article 1(2) provides for separate accounts in respect of tankers, dry-cargo vessels and pusher craft respectively and specifies the sums available in each account for paying scrapping premiums in relation to each category of vessel. Those sums are designed to finance the scrapping premiums which need to be paid in order to achieve a reduction in overcapacity by the percentage sought. It follows that resources available in the account earmarked for a certain type of vessel may not be used to finance scrapping premiums for another type of vessel.

37. Articles 6 and 8 of the Commission Regulation make it clear that an application for a scrapping premium may be accepted only if there are sufficient resources in the account of the Fund which is earmarked for the category of vessels to which the vessel in question belongs. Article 6(3) provides that valid applications for scrapping premiums amounting to 70% of the applicable rates shall be deemed to be accepted 'within the limits of the financial resources available in the various accounts, as provided for in Article 1(2)'. Article 8(3) provides that the national Funds must continue to grant scrapping premiums 'until the financial resources available in the various accounts referred to in Article 1(2) are used up'.

38. I conclude therefore that the third question must be answered in the affirmative.

The fourth question

39. By the fourth question the referring court enquires as to the validity of the Commission Regulation. It states that Articles 1(2) and 8 of the Commission Regulation provide for the allocation of the financial resources available in a way which is more specific and more restrictive than that provided for in Article 3(3) of the Council Regulation. That article provides for a common account for dry-cargo vessels and pusher craft. However, it follows from Articles 1(2) and 8 of the Commission Regulation that an application for a scrapping premium in relation to a pusher craft must be rejected if the financial resources needed to accept it exceed the amount of ECU 5 million referred to in Article 1(2) for pusher craft, notwithstanding the fact that there are sufficient financial resources in the account provided for dry-cargo vessels after all valid applications for scrapping premiums in relation to dry-cargo vessels have been satisfied. The referring court asks whether the Commission Regulation is invalid on the ground that it infringes Article 3(3) of the Council Regulation.

40. It follows from the answers which I have given to the previous questions that the validity of the Commission Regulation is not in doubt. The distinction between the two accounts provided for in Article 3(3) of the Council Regulation is important for the purposes of mutual financial support between the Funds as provided for in the provisions of the Council and of the Commission Regulation. Article 3(3) does not give any indication as to the financial resources which must be made available for granting scrapping premiums with regard to each type of vessel. The accounts referred to in Article 1(2) of the Commission Regulation with regard to each separate category of vessel are the 'financial means available' within the meaning of Article 5(1) of the Council Regulation. It follows that Articles 1(2) and 8 do not contradict Article 3(3) of the Council Regulation.

41. In the order for reference, the referring court expresses doubt as to whether the sum of ECU 5 million provided for in Article 1(2) of the Commission Regulation in relation to pusher craft is sufficient to reduce effectively the existing structural overcapacity and thus to attain the objectives of the Council Regulation. According to the referring court, there is no evidence to suggest that the scrapping of the vessel 'Tonny' will not contribute to the attainment of the objectives of the Council Regulation.

42. As we have seen, the Council Regulation provides only for the framework of the scrapping scheme. Although it refers to the need to achieve a substantial reduction in overcapacity, it does not set a specific target. It delegates to the Commission the task of specifying the amount of resources which must be made available. The Commission estimated that amount in relation to each category of vessel taking into account the number of vessels which must be scrapped

and the rate of premiums which need to be paid.

43. As the Commission points out, the objective of the Council Regulation is not to scrap as much capacity as possible but rather to establish a balance between supply and demand. It is not possible to determine in advance precisely how much capacity needs to be scrapped. The Commission sought to reduce fleet capacity by 10% in respect of pusher craft after consulting the Member States and the professional organizations concerned.

44. It appears from the list of valid applications for a scrapping premium which was drawn up by the Commission in cooperation with the authorities of the Funds in the meeting of 15 June 1990 [22] that the vessel 'Tonny' was number 47 in that list. The Commission states that if a scrapping premium were granted for the vessel 'Tonny', scrapping premiums should also be granted for the eight vessels which preceded 'Tonny' in the list and which were refused scrapping premiums. According to the Commission, the scrapping of nine additional pusher craft would exceed significantly the target of 10% provided for in Article 1(1) of the Commission Regulation and would exceed by more than two million ecu the budget provided for pusher craft by Article 1(2) of that regulation.

45. In support of the view that the scrapping of 'Tonny' would contribute to the attainment of the objectives of the scrapping scheme, Mr Teirlinck refers to Commission Regulation (EEC) No 3690/92 [23] which amended the Commission Regulation. Regulation No 3690/92 refers to the need to reduce capacity further and states in its preamble that it is desirable to allow further scrapping premiums to be paid.

46. However, the fact that the Commission decided subsequently to reduce capacity further does not mean that the Commission Regulation which provided for the reduction of capacity by a certain percentage is invalid. Moreover, Regulation No 3690/92 provides for additional financial resources to be made available for the payment of scrapping premiums from 1 January 1993. It applies without prejudice to the provisions of Article 1(1), (2) and (3) of the Commission Regulation. [24] It does not allow the resources initially contained in one of the accounts established by Article 1(2) of the Commission Regulation to be used to grant premiums for the scrapping of vessels of a type other than that to which that account refers. In other words, it does not provide for the merging of the separate accounts established by Article 1(2) of the Commission Regulation.

47. I conclude that the fourth question must be given an affirmative reply.

22 — See above, paragraph 14.

23 — Cited above in note 15.

24 — See Regulation No 3690/92, Article 1, cited in note 15.

The fifth question

48. In its fifth question, the referring court seeks to ascertain whether the letter of 29 June 1990 addressed by the Commission to the Dutch Government on the basis of which the Minister rejected Mr Teirlinck's application for a scrapping premium in relation to the vessel 'Tonny' is a valid act.

49. The contents of the Commission's letter of 29 June 1990 have already been referred to. [25] The letter explains how the priority procedure provided for in Article 8 (1), (2) and (3) of the Commission Regulation was applied. Thus, it is not the validity of the letter itself which is in issue, but the validity of the measure or measures to which the letter refers. [26] It appears from the letter that the procedure provided for in Article 8(1), (2) and (3) was applied correctly. In applying the priority procedure, the Commission and the authorities of the Funds do not enjoy any discretion in deciding which applications should be accepted and which applications should be refused. Any change in the legal position of the applicants is the consequence of the rules laid down in Article 8 of the Commission Regulation. If, as I have suggested, Mr Teirlinck's view that Article 8 of the Commission Regulation is invalid must be rejected, it follows that the validity of the measures referred to in the letter is not in doubt. It might be otherwise if it were claimed that in drawing up the common list of valid applications for the purposes of applying the priority procedure provided for in Article 8(1), (2) and (3), the Commission and the authorities of the national Funds had made a factual mistake or had failed to apply the requirements of Community law correctly. No such claim is made in the present case. I conclude that the doubts of the referring court concerning the validity of the Commission's letter of 29 June 1990 (or of any measures to which the letter refers) are unfounded.

The sixth question

50. The sixth question concerns the interpretation of Article 6(4) of the Commission Regulation, which states that the Fund authorities must, before 1 September 1990, notify in writing applicants for scrapping premiums exceeding 70% of the rates provided for in Article 5 as to whether their applications have been accepted or refused.

51. The Minister did not comply with the time-limit of 1 September 1990. The decision refusing Mr Teirlinck's application for a

25 — See paragraph 14 above.

26 — See Case C-198/91 *Cook* v *Commission* [1993] ECR I-2487, paragraphs 13 to 15 of the judgment.

scrapping premium in relation to 'Tonny' was taken on 19 September 1990. The referring court asks whether the Minister's failure to comply with the time-limit of 1 September 1990 has as a result that Mr Teirlinck's application must be considered as accepted.

52. That question must be given a negative reply. It cannot be accepted that the failure of the Fund authorities to notify applicants whether their applications have been successful by 1 September 1990 has as an automatic consequence that those applications must be deemed to be successful. That would clearly run counter to the objectives of the Council and of the Commission Regulation. As the Dutch Government points out, it would lead to scrapping premiums being granted in excess of the financial resources available. Clearly, the provision of Article 6(4) cannot take precedence over the other provisions of the Commission Regulation which make it clear that scrapping premiums may be paid only within the limits of the financial resources available.

53. The purpose of the time-limit provided for by Article 6(4) is to urge the Fund authorities to deal promptly with applications for scrapping premiums and to coordinate the activities of the various national Funds. Article 6(4) seeks not only to protect the interests of applicants but also, primarily, to facilitate the efficient operation of the coordinated scrapping scheme. It is for that purpose that the Commission Regulation provides for time-limits within which the various stages in the scrapping process, namely submission of applications [27] and scrapping of vessels, [28] should be completed. Clearly, it is not the intention of the Commission Regulation that the failure of the Fund authorities to comply with the time-limit of 1 September 1990 must have as an automatic consequence the acceptance of an application for a scrapping premium. Nor is that consequence dictated by any overriding considerations of legal certainty.

Conclusion

54. Accordingly, I am of the opinion that the questions referred should be answered as follows:

(1) Article 5(1) of Council Regulation (EEC) No 1101/89 of 27 April 1989 on structural improvements in inland waterway transport does not give an appli-

27 — See Article 6(1).
28 — See Article 7.

cant for a premium for the scrapping of an inland waterway vessel a right to have his application accepted provided that the total financial resources in the Funds of the Member States concerned are sufficient.

(2) Article 5(1) of that Council Regulation does not give an applicant for a premium for the scrapping of a pusher craft a right to have his application accepted provided that the total financial resources available in the common account for dry-cargo vessels and pusher craft referred to in Article 3(3) of that regulation are sufficient.

(3) Articles 1(2) and 8 of Commission Regulation (EEC) No 1102/89 of 27 April 1989 laying down certain measures for implementing Council Regulation (EEC) No 1101/89 on structural improvements in inland waterway transport must be interpreted as meaning that a valid application for a scrapping premium for a pusher craft must be refused if the financial resources required to accept it exceed the amount of ECU 5 million provided for by Article 1(2) for pusher craft, notwithstanding the fact that the amount referred to therein for dry-cargo vessels and/or tanker vessels is not used up after acceptance of all applications for scrapping premiums in relation to those categories of vessels.

(4) Cnsideration of the matters examined has disclosed no factor of such kind as to affect the validity of the abovementioned Commission Regulation.

(5) Cnsideration of the matters examined has disclosed no factor of such kind as to affect the validity of the Commission's letter No 56765 of 29 June 1990 addressed to the Kingdom of the Netherlands or of any measures referred to in that letter.

(6) Article 6(4) of the abovementioned Commission Regulation must be interpreted as meaning that the failure of the Fund authorities to notify an applicant for a scrapping premium whether his application has been accepted before 1 September 1990 does not have as a consequence that the application must be deemed to be accepted.