JUDGMENT OF THE COURT OF FIRST INSTANCE
(Third Chamber, Extended Composition) 22 October 1996 *

In Case T-266/94,

Foreningen af Jernskibs- og Maskinbyggerier i Danmark, Skibsværftsforeningen, an association governed by Danish law, established in Copenhagen, acting on its own behalf and as agent for

Assens Skibsværft A/S, a company incorporated under Danish law, established in Assens (Denmark),

Burmeister & Wain Skibsværft A/S, a company incorporated under Danish law, established in Copenhagen,

Danyard A/S, a company incorporated under Danish law, established in Frederikshavn (Denmark),

Fredericia Skibsværft A/S, a company incorporated under Danish law, established in Fredericia (Denmark),

Odense Staalskibsværft A/S, a company incorporated under Danish law, established in Odense (Denmark),

Svendborg Værft A/S, a company incorporated under Danish law, established in Svendborg (Denmark),

Ørskov Christensens Staalskibsværft A/S, a company incorporated under Danish law, established in Frederikshavn (Denmark),

* Language of the case: English.

Aarhus Flydedok A/S, a company incorporated under Danish law, established in Århus (Denmark),

represented by Jan-Erik Svensson, of the Copenhagen Bar, with an address for service in Luxembourg at the Chambers of Philippe Dupont, 8-10 Rue Mathias Hardt,

applicants,

supported by

Kingdom of Denmark, represented by Peter Biering, Head of Department in the Ministry of Foreign Affairs, acting as Agent, with an address for service in Luxembourg at the Danish Embassy, 4 Boulevard Royal,

intervener,

v

Commission of the European Communities, represented by Anders Christian Jessen and Ben Smulders, of its Legal Service, acting as Agents, with an address for service in Luxembourg at the office of Carlos Gómez de la Cruz, also of its Legal Service, Wagner Centre, Kirchberg,

defendant,

supported by

Federal Republic of Germany, represented by Ernst Röder, Ministerialrat in the Federal Ministry of Economic Affairs, and Bernd Kloke, Oberregierungsrat in the same ministry, acting as Agents, assisted at the hearing by Michael Schütte, Rechtsanwalt, Brussels,

and

MTW Schiffswerft GmbH (formerly Meerestechnik Werft), a company incorporated under German law, established in Wismar (Germany), represented by Hans-Jürgen Rabe and Georg M. Berrisch, Rechtsanwälte, Hamburg, with an address for service in Luxembourg at the Chambers of François Turk, 13B Avenue Guillaume,

interveners,

APPLICATION for annulment, in whole or in part, of the Commission decision of 11 May 1994 on the payment of the second tranche of State aid to MTW Schiffswerft GmbH, formerly Meerestechnik Werft,

THE COURT OF FIRST INSTANCE
OF THE EUROPEAN COMMUNITIES
(Third Chamber, Extended Composition),

composed of: C. P. Briët, President, B. Vesterdorf, P. Lindh, A. Potocki and J. D. Cooke, Judges,

Registrar: J. Palacio González, Administrator,

having regard to the written procedure and further to the hearing on 14 May 1996,

gives the following

Judgment

Legal background

1 The Council has adopted special rules concerning the compatibility with the common market of State aids to the shipbuilding industry on the basis of Article 92(3)(d) of the EEC Treaty [now Article 92(3)(e) of the EC Treaty] and Article 113 of the EEC Treaty. Those rules are set out in Council Directive 90/684/EEC of 21 December 1990 on aid to shipbuilding (OJ 1990 L 380, p. 27; 'the Seventh Directive'), as amended by Council Directive 92/68/EEC of 20 July 1992 (OJ 1992 L 219, p. 54), Council Directive 93/115/EC of 16 December 1993 (OJ 1993 L 326, p. 62) and Council Directive 94/73/EC of 19 December 1994 (OJ 1994 L 351, p. 10). The Seventh Directive draws a distinction between production aid, known as operating aid, to which a ceiling applies, and restructuring aid supporting desirable structural changes in the European shipbuilding industry.

2 On 25 May 1992 the Commission presented a proposal to the Council for a directive intended to establish special transitional rules concerning shipyards in the former German Democratic Republic. The proposal was accompanied by a communication appraising the need to authorize, by way of derogation, operating aid in excess of the usual ceiling in order to facilitate the necessary restructuring in the East German shipbuilding sector [SEC(92) 991 final, hereinafter 'the communication of 25 May 1992']. On 20 July 1992 the Council adopted Directive 92/68.

3 Directive 92/68 added the following new Article 10a to Chapter IV of the Seventh Directive:

'1. With the exception of Article 4(6) and (7), Chapter II shall not apply to the shipbuilding and ship conversion activities of yards operating in the territories of the former German Democratic Republic on 1 July 1990.

2. Until 31 December 1993, operating aid for the shipbuilding and ship conversion activities of the yards referred to in paragraph 1 may be considered compatible with the common market provided that:

(a) aid to facilitate the continued operation of the yards during that period does not, for any of these yards, exceed a maximum ceiling of 36% of a reference annual turnover calculated on the basis of three years of shipbuilding and ship conversion activities after restructuring; this aid must be paid by 31 December 1993;

(b) no further production aid is granted on contracts signed between 1 July 1990 and 31 December 1993;

(c) the German Government agrees to carry out, according to a timetable approved by the Commission and in any case 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;

(d) the German Government provides evidence to the Commission, in the form of annual reports by an independent chartered accountant, that aid payments are strictly limited to the activities of yards situated in the former German Democratic Republic; the first such report must be submitted to the Commission at the latest by the end of February 1993.

3. The Commission shall ensure that the aid referred to in this Article does not affect trading conditions to an extent contrary to the common interest.'

Background facts of the dispute

4 MTW Schiffswerft GmbH ('MTW'), a company established in Wismar (Germany), operates a shipyard on the territory of the former German Democratic Republic. The shipyard was privatized as a result of its sale on 11 August 1992 to Bremer Vulkan AG. By letter of 2 October 1992 the German Government notified the Commission of a plan to grant aid to that shipyard.

5 According to information supplied by the Commission, the proposed operating aid amounted to DM 597.2 million (DM 80.7 million to cover 40% of old debts, DM 57.7 million in new capital, and DM 458.8 million to cover losses during restructuring).

6 On 30 October 1992 the Commission sent a letter to the German authorities asking for further information, which was supplied orally at a meeting on 2 December 1992, and then in writing on 4 December 1992.

7 Meanwhile, the Commission asked the consultantsA&PAppledore International (hereinafter 'Appledore') to carry out a study of the investment plans notified in favour of MTW and other East German yards and to calculate their effects on capacity. In its first report, sent to the Commission on 4 December 1992, Appledore concluded that the limit of 100 000 cgt ('compensated gross tonnage') fixed for MTW would be complied with.

8 At a meeting held on 23 December 1992, the Commission decided to authorize the payment to MTW of a first tranche of operating aid, amounting to DM 191.2 million. That decision (hereinafter 'the first decision' or 'the decision of 23 December 1992') was notified to the German Government by letter of 6 January 1993.

9 On 1 April 1993 the Commission presented its second report on the monitoring of the privatization of shipyards in the new German *Länder*. The report stated, inter alia, that 'pursuant to the derogation the German Government had agreed to carry out, before the end of 1995, a genuine and irreversible closure of 40% of the shipbuilding capacity of 545 000 cgt existing in 1990. The German Government gave the following breakdown of future shipbuilding capacity for seagoing vessels for the yards in the new *Länder*'.

	1990 capacity (cgt)	Future capacity (cgt)	Change
MTW	87 275	100 000	+ 12 725
WW	133 804	85 000	- 48 804
PW	0	35 000	+ 35 000
VW	183 030	85 000	- 98 030
EWB	38 228	22 000	- 16 228
NW	97 042	0	- 97 042
RSW	5 662	0	- 5 662
Total	545 041	327 000	- 218 041

10 The report of 1 April 1993 also shows that Appledore had assessed the capacity of the three privatized shipyards, MTW, WW and PW, on the basis of the investment plans. In Appledore's view, the agreed capacity ceilings (see the table above) were not likely to be exceeded in the future in the case of those three shipyards owing to technical bottlenecks which had been identified in the production facilities.

11 According to information supplied by the Commission, the German authorities sent the Commission in March 1993 the first report required by Article 10a(2)(d) of the Seventh Directive (hereinafter 'spill-over report'), drawn up by C & L Treuarbeit Deutsche Revision, which covered the period 1 November 1992 to 28 February 1993.

12 Further spill-over reports were sent to the Commission on 11 October 1993, 14 December 1993 and 2 February 1994. The annual spill-over report for 1993 was presented to the Commission on 16 March 1994.

13 The German authorities informed the Commission in early August 1993 that MTW was working on plans to relocate the yard, as it was very likely that the soil conditions at the existing site would make it impossible to build a yard of the type envisaged by the privatization agreement. The Commission held meetings with the German authorities on 19 August 1993 and with representatives of the Danish Ministry of Industry and the applicants on 18 October 1993 in order to discuss the possible implications of the proposed relocation.

14 On 27 October 1993 the Commission asked the German authorities for formal notification of the plan to relocate the yard. This was given by letter of 5 November 1993. The relocation plan was then discussed with the Member States at a multilateral meeting on 3 December 1993.

15 By letter of 15 December 1993 the Commission informed the German Government that it was unable to take a decision on the second tranche of aid before 31 December 1993.

16 Discussions on the implications of relocating the yard continued through the early months of 1994 and a further multilateral meeting with the Member States was held on 7 February 1994. On 29 April 1994 the German authorities gave notice that the plan to relocate the yard had been abandoned. At its meeting on 11 May 1994 the Commission decided to authorize payment of the second tranche of aid amounting to DM 406 million, including DM 220.8 million in cash, on the ground that the conditions set out in Article 10a of the Seventh Directive had been met.

17 The decision of 11 May 1994 (hereinafter 'the contested decision') was announced in a press release the same day. By letter of 18 May 1994 the Commission notified its decision to the German Government, the party to which the decision was addressed.

Procedure and forms of order sought by the parties

18 It was in those circumstances that the applicants brought the present proceedings by application received at the Court Registry on 20 July 1994.

19 By document received at the Court Registry on 4 October 1994 the applicants requested that the language of the case be changed from Danish to English. By order of 8 November 1994, the Court gave the parties leave to continue the proceedings in English.

20 By application received at the Court Registry on 8 December 1994 MTW applied for leave to intervene in support of the form of order sought by the Commission. By order of 10 March 1995, the President of the Second Chamber, Extended Composition, granted that application.

21 By application received at the Court Registry on 16 December 1994 the Federal Republic of Germany applied for leave to intervene in support of the form of order sought by the Commission. By order of 10 March 1995, the President of the Second Chamber, Extended Composition, granted that application.

22 By application lodged at the Court Registry on 20 December 1994 the Kingdom of Denmark applied for leave to intervene in support of the form of order sought by the applicants. By order of 10 March 1995, the President of the Second Chamber, Extended Composition, granted that application.

23 By a separate document received at the Court Registry on 17 February 1995, the applicants made an application under Articles 70 and 114 of the Rules of Procedure for an order that the Commission produce certain documents which it considered essential and necessary in order to clarify the facts of the case, and also for the commissioning of an expert report in order to examine the methods used by the Commission in verifying the reduction in capacity in accordance with

Article 10a of the Seventh Directive. The applicant requested the production of: (1) the notification by the German authorities of 2 October 1992 and the letter of 4 December 1992 by which those authorities provided additional information about the notification; (2) the spill-over reports referred to in Article 10a(2)(d) of the Seventh Directive; (3) the documentation concerning the payment of the second tranche of aid, especially the letter from the German authorities of 2 February 1994; (4) the letter from the German Government of 24 July 1992, confirming its agreement to make a genuine and irreversible capacity reduction of 40% within the period prescribed by Article 10a(2)(c) of the Seventh Directive, and (5) the Commission's letter to the German Government of 15 December 1993.

24 By document received at the Court Registry on 11 April 1995 the Commission claimed that the Court should reject the applicants' application for measures of inquiry, save for the production of the Commission's letter of 15 December 1993, which it annexed to the document.

25 By letter of 30 May 1995 the Court requested the Commission to produce the letter from the German authorities of 2 February 1994 concerning the payment of the second tranche of aid. The Commission produced that letter on 27 June 1995.

26 By decision of the Court of 19 September 1995, the Judge-Rapporteur was assigned to the Third Chamber, Extended Composition, to which the case was consequently allocated.

27 Upon hearing the report of the Judge-Rapporteur the Court of First Instance (Third Chamber, Extended Composition) decided to open the oral procedure without any preparatory inquiry. However, by letter of 18 March 1996, the Court requested the parties to produce certain documents and to reply to certain questions in writing and at the hearing. The applicants answered the Court's questions by letter received at the Registry on 1 April 1996. By letter received at the Registry on 23 April 1996, the Commission answered the questions and produced the documents requested.

28 Oral argument was heard from the parties at the hearing on 14 May 1996, when they answered questions put by the Court.

29 The applicants claim that the Court should:

— annul in whole or in part the Commission decision of 11 May 1994 concerning the payment of the second tranche of aid to MTW;

— order the Commission to pay the costs;

— order MTW, as intervener, to pay the costs of its intervention.

30 The defendant contends that the Court should:

— dismiss the application;

— order the applicants to pay the costs.

31 The Kingdom of Denmark, intervening, claims that the Court should annul the Commission decision of 11 May 1994 concerning payment of the second tranche of aid to MTW.

32 The Federal Republic of Germany, intervening, contends that the Court should dismiss the application.

33 MTW, intervening, contends that the Court should:

— dismiss the application;

— order the applicants to pay the costs, including those incurred by the intervener.

Admissibility

Arguments of the parties

34 The intervener, MTW, questions whether the eight Danish shipyards listed in the originating application are entitled to be treated as applicants in this case. As the application does not clearly designate the applicant, MTW argues that it follows *a contrario* from Article 44(6) of the Rules of Procedure that the application should be dismissed as inadmissible, at least as far as those shipyards are concerned.

35 In the event that the Court should find that the action was brought jointly by the association and the eight shipyards, the application by those shipyards taken separately should be dismissed as inadmissible, given they have not shown that they participated in the administrative procedure (Case 169/84 *Cofaz* v *Commission* [1986] ECR 391). Moreover, the Danish shipyards have not adduced any specific argument as to the potential effects of the State aid in question on their position on the market.

36 The applicants observe in the first place that it is clear from the Danish version of the application that the applicant is the Danish shipyards' association on its own behalf and on behalf of the shipyards mentioned in the application. They further argue that under Article 116(3) of the Rules of Procedure and the third paragraph

of Article 37 and Article 46 of the EC Statute of the Court of Justice, MTW, as intervener, is not entitled to raise an objection of inadmissibility as the defendant has not challenged the admissibility of the action (Case C-313/90 *CIRFS and Others* v *Commission* [1993] ECR I-1125, paragraphs 20, 21 and 22, and Case C-255/91 *Matra* v *Commission* [1993] ECR I-3203).

37 The applicants consider that the Court ought not to declare the action inadmissible of its own motion, since MTW raised the question of inadmissibility at a very late stage in the proceedings. In any event, the objection that the application is inadmissible in part should be dismissed, since the admissibility of the application brought by the association has not been challenged and only one and the same application is involved (*CIRFS* v *Commission*). Moreover, the Danish shipyards are MTW's competitors and the State aid sufficiently alters their situation on the market, as is clearly and precisely described in the application. The applicants therefore satisfy the requirements in order to have the right to bring proceedings (*Cofaz* v *Commission* and *Matra* v *Commission*).

Findings of the Court

38 As far as MTW's capacity as intervener to raise an objection of inadmissibility is concerned, it must be borne in mind that, according to the third paragraph of Article 37 of the Statute of the Court of Justice, as applied to proceedings before the Court of First Instance by virtue of the first paragraph of Article 46 of that Statute, submissions made in an application to intervene are to be limited to supporting the submissions of one of the parties. In addition, under Article 116(3) of the Rules of Procedure, the intervener must accept the case as he finds it at the time of his intervention.

39 It follows that MTW has no entitlement to raise an objection of partial inadmissibility and that the Court is not obliged to consider the arguments raised in its support (*CIRFS and Others* v *Commission*, paragraph 22).

40 However, since the objection would, if upheld, constitute an absolute bar to proceeding, the Court may consider of its own motion the admissibility of the application at any time pursuant to Article 113 of the Rules of Procedure.

41 It should be observed *in limine* that, in the light of the originating application and the answer to the questions put by the Court, the applicants are Foreningen af Jernskibs-og Maskinbyggerier i Danmark, Skibsværftsforeningen (Danish Shipyards Association, hereinafter 'Skibsværftsforeningen') on its own behalf and as agent of the following Danish shipyards: Assens Skibsværft A/S, Burmeister & Wain Skibsværft A/S, Danyard A/S, Fredericia Skibsværft A/S, Odense Staalskibsværft A/S, Svendborg Værft A/S, Ørskov Christensens Staalskibsværft A/S and Aarhus Flydedok A/S. According to its statutes, one of Skibsværftsforeningen's objects is to represent the shipbuilding industry in Denmark and abroad.

42 Contrary to MTW's contention, the Court considers that the application is in this respect in conformity with Article 44(1) of the Rules of Procedure.

43 Next, it should be recalled that under the fourth paragraph of Article 173 of the EC Treaty any natural or legal person may institute proceedings against a decision addressed to that person or against a decision which, although in the form of a regulation or a decision addressed to another person, is of direct and individual concern to the former. In this instance, the decision is addressed to the German Government.

44 It is settled case-law that persons other than those to whom a decision is addressed may claim to be individually concerned only if that decision affects them by reason of attributes peculiar to them or by reason of factual circumstances differentiating them from all other persons and, as a result, distinguishing them individually in like manner to the person addressed (Case 25/62 *Plaumann* v *Commission* [1963] ECR 95, at 107; Case T-435/93 *ASPEC and Others* v *Commission* [1995] ECR II-1281, paragraph 62, and Case T-398/94 *Kahn Scheepvaart* v *Commission* [1996] ECR II-477, paragraph 37).

45 It should further be observed that the Commission took the contested decision in the course of the preliminary procedure provided for by Article 93(3) of the Treaty. Since the applicants have not sought its annulment on the ground that the Commission was in breach of the obligation to initiate the procedure provided for in Article 93(2) or on the ground that the procedural safeguards provided for by

Article 93(2) were infringed (Case C-198/91 *Cook* v *Commission* [1993] ECR I-2487 and *Matra* v *Commission*), the mere fact that the applicants may be considered to be parties 'concerned' within the meaning of Article 93(2) cannot be sufficient to render the application admissible. Consequently, it must be considered whether the applicants are affected by the contested decision by reason of other circumstances distinguishing them individually in like manner to the person addressed in accordance with the *Plaumann* test.

46 In this connection, the Court finds that it appears from the case-file that at least two of the Danish shipyards among the applicant companies — Danyard A/S and Odense Staalskibsværft A/S — are in direct competition with MTW or will be when the restructuring of MTW has been carried out. MTW itself has admitted that it is a direct competitor of those two shipyards at present and will be so to an even greater extent when the new dry dock has been completed. In common with Danyard A/S, the intervener MTW is at present building mid-size oil tankers, bulk carriers and container ships of up to 40 000 deadweight tonnes (dwt). According to information provided by MTW, with its new facilities it will be able to build very large crude carriers (hereinafter 'E 3 tankers or vessels') of up to 300 000 dwt and container ships. Also according to information from MTW, such a product range will place it in the same market segments as Odense Staalskibsværft A/S. It also appears from the case-file that there is only a very limited number of shipyards in the Community building or currently capable of building E 3 tankers, among them Odense Staalskibsværft. Moreover, the latter shipyard's facilities were compared on several occasions with those of MTW during the administrative procedure in the course of estimating MTW's future capacity.

47 Whilst the mere fact that a measure is capable of exerting influence on the competitive relationships within a relevant market does not in itself suffice to deem any trader in any competitive relationship with the measure's beneficiary to be directly and individually concerned by it (Joined Cases 10/68 and 18/68 *Eridania* v *Commission* [1969] ECR 459, paragraph 7), the documents in the case-file establish (see the preceding paragraph) that the market positions of Danyard and Odense Staalskibsværft could well be affected to a substantial degree by the grant of the State

aid in question. They find themselves, therefore, in a distinct competitive situation which differentiates them as regards the State aid from any other trader (*ASPEC and Others* v *Commission*, paragraph 70).

48 In those circumstances, Danyard A/S and Odense Staalskibsværft A/S must be regarded as being individually concerned by the contested decision.

49 As to whether those two shipyards are also directly concerned by the contested decision, it is true that the decision could not affect their interests in the absence of implementing measures adopted by the German Government. The Court finds, however, that the German Government had already placed the cash component of the second tranche of the aid at issue in blocked accounts with Commerzbank and Dresdner Bank on 30 December 1993, pending the Commission's approval. Consequently, there was no doubt about the German authorities' intention to grant the aid in question. It must therefore be held that the aforementioned two shipyards are directly concerned by the contested decision (see, to the same effect, Case 11/82 *Piraiki-Patraiki and Others* v *Commission* [1985] ECR 207).

50 Since an action brought by Danyard A/S or Odense Staalskibsværft A/S would have been admissible, an action brought by Skibsværftsforeningen in the capacity of agent for those two shipyards must itself be declared admissible (Joined Cases T-447/93, T-448/93 and T-449/93 *AITEC and Others* [1995] ECR II-1971, paragraphs 59 to 62).

51 Since one and the same application is involved, there is no need to consider the *locus standi* of the other shipyards mentioned in the application or that of the association of Danish shipyards in its own right (*CIRFS and Others* v *Commission*, paragraph 31).

52 It follows from all of the foregoing that the application is admissible.

Substance

53 The applicants base their action on three pleas alleging, respectively, that the Commission had no competence *ratione temporis* to approve the second tranche of aid; infringement of the conditions set out in Article 10a(2) of the Seventh Directive, and infringement of essential procedural requirements. The Danish Government raises a plea alleging infringement of the 'principle of transparency'.

The plea alleging lack of competence ratione temporis

Admissibility of the plea

— Arguments of the parties

54 The intervener, MTW, submits that this plea is inadmissible. It observes that the plea alleges failure to comply with a procedural rule, namely the period expiring on 31 December 1993 within which, according to Article 10a(2) of the Seventh Directive, the Commission had to take its decision. According to the case-law, such a plea is admissible only if either the procedure would have led to a different result in the absence of the irregularities in question, or the provision allegedly infringed was intended to protect the applicants' legitimate interests (Case 37/72 *Marcato* v *Commission* [1973] ECR 361, paragraph 6; Case 30/78 *Distillers Company* v *Commission* [1980] ECR 2229, paragraph 26, and *Cofaz* v *Commission*, cited above, paragraph 23 et seq.). The applicants have not shown that this is the case.

55 The applicants contest those claims. In the first place, the Commission's decision would probably have been different if the procedural rules had not been infringed. Secondly and in any event, the applicants had a legitimate interest in the Court's considering the arguments in question. The mere possibility that a party's arguments might be rejected does not constitute a ground of inadmissibility.

— Findings of the Court

56 The plea raised by the applicants alleges lack of competence on the part of the Commission. If it were justified, it would lead to the annulment of the decision pursuant to the second paragraph of Article 173 of the Treaty.

57 The applicants comprise both the Danish association made up of the main Danish shipyards and eight shipyard-operating companies, at least two of which are in direct competition with the recipient of the contested aid. MTW cannot deny that those applicants have an interest in raising this plea and in obtaining judicial review of the extent of the Commission's competence.

58 It follows that the plea is admissible.

Merits of the plea

— Arguments of the parties

59 The applicants assert that the Commission approved a State aid at a time when it was not competent to do so, in that the contested decision was adopted after the deadline of 31 December 1993 laid down by Article 10a(2) of the Seventh Directive and also after the same deadline laid down for the payment of the aid by Article 10a(2)(a) of the directive. In so doing, the Commission is alleged to have exceeded its competence *ratione temporis*.

60 They maintain that there is no other provision empowering the Commission to adopt a decision authorizing payment of the aid after 31 December 1993, even assuming that the aid was notified in due time and that the aid was paid before that date. The directives in question strictly limit the powers of the Commission (Joined Cases C-356/90 and C-180/91 *Belgium* v *Commission* [1993] ECR I-2323).

61 In this regard, it appears from the proposal for Directive 92/68 that authorized aids to East German shipyards had to be paid by 31 December 1993 at the latest. The Community legislature thus intended to fix a final date by which restructuring of the shipbuilding industry of the former German Democratic Republic was to be completed with the help of authorized aid paid by the German Government. Thus only the Council had competence to take a decision after 31 December 1993 approving the second tranche of the aid in question pursuant to Article 92(3)(e) of the Treaty.

62 Although the expiry date for the application of the Seventh Directive was postponed from 31 December 1993 to 31 December 1994 by Directive 93/115, for its part the deadline for the payment of aid to the East German shipyards, laid down by Article 10a(2) of the Seventh Directive, was not altered.

63 The applicants contest the Commission's argument that the time-limit laid down by Article 10a was not mandatory. The matter had been discussed in the Council and Directive 93/115 had been adopted on 16 December 1993, the day after the Commission had informed the German Government of the difficulties in taking a decision before 31 December 1993.

64 At the hearing the applicants observed that in another context, namely that of aid to the steel industry, the Commission took the view that after the expiry of the time-limit laid down by Article 5 of Commission Decision 3855/91/ECSC of 27 November 1991 (OJ 1991 L 362, p. 57), a provision similar to the one at issue in this case, it no longer had the power conferred by that article [see the Commission's communication of 31 October 1995 (OJ 1995 C 289, p. 11)].

65 The applicants go on to argue that the case-law relied upon by the Commission (Case C-354/90 *Fédération Nationale du Commerce Extérieur des Produits Alimentaires and Syndicat National des Négociants et Transformateurs de Saumon* ('*FNCE*') [1991] ECR I-5505) does not apply in this case.

66 Unlike that case, in which the aid in question was granted under the provisions of the Treaty which did not prescribe any specific time-limit, this case concerns the approval out of time of an aid paid under specific, transitional rules by way of derogation, which expired on 31 December 1993. It is clear from the case cited that neither the Commission nor the Court may validate or legalize *ex post*, aid disbursed in breach of the last sentence of Article 93(3) of the Treaty. To accept the Commission's argument that it was entitled, even in those circumstances, to declare the aid in question compatible with the common market would be tantamount to improving the legal position of the German authorities and MTW by tolerating an unlawful payment and at the same time to extending the Commission's powers beyond the time-limit fixed by the Council.

67 The applicants observe that it was not until they received the defence that they were informed that the second tranche of the contested aid had been placed in blocked accounts before 31 December 1993, whereas the press release of 11 May 1994 gave the impression that that tranche would be paid after the adoption of the contested decision.

68 In the applicants' view, it can be inferred from the case-law that failure to comply with a time-limit such as the one laid down in Directive 92/68 constitutes an infringement of Community law (Case 30/72 *Commission* v *Italy* [1973] ECR 161). In this case, there could be no justification for the Commission's infringement of the Seventh Directive as the delay in processing the case was attributable only to MTW. The applicants add that, it was not only the case that the aid should not have been paid until the Commission had approved it, but that it should also have been compatible with the common market at a date before 31 December 1993. Given that the contested decision had been adopted in May 1994, it should have been based on factual circumstances completely different from those existing at the time when the aid was supposed to have been paid, namely at a time when the shipyard was to have been relocated. Those circumstances made payment unlawful (Case 104/76 *Jansen* [1977] ECR 829).

69 The applicants contest MTW's assertion that the payment of the second tranche of the aid had effectively been authorized when the Commission decided on 23 December 1992 to approve the first tranche. They submit that that assertion is invalidated by the fact that, at the stage of the defence, the Commission enumerated the conditions which had to be fulfilled before the second tranche of the aid could be declared compatible with the common market.

70 Lastly, the applicants reject the Commission's assertion that they have no legitimate interest in seeking the annulment of the contested decision, since it is of individual and direct concern to them. They submit, moreover, that the case-law shows that a certain formalism is required in the Commission's administration (Case C-137/92 P *Commission* v *BASF and Others* (the '*PVC* case') [1994] ECR I-2555; Case T-32/91 *Solvay* v *Commission* [1995] ECR II-1825, at present the subject of an appeal to the Court of Justice as Case C-288/95 P; and Case T-37/91 *ICI* v *Commission* [1995] ECR II-1901, also the subject of appeal as Case C-286/95 P). Disregard of procedural rules constitutes in itself an infringement which entails the annulment of a decision, whether or not that disregard had an effect on the contested decision.

71 The Danish Government supports the applicants' argument that in May 1994 the Commission was not competent to adopt the contested decision. The deadline set by Article 10a(2) of the Seventh Directive is not a formal procedural rule but one of the conditions which the aid must satisfy in order to be compatible with the common market. Contrary to the Commission's contention, the distinction between illegal aid and aid that is incompatible with the common market has no relevance to the assessment of State aid based on the special transitional rules introduced for shipyards in the former German Democratic Republic by Directive 92/68.

72 The Danish Government challenges the Commission's assertion that the transitional provisions were not expressly extended when Directive 93/115 was adopted owing simply to a misunderstanding. The question was discussed in the Council when the draft of Directive 93/115 was considered. The Council was unanimous that the special rules for shipyards in the former German Democratic Republic should not be extended. What is more, the time-limit was set in such a way as to allow Member States and other interested parties to arrange their commercial affairs. Such persons must have a legally protected certainty of being able to act in reliance on the rules of the directive and the time-limit in force. The Commission itself acknowledged the crucial significance of the time-limit in its reply to Written Question No 2792/92 from a Member of the European Parliament (OJ 1993 C 195, p. 18).

73 Moreover, by the contested decision the Commission approved the payment of the second tranche of aid on an false basis. At the time when the German Government informed the Commission of the payment of the aid on 17 March 1994, the aid was intended for a relocated shipyard. Yet the Commission assumed in the contested decision that MTW would remain at the premises originally envisaged.

74 Finally, regarding the fact that part of the second tranche of aid had been placed in blocked accounts pending the approval of the Commission, the Danish Government considers that, if that was equated with payment, it was unlawful, since the Commission had not yet given its authorization. If, on the other hand, the deposit could not be treated as payment, payment did not take place until the accounts were unblocked in 1994. In that case, the payment was unlawful on the ground that the Commission gave its approval at a time when it was no longer competent to do so and because payment could no longer lawfully be made after 31 December 1993. In that regard, the contested decision does not make it clear whether payment was made in 1993 or only in 1994.

75 The Commission argues that, in accordance with case-law, a distinction must be drawn between, on the one hand, invalid (or illegal) State aid and, on the other hand, State aid that is incompatible with the common market (see *FNCE*, paragraphs 9, 10 and 11).

76 It contends that in the present case the German authorities paid the aid before the Commission authorized it but that the invalidity of that aid, in line with the cited case-law, did not prevent the Commission from declaring it compatible with the common market, since the aid was granted before the deadline set by Article 10a(2) of the Seventh Directive and, furthermore, all other conditions set forth in that provision had been met. The Commission's role was therefore confined to assessing the compatibility of the aid, although it had been disbursed before it had been approved.

77 As regards the payment of the second tranche of aid, the Commission states that the letter of 2 February 1994 which it received from the German authorities shows that DM 220.8 million in cash was placed in blocked accounts in favour of MTW on 30 December 1993, pending Commission approval. The Commission denies the applicants' assertion that they were not informed of that payment before commencement of the action. The payment of the contested aid was the subject of discussions at meetings on 3 February 1994, 7 February 1994 and 21 March 1994, in which the applicants also participated. Article 48 of the Rules of Procedure precludes the applicants from relying in the reply upon arguments based on that erroneous assertion.

78 Having regard to the reasons for the delay in taking the decision, namely the submission of a relocation plan justified on purely objective grounds and the numerous discussions that took place following that plan, including with the applicants, the Commission denies that it lacked competence *ratione temporis*.

79 In that connection, the Commission asserted at the hearing that Article 10a of the Seventh Directive authorized the payment of operating aid for contracts signed between 1 July 1990 and 31 December 1993. Consequently, it was competent to approve the aid even after 31 December 1993 provided that it was paid in connection with such contracts. The time-limit laid down by Article 10a was therefore not the deadline for deciding on compatibility.

80 Next the Commission argues that, although the first subparagraph of Article 10a(2) gave a time-limit of 31 December 1993, that deadline was not 'mandatory'. It was incorporated into Directive 92/68 merely to ensure that its term of validity would coincide with that of the Seventh Directive. When Directive 92/68 was adopted on 20 July 1992 it was not yet known that on 16 December 1993 the validity of the Seventh Directive would be extended until 31 December 1994 by Directive 93/115. Whilst it was a matter of regret that the latter directive did not expressly extend the deadline set in Article 10a(2), it would be highly formalistic to conclude, solely on that basis, that the Commission was not competent after 31 December 1993 to authorize the second tranche of aid.

81 Finally, the compatibility of an aid should be assessed in the light of the effects it had on the market at the time when it was granted, in other words before 31 December 1993, as it had been assessed in this case. The fact that the Commission took its decision after 31 December 1993 had no adverse effect on the competitive situation of the applicant companies. Consequently, the applicants have no legitimate interest in seeking the annulment of the contested decision.

82 The intervener, MTW, supports the Commission's arguments concerning the inferences to be drawn from the expiry of the time-limit set by Article 10a(2). In particular, the case-law shows that mere infringement of the last sentence of Article 93(3) of the Treaty, in so far as the aid in question was paid before 31 December 1993, does not render the aid incompatible with the common market, since the Commission has no power to declare aid incompatible with the common market solely for breach of that article (*FNCE*, paragraphs 13 and 14, and the Opinion of Advocate General Jacobs in that case, section 21).

83 The aid in question had already been authorized in substance by the Commission's decision of 23 December 1992 on the first tranche of aid. The two Commission decisions did not authorize two separate State aids, but a first and second tranche of one and the same aid. By its decision of 23 December 1992 the Commission indicated that it was in a position to assess the aid in question on the basis of the information supplied by the German Government on 2 and 4 December 1992. Payment of the second tranche was subject only to the production by the German Government of a statement on the total reduction in shipbuilding capacity as allocated among the different yards, and the spill-over reports. In those circumstances, the Commission was competent to approve the release of the second tranche in 1994, since it depended only on those formal conditions being fulfilled.

84 Lastly, MTW argues that since the time-limit in question was a purely procedural rule, the present plea turns on the applicants' showing that the Commission would have refused to authorize the release of the second tranche of aid if it had taken its decision before the end of 1993 or that the provisions in question were intended to protect their interests (*Distillers Company* v *Commission* and *Marcato* v *Commission*). They have not done so here.

— Findings of the Court

85 It should first be emphasized that Directive 92/68, which inserted Article 10a in the Seventh Directive, constituted a specific, transitional derogation in the matter of State aid. It appears from the second recital in the preamble to Directive 92/68, first, that the East German shipbuilding industry needed restructuring in order to make it competitive and, secondly, that 'a special transitional arrangement should ... be introduced to enable the shipbuilding industry [in the former German Democratic Republic] to operate during the period of gradual restructuring which should enable it to comply with the State aid rules applicable throughout the Community'.

86 Although Directive 93/115 amended Article 13 of the Seventh Directive so as to extend it to cover 1994, it did not amend the time-limits set by Article 10a of the Seventh Directive. In order for the new period of application fixed by Directive 93/115 to have also applied to the special rules for East German shipyards, Directive 93/115 would have had to have expressly extended the time-limit set by Article 10a.

87 As to whether the condition laid down by Article 10a(2)(a) *in fine*, to the effect that the aid should have been paid by 31 December 1993, was complied with in this case, the Court finds that, according to the Commission's answers to the Court's written questions — which the applicants do not contest —, the cash component of the second tranche of the aid in question was deposited on 30 December 1993 in blocked accounts in MTW's name with Commerzbank and Dresdner Bank. Release of those funds was conditional on the approval of a administrator designated by the German Government and an administrator designated by the beneficiary.

88 The Court must consider whether that deposit must be deemed to be payment within the meaning of Article 10a(2)(a) *in fine*. Contrary to the Commission's contention, Article 48 of the Rules of Procedure does not debar the applicants from alleging an irregularity in the payment of the second tranche of the aid, since that article does not preclude a new argument being raised in support of the present plea.

89 In this connection, the Court points out that it appears from Article 11 of the Seventh Directive that Member States are to give the Commission prior notification of any individual decision applying the special aid rules introduced by Article 10a, which must be authorized by the Commission 'before [it is] put into effect'.

90 Accordingly, after the German Government had been informed by letter dated 15 December 1993 that the Commission could not take a final decision before the end of 1993 (see paragraph 15 of this judgment), if it still wished to grant operating aid to MTW, it was obliged in acting to take account of the conflict between the applicable provisions. On the one hand, under Article 10a(2) of the Seventh Directive it had to pay the aid to the beneficiary by 31 December 1993. On the other, it had to comply with Article 11(2) of that directive, providing that Member States have to notify the Commission 'before [State aid is] put into effect'.

91 In view of this very particular context, the Court considers that, since the German Government still wished to grant the second tranche of aid to MTW, it was obliged to place the cash component of the second tranche in blocked accounts in order to comply with the conditions of Article 10a. It must therefore be held that the condition relating to the payment of the aid was satisfied by making that deposit in favour of MTW by 31 December 1993. This finding is corroborated by the information given by the Commission at the hearing, which the applicants do not contest, to the effect that the interest on the blocked accounts accrued to MTW.

92 As to the question whether the Commission had the competence in May 1994 to declare the second tranche of aid to MTW compatible with the common market, it should be recalled that the Commission's competence to declare State aid to the shipbuilding industry compatible with the common market is limited by the directives in force (Joined Cases C-356/90 and C-180/91 *Belgium* v *Commission*, paragraphs 24 to 33, and Case C-400/92 *Germany* v *Commission* [1994] ECR I-4701, paragraphs 13 to 16).

93 Indeed, it follows from the structure and purpose of Article 92 of the Treaty that paragraph 3 of that article introduces the possibility of derogating, in certain specified cases, from the prohibition of aid which would otherwise be incompatible. Moreover, Article 92(3)(e) allows the Council to increase the range of categories of

aid which may be regarded as compatible with the common market over and above those set out in subheadings (a), (b), (c) and (d). By adopting the Seventh Directive, therefore the Council acted in accordance with the spirit of Article 92(3) when, after establishing that the shipbuilding aid in question was incompatible with the common market, it took account of a series of economic and social requirements which led it to make use of the option, recognized by the Treaty, to regard that aid as nevertheless compatible with the common market provided that it satisfied the criteria for derogations contained in the directive (*Germany* v *Commission*, paragraph 15).

94 At the material time the Seventh Directive authorized the Commission to declare the operating aid compatible with the common market provided that the aid granted for an individual contract did not exceed a maximum ceiling of 9% of the contract value before aid. However, in order to facilitate restructuring in the former German Democratic Republic, the Council decided in Article 10a of the Seventh Directive, by way of derogation from those rules, that 'until 31 December 1993' special operating aid exceeding that ceiling might be 'considered compatible with the common market' provided that certain conditions set out in Article 10a(2) and (3) were fulfilled.

95 It should next be noted that one of the conditions for permitting payment of such special operating aid was that 'no further production aid is granted on contracts signed between 1 July 1990 and 31 December 1993' [Article 10a(2)(b) of the Seventh Directive]. The Court considers that it follows from that provision that the Commission had the competence and the duty to consider the necessity for and hence the compatibility with the common market of operating aid paid in respect of contracts concluded throughout that reference period, including any contracts signed on the last day, 31 December 1993.

96 In view of the fact that an examination of the compatibility of State aid with the common market normally entails a complex economic and technical appraisal for which time is needed, it is clear that when Directive 92/68 was adopted, the Community legislature conferred on the Commission the power to take its decision on compatibility in certain cases even after 31 December 1993. In this regard, the Court holds that the actual wording of Article 10a does not expressly require the Commission to take its decision before 31 December 1993. What is more, in the

case of operating aid, that is to say, in particular, production aid linked to specific contracts, the Court considers that it is only the time when those contracts are signed which is material as far as the effects of the aid on competition are concerned, and not the time at which the Commission decision on the compatibility of the aid with the common market is adopted.

97 In view of those considerations the Court takes the view that the Commission was competent in May 1994 to rule in the contested decision on the compatibility with the common market of the second tranche of the aid in question.

98 The fact that the cash component of that second tranche of aid was placed in blocked accounts before that decision was adopted — which is deemed to have constituted payment within the meaning of Article 10a(2)(a) *in fine* of the Seventh Directive — cannot alter that finding. In the judgment in *FNCE*, the Court of Justice held that the Commission was bound to examine whether aid was compatible with the common market even where the Member State had acted in breach of the prohibition on implementing aid measures before the Commission had taken its decision.

99 Whilst it is true, as the applicants and the Danish Government observed at the hearing, that the Commission considered in the context of aid to the steel industry that it followed from Article 5 of Commission Decision 3855/91 (cited above), according to which 'aid ... for investment under general regional aid schemes may until 31 December 1994 be deemed compatible with the common market ...', that after the expiry of that time-limit it no longer had the power conferred by that article, that assessment cannot bind the Court, even assuming it to be correct. In any event, such an assessment is unnecessary in this case, if only because Article 10a of the Seventh Directive did not lay down any time-limit for notification, unlike Article 6(1) of Decision 3855/91, which provided that aid plans had to be granted in sufficient time for the Commission to open and close the procedure before that deadline, namely, in that case at least six months before that date.

100 The Court further holds that the adoption of the contested decision after 31 December 1993 was justified on objective grounds. The city of Wismar had hoped to find a new location for the shipyard, and as a result MTW examined the

possibility of moving to a new site which had previously been used by Soviet troops. However, its examination was delayed due to the state in which the Soviet army had left the land in question. Consequently, the German Government had been unable to inform the Commission of the proposed relocation until August 1993. The planned relocation having been abandoned on 29 April 1994, the Commission adopted the contested decision shortly after. Furthermore, since the aid plan had been notified as long before as 1992 and the Commission had approved the first tranche of the aid in December 1992, the Court considers that the German Government did not seek to circumvent the relevant provisions.

101 Lastly, it should be observed that the 1994 decision on the compatibility of the second tranche with the common market could not have come as a surprise to traders on the market. That question had been discussed at several multilateral meetings in 1993 and early 1994. In particular, the applicants had had detailed knowledge of the relevant facts. They were familiar with the decision of 23 December 1992 approving the first tranche of aid and had taken part in several meetings during the administrative procedure. Lastly, they had had access to several documents in the case-file. Even if the view is taken that the time-limit for taking the decision had been set in order to have regard to the ability of Member States and other interested parties to take commercial measures, it must be held that the applicants themselves had been in a position to adopt the relevant commercial measures in view of their participation in the administrative procedure and, in particular, of their awareness of the delay to which that procedure was subject.

102 It follows from all of the foregoing that the present plea must be rejected.

Plea alleging breach of the conditions set out in Article 10a(2) of the Seventh Directive

103 This plea has three limbs. The applicants complain in the first place that the Commission authorized aid exceeding the 36% ceiling laid down by Article 10a(2)(a) of the Seventh Directive. Secondly, they claim that the Commission did not ensure that the German Government would carry out, by 31 December 1995, a genuine and irreversible reduction in shipyard capacity, equal to 40% of the capacity

existing on 1 July 1990. Lastly, they submit that the Commission wrongly allowed for the possibility of increasing capacity after five or ten years.

The first limb of the plea, alleging infringement of Article 10a(2)(a) of the Seventh Directive

— Arguments of the parties

104 The applicants maintain that the aid approved exceeds the ceiling fixed by Article 10a(2)(a) of the Seventh Directive, which was set at '36% of a reference annual turnover calculated on the basis of three years of shipbuilding and ship conversion activities after restructuring'. According to the communication of 25 May 1992, that annual reference turnover should be calculated by multiplying the planned number of employees at the end of the restructuring period by an average production value per employee of DM 240 000. Since it was forecast that there would be 1 790 jobs at the shipyard in 1995, the aid ceiling comes to DM 464 million.

105 In the reply, the applicants calculated the ceiling at DM 486 million on the basis of turnover figures for 1992 and 1993 of approximately DM 450 million, which, they claim, were known to the Commission when the contested decision was adopted. In any event, the total aid of DM 597.2 million (a first tranche of DM 191.2 million and a second tranche of DM 406 million) exceeds the authorized ceiling.

106 The Commission denies that the approved aid exceeded the ceiling laid down by Article 10a(2)(a) of the Seventh Directive. The preparatory documents, especially the communication of 25 May 1992, shows that operating aid of DM 714.6 million had been envisaged in favour of MTW. The 36% ceiling was calculated on that

basis so as to enable aid of that amount to be granted. The Council was perfectly well aware of those figures when Directive 92/68 was adopted. Since the aid actually paid amounted only to DM 597.2 million, it could not therefore be in breach of Article 10a(2)(a) of the Seventh Directive.

107 The Commission further argues that the applicants are mistaken in using actual turnover figures for 1992 and 1993. Under the provision in question, the ceiling is to be fixed on the basis of 'a reference annual turnover ... after restructuring'. To have used the actual turnover for the two financial years before the restructuring process had even been completed would therefore be contrary to the very wording of the provision and go against the Council's intentions, as manifested in the preparatory documents.

108 The German Government considers that the intensity of the aid ultimately granted to MTW, namely DM 597.2 million, amounts to only 31.7%.

109 MTW essentially supports the arguments put forward by the Commission.

— Findings of the Court

110 According to Article 10(2)(a) of the Seventh Directive, operating aid may be considered compatible with the common market provided that it 'does not ... exceed a maximum ceiling of 36% of a reference annual turnover calculated on the basis of three years of shipbuilding and ship conversion activities after restructuring'.

111 It appears from the very wording of this provision that the calculation method put forward by the applicants in the reply based on actual turnover for 1992 and 1993 is irrelevant. The abovementioned provision expressly provides that the basis for the calculation should be an annual reference turnover 'after' the proposed restructuring, that is to say, after 1995, since the restructuring was scheduled to go on until 31 December 1995.

112 The proposition put forward by the applicants in the originating application (see paragraph 104 of this judgment) cannot be accepted either.

113 It should be borne in mind that Directive 92/68 contains no definition of 'reference annual turnover'. There is however a definition in the communication of 25 May 1992. According to that communication, reference turnover after restructuring should be 'calculated by multiplying the planned number of employees at the end of the restructuring period by an average production value per employee of DM 240 000'.

114 Accordingly, the Court finds that the Community legislature used as the basis for the calculation a hypothetical turnover, as the restructuring was planned to go on until 1995, whereas the aid authorized by Directive 92/68 was intended to facilitate continued operations in the East German shipyards during the period of gradual restructuring.

115 According to the communication of 25 May 1992, all the East German shipyards had work until 1993 on the basis of contracts signed before 1 July 1990 in respect of which the aid was not regarded as operating aid within the meaning of the Seventh Directive. For this reason, it proved necessary to use a hypothetical turnover. Indeed, the Community legislature could not use a special ceiling expressed as a percentage of the contract value before aid (see Article 4 of the Seventh Directive) or as a percentage of the aid recipient's annual turnover (see Article 5 of that directive).

116 It is undisputed that the number of employees could be estimated at 1 790 at the end of the restructuring period, in accordance with the Commission's estimates contained in the communication of 25 May 1992. It must therefore be held that, in accordance with the abovementioned definition, the amount of MTW's 'reference annual turnover calculated on the basis of three years of shipbuilding and ship conversion' came to DM 1 288.8 million (1 790 x 3 x DM 240 000).

117 It appears from the preparatory documents for Directive 92/68, in particular point V.8 of the communication of 25 May 1992, that at the time when that directive was adopted it was envisaged to grant MTW operating aid of up to DM 714.6 million. In order to achieve aid of that amount, the Commission effected a 'reverse' calculation in its communication of an aid ceiling expressed as a percentage of the 'reference annual turnover calculated on the basis of three years of shipbuilding and ship conversion activities after restructuring', with the said turnover being fixed at DM 1 288.8.

118 Although this does not emerge expressly from its proposal, as far as MTW was concerned, the Commission must have calculated the percentage of 35.7% using the following formula:

$$\frac{\text{aid}}{\text{turnover + aid}} = \frac{\text{DM 714.6 million}}{\text{DM (1 288.8 +714.6) million}} = 35{,}7\ \%.$$

119 The Court considers that this calculation method, which corresponds to the method used in Article 4(1) of the Seventh Directive [see also the definition set out in Article 1(e) of the Seventh Directive] and may be explained by the desire to treat aid provided directly to the shipyard in the same way as aid provided indirectly through the medium of a shipowner, was impliedly approved by the Council. It is the only formula capable of explaining, on the basis of the aid expressly envisaged of DM 714.6 million and the calculation of turnover set out in paragraph 116 of this judgment, the 36% ceiling adopted in Directive 92/68.

120 It follows from the foregoing that the ceiling laid down by Article 10a(2)(a) of Directive 92/68 authorized operating aid totalling DM 714.6 million. Accordingly, since the aid actually paid came to a total of only DM 597.2 million, the authorization of the second tranche cannot constitute a breach of that provision.

121 The first limb of the plea must therefore be rejected.

The second limb of the plea, alleging infringement of Article 10a(2)(c) of the Seventh Directive in so far as it provides for a reduction in capacity by 31 December 1995

— Arguments of the parties

122 The applicants assert that the Commission authorized the aid without ensuring that the German Government would carry out by 31 December 1995 a genuine and irreversible reduction of 40% of the capacity existing in the former German Democratic Republic on 1 July 1990. The restructuring of MTW's shipyard, as authorized by the contested decision, did not limit capacity to 100 000 cgt in accordance with the Seventh Directive, but on the contrary enabled MTW to produce a much higher tonnage. According to the estimates of the applicants' consultant, C. R. Cushing & Co. Inc. ('Cushing'), its capacity could reach 200 000 cgt per annum. Accordingly, the total reduction in the new *Länder* after restructuring did not amount to 40%.

123 In the applicants' submission, whilst it is true that Article 10a(2)(c) of the Seventh Directive requires a reduction in total capacity to be carried out for all the shipyards in the former German Democratic Republic, a certain capacity nevertheless has to be attributed to each shipyard. According to the aforementioned Commission report of 1 April 1993, the German Government undertook, as far as MTW was concerned, to comply with a capacity limit of 100 000 cgt (see paragraph 9 of

this judgment). In that connection, the breakdown into quotas allows no margin for increased capacity with the result that any overshooting of the cgt quotas allocated to the various shipyards will result in total capacity being exceeded and hence in an infringement of the requirement for a 40% reduction in capacity.

124 The applicants go on to argue that the aid was approved without the prior approval of a timetable ensuring a genuine and irreversible reduction of 40% of shipbuilding capacity in the former German Democratic Republic as required by Article 10a(2)(c) of the Seventh Directive. Furthermore, the first spill-over report was not, it seems, provided to the Commission before the end of February 1993. Yet those requirements are substantive rules closely connected with the other conditions set out in Article 10a.

125 As far as the concept of 'capacity' is concerned, the applicants assert that the Commission both misinterpreted it and changed it in the course of the administrative procedure. As a result, it has become impossible to ascertain whether the limit imposed by Article 10a(2)(c) of the Seventh Directive has effectively been complied with, especially as far as MTW is concerned.

126 'Capacity' should be taken as meaning the maximum capacity of the shipyard under optimum conditions. This interpretation is borne out by the fact that, when Directive 92/68 was adopted, capacity was calculated using 'resource calculation, by comparing man-hours required to build a ship with the man-hours available' (see the communication of 25 May 1992).

127 Referring to the Commission's report of 8 November 1991 on the state of the shipbuilding industry in the Community [document SEC(91) 2057 final], in particular the actual production figures for the former German Democratic Republic, the applicants assert that the capacity as at 1 July 1990, which was fixed at 545 000 cgt in Directive 92/68, was never attained. The actual maximum production was approximately 502 000 cgt (1984 and 1985) and approximately 345 000 cgt in 1990.

128 Consequently, the concept of capacity should be taken to mean absolute maximum production. This understanding is confirmed by the preparatory documents, notably Council Document No 7049/92 of 10 June 1992 relating to a Coreper meeting held in June 1992 and by a document of the Commission itself (DG III. C.3 of 4 February 1985), which equated 'national capacity' with 'theoretical maximum capacity'. In addition, that definition of capacity is used in the Comprehensive Information System on Shipbuilding Capacity, Annual Reports, of the Organization for Economic Cooperation and Development ('OECD'): 'the maximum capacity that can be utilized for building merchant seagoing ships, taking into account the physical possibilities and any legal or administrative limitations in shipbuilding'. Lastly, according to Cushing's expert report, capacity is 'the capability to produce, i. e. maximum output'.

129 In order to avoid the reduction required by Directive 92/68 being rendered illusory, it is important that the concept of capacity is not changed. Yet that concept was subsequently altered by the Commission inasmuch as, in establishing capacity following the restructuring, it no longer considered the potential capacity, but contrary to the meaning of Directive 92/68, 'actual capacity', that is to say 'production achievable under favourable normal conditions'.

130 In this context, actual production is invariably lower than capacity, in view of production bottlenecks. In this regard, the Commission's statement that capacity can be reduced genuinely and irreversibly by ensuring that a number of restrictions and bottlenecks in the production facilities are maintained cannot be accepted, since the bottlenecks merely reduce actual output and not capacity.

131 Citing Cushing's expert report (Annex 24 to the reply), the applicants state that a relatively low level of investment would enable most of the bottlenecks identified to be eliminated, assuming that they exist. For example, as regards steel production, it would be sufficient to add more preparation equipment. In particular, steel preparation space does not constitute a real bottleneck and capacity calculation should always cover the possibility of 3 shifts a day, which is the maximum possible under normal conditions, and not the 1.7 shifts assumed by the Commission.

132 What is more, it appears from correspondence with the Commission that, according to its own consultant, it would be possible to eliminate the bottlenecks limiting MTW's 'capacity' to 100 000 cgt. In this way, production could exceed the authorized ceiling.

133 The Commission's estimates of MTW's capacity are incorrect, since they are based on the mistaken assumption that the shipyard will produce 2.5 E 3 tankers. In this respect, the Commission's consultants — and hence also the Commission itself — based their evaluation of capacity on the possibility of processing 102 500 tonnes of steel a year, equivalent to 2.5 E 3 tankers, which, according to the Commission, corresponds to the capacity of 100 000 cgt allocated to MTW. That calculation method is misleading for several reasons.

134 First, the assumption that MTW will produce only E 3 tankers does not accord with reality as the Commission and MTW admitted during the written procedure when they stated that they were aware that production of ships would be diversified to include in particular E 3 tankers, container ships and passenger ships. In addition, it is unlikely that MTW will build E 3 ships in future since demand on the world market is lower than anticipated, there appear to be no orders for E 3 tankers in MTW's order book and the port of Wismar is not at present wide enough to enable an E 3 vessel to leave the harbour.

135 Secondly, if the calculations were based on a more probable and foreseeable ship production, capacity expressed in cgt would be in excess of the authorized limit of 100 000 cgt, all things being equal, in particular the processing of 102 500 tonnes of steel a year. It appears from OECD document C/WP6/SG(94)8 that if the higher coefficients for other types of ships were used, there would be an increase in capacity expressed in cgt, which the Commission's consultants have admitted. According to the applicants, a document which they produced at the hearing shows that if other product ranges, notably the range which MTW had originally intended to produce, had been used as the basis for the calculation, the shipyard's production would have exceeded the allocated 100 000 cgt within the limits of the authorized processing of steel.

136 Lastly, the applicants complain that the Commission wrongly applied the coefficient for single-hulled E 3 vessels (0.25) rather than that for double-hulled ships (0.30) which was applicable when the contested decision was adopted.

137 The Danish Government argues that the Commission has not ensured that the capacity limit fixed by Article 10a(2)(c) of the Seventh Directive will be complied with after 1 January 1996, and that the contested decision must therefore be annulled.

138 As regards the question of the total capacity of shipyards in the former German Democratic Republic, the Danish Government fully subscribes to the applicants' arguments.

139 As for MTW's capacity, the Danish Government considers that the capacity of MTW's shipyard exceeded 100 000 cgt as at 31 December 1995. On the basis of a report drawn up by Carl Bro Industry & Marine A/S ('Carl Bro'), it concludes that MTW's capacity and total capacity in the former German Democratic Republic amount respectively to approximately 240 000 cgt and 576 000 cgt per annum. In support of that contention, it argues that the production facilities at the MTW shipyard appear to be oversized in relation to the authorized capacity, and that the built-in bottlenecks in the shipyard are of no real importance, since the only truly restrictive bottlenecks for a shipyard are the cranes and docks. The reduction in capacity is therefore not irreversible.

140 Lastly, the Danish Government argues that, contrary to the Commission's view, MTW's capacity cannot be controlled by restricting steel production, since there is no fixed relationship between compensated gross tonnage, in which production and capacity are measured, and the use of steel for various types of vessels. As far as this question is concerned, the Danish Government essentially supports the applicants' argument.

141 As a preliminary observation, the Commission points out that the Community Court's review of the Commission's appraisal should be restricted to verifying whether the rules on procedure and the statement of reasons have been complied with, whether the facts are materially accurate and whether there has been any manifest error of appraisal or a misuse of powers. In this regard, the applicants have not adduced any evidence capable of proving that the contested decision is vitiated by any factual error or by any manifest error of appraisal.

142 The Commission also observes *in limine* that the applicants' assertion concerning future capacity is premature. Even if MTW were to make changes resulting in an increase in capacity, that would only constitute an infringement of the contested decision in so far as the aid could no longer be viewed as compatible with the common market. In that regard, the German authorities had until 31 December 1995 to achieve the overall capacity reduction.

143 The Community legislature left the Commission with some discretion in interpreting the concept of capacity. The interpretation of that concept put forward by the applicants is not normally used in the industry and, in any event, is contrary to the Council's intention to retain a viable shipbuilding industry capable of producing 327 000 cgt [545 000 cgt minus 40%].

144 The Commission argues that capacity must be understood as referring to production achievable under favourable normal conditions, given the facilities available. The concept was applied in that way for the estimate of capacity appearing in Directive 92/68, which, moreover, the Member States approved. The relevant figures show, contrary to the applicants' assertion, that the East German yards were in fact able to achieve figures virtually equivalent to the 1990 capacity estimates.

145 The Commission goes on to state that it made its approval of the aid conditional upon the maintenance of a number of production restrictions and bottlenecks. Although bottlenecks are by their very nature temporary, removing or by-passing them would only tend to create congestion elsewhere in the production line. In that respect, when the report drawn up by the applicants' consultant concludes that bottlenecks could be removed at relatively low cost, it disregards a number of realities at the MTW shipyard.

146 As far as the concept of 'capacity' is concerned, the Commission has not changed it, although the method for calculating capacity was slightly refined as between the assessment of 1990 capacity and the assessment of future capacity. The method employed differed somewhat because the Commission had much more detailed information available with which to assess future capacity.

147 The Commission observes that the applicants' complaint to the effect that there was no timetable for the capacity reduction is not supported by any evidence. The letter of 24 July 1992 from the German authorities to the Commission did contain a timetable. In any event, capacity reductions in the former German Democratic Republic have in fact taken place. The applicants therefore have no legitimate interest in raising that complaint.

148 As for the expert reports drawn up by Cushing at the applicants' request and by the Danish Government's consultant, Carl Bro, they have no probative value, being based on a very incomplete knowledge of the facts. Moreover, the consultants did not have an opportunity to visit the site, nor did they have access to the investment or design plans.

149 The Commission contests the applicants' assertion that its assessment was inaccurate because it assumed that MTW would produce only E 3 tankers. It never made any such assumption. The Commission was fully aware that the future range of products would be diversified and include tankers, container ships and passenger ships. Since MTW aimed to achieve a maximum production of 2.5 E 3 tankers a

year, representing 100 000 cgt, it was natural to assess steel production in relation to that type of ship. Moreover, MTW's current orders are not significant, given that the construction dock is not yet ready.

150 Lastly, the Commission observes that at the outset it used the coefficient applicable in 1992. Reasons of legal certainty thus prevented it, at the end of the design process, from using new coefficients negotiated in the meantime.

151 The German Government states, in the first place, that it has undertaken to the Commission that the shipyards will adhere to the investment and construction plans submitted to and approved by the Commission's independent expert, in order to ensure that the capacity ceilings laid down for the various yards are not exceeded.

152 It goes on to assert that the production figures for shipyards in the former German Democratic Republic derive from studies by DMS Deutsche Maschinen-und Schiffbau AG (hereinafter 'DMS') in collaboration with the several shipyards. The divergences in production figures before reunification may be due to the fact that the former German Democratic Republic did not provide data to any multilateral organization and that the industry did not make formal returns to any trade association.

153 It follows that, with the facilities and manpower available in favourable but normal conditions, the shipyards could have had an actual production in the final phase of the German Democratic Republic of approximately 545 000 cgt per annum and a capacity of around 600 000 cgt.

154 Lastly, the German Government supports the Commission's view that shipyard capacity should be calculated assuming 1.7 shifts per day. In fact, according to research carried out by Verband für Schiffbau und Meerestechnik e. V., the average in the German shipbuilding industry is 1.2 shifts per day. The Federal Government

also states that the improvement of the waterway to the port of Wismar is due to start in the second half of 1995. In its view, this should enable E 3 tankers to have access to Wismar in the future.

155 According to the intervener, MTW, if it were able to produce in excess of 100 000 cgt — which it denies —, that would be irrelevant as far as Article 10a of the Seventh Directive is concerned. Article 10a(2)(c) requires only an overall reduction in the capacity of the former German Democratic Republic. Consequently, that provision did not oblige the Commission to secure an individual capacity reduction at the intervener's shipyard.

156 Since the applicants have not proved that the other East German shipyards have exceeded or used the capacities allocated to them in full, with the result that a capacity excess at the intervener's yard would cause the overall limit of 327 000 cgt to be exceeded, the applicants' claims with regard to the individual capacity of the intervener's yard are irrelevant.

157 MTW goes on to observe that the deadline laid down by Article 10a(2)(c) for achieving the capacity reduction was 31 December 1995. Consequently, the Commission was not bound at the time when the contested decision was adopted to declare an aid incompatible with the common market on the ground that a reduction in capacity, which was not obligatory at the date, had not been guaranteed. Moreover, that provision did not, *stricto sensu*, require a 40% capacity reduction, but only a commitment on the part of the German Government to carry out such a reduction. Since the German Government has expressed its agreement, that condition has been complied with. Accordingly, the pleas relating to the reduction of capacity are unfounded.

158 With regard to the reference to E 3 tankers as the basis for calculating capacity, MTW submits that the applicants' argument is based on a number of misinterpretations. First, the dock was designed so as to permit the construction of vessels of the E 3 type. Secondly, the German Government was already planning the widening of the port of Wismar in order to allow large ships access, and the works were

due to be completed by 1997. Thirdly, it is incorrect that MTW never intended to build E 3 tankers. MTW will be the only shipyard in the Bremer Vulkan group designed to build E 3 ships. MTW's order book, referred to by the applicants, is irrelevant, since all the vessels listed therein were to be completed and delivered by February 1996, that is to say, before the completion of the new production facilities.

— Findings of the Court

159 The Court considers that Article 10a(2)(c) of the Seventh Directive must be interpreted as requiring an overall 40% reduction in production in the former German Democratic Republic only, that is to say, a reduction from 545 000 to 327 000 cgt, by 31 December 1995.

160 Consequently, it follows from Article 10(a), first, that the Commission was not obliged when it adopted its decision to ensure that the capacity of MTW's yard, considered separately, would be reduced or limited to 100 000 cgt and, secondly, that it was entitled in 1994 to approve the payment of the second tranche solely on the strength of the German Government's undertakings as to a breakdown of capacity as between the East German shipyards and a reduction in overall capacity before the end of 1995.

161 In this connection, the Court holds that, subject to the obligation to comply with the time-limit of 31 December 1995 as regards the 40% reduction in capacity, at the material time the German Government alone was competent to allocate the total capacity as between the several East German shipyards and, consequently, to allocate MTW a maximum capacity of 100 000 cgt or more a year.

162 It appears from the Commission's report of 1 April 1993 (see paragraph 9 of this judgment) that, pursuant to the derogation provided for by Directive 92/68, the German Government had actually agreed to reduce capacity before the end of 1995 and indicated an allocation of future capacity as between the East German shipyards.

163 It is true, as the Commission observed at the hearing, that if the recipient MTW had made changes to its shipyard after the contested decision was adopted which caused it to exceed the overall limit on the capacity granted to the East German shipyards, that would not have affected the legality of the decision, which must be assessed at the time when it was taken (Case 40/72 *Schroeder* [1973] ECR 125). Such a circumstance might, in an appropriate case, prompt the Commission to adopt a new decision finding an infringement of the conditions set out in Article 10a and subsequently to seek restitution of the aid in question.

164 However, the Court finds that in this case the Commission took its decision on the basis that MTW's future capacity would not exceed the 100 000 cgt allocated by the German Government. In this respect, it carried out technical checks during with administrative procedure with the help of independent experts in order to ensure that that capacity limit would be respected.

165 Accordingly, it appears from the contested decision that 'although the technical examination carried out on behalf of the Commission by an independent consultant showed that MTW's construction capacity could scarcely exceed what the German Government had fixed for that shipyard (100 000 cgt) as against the maximum available capacity in East Germany (327 000 cgt), it was deemed necessary to maintain supervision for the duration of the investment project so as to ensure that the limitation of construction capacity was complied with'.

166 Next, the contested decision makes approval of the aid subject to undertakings on the part of the German Government designed to ensure that MTW does not exceed the maximum authorized production of 102 500 tonnes of steel, that the length of the construction dock does not exceed 366 metres and that the part of the dock originally intended for tandem construction is removed. In this context, it is also worth noting that at the hearing the Commission stated that at the time when the contested decision was adopted, that is to say, more than one and a half years before the end of the restructuring period, it had been obliged to base itself on the undertakings given by the German Government. It added that, in its view, as from the time when the German authorities gave those undertakings, especially that relating to MTW's capacity, those authorities could no longer change the allocation of capacity without the prior authorization of the Commission.

167 In those circumstances, the Court considers that the justification for the present limb of the plea depends, as indeed the Commission acknowledged at the hearing, on whether the applicants can adduce evidence capable of showing that, in considering at the time that the limitation of capacity to 100 000 cgt per annum would be respected, the Commission committed a manifest error in assessing the facts or based itself on inaccurate material facts.

168 Before determining whether that was the case, it should be recalled that, in the context of an action for annulment, the Court's function is solely to ascertain whether the contested decision is vitiated by one of the grounds of unlawfulness set out in Article 173 of the Treaty, and the Court cannot substitute its own assessment of the facts for that of the author of the decision (*Matra* v *Commission*, paragraph 23).

169 Although, in assessing the compatibility of the operating aid under the exceptional rules introduced by Directive 92/68 the Commission's role is limited to checking that the conditions set out in Article 10a of the Seventh Directive have been observed (see paragraphs 92, 93 and 94 of this judgment and Joined Cases C-356/90 and C-180/91 *Belgium* v *Commission*, paragraph 33), the Commission nevertheless has a broad discretion with regard to its assessments of the factual data underlying its estimate of MTW's future capacity (see, to the same effect as regards the application of Article 92(3) of the Treaty, *Matra* v *Commission*, Case C-142/87 *Belgium* v *Commission* [1990] ECR I-959 and Joined Cases T-244/93 and T-486/93 *TWD* v *Commission* [1995] ECR II-2265).

170 In cases such as this which involve a complex economic and technical assessment, judicial review by the Community Court must be limited to checking that the rules on procedure and the statement of reasons have been complied with, that the facts are materially accurate, and that there has been no manifest error of assessment and no misuse of powers (Joined Cases 142/84 and 156/84 *BAT and Reynolds* v *Commission* [1987] ECR 4487, paragraph 62; Case T-17/93 *Matra Hachette* v *Commission* [1994] ECR II-595, paragraph 104, and Case T-9/93 *Schöller* v *Commission* [1995] ECR II-1611, paragraph 140).

171 The complaints raised against the contested decision must be considered in the light of that case-law.

172 As far as the complaint that the Commission misinterpreted the concept of capacity is concerned, it should be noted that Directive 92/68 contains no definition of that concept. It follows, as the Commission has rightly observed, that the Community legislature left it a measure of discretion in this respect.

173 In this regard, it should be noted that it appears from the case-file that there is no single, generally accepted definition of 'capacity' in the sector. Thus, a Memorandum of 12 October 1994 on World Shipbuilding Capacity by the Association of West European Shipbuilders and the Shipbuilders' Association of Japan, produced by the Commission, illustrates the variety of capacity concepts used by the industry.

174 The Court considers that the OECD document cited by the applicants, which defined 'available national capacity' as 'the maximum capacity that can be utilized for building merchant seagoing ships, taking into account the physical possibilities and any legal or administrative limitations in shipbuilding', does not confirm the applicants' proposition that 'capacity' constitutes the maximum output of the shipyard under optimum conditions. On the one hand, as the Commission observed at the hearing, the OECD document refers to 'maximum capacity', whereas Article 10a(2)(c) of the Seventh Directive uses the term 'capacity'. On the other hand, according to the OECD definition, account should be taken of the physical possibilities and any relevant legal or administrative limitations, which tends to correspond to the Commission's definition that capacity is to be equated with production achievable under favourable normal conditions, given the facilities available. In any event, the OECD definition cannot be binding on the Commission in this case, since it is used in a different context, that is to say, for statistical purposes.

175 The applicants' claim that their particular interpretation of the concept of 'capacity' also transpires from the communication of 25 May 1992 cannot be accepted either. Whilst the estimate of capacity in the former German Democratic Republic as at 1 July 1990 was based on a 'resource calculation, by comparing man-hours required to build a ship with the man-hours available', the only reason for this was that very little reliable information was available on East German shipbuilding in the period prior to July 1990.

176 Given that the burden of proof has to be discharged by the applicants when they contest the Commission's interpretation adopted in the exercise of its discretion, the documents to which the applicants refer in support of their interpretation, namely Council Document No 7049/92 of 10 June 1992 and Commission document DG III. C.3 of 4 February 1985 are inadmissible as evidence, since they have not been produced to the Court.

177 The Court therefore considers that the applicants have failed to adduce evidence capable of proving that the Commission exceeded its discretionary power in interpreting the concept of capacity as the production achievable under favourable normal conditions, given the facilities available.

178 As regards the complaint alleging that that interpretation was changed in the course of the administrative procedure, the Court finds that it appears from the documents in the case-file, in particular the production figures for the East German shipyards (over the 1975 to 1990 period) drawn up by DMS after German reunification in collaboration with the various East German shipyards, that average production over the years prior to 1990 was more or less equal to the capacity of 545 000 cgt estimated by DRT Europe, the Commission's consultant, and subsequently adopted by the Council. The Court considers that it appears from those data that the estimate of capacity in 1990 in fact corresponded to the production achievable under favourable normal conditions, given the facilities available, in line with the interpretation of capacity employed by the Commission. In this regard, the Court considers that the Commission was right to refine its method of estimating capacity as the investment projects progressed and the data and information became more detailed.

179 The production figures contained in the Commission's report of 8 November 1991 on the state of the shipbuilding industry in the Community [document SEC(91) 2057 final], on which the applicants rely in support of their complaint, cannot alter that assessment, since they are less precise. Indeed, it appears from the Commission's answer to the written questions put by the Court that the production figures given in that report were collated by Lloyds Maritime Information Service, which,

as a western company, experienced difficulties in obtaining reliable figures, since the former German Democratic Republic did not provide data to any multilateral organization and the East German industry did not make formal returns to any trade association.

180 The Court therefore considers that the applicants have not established that the Commission changed its interpretation of the concept of capacity in the course of the administrative procedure.

181 As regards the complaints relating to the assessment of MTW's future capacity, it should be emphasized that the Commission carried out a complex economic analysis of its basic capacity on the basis, *inter alia*, of a study drawn up by outside consultants, namely Appledore. In this regard, it appears from the Commission's Second Report of 1 April 1993 on the Monitoring of the Privatization of Shipyards in the new German *Länder* that Appledore evaluated the capacity of the three privatized shipyards, including MTW. According to the data collected by Appledore, the capacity ceilings would be adhered to on account of the various production bottlenecks. Ultimately, Appledore considered, after carrying out various technical checks, that MTW's shipyard would have to achieve a level of productivity approaching or even in excess of the 'best European standards' before it could produce 100 000 cgt a year.

182 In this connection, the Commission argued during the written procedure that the capacity limitation would be achieved if the shipyard were designed in such a way that the other facilities were in balance with the bottlenecks. Although bottlenecks are by their very nature temporary, removing or by-passing them would only tend to create congestion elsewhere in the production line and thus lead to less than optimal performance. The Commission's consultants stressed in this regard that it is virtually impossible to design a production facility without bottlenecks.

183 In answer to the written questions put by the Court, the Commission stated that, according to the latest bottleneck review (carried out in August 1995), the panel lines and block assembly areas act as the primary bottlenecks. It added that other key facilities, such as the docks, cranes and unit assembly areas, had also been reviewed in order to determine expected utilization in terms of cycle times, namely the time available to do a particular task relevant to a particular facility. As a result

of this review, Appledore had not indicated any excess capacity in any area. Moreover, the Commission's consultants take the view that, whereas most shipyards can increase their level of production whenever necessary by using low-cost, intensive operating methods since they have suitable space available, MTW does not have large open areas which could be used to increase steel production.

184 Given that the concept of capacity within the meaning of Directive 92/68 must be understood as meaning the production achievable under favourable normal conditions, given the facilities available, the Court considers that the Commission's argument that capacity may be limited by retaining a number of production restrictions and bottlenecks should be accepted.

185 It must be held that the applicants have not adduced any evidence capable of proving that the Commission's consultants made any manifest error in assessing the facts or that they based themselves on inaccurate material facts when they carried out their technical appraisals of the facilities as a whole.

186 In this regard, the Court considers that the two expert reports produced by the applicants and the Danish Government do not call in question the assessments made by the Commission's consultants of MTW's capacity; moreover, those reports adopted distinctly different methods of estimating capacity.

187 The Court finds, on the one hand, that the experts commissioned to draw up the two reports specialize in ship design and not in shipyard design and, on the other, that the two reports are based on incomplete knowledge of the facts, which, moreover, Cushing's report acknowledges. In particular, Cushing relies to a large degree on reports, notes of meetings and other documents relating to MTW's planned relocation, which was subsequently abandoned. In addition, neither Cushing nor

Carl Bro had the opportunity of visiting the site of the shipyard or access to the investment and design plans. According to Appledore, the upshot is that there are many inaccuracies in the estimates and conclusions contained in Cushing's report, in particular with regard to the number of employees directly assigned to production, the production area and the size of the new dry dock. In those circumstances, the Court considers that the reports do not establish any manifest errors of assessment on the part of the Commission.

188 As far as concerns the complaint relating to the use of the production of E 3 tankers as the basis for calculating maximum steel production, it appears from the contested decision that approval of the aid is conditional upon the maximum authorized production of 102 500 tonnes of steel not being exceeded. That production was calculated on the basis of 2.5 E 3 tankers being built.

189 The applicants assert that the Commission's estimates are misleading, since if the calculations are based on a varied range of ships, which is more probable and foreseeable, for example, production comprising in particular E 3 tankers, container ships and passenger ships, as MTW originally intended to manufacture, capacity calculated on the basis of processing 102 500 tonnes of steel a year would exceed the authorized limit of 100 000 cgt.

190 With regard to this, the Court finds that the applicants do not deny that the design work on MTW's shipyard stressed E 3 tankers. Moreover, it appears from the case-file that the dock, which will be operational in November 1997, was designed for the construction of E 3 tankers. In the answers to the Court's questions it was stated that the work on enlarging the waterways which will enable large tankers, such as E 3 tankers, to leave the port of Wismar is scheduled to be finished at the end of 1997.

191 It must next be observed that, whilst it is true, as indeed the Commission has admitted, that production of a different product range might result in the maximum capacity of 100 000 cgt being exceeded — with steel production remaining the same at 102 500 tonnes —, it appears from the case-file that such a situation is

completely hypothetical, since the applicants' argument is based on the erroneous proposition that it is possible for the shipyard to process the same quantity of steel, irrespective of the complexity of the processing in question.

192 Indeed, it appears from the Commission's answer to the questions put by the Court that the maximum production of steel (namely 102 500 tonnes) can be achieved only in the event that the shipyard produces only E 3 tankers.

193 According to the Commission, the reason for this is that if the shipyard decided to produce smaller, more complex vessels, such as for example, container ships, ferries and passenger ships, this would inevitably affect its ability to process steel. Generally, such ships use steel plates of considerably lower thickness, which reduces the quantity of steel required, yet without necessarily reducing the number of plates to be handled. In addition, the increased number of curved plates and the very different outfitting demands would, among other things, increase working time and waiting time at each stage of production, and thus have a considerable impact on the overall steel processing capacity.

194 Consequently, in the Commission's view, the production and processing of steel plates for which the yard is not designed would quickly lead to saturation of some production areas. The paint cells, for instance, would become limiting factors because the same number of paint cells would have to handle a greater throughput owing to the fact that the units to be handled would tend to be smaller and greater in number. Likewise, the number of complex parts, although requiring less steel, would tend to absorb higher levels of man-hours in outfitting and longer stays in certain production areas of the yard.

195 Since the applicants have not adduced factual evidence sufficient to cast serious doubt on those assertions concerning the production of steel, the Court considers that the complaint relating to the reference to ships of type E 3 as the basis for the calculations must be rejected.

196 Turning next to the applicants' complaint that the Commission wrongly applied the OECD cgt coefficient corresponding to single-hulled vessels of type E 3 (0.25) instead of the coefficient for double-hulled vessels (0.30), the Commission's argument should be accepted to the effect that the principle of legal certainty prevented it, at the end of the design process, from using new coefficients negotiated in the meantime, since the coefficient applicable when capacity was estimated in 1992 was 0.25. In any event, it appears from the case-file and from the parties' pleadings that, although it had been applicable as from 1 January 1993, the new coefficient applicable for double-hulled vessels (0.30) was not published before June 1994.

197 Lastly, as regards the applicants' complaints alleging infringements of procedural rules, namely the German Government's omission to produce the timetable referred to in Article 10a(2)(c) of the Seventh Directive and the late submission of the first spill-over report, it is sufficient to observe that, even if those infringements have been made out, the applicants have not shown that in the absence of the irregularities in question the procedure might have led to a different result (Case C-142/87 *Belgium* v *Commission* and *Distillers Company* v *Commission*). In addition, they were unable to contest the Commission's assertion that there would have been reductions in capacity in the former German Democratic Republic in any event. In those circumstances, the complaint must be rejected as unfounded.

198 In view of all of the foregoing considerations, the second limb of the plea must be rejected.

199 In so far as it takes the view that it has sufficient information from the documents in the case-file, the Court considers that it is unnecessary to grant the applicants' request for an order for the production, on the one hand, of the notification of the German authorities of 2 October 1992 and of the letter of 4 December 1992 from the German Government, including the contract of sale of MTW concluded between the Treuhandanstalt and Bremer Vulkan and, on the other hand, the letter of 24 July 1992 from the German Government. The applicants requested that those documents be produced on the ground that they contained particulars of the capacity limit, purportedly one of the key points of the case. Since, however, the applicants do not deny that the German Government undertook *vis-à-vis* the

Commission that MTW's future capacity would be limited to 100 000 cgt, the production of the documents sought is not essential for the purposes of reviewing the legality of the contested decision (order of the Court of Justice of 11 December 1986 in Case 212/86 *ICI* v *Commission*, not published in the ECR, paragraph 4).

200 As regards the request for an expert report, it should be recalled that, according to the case-law, in the absence of any evidence capable of casting doubt on its validity, the contested decision must benefit from the presumption of validity enjoyed by all Community measures (Case 11/81 *Dürbeck* v *Commission* [1982] 1251). Consequently, if the applicants are unable to adduce evidence capable of shaking that presumption, the Court should not order measures of inquiry. Since the expert reports drawn up by the applicants and the Danish Government, as held in paragraph 186 of this judgment, do not enable doubt to be cast on the assessments made as to MTW's capacity and the applicants have not adduced evidence suggesting that the Commission might have committed manifest errors of assessment, there is no need to order an expert report

The third limb of the plea, alleging infringement of Article 10a(2)(c) of the Seventh Directive inasmuch as the Commission allowed the possibility of increasing capacity after five or six years

201 The applicants argue that the Commission has infringed Article 10a(2)(c) of the Seventh Directive, which requires a genuine and irreversible reduction in capacity, in so far as it accepted that capacity might be increased after five years with the Commission's approval or after ten years in the absence of such approval. In their view, the principle set out in Article 7 of the Seventh Directive could not be applied, since that article concerns only aid for closures. In this case, by contrast, a more modern shipyard was to be created with an increase in capacity to 100 000 cgt.

202 The Commission observes that the contested decision provides that the 'limitation of capacity shall apply for a period of ten years starting from the end of the restructuring. After five years, Germany may request the Commission to cancel the limitation of capacity.'

203 Article 10a does not embody a definition of the terms 'genuine and irreversible reduction of capacity' used in paragraph 2(c). Those terms must therefore be interpreted in the light of the other provisions of the Seventh Directive.

204 As far as aid for closures is concerned, the first and second subparagraphs of Article 7(1) of the Seventh Directive provide as follows:

'Aid to defray the normal cost resulting from the partial or total closure of shipbuilding or ship repair yards may be considered compatible with the common market provided that the capacity reduction resulting from such aid is of a genuine and irreversible nature.

In order to establish the irreversible nature of aided closures, the Member State concerned shall ensure that the closed shipbuilding and ship repair facilities remain closed for a period of not less than five years.'

205 It appears from Article 7 of the Seventh Directive that a closure must be regarded as irreversible where it lasts for more than ten years. Where appropriate, the Commission may authorize reopening after five years. Indeed, the fourth subparagraph of Article 7(1) provides that 'If, after a period of five years but before the tenth anniversary of the closure, a Member State wishes to reopen a closed shipbuilding or ship repair facility, it must obtain the Commission's prior approval'.

206 The Court considers that the terms 'genuine and irreversible reduction of capacity' in Article 10a must be interpreted in the same way. Consequently, since a reduction in the overall capacity of East German shipyards is concerned, the applicants' argument to the effect that the principles arising out of Article 7 do not apply because MTW's capacity will allegedly be increased is irrelevant.

207 The third limb of the plea must therefore be rejected.

208 Accordingly, the entirety of this plea, alleging infringement of the conditions set out in Article 10a(2) of the Seventh Directive, must be rejected.

The plea alleging infringement of essential procedural requirements

209 This plea has two limbs. First, it is claimed that the contested decision is insufficiently reasoned. Secondly, it is alleged that the Commission did not obtain the spill-over reports required under Article 10a(2)(d) of the Seventh Directive.

The first limb of the plea, alleging infringement of Article 190 of the Treaty

— Arguments of the parties

210 The applicants argue that the contested decision is vitiated by a defective statement of reasons. They point out that it has been consistently held that the statement of reasons required by Article 190 must disclose in a clear and unequivocal fashion the reasoning followed by the Community authority which adopted the measure in question in such a way as to make the persons concerned aware of the reasons for the measure and thus enable them to defend their rights and the Community judicature to exercise its power of review (Case T-95/94 *Sytraval* v *Commission* [1995] ECR II-2651, paragraph 52, at present the subject of an appeal to the Court of Justice as Case C-367/95 P). It is important, in the applicants' submission, that the reasoning of a decision should contain the necessary information for any third party with an interest therein (see Joined Cases 296/82 and 318/82 *Netherlands and Leeuwarder Papierwarenfabriek* v *Commission* [1985] ECR 809).

211 The applicants concede that the statement of reasons of a decision may be brief in an appropriate case (Case 24/62 *Germany* v *Commission* [1963] ECR 63). However, it submits that there are limits, as may be inferred from Case 323/82 *Intermills* v *Commission* [1984] ECR 3809, paragraph 35, which bears certain similarities to the present case. Article 10a of the Seventh Directive and the decision of 23 December 1992 laid down a number of specific conditions in order for the

Commission to be able to approve the second tranche of aid. Consequently, at the time when the contested decision was adopted, the Commission should have explained why it considered that those conditions had been fulfilled.

212 In particular, it is not clear from the contested decision: (1) that the need for the aid had been demonstrated by the details given of losses on current contracts (*Intermills* v *Commission*, paragraph 33); (2) that the German Government had given a clear undertaking to carry out a genuine and irreversible 40% reduction in the capacity of shipyards in the former German Democratic Republic; (3) that the ceiling laid down in Article 10a(2)(a) had been complied with; (4) that the second tranche of the aid had been paid before 31 December 1993; (5) that the Commission had received all the spill-over reports, and, finally, (6) that the Commission had assured itself that no further production aid would be granted. Furthermore, the Commission failed to mention in the contested decision that the German authorities had already paid the aid before 31 December 1993. In the applicants' submission, the Commission was not entitled merely to state that the conditions set out in Article 10a(2) of the Seventh Directive had been complied with (*Intermills* v *Commission*, paragraph 35).

213 Referring to the reasons given by the Commission in the defence, the applicants argue that an inadequate statement of reasons cannot be remedied after an action has been brought (Case 195/80 *Bernard Michel* v *Parliament* [1981] ECR 2861).

214 Even though they were invited to meetings at which the case was discussed in detail, the applicants maintain that on those occasions they did not obtain any information about the factual or legal grounds on which the aid was ultimately held to be compatible with the common market. They were informed only about the size of the shipyard and the plan for its relocation.

215 The applicants further challenge the relevance of the case-law cited by the Commission (Joined Cases 43/82 and 63/82 *VBVB and VBBB* v *Commission* [1984] ECR 19 and Joined Cases C-356/90 and C-180/91 *Belgium* v *Commission*). In particular, the latter judgment does not release the Commission from its obligation under Article 190 of the Treaty.

216 Lastly, as far as Article 10a(3) of the Seventh Directive is concerned, the applicants claim that the Commission did not make it clear in the contested decision, as it was bound to do, whether or not it considered that the aid granted was compatible with the common interest.

217 The Danish Government submits that the requirements with regard to the statement of reasons ought to be more strict where as here an individual decision is involved than in the case of general measures.

218 It goes on to argue that the contested decision did not afford interested parties sufficient opportunity to comprehend the legal situation thus created and to check its legality (*Sytraval* v *Commission*). In addition to the complaints raised by the applicants, the Danish Government submits in particular that: (1) it is not evident from the letter of 18 May 1994 that it is a decision; (2) the decision does not contain any clear reference to its legal basis; (3) the decision does not set out specifically the obligations assumed by the German Government; (4) the description of the required limitations in capacity is incoherent and inconsistent; (5) having regard to the fact that in cases involving State aid interested parties must be entitled to request particularly detailed statements of reasons, the decision does not make it clear whether the Commission carried out the slightest further examination of the effects which the contemplated aid would have on the entire shipbuilding industry, and (6) the decision contains information which is irrelevant and unrelated to the contested decision.

219 Even if the Commission were entitled, in accordance with the case-law, to confine itself to stating that the conditions laid down in the exceptional provisions in question had been complied with (Joined Cases C-356/90 and C-180/91 *Belgium* v *Commission*), it has not satisfied even that limited requirement. The contested decision must therefore be annulled for failure to provide an adequate statement of reasons (Case C-360/92 P *Publishers Association* v *Commission* [1995] ECR I-23).

220 The Commission avers that the duty to state reasons for a particular measure under Article 190 of the Treaty depends, on the one hand, on the nature of the measure in question and, on the other hand, on the context in which it was adopted (Case 13/72 *Netherlands* v *Commission* [1973] ECR 27, paragraph 11).

221 As to the nature of the contested decision, the Commission maintains that its role was confined to verifying whether the specific conditions set out in Article 10a of the directive were fulfilled. Accordingly, it was entitled to confine itself to stating that it had verified that those conditions were fulfilled, as it in fact did.

222 On the subject of the context in which the decision was adopted, the Commission argues that, in view of the very active part played by the applicants during the administrative procedure, they were fully apprised of all the factual and legal grounds on which the Commission found the aid to be compatible with the common market. The applicants' complaints should therefore be rejected. The Commission refers in this connection to the Opinion of Advocate General Lenz in Joined Cases 62/87 and 72/87 *Exécutif Régional Wallon and Glaverbel* v *Commission* [1988] ECR 1573. In its contention, the case of *Michel* v *Parliament* is therefore irrelevant, since the applicants were apprised before the contested decision was taken of all the important grounds on which the Commission eventually found the aid to be compatible with the common market.

223 As to the complaints specifically raised by the Danish Government, the Commission states, first, that its practice in the area of State aids is to send the Member State concerned, for notification purposes, a copy of the decision taken by the Members of the Commission in the form of a letter. What is more, it was clear

from the wording of the letter of 18 May 1994 — constituting the contested decision — that it was indeed a decision. Secondly, contrary to the Danish Government's allegation, the letter mentioned both the legal basis and the conditions to which the decision was subject. Thirdly, the Commission considers itself unable to refute the argument that the technical description contained in the contested decision of the reduction in capacity is incoherent or contradictory, given that the Danish Government has not developed that argument. Fourthly, contrary to the Danish Government's view, a decision taken under Article 10a of the Seventh Directive calls by nature for a summary statement of reasons. Fifthly, even if — which the Commission denies — the letter of 18 May 1994 did contain a number of conditions unrelated to the case, that would not affect the applicants' legitimate interests. Sixthly, contrary to the Danish Government's allegations, the decision does mention the spill-over reports, at least indirectly, and also indicates that no further production aid may be paid to the shipyard.

224 The Commission argues that Article 10a(3) of the Seventh Directive adds nothing to the conditions set out Article 10a(2), but was inserted in order to show unambiguously that the Commission is obliged to check that shipyards in receipt of aid are not suddenly selling ships at below market prices.

225 Concerning the manner in which the second tranche was paid, the Commission emphasizes that, in view of the minutes of the meeting of 21 March 1994, the applicants were aware that that tranche had been paid into blocked accounts before 31 December 1993.

226 The intervener, MTW, stresses that the contested decision relates only to the second tranche of a State aid, the first tranche of which had already been approved and adopted following the same notification and in the same context. Since the aid itself had already been examined and authorized by the earlier decision of 23 December 1992, the Commission was entitled, in MTW's opinion, merely to state in the contested decision that the rules as to form laid down in the first decision for the release of the second tranche had been complied with.

227 In the first place, the Commission was obliged to give a detailed account of its reasoning only in so far as the later decision went appreciably further than the earlier one (Case 73/74 *Groupement des Fabricants de Papiers Peints* v *Commission* [1975] ECR 1491, paragraph 31). In the present case, the rule established by the Court that a short statement of reasons suffices if the decision fits into a well-established line of decisions should apply by analogy.

228 Secondly, the applicants were fully aware of the context of the contested decision, since they participated to a large degree in the decision-making process and had access to virtually all the relevant documents.

229 Thirdly, MTW considers that the reasons given for a decision ought not to contain confidential information, the disclosure of which would be contrary to the Commission's duty of discretion. The Commission could not therefore disclose any information concerning the spill-over reports, aid payment methods or planned investments for the intervener's shipyard.

— Findings of the Court

230 It has been consistently held that the statement of reasons required by Article 190 of the Treaty must be appropriate to the measure concerned and must disclose in a clear and unequivocal fashion the reasoning followed by the institution which adopted the measure in question in such a way as to enable the persons concerned to ascertain the reasons for the measure and to enable the Community Court to carry out its review. It is not necessary for the reasoning to go into all the relevant facts and points of law, since the question whether the statement of reasons meets the requirements of Article 190 of the Treaty must be assessed with regard not only to its wording but also to its context and to all the legal rules governing the matter in question (Case C-56/93 *Belgium* v *Commission* [1996] ECR I-723, paragraph 86, and the cases cited therein).

231 As for the context in which the measure in question was adopted, it should be recalled, as the Court has already held in paragraph 169 of this judgment, that for the purposes of assessing the compatibility of operating aid under the exceptional

rules introduced by Directive 92/68, the Commission's role is limited to checking that the conditions set out in Article 10a of the Seventh Directive have been observed. In those circumstances, it appears from the case-law that any need to state reasons other than the finding that those conditions are fulfilled is precluded (Joined Cases C-356/90 and C-180/91 *Belgium* v *Commission*, paragraph 36).

232 Since the conditions set out in Article 10a are, moreover, of a factual nature, the Court considers that it is unnecessary for the Commission to reiterate all those conditions in its statement of reasons. It should be recalled that the requirement of a statement of reasons must be viewed in the light of the circumstances of the case, in particular the content of the measure in question, the nature of the reasons relied on and the interest which the addressee, in this case the German Government, may have in obtaining explanations (Case C-303/88 *Italy* v *Commission* [1991] ECR I-1433, paragraph 52).

233 In this regard, the Court notes that it appears from the contested decision that, after it received the definitive contract and additional information about the privatization of MTW, the Commission was initially able, by its decision of 23 December 1992, to authorize payment of the first tranche of operating aid. Subsequently, after receiving other information from the German Government, it found itself in a position to verify that the conditions for the implementation of the special aid laid down by Directive 92/68 were satisfied and it was thereby enabled it to authorize payment of the second tranche.

234 As far as those conditions are concerned, the Commission mentioned in the contested decision, among other things, the need for the second tranche of aid and referred to the checks carried out into MTW's future capacity. The contested decision embodies particulars concerning the limitation of that capacity. It requires in particular that the maximum authorized production of 102 500 tonnes of steel not be exceeded, that the length of the construction dock, which was originally 422 metres, be reduced to 366 metres and that the part of the construction dock originally intended for tandem construction be removed. In addition, according to the contested decision, although the technical examination showed that MTW's construction capacity was scarcely capable of exceeding that which the German Government had allocated to that shipyard (100 000 cgt), the Commission considered it necessary to maintain supervision so long as the investment project continued in order to ensure that the limitation of construction capacity was complied with.

235 Lastly, it appears from the contested decision that, in reliance on the German Government's assurances relating to compliance with the capacity limitation and to the obligation to avoid aid spilling over to other shipyards, the Commission decided not to oppose payment of the second tranche of aid.

236 The Court considers that, although succinct, that statement of reasons constitutes sufficient reasoning within the meaning of Article 190 of the Treaty, in the light of the case-law cited and bearing in mind the limited role played by the Commission in the matter. The contested decision in fact contains a statement of the factual and legal considerations which are of essential importance within the context of the decision.

237 This assessment is borne out by the fact that the contested decision was adopted at the end of the preliminary procedure provided for by Article 93(3) of the Treaty.

238 That article does not require the Commission to involve third parties in the administrative procedure. It is only in connection with the procedure provided for in Article 93(2) of the Treaty that the Commission is under an obligation to give the parties concerned notice to submit their comments (*Cook* v *Commission*, paragraph 22, and *Matra* v *Commission*, paragraph 16). Subject to the obligation to open that procedure — in respect of which the applicants have not, moreover, raised any plea — the Commission would therefore have been entitled to adopt the contested decision on the basis solely of its correspondence with the German Government. It follows that the Commission was not in principle obliged to take account in particular of any potential interests which any third party might have in being given explanations in the statement of reasons.

239 The Court considers, moreover, that in view of their detailed knowledge of the facts of the case, the applicants were not prevented from defending their rights and contesting the soundness of the contested decision. Indeed, it appears from the case-file, as the Commission has rightly pointed out, that the applicants participated to a large degree in the administrative procedure and were therefore apprised

at least of the principal factual and legal reasons for which the Commission considered that the aid was compatible with the common market. As has already been noted in paragraph 101 of this judgment, they took part in several meetings and had access to a number of documents in the case-file. They were given detailed answers to questions on, *inter alia*, MTW's future capacity. In addition, both the minutes and the correspondence produced by the applicants themselves clearly show that they had particularly extensive knowledge of the facts.

240 In view of all the foregoing considerations, the first limb of the plea must be rejected.

The second limb of the plea, alleging infringement of Article 10a(2)(d) of the Seventh Directive

241 The applicants initially claimed that, in breach of Article 10a(2)(d) of the Seventh Directive, the Commission did not obtain the spill-over reports required by that article. In the reply, the applicants merely argued that the Commission did not receive the first of the 'spill-over' reports before the end of February 1993.

242 The Commission states that it did receive the spill-over reports referred to in Article 10a(2)(d) of the Seventh Directive. The second limb of the plea should therefore be rejected.

243 The Court finds from the Commission's report of 1 April 1993, mentioned in paragraph 9 of this judgment, that the Commission received the first spill-over report in mid-March 1993, that is to say, some weeks after the deadline expired. However, it is settled case-law that the breach of a procedural rule will result in annulment only if, in the absence of that irregularity, the procedure might have led to a different result (Case C-142/87 *Belgium* v *Commission* and *Distillers Company* v *Commission*).

244 Since, on the one hand, the applicants no longer contest the fact that the other annual spill-over reports were sent to the Commission in accordance with Article 10a of the Seventh Directive and, on the other, they have not even sought to prove that the administrative procedure might have led to a different result had the Commission received the first report before the end of February 1993, the second limb of the plea must be rejected as groundless. Consequently, there is no need to order the production of the spill-over reports requested by the applicants by way of measure of inquiry.

245 Consequently, the plea alleging infringement of essential procedural requirements must be rejected.

The plea alleging infringement of the 'principle of transparency' or 'audi alteram partem'

Arguments of the parties

246 The Danish Government states that the Commission is obliged to initiate the procedure involving the parties concerned under Article 93(2) when it considers, on the basis of a provisional examination carried out under Article 93(3), that there are doubts as to the compatibility of the aid in question with the common market. It infers from this that the administrative procedure relating to State aid must be transparent for both Member States and all parties concerned, including competing undertakings which may be directly affected. It argues that a strict requirement of transparency also arises from the case-law (Case 730/79 *Philip Morris Holland* v *Commission* [1980] ECR 2671, Case 84/82 *Germany* v *Commission* [1984] ECR 1451 and Case C-301/87 *France* v *Commission* [1990] ECR I-307). At the hearing, the Danish Government, relying on Case C-58/94 *Netherlands* v *Council* [1996] ECR I-2169, paragraphs 20, 21 and 22, refuted the Commission's argument that this plea is inadmissible.

247 The principle of transparency (or *audi alteram partem*) implies that the parties concerned should be in a position to obtain full information as to the manner in which the Commission is dealing with the matter, and be given notice to submit any observations concerning an aid project. Moreover, the fact that, in the matter of State aid, the Commission has a very significant discretion constitutes in itself a reason for imposing a strict transparency requirement.

248 In this case, however, the Commission did not handle the matter with sufficient transparency to satisfy that requirement. Given the compressed period within which the case was dealt with, the parties concerned had only limited access to information and limited opportunity to follow the way in which the Commission was dealing with the case, especially in the final stage. Moreover, the approval of the payment of the second tranche was published in the *Official Journal of the European Communities* nearly two months after the expiry of the time-limit under Article 173 of the Treaty for bringing an action for annulment of the contested decision.

249 The Commission argues that this plea is inadmissible, since it was not raised by the applicants. Under Article 116(3) of the Rules of Procedure, the third paragraph of Article 37 and Article 46 of the EC Statute of the Court of Justice, the Danish Government as intervener is precluded from raising new questions which are effectively new pleas (Opinion of Advocate General Lagrange in Case 30/59 *De Gezamenlijke Steenkolenmijnen in Limburg* v *High Authority* [1961] ECR 1; the Opinion of Advocate General Darmon in Case 233/85 *Bonino* v *Commission* [1987] ECR 739; Case C-155/91 *Commission* v *Council* [1993] ECR I-939, paragraph 24, and the Opinion of Advocate General Tesauro in that case, section 13; *CIRFS* v *Commission*, paragraphs 21 and 22, and the Opinion of Advocate General Lenz in that case, section 48; and *Matra* v *Commission*, paragraphs 11 and 12). In any event, the plea is both legally and factually unfounded.

250 As a matter of law, it is only in the context of an examination under Article 93(2) of the Treaty that the Commission is obliged to give parties concerned notice to submit their comments. Moreover, the purpose of the procedure under

Article 93(2) is to enable the Commission to be fully informed of all the facts of the case and not, as the Danish Government seems to suggest, to enable parties concerned to monitor the Commission's handling of the case.

251 Nevertheless, as a matter of fact, the Commission did engage in an exchange of views and arguments with the applicants and the latter kept up to date as far as possible with the information that the Commission had gathered during its inquiry, not only in 1994 but also in 1993. In addition, the Member States were informed at multilateral meetings of all important developments in the matter.

252 Finally, as for the complaint of the Danish Government that the contested decision was published late, the Commission states that a delay of four months is not unusual and cannot be considered unreasonable. In any event, it could not affect the legality of the contested decision.

— Findings of the Court

253 The Court notes that the Danish Government accuses the Commission of having breached a 'principle of transparency' by reason of the fact that the parties concerned had only limited access to information and limited opportunity to monitor the way in which the Commission handled the case, especially in its final phase.

254 The Court has no need to rule on the admissibility of this plea, since it must in any event be rejected as groundless.

255 The preliminary stage of the procedure for reviewing aid under Article 93(3) of the Treaty, which is intended merely to allow the Commission to form a prima facie

opinion on the partial or complete compatibility of the aid in question, must be distinguished from the examination under Article 93(2) of the Treaty (*Matra* v *Commission*, paragraph 16, and *Cook* v *Commission*, paragraph 22). As has already been mentioned in paragraph 238 of this judgment, it is only in connection with the latter examination stage, which is intended to enable the Commission to be fully informed about all the facts of the case, that the Treaty puts the Commission under an obligation to give the parties concerned notice to submit their comments.

256 If a case necessitates initiating the procedure provided for in Article 93(2), the Commission must give the parties concerned notice to submit their comments. However, the sole aim of this is to obtain from persons concerned all information required for the guidance of the Commission with regard to its future action (Case 70/72 *Commission* v *Germany* [1973] ECR 813, paragraph 19). In its judgment in Case 84/82 *Germany* v *Commission* the Court of Justice held (in paragraph 13) that the procedure provided for in that article 'guarantees the other Member States and the sectors concerned an opportunity to make their views known and allows the Commission to be fully informed of all the facts of the case before taking its decision'.

257 The contested decision was, however, adopted at the end of the preliminary procedure provided for by Article 93(3) of the Treaty. In this regard, it appears from the case-law (Case 84/82 *Germany* v *Commission*, paragraph 13) that one of the main characteristics distinguishing the examination under Article 93(2) from the preliminary examination under Article 93(3) resides in the fact that the Commission is under no obligation at that initial stage to give notice to the parties concerned to submit their comments before it takes its decision.

258 It is therefore clear from both the system of Articles 92 and 93 of the Treaty and from the case-law that the Commission was not under an obligation to involve third parties in the administrative procedure in the extensive manner suggested by the Danish Government.

259 Admittedly, in some cases the Commission submits to undertakings which have taken part in the administrative procedure the comments which have been sent to it by the Member State concerned in the course of the preliminary stage of the examination procedure. The Court considers, however, that it is not bound to do so by virtue of any 'principle of transparency'.

260 In any event, the Court finds that the plea is not justified in fact. It is clear from the case-file that the applicants were closely associated with the administrative procedure. The file shows that they had an opportunity to make their point of view known at several meetings. The Commission also informed them to a large extent of major developments in the case.

261 In view of those considerations and in so far as a delay before publication in the Official Journal cannot affect the legality of the contested decision, the Danish Government's plea must be rejected as unfounded.

The plea alleging that the rules on the procedure for adopting Commission decisions were infringed

262 The Danish Government questions whether, in adopting the contested decision, the Commission complied with the principle of collegiate responsibility, since the contested decision was signed only by the Commissioner responsible. In addition, it submits that the contested decision was vitiated by a serious formal defect consisting in lack of authentication.

263 After receiving a copy of the minutes of the Commission's meeting of 11 May 1994, however, it withdrew this plea, since it is clear from the minutes, on the one hand, that the contested decision was adopted at that meeting by the college of

Commissioners and, on the other, that the President and the Secretary General of the Commission authenticated the decision by signing it on 18 May 1994.

264 In these circumstances, there is no longer any need to rule on this plea.

265 Since none of the pleas put forward by the applicants and the Kingdom of Denmark, intervening, have been upheld, the application must be dismissed as unfounded.

266 It follows that it is unnecessary to rule on the plea raised by the intervener, MTW, alleging that annulment of the contested decision would be in breach of its legitimate expectations.

Costs

267 Under Article 87(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the applicants have been unsuccessful and the Commission and the intervener, MTW, applied for costs, the applicants must be ordered to pay the costs.

268 However, the Member States which intervened in the proceedings shall bear their own costs pursuant to the first subparagraph of Article 87(4) of the Rules of Procedure.

On those grounds,

THE COURT OF FIRST INSTANCE
(Third Chamber, Extended Composition)

hereby:

1. **Dismisses the application;**

2. **Orders the applicants to pay the costs of the proceedings, including the costs incurred by the intervener, MTW;**

3. **Orders the Federal Republic of Germany and the Kingdom of Denmark to bear their own costs.**

Briët Vesterdorf Lindh

Potocki Cooke

Delivered in open court in Luxembourg on 22 October 1996.

H. Jung B. Vesterdorf

Registrar President