OPINION OF ADVOCATE GENERAL LENZ
delivered on 23 May 1996 *

A — Introduction

1. This case is a reference for a preliminary ruling from the Raad van State der Nederlande raising questions with regard to the scope of Community legal instruments regarding, on the one hand, the common fisheries policy and, on the other hand, aid to shipbuilding, in the field of application of the rules of Articles 92 and 93 of the EC Treaty on aid.

2. On 28 November 1988 the plaintiff in the main proceedings (IJssel-Vliet Combinatie BV) had made an application for aid for the construction of a fishing vessel (stern-trawler/fish transport vessel), which on 1 December 1989 was refused by the Minister van Economische Zaken (Minister for Economic Affairs), the defendant in the main proceedings.

3. The national aid procedure is based on the Regeling Generieke Steun Zeescheepsnieuwbouw 1988 [1] (General aid scheme for new construction of ocean-going vessels 1988) (hereinafter 'the Scheme'). Under the Scheme subsidies may be granted for orders placed between 31 December 1987 and 1 January 1991. Under Article 12(1)(f) of the Scheme applications are to be rejected if the grant of the subsidy would be contrary to the State's obligations under the Treaties establishing the European Communities. In accordance with Article 28 of the Scheme, decisions were issued on the basis of the Scheme subject to approval by the Commission, which was given by a letter dated 22 December 1988.

4. The contested application for a subsidy was refused on the ground that, according to the Commission's view, by which the authority felt bound, the grant of an aid for the construction of a new fishing vessel would be possible, in view of the reduction in capacity of the fishing fleet, only if it was compatible with the multiannual guidance programme under Council Regulation (EEC) No 4028/86 of 18 December 1986 on Community measures to improve and adapt structures in the fisheries and aquaculture sector [2] (hereinafter 'the Fisheries (Structures) Regulation'), which in this case it was not. [3] In the statement of the reasons on which the decision to refuse the application was based, the Minister relies on the

* Original language: German.

1 — Staatscourant 1988, 215.

2 — OJ 1986 L 376, p. 7.

3 — See the Commission Decision of 11 December 1987 on the Multiannual Guidance Programme laid down by the Netherlands for the Fishing Fleet (1987-1991) pursuant to Regulation (EEC) No 4028/86 (OJ 1988 L 62, p. 28).

Commission letter of 22 December 1988 approving the Scheme in which it was pointed out that aid for the construction of fishing vessels must comply both with the Guidelines for the Examination of State Aids in the Fisheries Sector [4] and with all provisions of the Commission circular letter of 26 May 1988 on State aid for fisheries and the construction of vessels. [5]

5. The *court of reference* states, in its reference for a preliminary ruling, that the Commission exercises the authority conferred upon it by Article 93(1) of the Treaty to assess the compatibility with Community law of a national aid measure for the construction of a vessel intended for fishing in the waters and under the jurisdiction of the Member States of the Community on the basis of 'criteria of ... competition policy ... but also criteria derived from the Community fisheries policy'. Those criteria were specified in detail in the Guidelines. The court of reference therefore regards it as necessary to clarify the basis of the Commission's authority to draw up such Guidelines and their legal effect.

The court of reference discusses arguments for and against the Commission's authority to draw up legally binding rules of interpretation for the assessment of national aid measures. One indication that the Commission has no such authority is that there is no express authorization from the Council to the Commission to take into consideration, in the context of its assessment of State aid under Community law, not only considerations of a type based purely on competition policy, but also considerations derived from the common fisheries policy. Under Article 42 of the Treaty, only the Council is competent as regards fisheries policy.

The fact that it is not impossible to regard the grant of aid for the construction of a fishing vessel for the Community fleet as aid, within the meaning of Article 92(3)(c) of the EEC Treaty, to facilitate the development of certain economic activities which may in certain circumstances be regarded by the Commission as compatible with the common market tends on the other hand to indicate that the Commission does have such authority. It is conceivable that in this context, even without specific authorization, the Commission might take into account considerations derived from the common fisheries policy not only for the assessment of an individual case but also in laying down general guidelines.

If it may be assumed that the Commission is authorized to draw up guidelines, the further question arises whether and on what basis a Member State is obliged to take them into account in deciding upon an application for aid. In that respect the court of reference regards Article 5 of the Treaty as an appropriate legal basis. The court refers the

4 — OJ 1988 C 313, p. 21.
5 — Commission letter No SG (88) D/6181.

following questions to the Court of Justice for a preliminary ruling:

'1. *In the absence of an express authorization* from the Council of the European Communities, *is the Commission* of the European Communities, having regard to Article 42 of the Treaty establishing the European Community in conjunction with Article 49 of Council Regulation (EEC) No 4028/86 of 18 December 1986 on Community measures to improve and adapt structures in the fisheries and aquaculture sector, *empowered under the competence given to it by Article 93* of the EC Treaty to investigate aid granted by Member States, *to draw up, publish and apply as basic principles in the assessment of State aid measures, Guidelines for the Examination of State aids in the Fisheries Sector (88/C 313/09) in order to coordinate Council Regulation (EEC) No 4028/86 and the Council Directive* of 26 January 1987 on aid to shipbuilding *(87/167/EEC), where those Guidelines lay down not only criteria pertaining exclusively to competition policy but also criteria derived from the Community fisheries policy*? [6]

2. If Question 1 is answered in the affirmative:

Are the Member States obliged to apply the above-mentioned Guidelines as basic principles when deciding on an application for aid for the building of a vessel intended for fishing? If so, what is the basis for that obligation?

Does that obligation only apply where the vessel in question is wholly or partly intended for fishing in waters under the sovereignty or jurisdiction of the Member States of the European Community or waters to which the Communities' external fisheries policy relates?'

6. The plaintiff in the main proceedings, the Netherlands Government and the French Government and the Commission took part in the proceedings. I shall refer to their arguments in the course of my legal assessment.

B — Discussion

7. To answer the questions referred to the Court it will be necessary to consider first, in the context of the first question, the Commission's authority to issue 'Guidelines for the Examination of State Aids in the Fisheries Sector' and thereafter the compatibility of their content with Community law before

6 — My emphasis.

I examine, in the context of the second question, any possible binding effect of the Guidelines and their scope.

8. To begin with, we must examine the objection raised by the plaintiff in the oral procedure, to the effect that the aid at issue is in practice not an aid to the fishing industry but an aid only to the shipyard. The aid is appropriate, and intended, to make the plaintiff European shipyard internationally competitive. In fact, at the time the contract was placed the shipyard was in competition with a Norwegian shipyard. The aid would not benefit the purchaser — for example in the form of a reduction in price — and he would therefore have no advantage from the grant of any aid.

9. It is undeniable that, according to the Council Directive of 26 January 1987 on aid to shipbuilding (87/167/EEC) (hereinafter 'the Sixth Directive') and the Netherlands general aid scheme for new construction of ocean-going vessels, the aim pursued by aid is to support the European shipbuilding industry and to make it competitive on the international market. [7] Nevertheless, I regard it as questionable whether any grant of aid to the shipyard can fail to be of some benefit to the potential purchaser of a vessel. Even if no price reduction is granted or agreed, the changed economic position of the shipyard resulting from the aid will in all probability be reflected in the terms of the contract. If it is assumed that that aid puts only the shipyard in a competitive starting position the shipyard will, as a result of the aid, be enabled to offer to construct a vessel on conditions which are attractive to the potential purchaser and possibly decisive for the award of the contract. Even though the aid is not passed on directly to the purchaser, it may, in my view, be assumed that it will at any rate accrue to him indirectly inasmuch as the shipyard is in a position to make an offer which is economically the most attractive. In deciding who is the beneficiary of a measure of State aid, consideration needs to be given not only to the immediate recipient of the subsidy, but also to the effects of the subsidy extending beyond that relationship. [8]

10. Irrespective of the — measurable — extent to which the aid is to be regarded as support for the potential purchaser, the aid may, on the basis of assessments of the legal transaction underlying it, be regarded as a product-support measure, the product being a 'fishing vessel'. The starting point for such an examination is the fact that there are various types of aid. [9] In Directive 87/167 the Community legislature has given first place

7 — See the second recital in the preamble to the directive (OJ 1987 L 69, p. 55).

8 — Cf., in this respect, my Opinion in Case 102/87 *France* v *Commission* [1988] ECR 4067 at p. 4075, point 22, and Advocate General Jacobs's Opinion, delivered on 7 May 1996, in Case C-241/94 *France* v *Commission*, [1996] ECR I-4551, at point 51 et seq.

9 — Cf. the seventh recital in the preamble to Directive 87/167 and Articles 4 to 8 thereof.

to production aids. [10] According to that directive, contract-related production aid cannot be granted or claimed for the construction of any vessel at all but only for the vessels listed in Article 1(a) of the directive, including fishing vessels of not less than 100 GRT. [11] That list clearly identifies those transactions which may receive aid. From that list the further conclusion may be drawn, in my view, that with contract-related production aid it is the product to be produced which receives the support. Apart from the direct financial assistance to the shipyard, it is the construction of a specific vessel which receives support and which, moreover, qualifies for aid only if it meets certain criteria laid down in advance.

11. The plaintiff's argument that the aid at issue can by no means be deemed to be an aid in favour of the fishing industry but benefits exclusively the applicant shipyard must therefore be rejected.

I. *The answer to the first question*

The parties concerned take different positions with regard to the legal questions raised.

12. The *plaintiff* takes the view that the point of the first question is whether the Commission, in assessing the compatibility with the common market of aid to shipbuilding, may, on the basis of considerations relating to fisheries policy, diverge by means of the Guidelines from the criteria laid down in the Sixth Directive. [12] As so understood, the question referred to the Court, should, it submits, be answered in the negative.

In the plaintiff's view, the Commission may not make the compatibility of an aid with the common market depend upon criteria other than those laid down in the Sixth Council Directive on aids to shipbuilding. The Sixth Directive provides that aid may be considered compatible with the common market provided that it complies with the criteria for derogation contained therein (second subparagraph of Article 1(d)). Aid may be granted for shipbuilding if the ceiling within the meaning of Article 4(1) of the directive is not exceeded. The directive makes no reference to the fisheries policy.

The plaintiff refers to the judgment given in Joined Cases C-356/90 and C-180/91 *Belgium* v *Commission* [13] and draws a converse conclusion to the effect that an aid to shipbuilding which does not exceed the ceiling is *ipso facto* compatible with the common

10 — Cf. the seventh recital and Article 4 of Directive 87/167.

11 — The abbreviation denotes gross registered tonnes, as may be seen from the annex to the directive.

12 — See Directive 87/167.

13 — [1993] ECR I-2323, at paragraphs 30 to 33.

market. On the basis of the Sixth Directive — contrary to the earlier directives — the Commission has, the plaintiff contends, no power to look further into the matter.

If, however, contrary to the view taken by the plaintiff, the Commission still has some scope for assessment, then at least no considerations based on fisheries policy may be included in the assessment process. When Article 49 of the Fisheries (Structures) Regulation [14] refers to the applicability of Articles 92 and 93 of the Treaty in their entirety, that means that only criteria of competition policy may play a part in the process of assessment under Article 49. These considerations of competition policy have for their part been specified by the Council in conformity with Article 92(3)(d) of the EEC Treaty in the form of the Sixth Directive. Moreover, the Commission cannot subject an aid under the Sixth Directive, which is itself based on Article 92(3)(d) (now 92(3)(e)) of the EC Treaty, to a further examination under Article 92(3)(c). The assessment made by the Commission in the Guidelines is consequently *ultra vires.*

13. The *Netherlands Government* takes the view that the Commission did indeed have authority to issue the Guidelines on the basis, on the one hand, of the Commission's very wide powers in the field of competition and, on the other hand, of the nature of the Guidelines which are designed to inform the Member States of the policy being pursued by the Commission in the sphere of fisheries aid. It considers it important to note that the Guidelines are also in keeping, as regards their content, with the Fisheries (Structures) Regulation and with the Sixth Directive on aid to shipbuilding.

The Netherlands Government goes into great detail with regard to the meaning and purpose of the Guidelines which, whilst not themselves binding, may well give rise to legal obligations in the particular context. With regard to the Commission's powers, the Netherlands Government points out that it is the Commission's task to ensure that Community policy in general is consistent. Thus, in the framework of its aid policy, it is required to have regard to the terms of both the regulation in question and the directive. As a result, there can be no doubt as to the Commission's authority to issue the Guidelines.

14. The *French Government* looks in particular at how the scope and legal effect of the Guidelines or of other comparable Commission measures have significance extending beyond the bounds of this case. Its view is that guidelines, Community frameworks, communications or letters to the Member

14 — Regulation (EEC) No 4028/86.

States are appropriate means of informing the Member States of the manner in which the Commission proposes to exercise its wide discretion in the matter of State aid. It is in the interests of sound administration to let the Member States know which types of aid are likely to be declared compatible with the common market.

In the French Government's view, the Commission is entitled to have recourse to this type of measure in order to interpret the provisions applicable to aid or to propose to the Member States 'appropriate measures required by the progressive development or by the functioning of the common market'. Such measures, however, can in no way be binding unless they can be issued on a more specific legal basis than Articles 92 to 94 of the Treaty. If, therefore, a system of aid has been approved by the Commission, the issuing of a Community framework cannot call in question aid which is consistent with the general scheme, by, for example, regarding it in certain circumstances as new aid. If a Member State does not act in conformity with the measure proposed, then the Commission can if necessary commence the procedure laid down in Article 93(2) of the Treaty, regard being had to the general scheme.

The French Government is of the opinion that in the case now under consideration the Commission exceeded its power to issue an interpretation, since its letters of 30 March and 26 May 1988 were both of such a nature as to modify the legislation enacted by the Council dealing with aid to shipbuilding. In fact, an aid of the type at issue in this case is permissible under the Sixth Directive, whilst the fisheries regulation does not exclude it.

The directive on aid to shipbuilding was moreover adopted after the fisheries regulation. Thus, as before, the Seventh Directive on aid to shipbuilding (90/684/EEC) extended its scope to fishing vessels. If the Commission had taken the view that the two Council instruments in question were incompatible, it ought to have put before the Council a modified proposal for a directive. In any event, the Commission was not entitled to issue guidelines whose content diverged from the directive.

15. The *Commission* takes the view that its powers of review under Articles 92 to 94 of the Treaty — which moreover had been declared applicable in each of the Fisheries (Structures) Regulations [15] — allow it, without any express authorization, to take into account criteria derived from the common fisheries policy.

15 — Council Regulation (EEC) No 2908/83 of 4 October 1983 (OJ 1983 L 290, p. 1) and Council Regulation (EC) No 3699/93 of 21 December 1993 (OJ 1993 L 346, p. 1).

It bases that power, first, on the relationship between Articles 39 and 42, on the one hand, and Articles 92 to 94 of the Treaty, on the other. In so far as the competition rules had been declared applicable to an agricultural policy sector, the objectives of Article 39 may also be taken into account in examining the provisions on competition. This opinion is borne out by the case-law of the Court [16] which has recognized that agricultural policy aims have priority over competition policy aims.

Secondly, the Commission bases its power to have regard to agricultural policy aims when monitoring aid directly on Articles 92 and 93 of the Treaty. In examining the compatibility of State aid with the common market pursuant to Article 92(3)(c) the Commission has a wide discretion. It issued the Guidelines using that discretion. In the Fisheries (Structures) Regulation the Council clarified the concept of 'common interest' appearing in Article 92(3)(c). Since 1988 the Commission has, in the exercise of its powers of review, declared compatible with the common market only such aid for the construction of fishing vessels as could be classified within a multiannual programme within the meaning of the Fisheries (Structures) Regulation. With such aid it applied, as the upper limit, even in the event of financing solely by a Member State, the aid ceiling applicable to financing by the Community. In exercising its discretion it was able to assess what bearing Regulation No 4028/86 had on Directive 87/167 and vice versa. In any event, aid for the construction of fishing vessels is mentioned only very briefly in the Guidelines, which also cover a whole range of other types of State aid for the fisheries sector. With regard to aid for the construction of fishing vessels, Regulation No 4028/86 is a *lex specialis* in relation to Directive 87/167.

After demonstrating that, for the reasons given above, it is entitled, when reviewing aid, to take fisheries policy aims into account, the Commission, responding to the first question, specifically addresses the issue of its power to issue guidelines. Their aim is twofold. First, they are 'appropriate measures' within the meaning of Article 93(1) and, secondly, they are a specific exercise of its discretion under Article 92(3). Its power to adopt such guidelines is, it contends, borne out by the case-law of the Court. [17]

16. In supervising aid the Commission has in principle a wide discretion. That becomes particularly clear in the assessment of aid which *may* be considered to be compatible with the common market within the meaning of Article 92(3). In this respect, the most

16 — Judgments in Case C-280/93 *Germany* v *Council* [1994] ECR I-4973 and in Case 177/78 *Pigs and Bacon* [1979] ECR 2161.

17 — Judgments in Case 310/85 *Deufil* v *Commission* [1987] ECR 901 and in Case C-313/90 *CIRFS and Others* v *Commission* [1993] ECR I-1125.

important criterion for approval is contained in Article 92(3)(c) applicable to aid to facilitate the development of certain economic activities or economic areas, where such aid does not affect trading conditions to an extent contrary to the common interest. This wide discretion comes into play both in the review of existing aid under Article 93(1) and (2) and in the examination of new aid under Article 93(3). An extensive decision-taking power to accept or reject proposed State aid is the corollary of that wide discretion. Thus, under the last sentence of Article 93(3), a Member State may not put its proposed measures into effect before the Commission has issued a final decision.

17. It is therefore consistent with the principle of sound administration for the Commission to draw up and publish guidelines announcing how it proposes to exercise its discretion in relation to its review of aid. Similarly, the drawing up of guidelines is in the well-understood interests of the Member States, which are thus placed in a position to take the Commission's view into account in their aid policy and so to avoid possible conflicts. Guidelines or Community frameworks having the content and the purpose described have in the past been approved by the Court of Justice. [18]

18. The provisions of the Guidelines must be examined in the context of the relevant rules. Guidelines are in principle to be deemed to be lawful if they do not conflict with the Treaty or with binding instruments enacted by the Community institutions. The Guidelines at issue are entitled 'Guidelines for the Examination of State Aids in the Fisheries Sector'. The basic Community legal instrument relating to aids in the fisheries sector for the material period was Council Regulation No 4028/86 enacted on 18 December 1986. That Fisheries (Structures) Regulation is specifically mentioned in the introduction to the Guidelines. An essential feature of aid allowed under the regulation is that it must be in line with a 'multiannual guidance programme' [19] to be drawn up by the Member States and approved by the Commission.

19. The Council Directive on aid to shipbuilding, [20] enacted only shortly thereafter, on 26 January 1987, was adopted on the basis of Article 92(3)(d) [21] and Article 113. The aid referred to in the directive is therefore 'such other categories of aid as may be specified by decision of the Council acting by a qualified majority on a proposal from the Commission', [22] which *may* be considered to be compatible with the common market. The purpose of the directive is therefore to define one category of State aid as aid

18 — Cf. Case 310/85 *Deufil* (cited in footnote 17) 'Aid Code'; Case C-313/90 *CIRFS* (cited in footnote 17) 'Aid Discipline'; Case C 135/93 *Spain* v *Commission* [1995] ECR I-1651 'Community framework on State aid'.

19 — Cf. Article 2(2) of the regulation.

20 — Directive 87/167, which was decided as early as 22 December 1986; cf. *Bulletin of the European Communities* No 12, 1986, pp. 72 and 153.

21 — Now renumbered as 92(3)(c).

22 — Cf. Article 92(3)(d) (now 92(3)(c)) of the Treaty.

which may be approved. However, the directive does not *directly* declare certain State aid lawful: that depends upon further measures of the Member States which must in turn be authorized under Community law. [23]

20. The aims and scope of the Fisheries (Structures) Regulation, on the one hand, and the Directive on aid to shipbuilding, on the other, are different. Nevertheless, the matters covered overlap where the rules regarding aid for the construction of certain fishing vessels [24] for the Community fishing fleet are concerned. [25] It is therefore necessary, from the substantive point of view and with regard to the financial consequences, to determine how the provisions interact with one another.

21. In the first place, it must be noted that the directive on aid to shipbuilding was enacted *after* the adoption of the Fisheries (Structures) Regulation, as the plaintiff expressly mentions. However, I do not think it is possible to use the timing of their adoption to support the argument that one of the Community instruments in question is subordinate to the other, which is, moreover, improbable as the dates on which they were adopted were so close together. Whilst the Council adopted the Fisheries (Structures) Regulation on 18 December 1986, it adopted the Sixth Directive on aid to shipbuilding only four days later on 22 December 1986. [26] Moreover, it is impossible to conclude either from the recitals in the preamble or from the operative part of the directive that the intention was to abrogate any particular provision of the Fisheries (Structures) Regulation.

22. If we consider the regulation and the directive in relation to any order of precedence between them based on their nature of legal instruments, it is apparent that under Article 189 of the Treaty a regulation has general application, is binding in its entirety and is directly applicable in all Member States, whilst a directive is binding, as to the result to be achieved, upon each Member State to which it is addressed, but basically requires transposition into the law of the Member State in order to produce further legal effects. From this general consideration it is clear that, in terms of its legal effects, the regulation has priority over the directive. In this specific case, in allowing aid only if it is in line with a multiannual State guidance programme, the Fisheries (Structures) Regulation is framed in such a way that its effects as regards State aid are like those of a directive.

23. The Commission expressed the view, both in its circular of 26 May 1988 sent to the Member States and during these proceedings, that the Fisheries (Structures)

23 — Cf. Article 10 of Directive 87/167.

24 — Cf. the second indent of Article 1(a) of the directive.

25 — Cf. Article 1(1)(a) of the regulation.

26 — Cf. *Bulletin of the European Communities* No 12, 1986, pp. 72 and 153.

Regulation was a *lex specialis* in relation to the directive on aid to shipbuilding. Since the subject-matter of the two instruments is fundamentally different, it is difficult to identify such a specialty relationship. On the other hand, if only the overlapping provisions are considered, it may be seen that aid obtainable in implementation of the Fisheries (Structures) Regulation — whether financed by a Member State alone or by the grant of a Community subsidy — may reach a higher amount than aid which may be approved under the directive on aid to shipbuilding. This leads to the conclusion that the relevant rules of the Fisheries (Structures) Regulation are of a special nature. Yet it must be remembered that, in this dispute, approval of aid normally allowable only on the basis of Directive 87/167 was *refused* under the Fisheries (Structures) Regulation.

24. The starting point for assessing the interaction between the relevant provisions of Regulation No 4028/86 and those of Directive 87/167 ought, I think, to be the Fisheries (Structures) Regulation. Not because it is the earlier instrument but because it is a special measure in the sphere of the common agricultural policy and therefore in principle shares the priority of the provisions of the Treaty on agriculture over the general provisions of the Treaty. [27] Without a positive decision of the Council under Article 42 of the Treaty, such a structural measure of agricultural policy and the measures to be adopted for its implementation do not fall under the chapter on competition.

In Article 49 of the Fisheries (Structures) Regulation, however, the Council expressly states that Articles 92, 93 and 94 of the Treaty are to apply, in the sectors covered by the regulation, to the national aids granted by Member States. Aid of the type mentioned is accordingly subject to review of aid and examination of it is undertaken with reference to Article 92. Since the type of national aid at issue is not in fact compatible with the common market under Article 92(2), the Commission must examine, under Article 92(3), whether it may be considered to be compatible with the common market. The criteria for the examination are set out in Article 92(3)(c). The aid must be:

'aid to facilitate the development of certain economic activities or of certain economic areas, where such aid does not adversely affect trading conditions to an extent contrary to the common interest'.

The evaluation factors set out in the Fisheries (Structures) Regulation may be regarded in this connection as a definition of 'the common interest'. The 'multiannual guidance programmes' to be drawn up by the Member States on the basis of the regulation, in order to become binding in Community law, require approval by the Commission. [28]

27 — Cf. Case 177/78 (cited in footnote 16), at paragraph 9 et seq. and Case C-280/93 (cited in footnote 16), at paragraph 61.

28 — Cf. Article 4(3) of Regulation No 4028/86 and the Commission decision of 11 December 1987 (cited in footnote 3).

Already at this stage of the procedure the Commission undertakes an assessment of projects qualifying for assistance, since amongst other things the programmes 'may constitute a framework for Community ... financial assistance'. [29]

25. Against that background, the position adopted and published [30] by the Commission, to the effect that it could in principle approve State aid covered by a multiannual guidance programme, whilst regarding aid not covered by such a programme as incompatible with the common market, raises no legal objections.

26. The question now is whether, regard being had to the Sixth Directive on aid to shipbuilding, the assessment validly undertaken on the basis of the Fisheries (Structures) Regulation needs to be revised. Directive 87/167, based on Article 92(3)(d) of the Treaty, is ultimately nothing more than a possible precondition for approval in the context of Article 92(3). [31] The compatibility with the common market of the planned aid scheme or aid must, like all other aid falling under Article 92(3), therefore be examined. Such an examination, which the Commission is bound to carry out, has not been pre-empted by the Council's adoption of the directive. [32] The directive in itself provides no basis for claiming aid of any kind. It merely authorizes the Member States to subsidize the shipbuilding industry in compliance with the minimum conditions set out in the directive.

27. The plaintiff's view that a State aid to shipbuilding which falls below the aid ceilings in Article 4 of Directive 87/167 is *ipso facto* lawful is therefore incorrect. Nor can such a view be supported by way of a deduction *a contrario* from the judgment in Joined Cases C-356/90 and C-180/91, [33] in which the Court decided that aid above the ceiling was *ipso facto* unlawful. That decision does not conflict with the view taken in this case since, if the ceiling is exceeded, that means that the minimum conditions laid down by the directive for aid to be eligible for approval have not been met. Observance of the aid ceiling is, on the other hand, only *one* condition for an aid to be compatible with Community law.

28. If, however, it has already been positively established that a given aid is incompatible with the common market because it

29 — Cf. Article 4(2) of Regulation No 4028/86. For priority consideration of provisions of a common organization of the market under Articles 92, 93 and 94 of the Treaty, cf. Case 177/78 *Pigs and Bacon*, cited in footnote 16, at paragraph 11.

30 — Guidelines Section II, B3(i), first and second indents in conjunction with Article 1(1)(a) and (2) and Article 6 of Regulation No 4028/86 and the fifth paragraph of the circular of 26 May 1988 SG (88) D/6181.

31 — Cf. also Article 4(1) of Directive 87/167, which states that 'Production aid in favour of shipbuilding ... *may* be considered compatible with the common market'. For a comparable appraisal of the Seventh Directive on aid to shipbuilding (Council Directive 90/684/EEC on aid to shipbuilding, OJ 1990 L 380, p. 27), the successor to Directive 87/167, see the judgment in Case C-400/92 *Germany* v *Commission* [1994] ECR I-4701, at paragraph 13.

32 — Cf. Article 10(1) of Directive 87/167.

33 — Cited in footnote 13.

is contrary to the 'common interest', that result cannot be invalidated by the fact that it would at any rate fulfil some other possible precondition for approval. This approach is in the interests of a consistent interpretation of Community law. The requirement of a consistent application of the Fisheries (Structures) Regulation in regard to domestic law is in fact expressly laid down in the preamble to the regulation. [34]

29. In so far as the overlap between the legal provisions at the basis of the dispute can be resolved by an interpretation consistent with Community law, there is, in my view, no 'contradiction' between the Fisheries (Structures) Regulation and the Sixth Directive on aid to shipbuilding. The task of solving conflicts of rules is one for the Community institutions and is inherent in the Community legal order as in any State legal order. If that were not so, the Community legal order would not be a meaningful order but a 'chaos' of legal instruments in 'an unwrought confused mass'. [35]

30. The view of the law put forward by the Commission in the Guidelines therefore accurately reflects the state of the law applicable at the time they were adopted. As regards their substance, therefore, no objection can be raised to the Guidelines in so far as they are relevant in this case. The unlawful nature of certain aid for the construction of fishing vessels for the Community fleet is a necessary consequence of the interpretation of the Fisheries (Structures) Regulation and the national measures issued on the basis thereof, which I have previously stated to be correct.

31. Considering the shipbuilding aid in question, it is quite legitimate to demonstrate its incompatibility with the common market with considerations relating to the common fisheries policy. Consequently, no error of assessment is made if factors relating to structural policy in the fisheries sector are taken into consideration when the national aid scheme is assessed under Community law.

32. The plaintiff's objection that the interpretation of the relationship between the Fisheries (Structures) Regulation and the Sixth Directive put forward by the Commission in the Guidelines partly negates the provisions of the directive is not sustainable. Contract-related production aid in favour of shipbuilding, [36] where 'shipbuilding' is to be regarded as including the building in the Community of new fishing vessels of not less than 100 GRT, [37] is not unlawful at all.

34 — The sixth recital in the preamble to the Fisheries (Structures) Regulation states: ... 'structural measures must as far as possible be implemented within the framework of multiannual guidance programmes ensuring, in respect of each Member State, that the Community measures are *consistent* with national measures and that the latter are compatible with the objectives of the common policy' (my emphasis).

35 — *Rudis indigestaque moles*: Ovid, *Metamorphoses*, Book 1, 7.

36 — Cf. Article 4(1) of Directive 87/167.

37 — Cf. Article 1(a) of Directive 87/167.

A subsidy may be granted if (i) the vessels are intended for the Community fleet, provided that the building plans are identifiable with a multiannual guidance programme, or (ii) they are intended for the fishing fleet of a third country. For both these categories it is irrelevant that, for different reasons, they are not found to be incompatible with the common market under Article 92(3)(c).

33. As an interim answer to the first question it must therefore be stated that in issuing Guidelines for the Examination of State Aids in the Fisheries Sector the Commission was acting within the bounds of its authority under Articles 92 and 93 of the Treaty, under Regulation No 4028/86 and under Directive 87/167 and that the content of the Guidelines is consistent with the said provisions.

II. *The answer to the second question*

1. Are the Member States bound by the Guidelines?

34. The *plaintiff* advances considerations with regard to the answer to the second question only in the alternative, since the answer which it proposes to the first question renders the second question redundant. In the plaintiff's opinion, the Member States are not obliged to observe the Guidelines because they are not binding. It accepts that in the *CIRFS* judgment the Court recognized an aid discipline, to which the Member States had expressly assented, as having binding effects. In this case, however, the Guidelines are a unilateral Commission measure and are not therefore comparable.

The plaintiff goes on to argue that even if binding force were to be attributed to the Guidelines, this would apply only to existing aid because the Guidelines were issued on the basis of Article 93(1). This case, on the other hand, involves new aid for which there is no apparent legal basis for the issue of binding guidelines.

35. The *Netherlands Government* is of the view that the answer to the first part of the second question should be that binding effect should be attributed to the Guidelines. Even if the Guidelines did not of themselves produce such legal effects, they must in any event be deemed to have such effects in this context owing to the fact that they were subsumed into the Commission decision of 22 December 1988.

36. In the *Commission's* view, the Netherlands State was effectively bound to comply with the Guidelines in this case. In the

Commission's letter of approval of 22 December 1988 the Netherlands aid scheme was approved only on condition that when aid was granted the Guidelines and the circular of 26 May 1988 were observed. Under Article 93(3) the Netherlands Government could grant aid only if it complied with the Guidelines.

Furthermore, the Guidelines were proposed to the Netherlands as an 'appropriate measure' under Article 93(1), which admittedly does not in itself create any binding effect. The Member States are therefore not obliged to give their assent. Nevertheless, in the event of any aid inconsistent with the Guidelines being granted, the Commission could have taken a decision under Article 93(2) requiring the aid to be altered.

If, however, the Guidelines have been accepted by a Member State — as occurred in this case by a letter of 31 January 1989 from the Netherlands Government — then, according to the *CIRFS* judgment, aid inconsistent with the Guidelines would be regarded as new aid which could not be put into effect without the Commission's approval under the last sentence of Article 93(3).

Finally, as the court of reference has indicated, Article 5 of the Treaty creates a duty for the Member States to take all appropriate measures to ensure fulfilment of the obligations arising out of the Treaty or resulting from action taken by the institutions. Thus, once the Member States have assented to the Guidelines they are bound by them.

37. Guidelines which an authority issues and publishes in order to provide information as to how it intends to exercise an existing discretion serve the purposes of legal certainty and create confidence that the authority will act in the way it has described. To that extent the issue of guidelines serves first and foremost to bind the institution.

38. A discretion to be exercised by the Commission arises in the application of Article 92(2) and (3) in conjunction with the duties of supervision imposed by Article 93. In the introduction to the Guidelines the Commission therefore refers expressly to Article 92(2) and (3). [38] In addition it relies upon Article 93(1), [39] which suggests that it wishes the Guidelines to be understood as a proposal for an 'appropriate measure' within the meaning of that provision.

38 — Cf. fourth paragraph of the Guidelines.

39 — Cf. sixth paragraph of the Guidelines.

39. From both points of view alone, that is to say treating the Guidelines as a specific exercise of discretion under Article 92(2) and (3) and as a proposal for an appropriate measure, it is, in my view, impossible for the Guidelines, as a purely unilateral measure, to produce any binding effect as regards national authorities.

40. In this case, however, even before the Guidelines were published in the Official Journal [40] the Member States were involved [41] in the preparations for issuing the Guidelines. In this respect the plaintiff assumes incorrectly that there had been no agreement between the Commission and the Netherlands Government.

41. By a decision of 29 March 1988 the Commission adopted a *draft* for the amendment of the Guidelines, [42] which had been applicable since 1985. By letters of 30 March and 6 May 1988 the Netherlands Government was invited to make comments on the document. After receiving and examining the comments of the Member States, the Commission adopted the definitive text of the Guidelines, of which it notified the Netherlands Government on 30 November 1988, [43] and which it published in the Official Journal on 8 December 1988. [44]

42. The consultation procedure in which the Member States had the opportunity not only to take cognizance of the Commission's intentions on the basis of a specific draft but also to put forward their own views, could, in my opinion, have produced a consensus such as to have the effect of binding the Member States.

43. In its judgment in the *CIRFS* case [45] the Court of Justice recognized an aid discipline which was 'the outcome of an agreement between the Member States and the Commission' [46] as having not only objective significance but also *binding effect*. That appraisal, which may be extrapolated to this case, is not called in question by the *Deufil* judgment, [47] where the question at issue was whether an aid code could actually derogate from the provisions of the Treaty, to which in the result the Court gave a negative answer.

44. In this case, there is strong factual evidence that an 'agreement' had actually come into being. In the said letter of 30 November

40 — OJ 1988 C 313, p. 21.

41 — Commission letter of 30 November 1988, Document SG (88) D/13965; Annex 5 to the Commission's observations.

42 — OJ 1985 C 268, 19 October 1985.

43 — See the Commission letter of 30 November 1988, Document SG (88) D/13965; Annex 5 to the Commission's observations.

44 — OJ 1988 C 313, p. 21.

45 — Cited in footnote 17.

46 — Judgment in the *CIRFS* case (cited in footnote 17), at paragraph 36.

47 — Cited in footnote 17.

1988 addressed to the Netherlands Government notifying it of the Guidelines, that Government was requested to make an affirmative statement by a fixed time-limit to the effect that in future it would comply with the Guidelines. By a letter of 31 January 1989 from the Permanent Representation of the Kingdom of the Netherlands, [48] the Netherlands Government formally declared itself ready to comply with the Guidelines. [49] In my view, the Netherlands Government became legally bound once that declaration was made.

45. The binding effect associated with a Member State's assent is in my opinion no bar to a Member State's willingness to cooperate. It is true that a Member State which refuses its assent may not be formally bound in the same way as a Member State which has undertaken to comply with the Guidelines. In devising its aid policy a Member State which has not cooperated in the agreement will not obtain any advantages, since in reviewing aid the Commission will apply the Guidelines it has drawn up and the Member State concerned will then be bound on pain of legal proceedings to comply with them. Furthermore, a Member State which refuses to participate in the consultation procedure forgoes the opportunity to influence the terms of the Guidelines.

46. The Netherlands authority called upon to decide the application for aid therefore correctly assumed that it was bound by the terms of the Guidelines.

47. In this specific case, besides being based on the Netherlands Government's assent, the binding effect results directly from Directive 87/167. Under Article 10(2)(a) thereof the Member States are to notify the Commission in advance of 'any aid scheme — new or existing — or any amendment of an existing scheme covered by this directive' and are not to grant the aid without its approval.

48. The Netherlands Government gave the Commission such compulsory notice of the 1988 Scheme (Regeling Generieke Steun Zeescheepsnieuwbouw). [50] The Commission granted its approval, without which an aid could not effectively be granted, by a letter

48 — See Document No 639 in Annex 7 to the Commission's observations.

49 — That letter stated: 'Naar aanleiding van dit verzoek kan de Nederlandse regering mededelen dat de huidige nationale steunmaatregelen voldoen aan de richtsnoeren. Zij wil er op wijzen dat de Europese Commissie van de nationale maatregelen terzake op de hoogte is via de verstrekte informatie in het kader van het artikel 93 lid 2 onderzoek naar de Nederlandse steunmaatregelen, de aanmelding van nieuwe steunmaatregelen en de aanmelding van de Nederlandse uitvoeringsbepalingen van VO 4028/86. Toekomstige maatregelen zullen conform de bepalingen van het EEG-Verdrag worden aangemeld en toegepast.'
'Le gouvernement néerlandais peut [...] confirmer que les aides nationales octroyées actuellement satisfont aux lignes directrices. Il signale que la Commission européenne a été mise au courant des mesures prises à l'échelon national par le biais des informations données dans le cadre de l'examen des aides néerlandais effectué conformément à l'article 93 paragraphe 2, par le biais de la notification des nouvelles aides et de celle des modalités d'application néerlandaises du règlement 4028/86. Les mesures prises à l'avenir seront notifiées et appliquées conformément aux dispositions du traité CEE.'
That means:
'The Netherlands Government can confirm that the national aids granted at the present time are in conformity with the Guidelines. It points out that the Commission has been informed of measures taken at national level by information provided in the framework of the examination of Netherlands aids in pursuance of Article 93(2), by the notification of new aid and the Netherlands provisions for implementation of Regulation 4028/86. Future measures will be notified and implemented in conformity with the provisions of the EEC Treaty.'

50 — According to the Commission's letter of approval of 22 December 1988 (Document SG (88) D/15402, Annex 1 to the Commission's observations), it had been notified by a letter dated 26 October 1988 of the amendments requiring approval.

of 22 December 1988. The approval was granted subject to observation of the Guidelines when the aid was awarded. In this way the Guidelines became binding in relation to the award of aid in implementation of the Sixth Directive on aid to shipbuilding.

49. The plaintiff's objection that the Guidelines could have become binding, if at all, only for existing aid but by no means for new aid is not sustainable because both the Netherlands Government's agreement to respect the Guidelines and the Commission's approval of the Scheme subject to observance of the Guidelines cover future observance thereof.

50. The French Government's objection that guidelines cannot in any event be appropriate for attributing to existing aid the status of new aid with the resultant legal consequences does not need to be examined as it is irrelevant in this case.

51. Moreover, by being included in the letter of approval of 22 December 1988 the Commission circular of 26 May 1988 [51] also produced a binding effect comparable to that produced by the Guidelines. The circular by itself, as a unilateral act, could not, I think, have had such effects. However, as it was made the actual basis of the approval under Article 10(2) of Directive 87/167, the content of the circular became binding in law.

52. The answer to be given to the first part of the second question should therefore be that the national authorities were bound by the Commission's Guidelines.

2. The material scope of guidelines

53. Finally, it is necessary to examine the second part of the second question which in effect inquires about the material scope of the binding effect which arose. The court of reference asks whether it makes any difference if the vessel in question is not intended wholly for fishing only in waters under the sovereignty or jurisdiction of the Member States but also in waters to which the Community's external fisheries policy relates.

51 — Document SG (88) D/6181 in Annex 8 to the Commission's observations.

54. The *plaintiff* points out that the vessel for which the construction subsidy was requested was equipped for fishing outside Community waters and at the time was also actually fishing in American waters. Even if the Commission were to have been authorized to issue guidelines which the Member States were required to observe, that could in any event apply only to vessels fishing in waters under the sovereignty and jurisdiction of Member States of the European Community. The extension of the prohibition of aid for the construction of fishing vessels fishing in waters under the sovereignty and jurisdiction of non-member States would not only be *ultra vires* but also completely unjustified. Such aid would not have the least effects on the conservation of fish stocks in Community waters which the common fisheries policy seeks to secure.

55. The *Netherlands Government* observes that the distinction made by the court of reference with regard to the waters to be fished is not supported by the relevant Community legislation. The only question therefore is whether the vessel is intended for the Community fleet.

56. The *Commission*, too, takes the view that in the application of the relevant legal instruments it is not the question where the fishing vessel fishes but the question whether it forms part of the Community fleet which matters.

57. The Netherlands Government's and Commission's argument that the relevant Community legal instruments on aid do not treat fishing vessels differently according to the place where they fish but that the application of Community law depends only on whether the vessel forms part of the Community fleet must be upheld. It must be possible to determine according to objective criteria whether a vessel does form such a part. As the Commission convincingly argued at the hearing, the test is simply the flag under which the vessel sails.

58. There are also further arguments in favour of having regard only to a vessel's forming part of the Community fleet. Effective pursuit of the objectives of the common fisheries policy requires all fishing vessels sailing under the flag of a Member State to be bound by the provisions of Community law: a vessel should not be able to evade them simply by fishing elsewhere. For example, the common fisheries policy has as its aim *inter alia* the more or less equitable apportionment of fishing rights to fishing grounds accessible to the Community. [52] The relevant rules are not restricted to Commu-

52 — The attainment of this objective is achieved by means of a large number of Community legal instruments concerning catch quotas and their distribution.

nity waters but also cover fishing grounds made open to the Community under international agreements.

59. Even if, like the plaintiff, one regards the conservation of fish stocks as the primary aim of the common fisheries policy, that does not mean that Community jurisdiction stops at the limits of Community waters, since international commitments entered into for the conservation of fish stocks are binding on the Community. [53]

60. I therefore conclude that the applicability of Community law will depend on whether a vessel forms part of the Community fleet, which will be determined by the flag under which the vessel sails.

C — Conclusion

61. It follows from the foregoing considerations that the following answers should be given to the questions referred to the Court for a preliminary ruling:

1. Under the authority conferred upon it by Article 93 of the Treaty establishing the European Community the Commission of the European Communities may draw up, publish and apply as basic principles in the assessment of national aid schemes Guidelines for the Examination of State Aids in the Fisheries Sector, laying down criteria derived, on the one hand, from Council Regulation (EEC) No 4028/86 of 18 December 1986 on Community measures to improve and adapt structures in the fisheries and aquaculture sector and, on the other hand, from the Council Directive 87/167/EEC of 26 January 1987 on aid to shipbuilding.

2. If a Member State has formally agreed to observe the said Guidelines, it is obliged to refer to them when considering an application for aid for the

53 — Cf. judgment in Case C-258/89 *Commission* v *Spain* [1991] ECR I-3977, at paragraph 9.

construction of a fishing vessel. The position is the same where the Commission has incorporated the Guidelines in a decision approving an aid scheme within the meaning of Article 10(2) of the Council Directive 87/167/EEC.

That obligation applies in respect of all fishing vessels which are to form part of the Community fishing fleet, the test for a vessel's forming part of the fleet being the flag under which it sails.