JUDGMENT OF THE COURT OF FIRST INSTANCE
(Second Chamber, Extended Composition)
16 March 2000 *

In Case T-72/98,

Astilleros Zamacona SA, established in Santurce, Spain, represented by A. Creus Carreras, of the Barcelona Bar, and B. Uriarte, of the Madrid Bar, Cabinet Cuatrecasas, 60 Avenue de Cortenberg, Brussels, Belgium,

applicant,

v

Commission of the European Communities, represented by P. Nemitz, of its Legal Service, and M. Desantes, a national civil servant on secondment to the Commission, acting as Agents, assisted by M. Muñoz, of the Saragossa Bar, with an address for service in Luxembourg at the Chambers of C. Gómez de la Cruz, of its Legal Service, Wagner Centre, Kirchberg,

defendant,

* Language of the case: Spanish.

APPLICATION for the annulment of Commission Decision 98/157/EC of 5 November 1997 concerning aid Spain proposes to grant to Astilleros Zamacona SA in respect of five tugboats (OJ 1998 L 50, p. 38),

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

composed of: A. Potocki, President, K. Lenaerts, J. Azizi, J. Pirrung and A.W.H. Meij, Judges,

Registrar: J. Palacio González, Administrator,

having regard to the written procedure and further to the hearing on 6 October 1999,

gives the following

Judgment

Legal background

1 According to Article 92(1) of the EC Treaty (now, after amendment, Article 87 EC), 'any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring

certain undertakings or the production of certain goods shall, in so far as it affects trade between Member States, be incompatible with the common market'.

2 Under Article 92(3)(e) of the Treaty, 'categories of aid... specified by decision of the Council acting by a qualified majority on a proposal from the Commission' may be considered to be compatible with the common market.

3 On the basis of that provision and of Article 113 of the EC Treaty (now Article 133 EC), Council Directive 90/684/EEC of 21 December 1990 on aid to shipbuilding (OJ 1990 L 380, p. 27; 'the directive') was adopted. The directive has been amended a number of times, but without affecting the provisions at issue in this case.

4 Article 4(1) of the directive provides that 'production aid in favour of shipbuilding and ship conversion may be considered compatible with the common market provided that the total amount of aid granted in support of any individual contract does not exceed, in grant equivalent, a common maximum ceiling expressed as a percentage of the contract value before aid, hereinafter referred to as the ceiling'.

5 According to Article 4(2) of the directive, the ceiling is to be fixed by the Commission.

6 According to the first subparagraph of Article 4(3) of the directive, 'the aid ceiling applicable to a contract shall be that in force at the date of signature of the final contract. However, this rule shall not apply in respect of any ship delivered more than three years from the date of signing of the final contract. In such cases, the ceiling applicable to that contract shall be that in force three years before the date of delivery of the ship'.

7 However, in accordance with the second paragraph of Article 4(3) of the directive, 'the Commission may grant an extension of the three-year delivery limit laid down in the first subparagraph when this is found justified by the technical complexity of the individual shipbuilding project concerned or by delays resulting from unexpected disruptions of a substantial and defensible nature in the working programme of a yard'.

Facts underlying the dispute

8 In December 1991, Astilleros Zamacona SA, a small shipyard in Bilbao, signed 16 shipbuilding contracts with a number of shipowners. Ten of those contracts never came into force, and one is not in dispute. The five contracts at issue in this case, concerning the building of tugboats, were numbered 300, 301, 318, 319 and 320.

9 At the date of signature of those contracts, the maximum authorised ceiling for the aid was 9%. As from 1 January 1992, that ceiling was reduced to 4.5% (OJ 1992 C 10, p. 3).

10 Under Article 18 of each of those five contracts, the contracts were not to 'enter into force' until a later date (30 April 1992 in one case, 30 November 1992 in another and 30 December 1992 in the last three cases), subject to a first payment by the shipowner and, in four of the five contracts, to written confirmation by the shipowner. The same provision stated, in contracts nos 301, 318, 319 and 320, that the contract would become void if it did not enter into force on the anticipated date.

11 The date of 'entry into force' of contracts nos 318 and 319 was postponed until 31 July 1994, 19 months after the date initially envisaged. That of the other three contracts was not changed.

12 All the contracts were subject to amendments between 20 December 1993 and 10 May 1994. They finally 'entered into force' between 5 March and 10 May 1994. Some days later, they were assigned to other shipowners, save for contract no 318.

13 On 10 February 1995, the Spanish authorities asked the Commission to extend the three-year delivery limit for the tugboats laid down in the first subparagraph of Article 4(3) of the directive.

14 Two of the five tugboats built by the applicant were delivered in July 1995, two others in October 1995, and the last in May 1996.

15 On 20 November 1996, the Commission decided to open the procedure under Article 93(2) of the EC Treaty (now Article 88 EC) with a view to examining the Spanish authorities' request of 10 February 1995 (OJ 1997 C 58, p. 8).

16 The Spanish authorities submitted their written observations on 24 January 1997 and at two meetings with Commission staff and the applicant's representatives on 1 April and 28 May 1997. By letter of 12 May 1997, they added to their observations in reply to doubts expressed by the United Kingdom and Danish Governments as to the compatibility of the aid.

17 By Commission Decision 98/157 of 5 November 1997 concerning aid Spain proposes to grant to Astilleros Zamacona SA in respect of five tugboats (OJ 1998 L 50, p. 38; 'the decision'), the Commission rejected the Spanish authorities' request on the ground that the aid did not comply with the provisions of Article 4(3) of the directive. It therefore decided that the level of aid envisaged for the five contracts in question should be reduced so as to ensure that, in relation to each ship, the amount of the aid did not exceed 4.5% of the contractual value before aid, in accordance with the ceiling applicable for 1992 and 1993.

18 It was in those circumstances that, by application lodged at the Registry of the Court of First Instance on 30 April 1998, the applicant brought the present action.

19 Upon hearing the report of the Judge-Rapporteur, the Court of First Instance (Second Chamber, Extended Composition) decided to open the oral procedure. The parties were asked to reply in writing to a number of questions and to produce certain documents. They complied with those requests within the time-limits.

20 They presented oral argument and replied to the questions of the Court of First Instance at the hearing on 6 October 1999.

Forms of order sought

21 The applicant claims that the Court should:

— annul the decision;

— order the production of internal Commission documents relating to the adoption of that decision and the opening of the procedure which led to it being adopted;

— order the Commission to pay the costs.

22 The Commission contends that the Court should:

— dismiss the action;

— order the applicant to pay the costs.

The scope of the review of legality by the Court of First Instance

23 During the procedure before the Court of First Instance, the question was raised whether, at the date on which they were signed, the five contracts in question could be described as final contracts within the meaning of the first subparagraph of Article 4(3) of the directive.

24 However, the Court notes that, in the decision, the Commission did no more than express 'serious doubts' as to whether they could be described as final contracts (Point V, penultimate paragraph, and Point VII, first paragraph). It thus emerges from the wording of the decision and the Commission's replies to the written and oral questions of the Court that the decision is based not upon the absence of a final contract but upon the fact that the conditions for applying the second subparagraph of Article 4(3) of the directive are not met.

25 Therefore, in the context of the review of legality which it has to exercise under Article 173 of the EC Treaty (now Article 230 EC), it is not for the Court of First Instance itself to carry out an examination of the description of the five contracts in dispute as 'final contracts' within the meaning of the directive.

26 For the purposes of the present judgment, therefore, it should be assumed that the contracts are 'final contracts' and that the authorised aid ceiling initially applicable to them was that in force at the date of their signature in December 1991.

27 Bearing those preliminary remarks in mind, it is necessary to examine the pleas in law in support of this action, claiming, first, infringement of the duty to state reasons; second, infringement of Article 4(3) of the directive and manifest error in assessing the facts; and, third, infringement of the principle of proportionality.

Infringement of the duty to state reasons

Arguments of the applicant

28 Under Article 190 of the EC Treaty (now Article 253 EC), reasons for legal measures must be stated.

29 The applicant maintains that the duty to state reasons is particularly important in this case since the Commission had a wide discretion (Case 41/69 *ACF Chemiefarma* v *Commission* [1970] ECR 661, paragraphs 76 and 77; Case C-367/95 P *Commission* v *Sytraval and Brink's France* [1998] ECR I-1719).

30 By limiting itself to the assertion that a simple statement of the facts was a sufficient basis on which to conclude that the conditions justifying an extension of the delivery period were not met, the Commission infringed Article 190 of the Treaty.

31 Similarly, the wish to avoid setting a precedent could not justify the lack of reasoning which vitiated the decision.

32 Finally, concerning the first case for applying Article 4(3) of the directive, the Commission should have indicated clearly and precisely, with the aid of examples

or general rules, the circumstances in which it considered that the conditions laid down in that provision were or were not met.

Findings of the Court

33 It is settled case-law that the statement of reasons required by Article 190 of the Treaty, which is an essential procedural requirement within the meaning of Article 173 of the Treaty, 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 competent Community court to exercise its power of review (see, *inter alia*, *Sytraval and Brink's France*, cited above, at paragraph 63).

34 In this case, the reasons for the decision are divided into seven sections. The first constitutes a general introduction, recalling, *inter alia*, the purpose of the procedure. The second describes the progress of the procedure before the Commission. The third contains a summary of the comments submitted by the Spanish authorities. The fourth is a summary of the relevant provisions of the directive. The fifth examines the facts of the case and is complemented by a summary in the form of a table. In the sixth, the Commission examines whether, having regard to the circumstances relied upon by the Spanish authorities, there were delays caused by unexpected disruptions in the working programme of the yard that were substantial and defensible within the meaning of the directive. The seventh section constitutes the conclusion to which the matters referred to above led the Commission.

35 Those explanations allow an understanding both of the factual context of the case and of the basis of the legal conclusions which the Commission drew therefrom for the purposes of applying the second subparagraph of Article 4(3) of the directive. Moreover, the pleadings lodged in this case show that the applicant perfectly understood the Commission's reasoning, each point of which it challenges.

36 The decision therefore includes a sufficient statement of reasons with regard to Article 190 of the Treaty. By contrast, the review of any inaccuracies there may be in the grounds for the decision forms part of the examination as to whether the latter is well founded (see, for example, Case T-84/96 *Cipeke* v *Commission* [1997] II-2081, paragraph 47).

37 Moreover, the duty to state reasons, as recalled above, does not require the Commission to determine in the abstract the circumstances in which the conditions of Article 4(3) of the directive are fulfilled.

38 The plea must therefore be rejected.

Infringement of Article 4(3) of the directive and manifest error in assessing the facts

Arguments of the applicant

39 The applicant cites four circumstances with which it was confronted, and which the Commission should have described as 'delays resulting from unexpected disruptions of a substantial and defensible nature in the working programme of a yard' within the meaning of the second subparagraph of Article 4(3) of the directive.

Adoption of a new port law

40 In December 1991, the announcement of the imminent amendment of Spain's very old port legislation caused a great degree of uncertainty. The applicant maintains that the new law, finally adopted on 24 November 1992 and concerning both the merchant navy and the regulation of ports ('ley de puertos y de la marina mercante'), contained several amendments to the previous situation, particularly in relation to the system of port services, especially pilotage, and in relation to the penalties imposed for breaches of maritime safety.

41 That led to postponement of the contracts' entry into force and an increase in the demands of the contractors in safety matters. Certain clauses in the contracts were thus amended by riders in 1993, 1994 and 1995.

42 In the applicant's submission, those disruptions would appear to be substantial and defensible, which the Commission does not appear to deny in its decision.

43 Those disruptions were also unexpected within the meaning of Article 4(3) of the directive. The applicant submits that, by its nature, the adoption of a law constitutes an unforeseeable risk, being a general measure imposed by the public authorities which interferes in the area of private contracts. They maintain that that is particularly so in this case, since, at the date the contracts were signed, the aims and scope of the future law were not precisely known. Moreover, for as long as a law was not adopted, several amendments might intervene, especially where, as in this case, it was sharply contested. Finally, certain provisions were declared

unconstitutional by the Tribunal Constitucional (Spanish Constitutional Court, Judgment 40/1998 of 19 February 1998), which demonstrated the uncertainty that might prevail amongst shipowners at the time the law was adopted. In reality, the unexpected nature, within the meaning of Article 4(3) of the directive, related not to the adoption of a new law but to its scope, its final content and developments subsequent thereto, namely regulatory provisions made for the application of that law.

Devaluation of the peseta in 1992

44 That devaluation considerably raised the price of parts bought on other national markets and thus the costs of building tugboats. Major amendments were made to the technical specifications in the contracts in order to offset those effects. Therefore, the contracts' entry into force had to be postponed, their implementation was delayed, and the working programme of the yard was substantially affected (see, by way of analogy, Commission Decision 96/278/EC of 31 January 1996 concerning the recapitalisation of the Iberia company (OJ 1996 L 104, p. 25)).

45 A devaluation, being a sovereign decision of the State, constituted an unforeseeable disruption, even for a diligent and well-informed operator. In that respect, the applicant points out that, in the context of the European Monetary System, devaluations were a rare phenomenon, bearing in mind the rules governing that mechanism; moreover, the normal margin of fluctuation was at that time only 6%. Whilst the applicant might foresee a fluctuation of that order, it could not expect greater fluctuations.

Works in the port of Bilbao

46 Those works were decided upon by the port authorities, with a view to building a new fitting-out wharf. Although the applicant had received a verbal assurance that those works would be completed in April 1992, they were in fact carried out from May 1992 to May 1993; the new fitting-out wharf did not become operational until June 1994. Thus, whilst the existence of the works projects was known, their extent and duration, much greater than forecast, were unexpected. Similarly, the incorrect implementation of the works, about which the applicant complained to the port authorities, was unforeseeable.

47 Taking account of the proximity between those works and the applicant's shipyard, and, consequently, the unavailability of several installations in the yard, normal production activity was affected, as the Commission acknowledged in the decision. That necessarily had the effect of delaying the delivery of the tugboats. In particular, productivity diminished at that time and the undertaking recorded a significant reduction in keels laid, deliveries, and the number of contracts which entered into force. In fact, the construction of three of the tugboats at issue in this case had to be completed in dry dock, in the repair workshop.

The applicant's takeover of the business of the Ardeag shipyard

48 The applicant argues that, contrary to the Commission's assertions, the takeover of that business did not constitute a simple commercial choice on its part. The applicant was aware of the orders which it had undertaken to honour and of the fact that a delay in their delivery would entail the loss of half the aid authorised. In reality, the takeover was imposed by the Spanish Ministry of Industry under

the programme for restructuring the shipbuilding sector, as a condition for receiving the benefit of redeployment aid programmes. On 18 March 1992, the Director-General of the Ministry of Industry approved the applicant's action programme for the period 1991/1993, which was amended after the takeover of Ardeag and approved on 10 March 1993; in anticipation of that amendment, all investments and implementation of the restructuring measures were suspended, entailing a temporary freeze on work.

49 That intervention by the administration in the area of industrial initiative was undeniably unexpected.

50 Moreover, the taking over of another shipyard's workload constituted a substantial and defensible disruption within the meaning of Article 4(3) of the directive. The fact that the takeover of the yard was accompanied by the granting of public aid did not affect that conclusion. Finally, the Commission should have taken account of the fact that four of the five tugboats were delivered within the three-year period envisaged by the directive, to which was to be added a period of ten months and thirteen days, corresponding to the 79 000 working hours that were necessary to fulfil Ardeag's obligations.

51 Having made those observations, the applicant also makes a number of general complaints against the Commission:

— first, the Commission did not undertake a full examination of the facts. In that respect, it was not enough simply to deplore the absence of evidence

relied upon by the applicant in support of its claims. The Commission could have remedied that by seeking the assistance of an independent expert who would have assessed the real impact of the disruptions referred to;

— next, the Commission should have carried out an overall assessment of the four circumstances described above. It would then have found that the conditions of Article 4(3) of the directive were sufficiently met in this case, since each of those conditions was fulfilled by at least one of the disruptions referred to by the applicant;

— finally, the Commission should have taken account of the particular situation of Spain in the shipbuilding industry.

Findings of the Court

52 It should be recalled, first, that the directive establishes, *inter alia*, the conditions in which operating aid in the shipbuilding industry may, exceptionally, be regarded as compatible with the common market (Joined Cases C-356/90 and C-180/91 *Belgium* v *Commission* [1993] ECR I-2323, paragraphs 24 to 32). Moreover, the second subparagraph of Article 4(3) of the directive itself establishes a system that is in derogation from the principles set out in the first subparagraph of that provision. It permits a departure from the principle of progressive reduction in the level of aid where ships are not built within the three-year period.

53 Therefore, the second subparagraph of Article 4(3) of the directive must be given a restrictive interpretation (Case T-155/97 *Natural van Dam and Danser Container Line* v *Commission* [1998] ECR II-3921, paragraph 31). Moreover, the very wording of that provision, with the cumulation of conditions, shows that the legislature intended to reserve its application for very specific situations.

54 Secondly, a Member State which seeks to be allowed to grant aid by way of derogation from the Treaty rules has a duty to collaborate with the Commission in the context of the procedure in which it participates (see paragraphs 13 and 16 above). In pursuance of that duty, it must in particular provide all the information necessary to enable the Commission to verify that the conditions for the derogation sought are fulfilled (Case C-364/90 *Italy* v *Commission* [1993] ECR I-2097, paragraph 20).

55 The complaint that the Commission failed to seek assistance from an independent expert when drafting the contested decision is therefore without foundation. Moreover, no provision in the Treaty or in Community legislation imposes such an obligation (Joined Cases T-371/94 and T-394/94 *British Airways and Others and British Midland Airways* v *Commission* [1998] ECR II-2405, paragraph 72).

56 Thirdly, it should be remembered that acts of Community institutions enjoy a presumption of legality (see, to that effect, Case 15/85 *Consorzio Cooperative d'Abruzzo* v *Commission* [1987] ECR 1005, paragraph 10), which it is for the applicant for annulment to rebut by adducing evidence capable of casting doubt upon the assessments made by the defendant institution.

57 It is necessary to examine, in the light of those principles, the complaints made by the applicant against the Commission's assessments on each of the circumstances relied upon.

58 Concerning the adoption of a new port law in Spain, the Court considers that, as the Commission stated in the decision, it has not been proven that that circumstance 'constituted a disruption to the working programme of [the applicant] that led to delivery of the vessels being delayed'. The applicant has not succeeded in establishing the causal link which it claims exists between the adoption of a new port law and the postponement of the entry into force of the contracts.

59 In that respect, it should be emphasised at the outset that none of the riders to the contracts contains the slightest reference to that new law or its implications.

60 Next, having regard to the general nature of the arguments set out in the applicant's pleadings, the Court of First Instance requested the applicant to 'state precisely in what way the amendments, particularly the technical ones, made to the contracts were aimed at complying with provisions of the law' in question. In particular, it was asked to produce a table showing, first, the amendments made to the contracts and, secondly, the provision or provisions of the law which justified those amendments.

61 The applicant produced such a table, which shows that all the technical amendments to the contracts were justified by Article 74 of the law alone. However, as the applicant itself has acknowledged, that article merely refers to

the objectives of the law in general terms. Such a provision cannot be accepted as being sufficient to establish a causal link with the precise technical amendments relied on by the applicant, such as the building of double walls in the engine rooms, new layout for fuel tanks, and an increase of more than 100% in the power of auxiliary engines.

62 Apart from the provisions of the law itself, the applicant has also referred to the climate of uncertainty engendered by that law, which it claims justified the postponement of the contracts' entry into force and the bringing of the vessels into the workshop.

63 In that respect, the applicant began by producing a large number of press cuttings, annexed to its application, designed to demonstrate the heated nature of the arguments concerning the draft law. It is apparent, however, that none of those cuttings concerns provisions of the law which would be capable of justifying technical amendments of the contracts. No causal link has therefore been established with the postponement of the contracts' entry into force.

64 The applicant has also referred to a judgment of the Tribunal Constitucional concerning the law in question. It is, however, apparent that none of the provisions submitted to that court bore any relation to the technical specifications of the tugboats which the applicant had to build or to the working programme of the yard.

65 Finally, the applicant has sought to justify the postponement of the contracts' entry into force by reference to the adoption of a framework of regulations for the implementation of the law. As is shown by its written replies to the questions of the Court of First Instance, however, the applicant's arguments have remained imprecise, citing merely an 'announced' extension of regulations 'involving

specific requirements on vessel safety'. Moreover, despite the years which have passed since the adoption of the law of 24 November 1992, the applicant has not cited any particular regulation to justify the contractual amendments which were made.

66 Having regard to the rules referred to above concerning the strict interpretation of derogatory provisions and the burden of proof, both before the Commission and before the Court of First Instance, it must be concluded that it has not been established that the adoption of the Spanish port law of 24 November 1992 justified the postponement of the entry into force of the contracts and thus affected the working programme of the yard.

67 Concerning next the devaluation of the peseta, it should be noted that this is the only circumstance relied upon by the applicant which is referred to in the riders to the contracts. The preamble to the riders produced before the Court of First Instance states that 'for the convenience of the shipowner and bearing in mind primarily the considerable increase in the peseta price of Voith engines, it is necessary to amend the specification and payment details of the construction contract'.

68 Those preambles show, however, that it was not the devaluation as such that entailed disruptions which affected the working programme of the yard, but the fact that the contracting parties chose to renegotiate their contracts in order to compensate for the effects of that devaluation. That is confirmed by the reference to the 'convenience of the shipowner' which appears in the preamble to the riders.

69 It should moreover be noted that, although the devaluation of the peseta occurred in October 1992, it was not until between 14 and 20 months later that the first riders were concluded. Therefore, it has not been established that the devaluation was the cause of the delay in the entry into force of the contracts and thus affected the working programme of the yard.

70 Furthermore, a devaluation cannot be described as an unexpected disruption within the meaning of the second subparagraph of Article 4(3) of the directive. The risks of both depreciation and devaluation of a currency are known in commerce. The fact that, as the applicant has emphasised, major devaluations were rare having regard to the European Monetary System which was then in force does not remove that risk, against which there are legal and financial means of making provision.

71 Concerning the works in the port of Bilbao, the Commission acknowledges in the decision that they entailed disruption which affected the activities of the yard. It has, however, disputed the unexpectedness and extent of that disruption.

72 In that regard, the Court considers that proof of the substantial nature of the disruption relied upon has not been adduced.

73 As the Commission pointed out in its decision, the level of the shipyard's activity during the period of the works does not appear to differ from that of the previous period. Thus, during the years 1992 and 1993, which correspond more particularly to the years of works in the port, the number of keels laid in the yard remained similar to that found in the years 1988 to 1991. Similarly, the number of vessel launches there in 1992 and 1993 was identical to, or higher than, that encountered from 1988 to 1991. The same finding may be made as regards vessel deliveries.

74 Concerning, finally, the takeover of the Ardeag shipyard, the Commission considered, *inter alia*, that the takeover of that shipyard constituted a commercial decision taken by the applicant and could not therefore benefit from the derogation in the second subparagraph of Article 4(3) of the directive.

75 It should be noted that the applicant does not deny that that provision can refer only to disruptions that are external to the shipyard.

76 It merely argues that the takeover of the shipyard was 'imposed' upon it by the Spanish authorities and thus constitutes a circumstance outside its volition. In its application, it gave no further detail on that assertion but proposed to support it 'at the stage of giving evidence in court'. The Court requested the applicant to follow up that offer of proof.

77 In reply to the Court's question, the applicant modified its statement, merely indicating that the Spanish authorities had 'favoured' that link. It based its argument on a sentence taken from a letter from the Spanish authorities to the Commission of 24 January 1997, according to which 'the acquisition of Ardeag [took place] in the context of marked redeployment in the industry and [was] directly favoured by the Spanish administration itself; moreover, it could not have been otherwise, in the context of the Community policy leading to the reduction and concentration of production capacity'.

78 That mere quotation is not sufficient to establish that the decision to take over the Ardeag shipyard is not the result of a commercial decision freely adopted by the applicant taking into account the whole of the circumstances, and in particular the investment aid of over ESP 500 million which it enjoyed on that occasion. It has therefore not been demonstrated that the takeover of the shipyard was the result of such pressure on the part of the Spanish authorities as to be external to the applicant.

79 Therefore, the takeover of the Ardeag shipyard cannot be regarded as a disruption which allows benefit to be taken of the derogation in the second

subparagraph of Article 4(3) of the directive. That conclusion accords moreover with the observations of the Spanish authorities in the administrative procedure. They acknowledged that the takeover of the Ardeag shipyard did not *per se* justify the delay in the delivery of the five tugboats (Point III(c), second subparagraph, in the recitals of the decision).

80 The applicant has therefore not established that the Commission made a legal or factual error in concluding that none of the circumstances relied upon fell within the second subparagraph of Article 4(3) of the directive.

81 The applicant has nevertheless maintained that the circumstances upon which it has relied should be assessed on an overall basis. Thus, one disruption might fulfil only some of the conditions laid down in the second subparagraph of Article 4(3) of the directive, while a second disruption fulfilled other criteria.

82 That argument cannot be accepted. First, the wording of the provision in question shows that the conditions listed there are cumulative. Moreover, the applicant's argument would run directly counter to the principle that rules in derogation are to be interpreted narrowly, giving the provision in question a manifestly wider scope than that sought by the legislature.

83 It follows that the plea in law must be dismissed in its entirety.

The alternative plea, alleging infringement of the principle of proportionality

Arguments of the applicant

84 The applicant recalls that the principle of proportionality is one of the general principles of Community law. Compliance with that principle is all the more necessary where important economic interests are at stake, as is the case here, given that the amount of the reduction in aid represents nearly ESP 135 million.

85 In this case, the applicant argues, it needs to be determined whether application by the Commission of the obligation imposed by the directive in order to be able to benefit, in this case, from aid of 9%, namely delivery of the tugboats within a three-year time-limit that is not in principle capable of extension, is proportionate to the consequence which follows from disregard of that condition, that is to say reduction of the aid level to half the percentage initially authorised (namely 4.5%).

86 Having regard to the serious consequences of the decision on the applicant's position, and to the fact that, in the shipbuilding industry, delays in construction are common, the applicant maintains that reduction of the aid ceiling would be disproportionate in relation to a delay of seven to fourteen months. That applies all the more since, in the decision, the Commission appears to acknowledge a period of ten months to be reasonable.

Findings of the Court

87 According to Article 4(3) of the directive, where a ship is delivered more than three years after the date of signature of the final contract, the ceiling applicable is

that which was in force three years before the date on which the ship was delivered, and not that in force at the date on which the contract was signed. In this case, the ceiling applicable was therefore 4.5% and not 9%.

88 According to the applicant, exceeding the three-year time-limit laid down for the delivery of ships from the signature of the final contracts should not lead to such a major reduction in the aid ceiling.

89 It is settled case-law that, in order to establish whether a provision of Community law complies with the principle of proportionality, it is necessary to ascertain whether the means which that provision applies to achieve its aim correspond to the importance of that aim and whether they are necessary in order to achieve it (Case C-357/88 *Hopermann* v *Bundesanstalt für Landwirtschaftliche Marktordnung* [1990] ECR I-1669, paragraph 14; Case C-118/89 *Lingenfelser* v *Germany* [1990] ECR I-2637, paragraph 12; Case C-155/89 *Belgian State* v *Philipp Brothers* [1990] ECR I-3265, paragraph 34; Case C-319/90 *Pressler* v *Germany* [1992] ECR I-203, paragraph 12). Those judgments show, moreover, that the establishment of an imperative time-limit entailing the outright lapse of a right may be regarded as compatible with the principle of proportionality, bearing in mind the purpose of the provision in question.

90 As is apparent from the general tenor of the directive and the recitals in the preamble thereto, the aim of the legislature was to make the shipbuilding industry 'efficient and competitive'. In that context, aid for restructuring the shipbuilding industry, especially if designed to promote the closure of yards or research and development, was favoured, in order to 'encourage restructuring in many yards' and to 'support the present trend in production towards more technologically-advanced ships', by comparison with operating aid, which was subject to ceilings. Bearing in mind that operating aid does not constitute the most efficient means of encouraging the European shipbuilding industry to improve its competitiveness, the directive provides that the ceiling is to be reviewed periodically, 'with the aim of progressively reducing the ceiling'.

91 By providing that a different ceiling is to be applied according to whether or not the ship is delivered within the three-year time limit from the signature of the final contract, the first subparagraph of Article 4(3) of the directive aims to prevent shipyards from avoiding the effect of the progressive reduction of the aid ceiling applicable. Otherwise, a yard might continue to enjoy a high aid ceiling for ships delivered several years after their order, without there being anything to justify that late delivery. Similarly, a yard would be able to take on orders benefiting from a high aid level at the end of the calendar year, just prior to the application of a reduction in the ceiling, knowing that the ships could not be completed within a reasonable time (Point IV, first paragraph, in the recitals of the decision).

92 In this case, first of all, it has been neither alleged nor established that the time-limit of three years laid down for the delivery of ships is abnormally short. It should be remembered in that respect that, under the terms of the contracts in dispute, the building of the tugboats was to last 14 months.

93 Moreover, the applicant has not produced any particular evidence to suggest that the reduction of the ceiling from 9% to 4.5% was excessive, having regard to the aims of the directive in the matter of aid to shipbuilding. It should also be noted that the three-year delivery period was substantially exceeded in this case. Delays of from seven to more than fifteen months, as the case may be, cannot be regarded as minor delays in respect of which the halving of the aid ceiling would be disproportionate. It should be emphasised in that regard that, contrary to the applicant's argument, there is nothing in the final paragraph of Point VI of the recitals of the decision to support the conclusion that the Commission regarded an excess time spent of ten months as 'reasonable'.

94 In those circumstances, the applicant has failed to demonstrate that the application of a different ceiling, in this case less by half, according to whether

or not the ships were delivered within a three-year time-limit from the signature of the final contract, would infringe the principle of proportionality.

95 Therefore, this plea in law must also be dismissed.

96 The application for the annulment of the decision must therefore be dismissed in its entirety.

The application for the production of documents

97 The applicant requests the Court to order the production of internal Commission documents relating to the adoption of the decision and the opening of the procedure which led to that adoption.

98 The Court notes that the applicant does not explain in what way the documents the production of which it requests are necessary for the purposes of these proceedings.

99 It is therefore not appropriate to accede to that request.

Costs

100 Under Article 87(2) of the Rules of Procedure of the Court of First Instance, the unsuccessful party is to be ordered to pay the costs if they have been applied for in

the successful party's pleadings. In this case, as the applicant has been unsuccessful, it must be ordered to pay the costs in accordance with the forms of order sought by the Commission.

On those grounds,

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

hereby:

1. Dismisses the action;

2. Orders the applicant to pay the costs.

Potocki Lenaerts Azizi

Pirrung Meij

Delivered in open court in Luxembourg on 16 March 2000.

H. Jung A. Potocki

Registrar President