OPINION OF ADVOCATE GENERAL COSMAS

delivered on 11 May 1999 *

Table of contents

I — Introduction I-8242

II — Legal framework I-8243

A — Treaty provisions and case-law of the Court on the extent of the Commission's powers I-8243

B — Guidelines for the examination of State aids in the fisheries and aquaculture sector I-8245

III — Facts I-8247

A — The procedure prior to the adoption of contested Commission Decision 96/563/EC I-8247

B — The main points of the Commission decision I-8250

IV — Pleadings of the parties I-8253

V — Examination of the pleas in law I-8253

A — First plea in law: infringement of the rights of the defence I-8254

B — Second plea in law: incorrect findings of fact I-8257

(a) The presentation of new material I-8258

(b) Substance I-8258

(1) Amount of aid I-8259

(i) Existence of other financing possibilities I-8259

(ii) Existence of other sureties I-8259

(iii) Reduction of production costs I-8260

(iv) Amount of aid and rate of interest of the loan I-8261

(v) Market developments I-8262

(vi) Overall assessment I-8263

(2) Findings of fact relating to the Guidelines I-8263

(3) Findings of fact concerning distortion of competition I-8264

C — Third plea in law: Misapplication of Article 92(1) of the Treaty I-8265

(a) Analysis of the case-law I-8265

* Original language: Greek.

(b) Analysis of the applicant's submissions I-8268
(1) The Guidelines I-8268
(2) Legal characterisation of the facts I-8271
(i) Determination of the amount of aid I-8271
(ii) Distortion of competition I-8272
(3) The obligation to state reasons I-8276
(i) Case-law of the Court I-8276
(ii) Examination of the applicant's arguments I-8278
D — Fourth plea in law: Misapplication of Article 92(3)(c) of the Treaty I-8280
VI — Conclusion I-8284

I — Introduction

1. By the present action, brought before the Court of Justice pursuant to Article 173 of the EC Treaty (now, after amendment, Article 230 EC), the Federal Republic of Germany seeks the annulment of Commission Decision 96/563/EC of 29 May 1996 on aid from the *Land* of Lower Saxony to JAKO Jadekost GmbH & Co. KG [1] ('the contested decision').

2. Specifically, in that decision, the Commission considered that the aid granted by Germany in 1994 to JAKO Jadekost GmbH & Co. KG in the form of security for a loan of DEM 10 688 025 by the *Land* of Lower Saxony was illegal, because it was accorded in breach of the procedural provisions contained in Article 93(3) of the EC Treaty (now Article 88(3) EC), and that in addition it was incompatible with the common market pursuant to Article 92(1) of the EC Treaty (now, after amendment, Article 87 EC).

3. The present case essentially raises three questions.

4. First of all, the question arises as to whether the fact that the Commission failed to transmit to a company concerned letters of its competitors can constitute a breach of its rights of defence, where, during the administrative procedure pre-

1 — OJ 1996 L 246, p. 43.

ceding the adoption of the decision by the Commission, the company was aware of the contents of its competitors' observations and was in a position to express its opinion on them.

II — Legal framework

A — *Treaty provisions and case-law of the Court on the extent of the Commission's powers*

5. Next, the question arises, on the one hand, as to whether the obligation to state reasons may depend upon the fact that certain factual or legal elements are not disputed during the procedure provided for under Article 93(2) of the Treaty. On the other hand, the question arises as to whether the pleas in law and facts relied upon by the applicant during that administrative procedure must be identical to those relied upon during proceedings before the Court.

6. Lastly, the question arises as to whether a presumption exists according to which operating aid (a) is in principle incompatible with Article 92(1) of the Treaty; (b) distorts, by its very nature, competition and is an obstacle to intra-Community trade; and (c) cannot in principle be considered compatible with the common market within the meaning of Article 92(3)(c) of the Treaty. If those points are answered in the affirmative, the further question arises as to whether the Commission can be discharged from the obligation to state reasons when issuing a decision under the procedure laid down in Article 93(2), or whether that obligation can be reduced to a minimum.

7. Article 92(1) and (3) provide:

'1. Save as otherwise provided in this Treaty, 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.

...

3. The following may be considered to be compatible with the common market:

...

(c) 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;

...'.

8. Article 93(2), first and second subparagraphs, and (3) provide:

'2. If, after giving notice to the parties concerned to submit their comments, the Commission finds that aid granted by a State or through State resources is not compatible with the common market having regard to Article 92, or that such aid is being misused, it shall decide that the State concerned shall abolish or alter such aid within a period of time to be determined by the Commission.

If the State concerned does not comply with this decision within the prescribed time, the Commission or any other interested State may, in derogation from the provisions of Articles 169 and 170, refer the matter to the Court of Justice direct.

...

3. The Commission shall be informed, in sufficient time to enable it to submit its comments, of any plans to grant or alter aid. If it considers that any such plan is not compatible with the common market having regard to Article 92, it shall without delay initiate the procedure provided for in paragraph 2. The Member State concerned shall not put its proposed measures into effect until this procedure has resulted in a final decision.'

9. The Court has given numerous judgments regarding the scope of the powers enjoyed by Community institutions in the framework of the responsibilities laid down under the Treaty provisions on competition and the review which the Court may undertake where those institutions enjoy substantial discretion.

10. Specifically, the Court's case-law provides numerous examples of judgments concerning the powers of the Commission within the framework of Articles 92 and 93(2) and (3) of the Treaty. For example, in its judgment in *Matra* v *Commission*,[2] the Court stated that 'as regards the application of Article 93(3) of the Treaty, the Commission enjoys a wide discretion, the exercise of which involves assessments of an economic and social nature which must be made within a Community context'. The Court then goes on (in paragraph 25) to point out that in its review of legality, the Court must restrict itself to determining whether the Commission has exceeded the

2 — Case C-225/91 [1993] ECR I-3203, paragraph 24.

scope of its discretion by a distortion or manifest error of assessment of the facts or by misuse of powers or abuse of process. [3]

11. Thus the Court, which may not, in such cases, substitute its assessment for that of the competent institution, must seek to attain a reasonable degree of certainty, on examining the evidence and counter-evidence produced by the parties, that no error has been made as to the facts or their legal characterisation which might affect the validity of the Commission's decision [4] or that the facts have not been evaluated in a way that is manifestly erroneous.

B — *Guidelines for the examination of State aids in the fisheries and aquaculture sector*

12. The Guidelines for the examination of State aids in the fisheries and aquaculture sector [5] (hereinafter 'the Guidelines'), in so far as they are of relevance in the present case, provide as follows:

'1. General Principles

1.1. These guidelines relate to all measures entailing a financial advantage in any form whatsoever funded from the budgets of public authorities (national, regional or provincial, departmental or local). They relate, in particular, to capital transfers, reduced-interest loans, and certain State holdings in the capital of undertakings, aid financed by special levies and aid granted in the form of State security for bank loans or the reduction of an exemption from charges or taxes, including accelerated depreciation and the reduction of social contributions.

All these measures are covered by the term "State aids" as used in this document.

3 — See also similar judgments (on the extent of the Commission's powers deriving from Article 92(3)) in the earlier judgments in Case 301/85 *Deufil* v *Commission* [1987] ECR 901, paragraph 18; Case C-301/87 *France* v *Commission* [1990] ECR I-307, paragraph 49; Case C-142/87 *Belgium* v *Commission* [1990] ECR I-959, paragraph 56; and Case C-303/88 *Italy* v *Commission* [1991] ECR I-1433, paragraph 34.

4 — See also section A, *in fine*, of the Opinion of Advocate General Gand in Case 8/65 *Acciaierie e Ferriere Pugliesi* v *High Authority* [1966] ECR 1.

5 — OJ 1992 C 152, p. 2.

...

Consequently the following principles apply:

1.3. State aids may be granted only if they are consistent with the objectives of the common policy.

— State aids must not impede the application of the rules of the common fisheries policy. Therefore in no circumstances can aids to the export of or to trade in fishery products within the Community be deemed compatible with the common market;

Aids may not be conservative in their effect: they must serve to promote the rationalisation and efficiency of the production and marketing of fishery products in a way which encourages and accelerates the adaptation of the industry to the new situation it faces at Community level.

— those aspects of the common fisheries policy that cannot be considered to have been thoroughly resolved, in particular as regards structural policy, may still warrant State aids provided such aids comply with the objectives of the common rules so as not to jeopardise or risk distorting the full effect of these rules; this is why they must, where appropriate, form part of guidance programmes provided for under Community rules;

In more practical terms, aids must provide incentives for development and adaptation which cannot be undertaken under normal market circumstances because of insufficient flexibility in the sector and the limited financial capacity of those employed in it. They must yield lasting improvements so that the industry can continue to develop solely on the basis of market earnings. Their duration must therefore be limited to the time needed to achieve the desired improvements and adaptations.

— State aids which are granted without imposing any obligation on the part of recipients and which are intended to improve the liquidity situation of their undertakings the amount of which depends on the quantity produced or marketed,

the prices of products, the unit of production or the factors of production and the result of which would be a reduction in the recipient's production costs or an improvement in the recipient's income are, as operating aids, incompatible with the common market. The Commission will examine such aids on a case-by-case basis where they are directly linked to a restructuring plan considered to be compatible with the common market'.

III — Facts

A — *The procedure prior to the adoption of contested Commission Decision 96/563/EC*

13. The company Jadekost GmbH & Co. KG (hereinafter 'Jadekost') has its registered office in Wilhelmshaven (Germany). It was founded in August 1991. It was part of the 'Nordfrost' group, whose majority shareholder was the managing director of Jadekost.

14. Jadekost specialises in manufacturing and marketing deep-frozen products (fish and meat-based products as well as ready-made dishes). The company had one production centre for processing fish products and another for processing meat products, with both centres operating several production lines.

15. In June 1993 Jadekost began producing deep-frozen fish products (fish fingers, fish fillets and 'gourmet' fish fillets). It was around this time that the market in question experienced sharp drops in prices.

16. As a result of its cash-flow problems, Jadekost endeavoured to obtain a security from the *Land* of Lower Saxony for an operating loan granted to it by its bank, the Bayerische Hypotheken-und Wechselbank AG.

17. On 2 February 1994 Jadekost, on the basis of a favourable business analysis carried out by the aforementioned bank, submitted to the *Land* authorities an application for a security to secure an 'operating loan for the company's working assets'.

18. On 1 March 1994 the Government of the *Land* of Lower Saxony decided to provide an 80% security for an operating loan of DEM 35 000 000 as well as offering to cover additional liquidity require-

ments, assessed at DEM 15 000 000, until December 1996. In its decision, the *Land* Ministry stated that such security was provided subject to the decision of the *Land* Loans Committee as well as being subject to approval by the Budget Committee of the Lower Saxony Parliament.

19. C & L Treuarbeit — Deutsche Revision prepared a business report, dated 29 March 1994, on the management of Jadekost. The report found that Jadekost's planning data were realistic, but at the same time assessed the risk for the security as high.

20. On 6 April 1994 the *Land* Loans Committee approved the security.

21. On the basis of the decision by the *Land* Loans Committee, the Treuarbeit, in a letter dated 6 April 1994 for and on behalf of the Lower Saxony Finance Ministry, informed the Bayerische Hypotheken- und Wechselbank that the security had been granted, giving the detailed conditions of approval. The loan was for an eight-year period, with no repayment requirements in the first two years.

22. On 27 April 1994, the Budget Committee of the *Landtag* gave its consent.

23. In a letter of 2 May 1994 the *Land* Finance Ministry informed Jadekost that its application for a security had been officially approved, and expressly indicated that the purpose of the security was to 'provide security for an operating loan' ('purpose of use of loan: operating funds').

24. A number of competitors and associations in Germany, Denmark, France and the United Kingdom provided the Commission with information indicating that the *Land* of Lower Saxony had granted aid to Jadekost in the form of a security for an operating loan.

25. In a letter of 30 June 1994, the Commission asked Germany for a statement on the matter and expressed doubt as to whether the aid was compatible with point 1.3 of the Guidelines.

26. In a letter dated 19 July 1994, Germany replied, stating, *inter alia*, that the security provided for the operating loan constituted the equivalent of the investments made with the company's own funds. If the secured loan had been used for investment, the company would have been able to use DEM 32 500 000 of its own

funds as operating funds. The aid would then have complied with the Guidelines.

27. On 31 August 1994, a discussion of the case took place between representatives of the Commission, the Federal Ministry of Food, Agriculture and Forestry, and the Lower Saxony Ministries of Economic Affairs, Technology and Transport and of Agriculture and Forestry.

28. In a letter of 1 September 1994, the Commission requested further information, and the information was provided within the time-limit for a reply, on 13 October and 2 November 1994.

29. Subsequently, by letter of 20 February 1995, the Commission notified the Federal Republic of Germany that it had decided to initiate the procedure laid down in Article 93(2) of the Treaty and gave it notice to submit its comments within one month.

30. On 31 March 1995 bankruptcy proceedings were initiated against Jadekost. Loans were called in. Those not covered by the proceeds realised, including payment of interest and security fees, were entered in the bankruptcy schedule.

31. By letter of 13 April 1995, the German Government stated that those parts of the security which did not have to be attributed exclusively to specific sectors should be regarded as approved aid, since the security in question had been granted in accordance with the General Directives on Securities of the *Land* of Lower Saxony, which had been approved by the Commission. The *Land* also maintained that, in assessing the legality of the aid, a comprehensive approach should be taken and the loans should not be artificially separated. The distinction between investment loans and operating loans was arbitrary and assessment of the legality of the aid should not be based on it. What should therefore be examined was whether and, if so, how much aid was permissible for the investment in total. Consequently, there was no operating aid incompatible with the common market, because none of the conditions listed in point 1.3 of the Guidelines applied.

32. In a Notice published in the *Official Journal of the European Communities*[6] pursuant to Article 93(2) of the EC Treaty, the Commission informed the other Member States and interested parties of the situation and invited them to submit their comments to the Commission within one month.

33. The German Government replied to that Notice by letter of 1 September 1995.

6 — OJ 1995 C 201, p. 6.

It summarised the contents of its previous letters and raised a number of new points.

34. On 29 May 1996 the Commission adopted the contested Decision *96/563* on aid from the *Land* of Lower Saxony to the company Jadekost.

B — *The main points of the Commission decision*

35. In section IV of the grounds of the contested decision, the Commission outlines why it considers the security granted by the *Land* of Lower Saxony to Jadekost to be unlawful.

36. Firstly it points out that the financial aid provided in the form of a security by the *Land* of Lower Saxony must be assessed in the light of Article 92(1) of the Treaty and the Guidelines (first and second paragraphs).

37. The subsidy granted to Jadekost was an operating loan and thus, pursuant to Section 1.3 of the Guidelines, incompatible with the common market within the meaning of Article 92(1) of the Treaty. Neither the German Government nor other interested parties had questioned the Commission's assessment. Under point 1.1 of the Guidelines, the granting of a State security for a bank loan was to be regarded as aid (paragraphs 8, 2 and 3). [7]

38. The amount of aid corresponded in full to the loan. Jadekost thus obtained, with the assistance of the *Land* of Lower Saxony, financing which it would otherwise not have been granted on account of its financial difficulties. In other words, since, owing to the undertaking's severe financial circumstances, no credit institution would have agreed to lend to it without a State guarantee, the entire amount of the loan must be regarded as aid. Moreover, since the security was the precondition for granting the loan, it contained a clear aid element which — because of the very high risk of the security [8] — corresponded in full to the loan granted. Although the aid was granted by the *Land* of Lower Saxony, it was nevertheless to be categorised as aid granted by Germany (paragraphs 5 to 7).

39. The aid in question was granted without any obligation being imposed on Jadekost with regard to its use within the meaning of point 1.3 of the Guidelines (paragraph 9).

7 — The Commission stated (paragraph 7) that the aid deriving from such a loan guarantee is generally equal to the difference between the rate of interest on a loan raised on normal market terms and the actual rate secured by virtue of the guarantee.

8 — According to the report of C & L Treuarbeit of 29 March 1994.

40. In particular, the company benefiting from the aid did not pay the premium which should have been calculated on the basis of the very high risk taken on by the lender and the guarantor. [9] The application charge of DEM 140 000 and the administration fee of 0.75% were not adequate for that purpose. Taking the charge and fee into account, the net subsidy equivalent was 98.7% (100% minus 0.75% administration fee and 0.55% application charge (DEM 140 000 as a proportion of DEM 25 600 000) (paragraph 10).

41. The aid improved Jadekost's income since it freed the company from costs which it would have had to bear in the normal course of business and the aid could not be classified under any other heading. This aid enabled Jadekost to offer its products at prices kept artificially low for the customers at a specific time. Point 1.3 of the Guidelines specifies that this type of operating aid is fundamentally incompatible with the common market, there being no need to examine the other conditions specified in Article 92(1) of the EC Treaty in order to establish this (paragraph 11).

42. It was further stated that the Commission considered that the aid granted to the Jadekost company did in fact threaten to distort competition. It benefited a particular company (Jadekost) and reduced the costs to be borne by that company, which artificially strengthened its position on the market. It was therefore liable to distort competition on the market in deep-frozen fish products with other companies in Germany and the other Member States which did not receive benefits of that type. There was competition on that market in the Community, and the products concerned were traded between the Member States. Since the aid granted to Jadekost strengthened the position of that company in relation to other companies, it was liable to distort trade between Member States (paragraph 12).

43. The Commission could not accept the 'comprehensive approach' advocated by Germany, according to which the security and the secured loan could not be considered separately from the project as a whole, i.e. the investment, and a *Land* security of DEM 32 500 000 could very well have been granted for the investment costs, which were covered without State subsidies, with the result that Jadekost would not have needed the *Land* security to finance its operating costs. In the Commission's view, when considering the legality of aid, the situation should be judged as it was at the time when the decision to grant aid was adopted, which in this case was early 1994. It was a fact that the security was expressly sought, and granted, for an operating loan and not for an investment loan. A 'comprehensive approach' should be rejected, since otherwise that could include an ever-increasing number of financing measures (paragraph 13).

9 — As is clear from the report of C & L Treuarbeit of 29 March 1994.

44. Since the Guidelines were only applicable to fish products, and only the proportion of the aid which supported that part of production was to be recovered, the percentage of fish products in comparison with meat products and ready-made dishes had to be determined (paragraph 14).

45. For that purpose the Commission took, as a basis, the quantities and turnover amounts stated by the German Government in its letter of 1 September 1995 from the sales plan for 1994 — the year in which the aid was granted. Of the total production of 20 000 tonnes, 45% were fish products, a further 45% were meat products and 10% were ready-made dishes. In terms of turnover in the different sectors, 42.3% was accounted for by fish products, 50% by meat products and 7.7% by ready-made dishes. The Commission took turnover as a proportion of fish products, resulting in a percentage of 42.3% (paragraph 14).

46. In calculating the amount to be recovered, the Commission stated that it had to be taken into account that the security only covered 80% of the DEM 35 000 000 loan, and the funds provided for the loan secured amounted to only DEM 32 000 000, 80% of which was DEM 25 600 000. On the basis of the premiss of a net subsidy equivalent of 98.7%, the resulting amount was DEM 25 267 200. Of that, DEM 10 688 025 (= 42.3%) came under the heading of fish products (paragraph 15).

47. In section V of the contested decision the Commission examined whether the exceptions contained in Articles 92(2) and 93(3) of the Treaty could apply to the case in point and came to the conclusion that they were not applicable due to the nature and objectives of the aid.

48. Article 1 of the contested decision reads:

'The aid in the form of a security provided by the Land of Lower Saxony for a loan of DEM 10 688 025 granted by Germany in 1994 to JAKO Jadekost GmbH & Co. KG is illegal, having been granted in breach of the rules of procedure laid down in Article 93(3) of the EC Treaty. The aid is also incompatible with the common market within the meaning of Article 92(1) of the EC Treaty.'

49. Article 2 of the contested decision states:

'Germany shall ensure that the aid referred to in Article 1 is revoked and recovered in full within two months of the date of notification of this Decision.

...'

50. Pursuant to Article 3, Germany was to inform the Commission within two months of the date of notification of the Decision of the measures it had taken to comply with the decision.

51. Lastly, Article 4 provides that the Decision was addressed to the Federal Republic of Germany.

IV — Pleadings of the parties

52. The application of the Federal Republic of Germany (hereinafter 'the applicant') was lodged at the Registry of the Court of Justice on 26 August 1996.

53. The applicant is seeking the annulment of Commission Decision 96/563/EC of 29 May 1996 on aid from the *Land* of Lower Saxony to the company JAKO Jadekost GmbH & Co. KG and an order that the Commission pay the costs of the proceedings.

54. The Commission asks the Court to dismiss the application and order the applicant to pay the costs.

V — Examination of the pleas in law

55. The applicant puts forward four pleas in law in which it complains of: (a) infringement of the rights of the defence; (b) incorrect findings of fact; (c) misapplication of Article 92(1) of the Treaty and infringement of the obligation to state reasons pursuant to Article 190 of the EC Treaty (now Article 253 EC); (d) misapplication by the Commission of Article 92(3)(c) of the Treaty and infringement of the obligation to state reasons.

A — *First plea in law: infringement of the rights of the defence*

56. By its first plea in law, the German Government contends that the contested decision is illegal because the fundamental principle that the rights of the defence must be observed was infringed. In particular the Commission granted neither the applicant nor the *Land* of Lower Saxony access to the observations of four competitors of Jadekost, which had been sent to the Commission during the administrative procedure. The German Government maintains that that omission also constitutes an infringement of an essential procedural requirement within the meaning of the second paragraph of Article 173 of the Treaty, entailing the invalidity of the contested decision.

57. The Commission states that, through inadvertence, the letters from the competing companies were not communicated to the applicant. Nevertheless, it maintains that this constitutes an infringement of the rights of the defence only if the outcome of the procedure might have been different without the omission. It considers that the observations of the competitors contained nothing of relevance to the assessment of the facts in the light of the competition rules that the applicant had not already brought to the attention of the Commission during the various stages of the procedure in which the Commission had examined the contested aid.

58. According to the settled case-law of the Court, [10] observance of the right to be heard is, in all proceedings initiated against a person which are liable to culminate in a measure adversely affecting that person, a fundamental principle of Community law which must be guaranteed even in the absence of any rules governing the proceedings in question. That principle requires that the addressees of decisions which significantly affect their interests should be placed in a position in which they may effectively make known their views. In other words, 'the person against whom an administrative procedure has been initiated must have been afforded the opportunity, during that procedure, to make known his views on the truth and relevance of the facts and circumstances alleged and on the documents used by the Commission to support its claim that there has been an infringement of Community law'. [11]

59. Moreover the Court has recognised that this principle requires the Member State in question to be placed in a position in which it may effectively make known its views on the observations submitted by interested third parties under Article 93(2) of the Treaty and on which the Commission proposes to base its decision. The Court has held that, in so far as the Member State had not been afforded the opportunity to comment on such observations, the Commission could not incorporate them in its decision against that State. [12]

10 — See, for instance, Case C-32/95 P *Commission* v *Lisrestal and Others* [1996] ECR I-5373, paragraph 21.

11 — See, for instance, Case 40/85 *Belgium* v *Commission* [1986] 2321, paragraph 28.

12 — See, for instance, Case C-301/87 *France* v *Commission* (*Boussac*) (cited in footnote 3), paragraph 30.

60. The Court further stated: [13] 'However, in order for such an infringement of the right to be heard to result in annulment, it is necessary to establish that, had it not been for such an irregularity, the outcome of the procedure might have been different.'

61. I would point out that, in Case C-301/87 (*Boussac*), [14] the Court noted that the observations in question, which were lodged with the Court at its request, did not contain any information in addition to that which the Commission already possessed and of which the French Government was aware. Under those circumstances, the fact that the French Government did not have an opportunity to comment on those observations was not likely to influence the outcome of the administrative procedure. The Court accordingly rejected that complaint.

62. In my view, the purpose of the procedure by which full protection of the right to be heard is secured is not affected if, despite not having been informed of certain documents during the course of an administrative procedure, the party concerned was able to take cognisance of the documents in question at subsequent stages of the procedure, and was thus in a position to comment upon any complaints based upon such facts.

63. Furthermore, the contested decision could be annulled on that ground only if, had it not been for such an irregularity, the outcome of the procedure might have been different. The burden of proof in this respect rests with the party contending that certain information contained in the documents which were not made accessible at the proper time would have significantly influenced the contents of the contested decision had they been submitted to the Court and had that party been made aware of them.

64. First, in regard to the observations of Jadekost's competitors, which the Commission took into consideration before publishing its Notice, it is clear from the case-file that the applicant was aware of their contents [15] and that it was in a position to comment upon the Commission's complaints. [16] As can also be inferred from the Commission's letters to the German Government, [17] as well as from those of the latter to the Commission, [18] the German Government's representatives were aware of the legal and factual context in which the Commission placed the infringement of Community law alleged by it, as section IV of the grounds of the contested decision explains.

13 — Ibid., paragraph 31. See also Case 259/85 *France* v *Commission* [1987] 4393, paragraph 13.

14 — In that case, France had applied for the annulment of a Commission decision regarding aid granted by the French Government to a producer of textiles, clothing and paper products, Boussac Saint Frères.

15 — This is clear from the Commission's facsimile of 1 September 1994 to the German Government, which has been submitted as annex B3 to the Commission's defence. In that facsimile, the applicant was requested to provide various information regarding the competitive practices of Jadekost in the area of pricing and in regard to its production costs.

16 — The Commission contends that the details contained in the letters of the competing companies were discussed with the applicant during meetings held on 31 August 1994 and 28 November 1995.

17 — See also the letters of 30 June 1994 and 20 February 1995 which have been submitted as annexes B1 and B6 to the Commission's defence.

18 — Letters of 2 November 1994 and 13 April 1995 submitted as annexes B5 and B7 to the Commission's defence.

65. It is clear from Commission Notice 95/C 201/106, published on 5 August 1995 pursuant to Article 93(2), addressed to the other Member States and other interested parties, that the Commission provided details of the legal and factual framework within which it placed the infringement of Community law committed by the Federal Republic of Germany through aid granted in the form of a security by the *Land* of Lower Saxony to Jadekost. [19]

66. The letters sent to the Commission following publication in the Official Journal did not, in my opinion, contain any details that had not been brought to Germany's attention during the administrative procedure and on which it was not given the opportunity to comment. [20]

67. Specifically, I would point out that the companies Pickenpack Tiefkühlgesellschaft GmbH & Co. KG and Hussmann & Hahn GmbH & Co. set out, in a joint letter of 31 August 1995, [21] with reference to previous letters they had submitted, *inter alia*, their view in regard to the legality of the aid and stated that Jadekost had marketed its products at below production-cost prices and had thus caused its competitors to suffer significant losses. They maintained that it was because of the security granted by the *Land* that Jadekost managed to obtain the loan. Furthermore, it is equally clear from a letter of 1 September 1995 from Nordsee GmbH to the Government of the *Land* of Lower Saxony, which refers to two previous letters that had been sent to the *Land* authorities on 19 August 1994 and 23 September 1994, that Nordsee GmbH had complained to the Lower Saxony Finance Ministry of Jadekost's ruinous competition towards its competitors. [22] Thus Nordsee GmbH expressed its doubts as to the legality of the aid and claimed that Jadekost had used the financial aid granted it in order to win market shares by charging below-cost prices at the expense of its competitors. Finally it appears from a letter sent by Nordstern Lebensmittel AG on 4 September 1995 [23] that it had complained to the Commission that Jadekost had sought substantially to increase its share of the German market and that, with Jadekost's entry on the market, retail prices for deep-frozen products had been considerably squeezed. The result had been, according to Nordstern, [24] that Jadekost was brought to the brink of insolvency (*konkursreif*) as early as the beginning of 1994. [25] In addition Nordstern informed the Commission of developments on the market and the handling of the case by the Lower Saxony *Landtag*.

19 — The Notice referred to the 1994 Guidelines rather than to those of 1992, but that does not mean that the interested parties did not know which rules formed the basis for the infringement of Community law.

20 — Certain information contained in those letters is set out at the end of section II of the contested decision.

21 — This letter is submitted as annex B14 to the Commission's defence.

22 — This letter is submitted as annex B15 to the Commission's defence.

23 — This letter is submitted as annex B16 to the Commission's defence.

24 — The company in question points out, in the same letter, that in its letter of 2 March 1994 addressed to the *Land* Government, it had also expressed its reservations as to the amount of the security which could be justified by Jadekost's maximum expected turnover, and which should not have exceeded DEM 4 or 5 million.

25 — Insolvency proceedings were initiated against Jadekost on 31 March 1995.

68. In conclusion, I consider that the details contained in the aforementioned letters had, essentially, been brought to the attention of the applicant by means of the earlier letters of the Commission or during meetings and that the applicant was therefore in a position, prior to the adoption of the contested decision, to comment on them. In any event, any claim to the contrary by the applicant would, in the light of the detailed and protracted discussions which took place between the Commission and the German authorities during the various stages of the procedure, be very hard to justify. [26] Furthermore, I am of the opinion that the applicant, in its reply, has failed to demonstrate, in a sufficiently convincing manner, when it learned of the information contained in the letters written after publication of the Commission Notice, that, had it not been for such an irregularity, the outcome of the procedure might have been different.

69. In view of the foregoing, the first plea in law must be dismissed as unfounded.

B — *Second plea in law: incorrect findings of fact*

70. By its second plea in law, the German Government claims that the Commission established the facts with only partial accuracy and failed to make a number of essential findings.

71. In particular, the applicant considers, in regard to the submission of certain new evidence, the presentation of new findings or the raising of new objections in the application, that is to say, after the conclusion of the administrative procedure, that the point in time at which the decision was adopted is only of importance where the preceding administrative procedure was conducted lawfully. In other words, where the original procedure was carried out in an irregular manner, the applicant cannot be required to comply with a strict rule that the pleas relied upon in the application should correspond to those relied upon in the administrative procedure.

72. The applicant claims that the Commission failed to carry out the administrative procedure in a manner which would have enabled it, at the conclusion of the procedure, to have marshalled all the facts that were of importance for the adoption of the contested decision. The applicant further maintains that the Commission withheld from it factual and legal considerations of significance for the decision.

73. The applicant furthermore contends that it cannot be denied the right to submit arguments, information and documents at the stage of the application, that is, after the conclusion of the administrative procedure. The legal evaluation of the facts may be undertaken when the case is before the

26 — See point 24 of the Opinion of Advocate General Jacobs in Case C-301/87, *France* v *Commission* (cited in footnote 3).

Court, because a Member State is not obliged either to present a comprehensive and definitive evaluation of the facts or to provide legal arguments at the stage of the administrative procedure before the Commission. Moreover, Community law does not contain any express rules on the exclusion of objections.

(a) *The presentation of new material*

74. According to the settled case-law of the Court,[27] the legality of a decision concerning aid is to be assessed in the light of the information available to the Commission when the decision was adopted. As pointed out by Advocate General Darmon,[28] review by the Court is confined to the legality of the decision. The Court cannot reopen the examination of the proposed aid in the light of material not put forward at the stage of the procedure which led to the contested decision.

75. The Court has therefore, in certain cases, refused to admit certain facts which a Member State had failed to bring to the attention of the Commission when the latter had requested the Member State to do so.[29]

76. Consequently, I am of the view that any new facts which the applicant has put before the Court and which it failed to draw to the attention of the Commission, despite being requested to do so during the administrative procedure, may not be taken into consideration, even where what are involved are facts that are adduced in a complementary capacity and whose importance was not recognised by the applicant until after the contested decision had been adopted. That is because, in order for the Court to be able to review the legality of the contested decision, it is necessary for the arguments raised in the administrative procedure to correspond to the pleas in law contained in the application.

(b) *Substance*

77. The second plea in law is divided into three parts. The first concerns the determination of the amount of aid, the second the findings of fact in relation to the Guidelines and the third the findings in regard to distortion of competition.

27 — Case C-241/94 *France* v *Commission* [1996] ECR I-4551, paragraph 33; Case 234/84 *Belgium* v *Commission* [1986] ECR 2263, paragraph 16; and Case 84/82 *Germany* v *Commission* [1984] ECR 1451.

28 — Point 8, *in fine*, of the Opinion in Case 248/84 *Germany* v *Commission* [1987] ECR 4013.

29 — See, for instance, Case C-241/94 *France* v *Commission* (cited above in footnote 27), paragraphs 36 and 37.

(1) Amount of aid

78. In the first part of its second plea, the applicant maintains that the Commission committed errors in determining the facts in regard to the existence and the amount of the aid. This part of the plea is divided into six limbs.

(i) Existence of other financing possibilities

79. The applicant maintains that the Commission failed adequately to ascertain whether there were other financing possibilities for Jadekost, which it had not ruled out during the administrative procedure.

80. As can be seen from the case-file, the Commission took all the steps provided for under Article 93(2) in order to marshall the information necessary to assess the security at issue, accorded by the *Land* in order to guarantee the bank loan obtained by Jadekost.

81. The applicant first raised the issue as to the Commission's failure actively to ascertain whether there were other financing possibilities in its application to the Court rather than during the administrative procedure. Thus, for the reasons outlined above, this argument cannot be taken into consideration since it was not put forward during the administrative procedure.

82. Moreover, I am of the opinion that since the Commission adopts a decision on the basis of facts put forward by the Member State during the administrative procedure, the Commission is not obliged, in every case involving the granting of a security, to examine other hypothetical financing possibilities, in so far as the party concerned does not do so itself.

(ii) Existence of other sureties

83. The applicant maintains that the Commission, when determining the amount of aid, failed to take into account the existence of significant sureties in favour of Jadekost's creditor banks. [30]

84. I am not convinced by this argument. As the Commission has pointed out, it is clear from the documents submitted by the

30 — In particular — in section III, paragraph 6, fourth sentence of its Decision, the Commission states that 'Since only very limited securities were available in the start-up phase, Jadekost took steps to obtain a security from the *Land* for the operating loans granted to it by its bank, the Bayerische Hypotheken- und Wechselbank AG.'

applicant, as well as from the position taken by the *Land* of Lower Saxony and the business report of the auditors, that other sureties were only of limited value. [31] In particular, the reasons as to why the risk for the provider of the security was very high are explained on p. 30 of C & L Deutsche Revision's business report, which the applicant submitted to the Commission as an annex to its letter of 3 January 1996. [32]

85. Furthermore, as the Commission notes (in point 46 of its defence), the *Land* of Lower Saxony had stated, in response to a question put to it in the *Landtag*: 'It was precisely because of the risk involved in granting the security that the approval of the Cabinet and the Budget Committee of the Lower Saxony *Landtag* was sought ... the majority of the Cabinet members and the members of the Budget Committee were in favour of providing the security. The *Land* was faced with the choice of either helping the company to overcome its current difficulties or, by refusing to do so, bringing about the company's bankruptcy.' [33]

86. Lastly, I am of the opinion that the Commission's position is corroborated by the provisions of the Land of Lower Saxony's General Directives on Securities concerning the conditions to be met for the *Land* of Lower Saxony to act as guarantor. In particular, point 3 of those General Directives, referred to in paragraph 120 of the Commission's defence, lays down the principle of subsidiarity, in accordance with which 'a security shall not in principle be given unless the measures cannot be implemented otherwise, in particular because sufficient sureties are not available and it is not possible to obtain the security from the Niedersächsische Bürgschaftsbank (NBB) GmbH'.

(iii) Reduction of production costs

87. The applicant argues that the security was not a *conditio sine qua non* for production. The decrease in production costs did not amount to 100% as the Commission claims, because production costs increased due to the fact that the company had to pay higher interest rates. Only the reduced interest rate on account of the security could lower the undertakings's costs.

88. On this point I think it suffices to point out, in agreement with the Commission, that the granting of a security resulted in a reduction of the company's costs, and that that finding by the Commission is not manifestly wrong. That is because, without the loan for which the security was provided, the recipient company would not

31 — As the Commission also notes, the applicant stated, in its letter of 19 July 1994 (annex B2 to the Commission's defence), that 'to guarantee operational funding the banks required an 80% security to be provided by the Land of Lower Saxony for a credit of DEM 35 000 000.'

32 — The Commission submitted this letter as annex B 9 to its defence.

33 — According to section 1.3 of the aforementioned General Directives on Securities, referred to by the Commission in point 46 of its defence, an application for a security requires the approval of the Budget Committee of the (Lower Saxony) *Landtag* if there is any departure from the Guidelines.

have been in a position to continue production, is so far as it would not have had the credits it required in order to continue its activities. That point will, however, be developed below when I examine, first, the fourth limb of the first part of the second plea in law and, second, the third plea in law, in particular as regards the determination of the amount of the aid.

(iv) Amount of aid and rate of interest of the loan

89. In regard to the amount of aid and the rate of interest on the loan, the applicant claims, first, that the risk entered into by the guarantor (the *Land* of Lower Saxony) did not correspond to the full amount for which the security had been granted. [34] It cites the *Land's* Directives on Securities, according to which reimbursement of the loan for which security is to be granted must be highly probable. The applicant goes on to maintain that the rate of interest at which Jadekost was accorded the loan was higher than the average market rate of interest which banks were charging for similar loans. The Commission had neglected to carry out a comparison of the interest rates usually charged on bank loans.

90. I would first like to recall that the Court, in *Boussac*, [35] when examining the question whether certain measures [36] which the French Government had taken in favour of the textiles, clothing and paper products company, Boussac Saint Frères, constituted State aid, held that it was necessary to apply the criterion of 'the opportunities open to the undertaking of acquiring the amounts in question on the capital market'. The Court then pointed out (paragraph 40) *inter alia* that it was apparent from the documents before it that the financial situation of the company in question was such that it 'would not, in view of its inadequate margin of self-financing, have been in a position to acquire the necessary funds on the capital market'. The Court also noted that the first private investments, which were much lower than the contributions of public funds, were only made after the latter had been allocated. It therefore concluded that the capital contributions made to the recipient undertaking (*Boussac*) constituted State aid within the meaning of Article 92(1) of the Treaty.

91. In the light of that case-law, I consider that the Commission is correct in contending that the amount of aid corresponds to the whole amount for which the security was granted. That is because, given that the risk involved for the guarantor was very

34 — The point was repeated at the hearing, in reliance on the relevant Commission Notice (Commission Notice on the *de minimis* rule for State aid (96/C 68/06) OJ 1996 C 68, p. 9), that, where significant sureties exist, the aid cannot be equal to 100% of the amount for which the aid was granted.

35 — Case C-301/87 *France* v *Commission* (cited in footnote 3), paragraph 39.

36 — Capital contributions, loans at reduced rates of interest and reductions in social security charges.

high, as certified by the report of C & L Deutsche Revision, had it not been for the security, the loan to Jadekost would never have been granted. Consequently, without the security, the company could not have continued operations and production, but would have gone into receivership. The granting of the security made it possible for Jadekost to obtain the loan required in order for it to continue its operations and the amount of the aid cannot be distinguished from the amount of the loan granted; the Commission's conclusion is not, in my opinion, manifestly wrong. [37] In view of the above, it is not necessary to examine whether the interest rate of the loan granted, in comparison with the usual market interest rate for loans at the time in question, shows that Jadekost was placed in a more favourable position in regard to its competitors.

(v) Market developments

92. The applicant maintains that the fall in prices observed in the fish products sector had already begun before Jadekost's entry into the market in June 1993 and had continued independently of the latter's activities. In that connection the applicant refers to the report by C & L Deutsche Revision, which concluded that Jadekost enjoyed good future prospects. It states further that neither the Nordfrost group nor its competitors had predicted the saturation of the market. Essentially, the applicant is of the view that the Commission assessed developments on the relevant market in too negative a manner.

93. In the Commission's view, the applicant's information shows that Jadekost could only have made a negligible profit.

94. In my opinion, the Commission's assessment corresponds to that in the business report of C & L Deutsche Revision, which concluded that, in the light of the reduction in its financial capacity, the very unpredictable development of the Nordfrost group and market developments, the risk for the security was very high. That was confirmed by the fact that on 31 March 1995 insolvency proceedings were opened against Jadekost. Furthermore, the information contained in the business report of C & L Deutsche Revi-

37 — The Commission Notice (96/C 68/06), relied upon by the applicant, takes merely the form of guidelines whose essential characteristic consists in clarifying the Commission's policy in different sectors (in regard to the meaning of guidelines, particularly under French law, see Prokopios Pavlopoulos, 'La directive en droit administratif', Paris LGDJ, 1978 (in the 'Bibliothèque de Droit Public' series, volume 128, XX, 268 pages), passim, Jean Boulouis, 'Sur une catégorie nouvelle d'actes juridiques: les "directives" in "Recueil d'Études en hommage à Charles Eisenmann", Paris, Cujas publishers, 1977, p. 191; and Pierre Delvolé, "La notion de directive" in *AJDA* 1974, p. 459)'. Furthermore, I am of the opinion that one cannot infer from the Notice that the Commission's findings and assessment are manifestly wrong inasmuch as the risk to the guarantor was, as I have already pointed out, considered to be very high due to the financial situation of Jadekost.
I would point out that, according to the Notice in question, the cash grant equivalent for loan guarantees in a given year can be either (1) calculated in the same way, as the cash grant equivalent of a soft loan, once the premiums paid have been deducted, the interest subsidy representing the difference between the reference interest rate and the rate obtained owing to the State guarantee, or (2) taken to be the difference between (a) the outstanding sum guaranteed, multiplied by the risk factor (the probability of default) and (b) any premium paid, i.e. (guaranteed sum × risk) — premium.
In the present case, the security granted corresponded to 80% of the DEM 35 000 000 loan accorded to Jadekost. After deduction of application and surety fees, the net subsidy equivalent corresponds to 98.7% of DEM 25 600 000, which was the amount of the security. If one applies the net subsidy equivalent of 98.7%, one obtains the sum of DEM 25 267 200 to which the securities correspond. Of that amount, DEM 10 688 025 (equivalent to 42.3%) represented fish products.

sion leads one, in my opinion, to the conclusion that in the present case, there has been neither an inaccurate finding of the facts nor a manifestly incorrect assessment on the part of the Commission, so that this plea in law must also be rejected as unfounded.

(vi) Overall assessment

95. The applicant contends that there was a connection between the additional liquidity requirements of Jadekost and the global investment plan. As a result, the security given by the *Land* could be used to finance remaining investments so that Jadekost's own funds could be employed to cover its liquidity requirements. The applicant points out that it was purely for reasons of simplification that it decided to use it as 'operating aid'; it does not claim that the security was granted as an investment credit rather than an operating credit. The applicant argues that the decisive factor in an overall assessment is, however, the fact that the total amount of the aid granted to Jadekost does not exceed the ceiling approved for carrying out the aid project.

96. The Commission points out that, until 13 April 1995, the applicant had itself characterised the loan for which the security was given as an operating credit. [38] That is evident from all the available banking documents, Jadekost's application to the Government of the Land of Lower Saxony, [39] the decision by the *Land* Government of 1 March 1994 [40] and the decision of the *Land* Loans Committee of 6 April 1994. [41]

97. From the above it follows, in my opinion, that there has been no error, and certainly no material error, on the part of the Commission in regard to establishing the facts because it failed to carry out an overall assessment of the investment plan to be put into effect by Jadekost, but rather focused its analysis solely on the part of the plan relating to Jadekost's liquidity requirements, in view of which the aid was granted.

(2) Findings of fact relating to the Guidelines

98. The second part of the applicant's second plea concerns the findings of fact in regard to the Guidelines for the fisheries

38 — The Commission submits a letter dated 22 July 1994 addressed to it (annex B2 to its defence).

39 — In that application, submitted as annex B19 to the Commission's defence, the proposed use of the loan is described as 'Betriebsmittelkredit fur das Umlaufvermogen'.

40 — Reproduced verbatim in section III, paragraph 6, *in fine*, of the contested decision.

41 — That decision has been submitted as annex B2 to the Commission's defence. The Commission contends that this can also be inferred from the decision of 2 May 1994 to approve the security.

sector. In particular, the applicant contends that the Commission did not take account of the fact that the security in question was granted on condition that Jadekost complied with the financing plan drawn up by Jadekost on 23 March 1994, as up-dated on 18 October 1994, which provided for use of the funds; compliance with the plan was to be monitored by the *Land* of Lower Saxony. That plan corresponds to that presented in the findings of the business reports for the years 1994 and 1995. Furthermore the applicant states that the contested decision contains no findings in regard to the quantities produced or in regard to the units or factors of production.

99. Nevertheless, as the Commission has pointed out, the financing plan was taken into consideration by the contested decision. [42] Furthermore, the contested decision contained an alternative application of the criteria set out under point 1.3 of the Guidelines, so that the Commission was under no obligation to examine whether the security was in any way linked to quantities produced and so forth. Consequently, the applicant's contention that in this case there is no finding of fact by the Commission relating to the application of the Guidelines is unfounded.

(3) Findings of fact concerning distortion of competition

100. By the third part of the second plea, the applicant contends that the Commission's findings relating either to the fact that the aid distorted competition or that its grant meant that Jadekost's costs were reduced, are inadequate.

101. In regard to the definition of the market, the applicant contends that mere reference to the market in 'deep-frozen fish products' and 'fish fingers, fish fillets and "gourmet" fish fillets' does not constitute an adequate finding of the facts. Furthermore, the Commission failed to make findings as to the European market, in particular with respect to the production figures for deep-frozen fish products in other Member States. It cites statistics on such figures which clearly indicate that the production of such products by Jadekost represents only a small share of overall production in the common market.

102. As the Commission nevertheless points out, the contested decision contains an express reference to the fact that there is competition on the market for deep-frozen fish products as well as on that for fish fingers, fish fillets and 'gourmet' fish fillets. The Commission further submits that there is clearly competition in Germany and in the Community, as stated in the contested decision (section I, paragraph 1). That can also be inferred from the correspondence with the national authorities produced by

42 — Sections III, paragraph 8, and IV, paragraph 9, of the contested decision.

the applicant. In other words, the contested decision contains findings in regard to the distortion of competition. The question whether those findings are sufficient will be examined with the third plea.

103. In view of the foregoing, the second plea in law must be rejected.

C — *Third plea in law: Misapplication of Article 92(1) of the Treaty*

104. By its third plea in law, the applicant maintains that the Commission misapplied Article 92(1) of the Treaty. It subdivides that plea into three parts: first, that the Commission had inappropriate recourse to the Guidelines in order to determine the elements constituting aid within the meaning of Article 92(1); second that its legal characterisation of the facts was incorrect; and third that it committed serious infringements of the obligation to state reasons laid down in Article 190 of the Treaty.

105. Before examining the applicant's submissions, I would like briefly to deal with the definition of distortion of competition within the meaning of Article 92(1) of the Treaty.

(a) *Analysis of the case-law*

106. As can be seen from the wording of Article 92(1), it is sufficient for the application of this provision that the aid in question 'threatens' to distort competition. More precisely, pursuant to Article 92(1) of the Treaty, any aid is incompatible with the common market which, by 'favouring' certain undertakings, distorts or threatens to distort competition. [43] It thereby follows that the existence of aid presupposes that some advantage is given to an undertaking. [44]

107. Thus where the Commission establishes that an undertaking has received aid, it must then determine what advantage the undertaking has obtained from the State measure, for, without such an advantage, the measure provided to the undertaking in question cannot be characterised as aid. [45]

43 — I would point out that the Court stated in Case 32/82 *Intermills* v *Commission* [1984] ECR 3809, paragraph 32: '... the granting of aid ... cannot be regarded as being automatically contrary to the provisions of the Treaty. Thus, irrespective of the form in which aid is granted... it is the Commission's task to examine whether it is contrary to Article 92(1) and, if so, to assess whether there is any possibility of its being exempt under Article 92(3), giving the grounds on which its decision is based accordingly.'

44 — See Christian Gavalda and Gilbert Parléani, Droit des affaires de l'Union Européenne, Paris, Litec, 2nd edition, 988, p 394 ff., paragraph 737.

45 — See Bellamy and Child, Common Market Law of Competition, 4th edition, 1993, p. 911, No 18-004.

108. The term 'distortion of competition' has been broadly interpreted in the case-law of the Court. Thus the Court accepted that there was distortion of competition where a State measure caused an artificial change in certain factors of an undertaking's production costs, or where it strengthened the position of an undertaking as against other undertakings competing in intra-Community trade. [46] In Case 730/79 *Philip Morris Holland* v *Commission* the Court ruled that the aid provided to the applicant 'was to help to enlarge its production capacity and consequently to increase its capacity to maintain the flow of trade including that between Member States' and was said 'to have reduced the cost of converting the production facilities and has thereby given the applicant a competitive advantage over manufacturers who have completed or intend to complete at their own expense a similar increase in the production capacity of their plant'. [47]

109. In another judgment concerning aid granted by the French Republic, the Court held that 'the proposed aid would enable the undertaking benefiting from it to reduce their investment costs, thereby strengthening their position as against that of other undertakings competing with them in the Community'. [48] That condition can also be fulfilled where the aid allows undertakings situated in one Member State to continue production, thus affecting the prospects of competing undertakings established in other Member States of exporting their products to that State. [49]

110. The Court has also ruled that, having regard to the interdependence between the markets on which Community undertakings operate, it is possible that aid might distort competition within the Community, even if the undertaking receiving it exports almost all its production outside the Community. [50]

111. As I explained in Joined Cases C-329/93, C-62/95 and C-63/95 *Germany and Others* v *Commission*, [51] that case-law confirms the idea expressed by Advocate General Capotorti in his Opinion in *Philip Morris Holland*. [52] There the Advocate General expressed the view (point 4) that 'the distortion of competition should be a consistent and necessary consequence of the benefit given to certain undertakings or the production of certain goods by means of the State aid. That construction is confirmed by logical rules of the economy.

46 — Case 173/73 *Italy* v *Commission* [1974] ECR 709; and Case 730/79 *Philip Morris Holland* v *Commission* [1980] ECR 2671.

47 — Paragraph 11 of Case 730/79 *Philip Morris Holland* v *Commission* (cited in footnote 46).

48 — Case 259/85 *France* v *Commission*, cited in footnote 13, paragraph 24.

49 — Thus, according to Case 102/87 *France* v *Commission* [1988] ECR 4067, paragraph 19, aid to an undertaking may be such as to affect trade between the Member States and distort competition where that undertaking competes with products coming from other Member States, even if it does not itself export its products. Such a situation may exist even if there is no overcapacity in the sector at issue.

50 — Case C-142/87 *Belgium* v *Commission* [1990] ECR I-959, paragraph 35.

51 — Point 49 of my Opinion in those cases, in which judgment was delivered on 24 October 1996 [1996] ECR I-5151.

52 — Cited in footnote 46.

Interference from outside which is selective in its nature cannot but distort the working of competition. It is permissible therefore to start from the presumption that any public aid granted to an undertaking distorts competition — or threatens to distort it ... — unless exceptional circumstances exist'.

112. On the question whether trade between Member States has been affected, the Court has ruled that, when State financial aid strengthens the position of an undertaking compared with other undertakings competing in intra-Community trade, the latter must be regarded as affected by that aid. [53] The Court upheld that case-law in Case 142/87 *Belgium* v *Commission*, stating that 'the relatively small amount of aid or the relatively small size of the undertaking which receives it does not as such exclude the possibility that intra-Community trade might be affected'. [54]

113. That case-law was further developed by the Court in Case C-303/88 *Italy* v *Commission*, [55] in which it ruled that 'aid may be such as to affect trade between the Member States and distort competition where the recipient undertaking competes with producers in other Member States, even if it does not itself export its products. Where a Member State grants aid to an undertaking, domestic production may thereby be maintained or increased with the result that undertakings established in other Member States have significantly less chance of exporting their products to the market in that Member State. Furthermore, even aid of a relatively small amount is liable to affect trade between Member States where there is strong competition in the sector in question'.

114. From the above-cited judgments it follows that, once an undertaking in receipt of aid operates in a market in which producers from different Member States are actually in competition with one another, the Commission can reasonably conclude that the requirement of an adverse effect on trade between Member States is satisfied. According to the Court, a situation of that kind can arise even when there is no overcapacity in the sector concerned. It follows that it is only in respect of products in which there is no cross-frontier trade on account of very high transport costs or other particular circumstances that it is still possible to conceive of aid which does not satisfy the requirement of an effect on trade. [56]

53 — Paragraph 11 of Case 730/79 *Philip Morris Holland*, cited in footnote 46.

54 — Paragraph 43 of the judgment, cited above in footnote 3.

55 — Judgment cited above in footnote 3 (paragraph 27).

56 — See also point 19 of the Opinion of Advocate General Van Gerven delivered on 1 October 1990 in Case C-303/88 *Italy* v *Commission*, in which judgment was delivered on 2 March 1991 (cited above in footnote 3).

(b) *Analysis of the applicant's submissions*

(1) The Guidelines

115. In the first part of its third plea, the applicant claims that the contested decision contains an error of law because, in accepting that the security in question contains elements of aid, it bases itself on the Guidelines for the purpose of determining whether elements constituting a breach of Article 92(1) of the Treaty are present, instead of carrying out an individual examination.

116. In particular, the applicant puts forward a series of arguments: (a) the Commission may lay down in a binding and general manner the elements constituting an infringement of Article 92(1) of the Treaty on the basis of the Guidelines (section IV, paragraphs 3, 4 and 11, of the contested decision); (b) the contested decision expressly and specifically states that the incompatibility with point 1.3 of the Guidelines renders examination of the other conditions specified in Article 92(1) of the Treaty unnecessary (section IV, paragraph 11, of the contested decision); (c) the Commission exceeded its powers in specifying in an abstract and binding manner how the elements contained in Article 92(1) of the Treaty are to be interpreted; and (d) the Guidelines can be of importance only in regard to the obligation of notification in the context of the procedure under Article 93(1) of the Treaty, or for the application of Article 92(3).

117. In my view the Guidelines issued by the Commission constitute guidance whose chief purpose is to help in clarifying the Commission's policy in various sectors. Although it is not possible to alter the conditions for applying articles of the Treaty by way of such Guidelines, the Commission thereby provides interested parties with a very important compass for regulating their own conduct because they can assess the possible consequences of their activities. For the Commission, such Guidelines constitute a factor of importance for the way in which it will exercise the discretion granted to it by the Treaty.

118. The Court has already examined, in Case C-311/94 *IJssel-Vliet*,[57] the question of the value of rules formulated by the Commission in guidelines — those of 1988 in the fisheries sector.[58] That case concerned the rejection by the Netherlands Minister for Economic Affairs of an application made by IJssel-Vliet Combinatie BV for a subsidy for the construction of a fishing vessel.

57 — Case C-311/94 *IJssel-Vliet Combinatie* v *Minister van Economische Zaken* [1996] ECR I-5023, paragraphs 36 to 44, see also points 34 to 52 of the Opinion of Advocate General Lenz.

58 — These are the Guidelines for the examination of State aids in the fisheries sector (88/C 313/09) (OJ 1988 C 313, p. 21).

119. In *IJssel-Vliet* the Court remarked first (paragraph 36) that 'Article 93(1) of the Treaty provides that the Commission, in cooperation with the Member States, is to keep under constant review the systems of aid existing in those States. It is to propose to them any appropriate measures required by the progressive development or by the functioning of the common market. That provision thus involves an obligation of regular, periodic cooperation on the part of the Commission and the Member States, from which neither the Commission nor a Member State can release itself for an indefinite period depending on the unilateral will of either of them'. [59]

120. The Court further pointed out in *IJssel-Vliet* (paragraph 38), that 'the Guidelines, which are not the first to have been applicable in the sector under consideration, are an updating of previous guidelines and thus fall within the framework of regular, periodic review of the fisheries sector'. It then went on to state (paragraph 39) that although the Commission retained control, that review was carried out in cooperation with the Member States. First the Member States had been consulted [60] on the draft Guidelines and subsequently the Commission indicated, in a letter to the Netherlands Government, [61] that when approving the final text of the Guidelines it had taken account of the observations made by the Member States. Lastly the Court (paragraph 40) concluded from that letter that 'the spirit of cooperation between the Commission and the Member States has been maintained throughout the existence of those Guidelines'. [62]

121. In the same judgment, the Court (paragraph 41) concluded from the documents before it that 'the Commission and the Netherlands Government established a framework of cooperation in accordance with Article 93(1) of the Treaty from which neither could release itself'. [63] In other words, it accepted that the Guidelines contained rules which, when they had been agreed to, were binding on the Commission and the Member States.

122. In *IJssel-Vliet* the Court stated further (paragraph 43) that 'the Commission approved the amendments to the national

59 — See also Case C-135/93 *Spain* v *Commission*, paragraph 24. In the *IJssel-Vliet* judgment the Court stated (paragraph 37) that: '[t]he Guidelines are based on Article 93(1) of the Treaty and are thus one element of that obligation of regular, periodic cooperation from which neither the Commission nor a Member State can release itself. They also — at least as regards relations between the Commission and the Netherlands — conform strictly to the spirit of regular, periodic cooperation envisaged by the said Treaty article between the Commission and the Member States.'

60 — In the case of the Netherlands Government, by letters of 30 March and 6 May 1988.

61 — By letter of 30 November 1988.

62 — In paragraph 40 the Court elaborated on this point in the following terms: 'In that letter, the Commission asked the Netherlands Government to assure it that the criteria laid down by the Guidelines would be observed in respect of all aids in the sector. In response, the Netherlands Government confirmed, by letter of 31 January 1989, that aids granted to the fisheries sector were in conformity with the Guidelines. ... When it did so, the Netherlands Government was applying the national aid scheme, which must therefore be deemed to have been covered by that confirmation.'

63 — Furthermore, in Case C-313/90 *CIRFS and Others* v *Commission* [1993] ECR I-1125, paragraph 35, the Court recognised as binding a 'discipline' which was of the same legal nature as the Guidelines and whose rules had been approved by the Member States. The said 'discipline' constituted rules for the Member States in regard to granting aid in a certain sector (the synthetic fibre industry), which the Commission had presented in a Notice on its policy in this area and which the Member States had agreed to; see also paragraph 42 of the judgment in *IJssel-Vliet*, cited in footnote 58.

aid scheme only to the extent that aid granted by the Netherlands Government for the construction of fishing vessels complied with the Guidelines. In those circumstances, by putting the amendments into effect, the Netherlands Government accepted the rules laid down in the Guidelines. ... those Guidelines are binding on that Member State'. That was because (paragraph 44) 'as a result of the obligation of cooperation laid down by Article 93(1) of the Treaty and of its acceptance of the rules laid down in the Guidelines, a Member State, such as the Netherlands, must apply the Guidelines when deciding on an application for aid for the construction of a vessel intended for fishing'.

123. In the present case, as the Commission has pointed out and the applicant has not disputed (points 90 and 181 ff. of the Commission's defence), apart from the fact that the Member States cooperate in drafting guidelines, the applicant participated in the procedure for the adoption of the Guidelines and approved them. Furthermore, the Guidelines constitute a precondition for the Commission's approval of the Land of Lower Saxony's General Directives on Securities.

124. As a result of the above it follows, in my opinion, that the Guidelines are binding on the Commission and on the applicant. Thus the German public authorities are required to apply them when deciding on applications from an undertaking for aid, for instance for the granting of a security for a bank loan where the undertaking operates in the fisheries sector.

125. Moreover, I would emphasise, in regard to the contents of the Guidelines for the examination of State aids in the fisheries and aquaculture sector, that point 1.1 indicates cases in which one may assume the existence of a State aid (as the use of 'in particular' demonstrates, this represents a list of examples), and does not seek to define aid in a manner contrary to Article 92(1) of the Treaty.

126. In view of the foregoing analysis, I consider that, in examining whether the aid granted to Jadekost could be regarded as compatible with the common market, the Commission was required to base itself upon the Guidelines.

127. The Commission maintains that it is clear from the contested decision that the facts were examined in order to ascertain whether the elements contained in Article 92(1) of the Treaty were present, and that all the undisputed findings concerning the legal characterisation of the aid, even during the administrative procedure, referred to that article.

128. To clarify further, the Commission states that the reference to the Guidelines in the contested decision can be explained by the fact that that decision concerns the question whether the aid, whose existence has been acknowledged (in other words it has been acknowledged that there is aid), could be approved under Article 92(3) of the Treaty, in the light of the Guidelines.

129. The Commission therefore relied, as it was bound to do, on the Guidelines, as well as Article 92(1), on which it also based itself, as is expressly stated in the first paragraph of Section IV of the contested decision.

(2) Legal characterisation of the facts

130. In the second part of its third plea in law, the applicant submits that, although the security granted by the *Land* of Lower Saxony has elements of aid within the meaning of Article 92(1), the contested decision is nonetheless wrong. The applicant splits this part of the plea into two limbs and contends that the contested decision is wrong as regards the way the amount of aid was determined and as regards the assessment of whether competition was distorted.

(i) Determination of the amount of aid

131. As regards the amount of aid, the applicant maintains that the Commission is required to determine and assess the actual, precise benefit which resulted from the security for the recipient of the aid. The Commission failed to verify whether Jadekost could have obtained a (lesser) credit without security. It erred in determining the amount of the aid because it failed to take into account the existence of sureties and neglected to examine their value and impact in respect of the assessment of the amount of aid. [64]

132. First, the applicant considers that it paid a risk-based premium which offset the aid-like character of the security and which the Commission failed to either assess or put a value on. It then went on to reiterate that the Commission had failed to take into consideration, in assessing the amount of aid, the existence of substantial sureties guaranteeing the loan and whose value should have been assessed as at the time they were established rather than when the loan was called in, which resulted in their being undervalued. That is because the existence of sureties reduces the risk to

64 — The applicant disagrees with the Commission's view that Jadekost could not have obtained any loan without the security. It considers that the Commission pursued two separate approaches in a manner which was confused (lacking in clarity) and contradictory. First, the Commission evaluates the undertaking's price advantage and then it determines whether and to what extent the undertaking could have obtained alternative financing with its existing sureties.

which the guarantor is exposed. [65] Lastly, the applicant maintains that the Commission failed to examine whether there was a possibility of other financing.

133. As far as the applicant's argument with the Commission as regards the amount of aid and the way in which it was determined is concerned, as I have stated in previous points of this Opinion, it is clear from the contested decision and the documents before the Court that the Commission correctly concluded that, without the security, Jadekost would not have obtained the loan it was granted under market conditions. Jadekost was accorded that amount because the *Land* of Lower Saxony granted a security and not because the value of the sureties furnished secured the loan. As a consequence, a particular undertaking benefited from favourable treatment, namely the selective intervention from an outside source (the State) to the benefit of an individual undertaking. The benefit to Jadekost was therefore equivalent to the entire amount it was able to obtain.

(ii) Distortion of competition

134. In the second limb of the second part of its third plea in law, the applicant submits, in regard to the distortion of competition within the meaning of Article 92(1) of the Treaty, that the Commission, on the basis of a reduction in production costs, concluded that Jadekost's market position had been artificially strengthened, although that did not correspond to the facts. The applicant maintains that it never admitted that the security threatened to distort competition.

135. The applicant's line of reasoning here is based upon the following considerations: (a) the Commission failed to determine either the relevant market or the existence of competition on that market; (b) moreover, in relying on the judgment of the Court of First Instance in *Siemens* v *Commission*, [66] the Commission wrongly considered that there was a general presumption that the granting of operating aid by its very nature distorts competition. The wording of the Guidelines implies that operating aid may be considered compatible with the common market. For that reason, it is always necessary to examine the concrete facts of any individual case. [67]

65 — The applicant draws a distinction between the question of principle, that is to say whether the existence of sureties is of relevance for determining the amount of aid on the one hand and, on the other, the question of the value of the existing sureties in the present case. That is because ultimately, the advantage obtained by the debtor whereon security is given is less than that obtained by the beneficiary of a subsidy.

66 — Case T-459/93 [1995] ECR II-1675.

67 — The applicant further maintains that: (c) the Commission's argument that the security resulted in a 100% reduction in production costs is incorrect; (d) the Commission wrongly considered that the granting of the security by the *Land* of Lower Saxony distorted competition in so far as Jadekost was able to sell its products at prices that were artificially lower than the usual market prices. With its small production quantities, Jadekost's entry onto the market had not had any effect on the constant downward trend in prices for deep-frozen fish products which had begun long before. Moreover, because Jadekost's production represent a minimal share of the European market, no distortion of competition could have been perceptible. Germany's share of overall production in the Member States is, according to the applicant, less than 24% and Jadekost has only a 1.5% share of the European market.

136. The applicant's arguments are unconvincing. As I shall set out below, there exists at least the threat of a distortion of competition. First, as the Commission correctly points out, the relevant market was defined in detail in section III, paragraph 3, of the contested decision. The market is that for deep-frozen fish products (fish fingers, fish fillets and 'gourmet' fish fillets). The Commission points out that the definition of the market is therefore the same as that given by the applicant in the administrative procedure.

137. The existence of competition on the market is expressly referred to in section III, paragraph 6, of the contested decision. As the Commission correctly points out, there is competition on that market at European level. This can be seen from the fact that there has been a common organisation of the market in these products since 1971 [68] and Guidelines for the examination of State aids in the fisheries and aquaculture sector. [69]

138. In addition, the case-law gives a broad interpretation to the notion of distortion of competition. Competition is distorted where a State measure artificially brings about a change in certain factors of an undertaking's production costs, and strengthens the position of an undertaking compared with other undertakings competing in intra-Community trade. [70]

139. I consider that the grant of operating aid to Jadekost [71] distorts competition and that, in any event, there is a threat of distortion of competition. That is because, by granting such aid, a particular undertaking and its production are favoured, which puts it in a more favourable position *vis-à-vis* its competitors.

140. Can it therefore be maintained that there is a general presumption that operating aid is prohibited?

141. To begin with, according to the judgment in *Siemens* v *Commission*, [72] operating aid consists of 'a typical general operating cost that a company must bear in its

68 — Those matters are regulated by Council Regulation (EEC) No 3759/92 of 17 December 1992 on the common organisation of the market in fishery and aquaculture products (OJ 1992 L 388, p. 1).

69 — The Commission submits that that can also be inferred from the fact that the contested decision mentions information that was provided by a number of competitors and associations in Member States.

70 — Case 173/73 *Italy* v *Commission* and Case 730/79 *Philip Morris* v *Commission* (both cited in footnote 46).

71 — Section IV, paragraphs 11 and 13, of the contested decision in the English text; section IV, paragraphs 12, 13 and 14, of the contested decision in the German text, which is the only authentic version.

72 — Case C-278/95 P *Siemens* v *Commission* [1997] ECR I-2507, paragraph 18.

normal activities'. [73] Operating aid is therefore aimed at freeing a company from the costs it would normally be required to bear in the course of the day-to-day running of its normal activities.

142. Moreover, according to settled case-law, [74] under no circumstances can operating aid be considered, pursuant to Article 92(3)(c) of the Treaty, compatible with the common market where, by its very nature, it is likely to affect trading conditions to an extent contrary to the common interest. [75]

143. The Guidelines define operating aid (in section 1.3, fourth paragraph, third indent) (in the fisheries sector). They are State aids which are granted without imposing any obligation on the part of recipients and which are intended to improve the liquidity situation of their undertakings, the amount of which depends on the quantity produced or marketed, the prices of products, the unit of production or the factors of production and the result of which would be a reduction in the recipient's production costs or an improvement in the recipient's income. It is expressly stated that such aid, as operating aid, is incompatible with the common market.

144. It follows from the above judgments of the Court and the text of the Guidelines, which, as I have pointed out, are binding upon the Commission and the Member States, that operating aid, by its very nature, distorts competition, subject to Article 92(2) of the Treaty, as stated in footnote 2 to point 1.3 of the Guidelines. Pursuant to Article 92(2) of the Treaty, 'the following shall be compatible with the common market: (a) aid having a social character, granted to individual consumers, provided that such aid is granted without discrimination related to the origin of the products concerned; (b) aid to make good the damage caused by natural disasters or exceptional occurrences; (c) aid granted to the economy of certain areas of the Federal Republic of Germany affected by the division of Germany'. [76]

73 — The Court of Justice therefore upheld the Court of First Instance's reasoning on this point; it had ruled in paragraph 77 of its judgment in Case T-459/93 *Siemens* v *Commission* [1995] ECR II-1675, that the purpose of both the aid towards the advertising campaigns and the market surveys and the aid for the purchase of equipment to be leased 'was the marketing of Siemens' products'. It then went on to state: 'Since marketing is a normal, everyday commercial activity, those aids constitute operating aids which, first, do not promote the "development" of any economic sector and, second, provide the applicant with artificial financial support such as to distort competition in the long term and to affect trade to an extent contrary to the common interest'.

74 — See also Case C-86/89 *Italy* v *Commission* [1990] ECR I-3891, paragraph 18, and Case C-301/87 *Boussac*, cited in footnote 3, paragraph 49.

75 — In the *Boussac* judgment, cited in footnote 3 (paragraph 54), the Court accepted that the financial assistance given by the French Government to Boussac was designed to prolong artificially the activity of the undertaking despite the fact that it was in a state of insolvency and that it could not be expected that the undertaking would be in a position to survive on its own in the immediate future. Nor had the measures in question been intended to modernise the undertaking in order to restore the competitiveness enjoyed years previously. For those reasons the Court came to the conclusion (paragraph 57) that the aid in question could not qualify under the exemptions set out in Article 92(3) of the Treaty.

76 — The provision furthermore provides that such aid is compatible with the common market in so far as it is required in order to compensate for the economic disadvantages caused by that division. Following the reunification of the two Germanys, that latter provision is of only historical significance.

145. In other words, point 1.3 of the Guidelines establishes a rebuttable presumption that operating aid in the fisheries sector, which is the sector that is of concern here, by its very nature distorts competition, where it is not linked to a restructuring plan for the undertaking, or none of the exemptions set out in Article 92(2) of the Treaty apply.

146. In particular, the last sentence of point 1.3 of the Guidelines provides that the Commission will examine such aid, that is to say operational aid, on a case-by-case basis, but only 'where ... [it is] directly linked to a restructuring plan considered to be compatible with the common market'. As Advocate General Jacobs pointed out in his Opinion in Case C-301/87 (*Boussac*),[77] accepting the definition put forward by the Commission, the concept of restructuring can be understood to mean the fundamental reorganisation of an undertaking with a view to maintaining or restoring its competitiveness and involving fundamental changes to the labour force, the means and the process of production, production capacity and other aspects of the undertaking's activities.

147. The existence of a presumption is of importance for apportioning the burden of proof. The result is that the Commission merely has to prove the existence of operating aid to raise the presumption of distortion of competition, because such aid cannot be considered compatible with the common market within the meaning of Article 92(3). That presumption is of course rebuttable.

148. However, apart from how the Member State or the Commission characterise the aid granted, the existence of a presumption does not mean that there is no need to examine, on a case-by-case basis, whether an aid has been granted and whether particular aid is indeed operating aid, that is to say, whether the Commission has wrongly characterised the facts in law. If aid has been correctly characterised as operating aid, then the presumption comes into play, that is to say, the aid in question is incompatible with the common market because it is capable of distorting competition, in view of the manner in which it was granted and its consequences for the market and intra-Community trade.

149. In the light of the above considerations, it can be concluded that the aid granted by the applicant to Jadekost by way of a security for a bank loan constitutes operating aid, since it was aimed at freeing the undertaking from costs that it would have to bear in the course of its normal activities.[78] Furthermore, it was not provided that the grant of the aid

77 — Point 67 of the Opinion in the case cited in footnote 3.

78 — See paragraph 18 of Case C-278/95 P *Siemens* v *Commission*, cited in footnote 72.

would be directly linked to a restructuring plan considered to be compatible with the common market. It is precisely for that reason that I am of the opinion that, in accordance with the presumption laid down in the Guidelines, the aid cannot be regarded as compatible with the common market because it distorts, by its very nature, the conditions of competition in the sector in which it was granted, and may well affect intra-Community trade.

(3) The obligation to state reasons

150. By the third part of its third plea in law, the applicant maintains that the absence of certain findings in the contested decision constitutes an infringement of essential procedural requirements and an erroneous statement of reasons within the meaning of Article 190 of the Treaty.

(i) Case-law of the Court

151. I would first point out that, pursuant to Article 190 of the Treaty, the legal acts of Community institutions must state the reasons on which they are based and that reasoning 'must be appropriate to the nature of the measure in question. It must show clearly and unequivocally the reasoning of the institution which enacted the measure so as to inform the persons concerned of the justification for the measure adopted and to enable the Court to exercise its powers of review'. [79]

152. Furthermore, the Court has consistently held that: 'the requirements to be satisfied by the statement of reasons depend on the circumstances of each case, in particular the content of the measure in question, the nature of the reasons and the need for information of the undertakings to whom the measure is addressed or of other parties to whom it is of direct and individual concern within the meaning of the second paragraph of Article 173 of the Treaty.' [80]

153. In particular, in the area of State aid, according to settled case-law, the statement of reasons may not merely restate the conditions set out in Article 92(1) and the Commission is therefore required to go into

79 — See, for instance Case C-353/92 *Greece* v *Council* [1994] ECR I-3411, paragraph 19; Joined Cases C-63/90 and C-67/90 *Portugal and Spain* v *Council* [1992] ECR I-5073, paragraph 16; and Case C-466/93 *Atlanta Fruchthandelsgesellschaft and Others* v *Bundesamt für Ernährung und Forstwirtschaft* [1995] ECR I-3799, paragraph 16.

80 — Joined Cases 296/82 and 318/82 *Netherlands and Leeuwarder Papierwarenfabriek* v *Commission* [1985] ECR 809, paragraph 19.

the specific details, [81] thereby allowing the Court to review its legality and to provide the undertaking concerned with the information necessary to enable it to ascertain whether or not the decision is well founded. [82]

154. Consequently the conclusion that may be drawn from the above analysis is that the statement of reasons is sufficient if it appears that the information contained in the contested decision is relevant and supports the Commission's finding that the two conditions set out in Article 92(1) are satisfied. [83] Such information must concern the undertaking which has received the aid, the situation on the market in question, the undertaking's share of that market, the position of competing undertakings, trade flows between Member States in the products concerned and the undertaking's exports. [84]

155. Nevertheless, it is my opinion that the case-law of the Court will help to resolve the question as to whether, in the case of operating aid, the presumption laid down in point 1.3 of the Guidelines relieves the Commission of its obligation to state, in detail, the reasons for its decision in the context of the Article 93(2) procedure, or whether a brief statement of reasons without details is sufficient.

156. In particular, I consider that the judgment of the Court in *Belgium* v *Commission* [85] provides arguments for resolving

81 — The case-law cited in the examination of submissions concerning distortion of competition and the effect on Community trade, leads to the conclusion that aid must be presumed to be capable of distorting competition and to affect intra-Community trade (in this context see Jacques Biancarelli, Le contrôle de la Cour de Justice des Communautés en matière d'aides publiques, L'actualité juridique — *Droit administratif*, 1993 (p. 412 to 436) p. 412 particularly p. 422, and Claude Blumann, 'Régime des aides d'Etat: jurisprudence récente de la Cour de Justice' 1989 to 1992, *Revue du Marché Commun et de l'Union Européene*, No. 361, 1992 (p. 721 to 739), p. 721, 726. However, that does not mean that a finding as to whether those two conditions are met is not required to be reasoned in accordance with Article 190 of the Treaty. Thus in the above-cited (footnote 43) Case 23/87 *Intermills*, the Court held that a Commission decision should be annulled since, as regards the damage to competition in the common market (paragraph 38): 'the relevant paragraphs of the preamble to the decision merely note the objections raised by the Governments of three Member States, two trade associations and an undertaking in the paper industry. Apart from that reference, the decision gives no concrete indication of the way the aid in question damages competition'. In its judgment in *Leeuwarder Papierwarenfabriek*, cited in footnote 80, the Court annulled a Commission Decision which contained no statement of reasons with regard to its assessment that the aid at issue affected trade between Member States and distorted or threatened to distort competition by favouring certain undertakings or products. As the Court observed 'The preamble recalls the concern expressed by the Governments of two Member States and by two trade associations in the relevant industry with regard to the distortion of competition resulting from the measure taken by the Netherlands Government ... and then merely repeats the wording of Article 92(1) ... without any indications of fact' (paragraph 23 of the judgment in *Leeuwarder Papierwarenfabriek*). In the same judgment the Court accepts that in certain cases the very circumstances in which aid is granted are sufficient to show that the aid is capable of affecting trade between Member States and of distorting or threatening to distort competition; however, the Court continues: 'the Commission must at least set out those circumstances in the statement of reasons for its decision. In this case it has failed to do so since the contested decision does not contain the slightest information concerning the situation of the relevant market, the place of Leeuwarder (the recipient of aid) in that market, the pattern of trade between Member States in the products in question or the undertaking's exports' (paragraph 24 of the judgment in *Leeuwarder Papierwarenfabriek*).

82 — See Joined Cases 296/82 and 318/82 *Leeuwarder Papierwarenfabriek*, cited in footnote 80, paragraph 19 ff., and *Germany and Others* v *Commission*, cited in footnote 51, paragraph 52.

83 — Joined Cases 62/87 and 72/87 *Exécutif Régional Wallon and Glaverbel* v *Commission* [1988] ECR 1573, paragraph 18.

84 — See Joined Cases C-329/93, C-62/95 and C-63/95 *Germany and Others* v *Commission*, cited in footnote 51, paragraph 53.

85 — Joined Cases C-356/90 and C-180/91 [1993] ECR I-2323.

that question. That judgment concerned the annulment of Commission Decisions [86] adopted pursuant to Article 93(2) of the Treaty on the basis of Directive 87/167. [87] Those Decisions concerned loans, that is to say aid, which the Belgian authorities granted to shipowners to enable the latter to carry out various shipbuilding activities (purchase and construction of vessels). The Court stated (paragraph 31) [88] that, in regard to production aid for shipbuilding and ship conversion, the criterion chosen by the Council was that the aid should not exceed the common maximum ceiling provided for in Article 4(1) of the Directive. [89] It followed (paragraph 32) that compliance with the ceiling in question was therefore the essential condition for aid to shipbuilding to be regarded as compatible with the common market and where that ceiling was exceeded, 'the aid in question is automatically incompatible'. It concluded (paragraph 33): '[i]n this context, therefore, the Commission's role is limited to checking that that condition has been observed'.

157. Moreover, in that same judgment in *Belgium* v *Commission*, the Court examined and rejected an alternative plea in law put forward by the Belgian Government alleging infringement of Article 190 of the Treaty. The Belgian Government had maintained that the reasoning of the contested decision was defective, since the Commission had in no way shown that the grant of the aid at issue would have disregarded the objective of the Directive, namely to avoid an increase in the production capacity of the Community shipyards. In particular, the Court found (paragraph 36) that that complaint was closely linked with the principal line of argument concerning the scope of the ceiling. Since that line of argument had been rejected, it held that the Commission could not 'be criticised for not carrying out any investigations other than ascertaining whether the ceiling had been respected. Consequently, any need for a statement of the reasons other than the finding that the aid exceeded the ceiling is precluded ...'.

(ii) Examination of the applicant's arguments

158. The applicant maintains that both the addressee of a decision and its competitors have a legitimate interest in a detailed statement of reasons in order to be able to understand and verify the Commission's decision. It therefore follows that neither the addressee's participation in the procedure leading to the adoption of this decision, nor the possibility for the Member State who was a party to the procedure to present its observations, nor the fact that the Member State had participated in the

86 — Commission Decision 90/627/EEC of 4 July 1990 on loans granted by the Belgian authorities to two shipowners for the purchase of a 34 000 m^3 LPG ship and two refrigerator ships (OJ 1990 L 338, p. 21) and Commission Decision 91/375/EEC of 13 March 1991 concerning credits granted by the Belgian authorities to various shipowners for the building of nine vessels (OJ 1991 L 203, p. 105).

87 — Council Directive 87/167/EEC of 26 January 1987 on aid to shipbuilding (OJ 1987 L 69, p. 55).

88 — The Court first stated (paragraph 30): 'the Council, in accordance with the rationale of Article 92(3), first noted that aid to shipbuilding was incompatible with the common market and then took into account a series of economic and social requirements which caused it to make use of its power under the Treaty to consider such aid nevertheless compatible with the common market, provided that it complied with the criteria for derogation contained in the Directive (87/167)'.

89 — The Court also explained, in paragraph 31, that that ceiling constituted what the Council regarded as the balance between the conflicting requirements of respect for the rules of the common market and the maintenance of a sufficient level of activity in European shipyards and also the survival of an efficient and competitive European shipbuilding industry.

consultations that took place prior to the issuing of the Guidelines in the fisheries sector, nor the reference to 'undisputed facts' justify a statement of reasons which is restricted to the bare minimum. Furthermore the applicant considers that the contested decision should be annulled on the ground of a defective statement of reasons, because it confines itself to formulating presumptions and suppositions instead of establishing the facts which constitute fulfilment of the conditions contained in Article 92(1) of the Treaty. [90]

159. As the Commission has acknowledged, the statement of reasons for the contested decision could have been clearer and more detailed. Nevertheless I am of the opinion that the decision is sufficiently reasoned on all points and that it fulfils the conditions laid down by the Court in its case-law, as has been shown above, so that it is sufficient and complete. Nor does it contain any contradiction which would justify its annulment.

160. I have come to this conclusion after examining, on the one hand, the Guidelines and, on the other, the pleas concerning distortion of competition and the effect on intra-Community trade. That examination has led me to conclude that there is a presumption that operating aid cannot be considered compatible with the common market. That is very important as regards the extent of the Commission's obligation to state reasons because it can confine itself to a succinct statement of reasons without harming the contested Decision.

161. I consider that, because the aid granted to Jadekost cannot, as it is operating aid, be regarded as compatible with the common market in application of the presumption contained in point 1.3 of the Guidelines, the brief statement of reasons in the contested decision does not give rise to problems, despite the fact that certain information (regarding distortion of competition and the effect on intra-Community trade), which should have related to the undertaking which received the aid, is missing. I also consider that a detailed presentation of that information which, as stated above, is covered by the presumption in question, was not necessary, not because the applicant participated in the procedure which led to the adoption of the contested decision, [91] but rather because, in application of the presumption, the aid granted, being operating aid, is, by its very nature, incompatible with the common market.

90 — In particular, it maintains that the contested decision failed to make findings in regard to (a) the amount of a premium adjusted in accordance with the risk accepted and its effects on the amount of aid; (b) the sureties established in view of the loan which were decisive for determining the amount of the aid in question; (c) the possibilities of obtaining alternative financing despite the fact the Commission had acknowledged the possibility of a risk-adjusted premium.

91 — It should be noted that, according to the Court's case-law developed in connection with the special conditions applicable when decisions on the clearance of accounts are adopted, where the Member State has been involved in all stages of the administrative procedure which resulted in the adoption of the decision against it, it suffices, precisely because of the nature and extent of that involvement, for the statement of reasons to be brief, that is to say, not very detailed; see, for instance, Case 819/79 *Germany* v *Commission* [1981] ECR 21, paragraphs 20 and 21, which concerned a decision on the clearance of accounts for expenditure submitted by the German Government for financing by the European Agricultural Guidance and Guarantee Fund (EAGGF), Guarantee Section. See also Joined Cases C-329/93, C-62/95 and C-63/95 *Germany and Others* v *Commission*, cited above in footnote 51, paragraph 31.

162. Such detailed information, which, although absent from the reasoning in the contested decision — apart from several general references — nevertheless, as stated above, does not entail the decision's annulment, consists of an examination of the situation on the relevant market, the undertaking's share of that market, the position of competing undertakings, trade flows between the Member States in the products concerned and the undertaking's exports. [92]

163. Consequently, in view also of the presumption laid down that operating aid is incompatible with the common market, I consider that the Commission was not in breach of its obligations under Article 190 of the Treaty and that its statement of reasons is sufficient. I would repeat, however, that the possibility of a summary statement of reasons concerns only those facts that are covered by the presumption, that is to say, distortion of competition and effect on intra-Community trade, and does not concern other issues, such as the existence of aid and particularly the existence of operating aid, in respect of which the Commission is required to give a comprehensive and sufficient statement of reasons for its decision.

164. It follows that, in cases of operating aid, the Commission can confine itself to providing a summary statement of reasons, without entering into detail, for a decision adopted in the procedure under Article 93(2) of the Treaty, as regards distortion of competition and effect on intra-Community trade.

165. As a consequence, I would propose that the third plea in law be rejected in its entirety.

D — *Fourth plea in law: Misapplication of Article 92(3)(c) of the Treaty*

166. In its fourth and last plea in law, the applicant maintains that, even if the conditions set out in Article 92(1) of the Treaty were fulfilled, the Commission should have considered the contested aid to be compatible with the common market pursuant to Article 92(3)(c) of the Treaty. The statement of reasons on that point does not meet the requirements laid down in Article 190 of the Treaty that it be both comprehensive and sufficient.

167. The applicant divides this plea in law into two parts. It first claims that the Commission failed to recognise the importance of the Guidelines in the fisheries sector in exercising its powers of assessment. Correct application would have led to a different result. Secondly it claims that the Commission incorrectly concluded that

92 — I would point out that the absence of information on those points led the Court, in Joined Cases C-329/93, C-62/95 and C-63/95 *Germany and Others* v *Commission* (cited above in footnote 51) to conclude that the Commission's statement of reasons in that case was insufficient (paragraphs 53 and 54).

the conditions set out in Article 92(3)(c) of the Treaty were not fulfilled. [93]

168. As has already been pointed out, the Guidelines are binding on the Commission and the Member States and, by its nature, operating aid is, in principle, incompatible with the common market. It should further be noted that Article 92(3)(c), as an exception to the general prohibition contained in Article 92(1), must be interpreted narrowly and applied in the same spirit. Lastly, as the Court pointed out in Case 730/79 *Philip Morris*, [94] the Commission enjoys a wide discretion under Article 92(3), because it involves assessments of an economic and social nature which must be made within a Community context.

169. It can be seen from section V of the contested decision that the Commission examined, in a proper manner, whether the contested aid could be allowed on the basis of Article 92(3)(c). Since the Commission enjoys a wide discretion, the assessment which it made is not, in my view, manifestly wrong. I have reached that conclusion after examining the various steps in the Commission's reasoning.

170. In particular, I consider that a distinction must be made as to whether Jadekost could benefit from aid, on the one hand, on account of the area in which it operated, or, on the other hand, on account of the sector in which it operated, as the Commission maintains moreover.

171. Even if Jadekost operated in an area in which aid to facilitate development could be obtained, the second sentence of point 1.6 of the Guidelines provides that the components of regional aid schemes relating to the fisheries sector will be examined on the basis of the Guidelines. In other words, the Guidelines contain the principles of coordination which the Commission will apply to regional aid schemes in force or to be established in the regions of the Community. That means that the Commission's discretion is exercised in accordance with the principles which it laid down itself, in cooperation with the Member States, in the Guidelines. The applicant's arguments to the contrary must therefore be rejected as unfounded.

93 — In support of its submissions, the applicant states as follows: (a) Jadekost carried on its business in an area that could have benefited from aid to facilitate development as it is an area with a low per capita income and high unemployment; (b) in the light of the applicant's view in respect of an overall approach to/assessment of the aid granted, the conditions for facilitating the development of certain economic areas as set out in Article 92(3)(c) of the Treaty were satisfied in the case of Jadekost. The security was intended to provide financing for a new undertaking, rather than to maintain a company that had been in operation for a long time; (c) the granting of the security in favour of Jadekost did not adversely affect trading conditions to an extent contrary to the common interest.

94 — Cited above in footnote 46. See also paragraph 49 of Case C-301/87 *Boussac*, cited above in footnote 3.

172. In regard to the area of activity for which the aid was granted, as the Commission has pointed out, the aid in question does not fulfil the conditions laid down in the Guidelines in the fisheries sector and it does not appear that the Commission exercised its discretion wrongly, that is to say, that its assessment is manifestly incorrect.

173. Since what is involved is operating aid, I would point out that such aid cannot in any circumstances, according to the settled case-law of the Court, [95] be considered compatible with the common market pursuant to Article 92(3)(c), inasmuch as, by its very nature, it threatens adversely to affect trading conditions to a degree contrary to the common interest. In addition, operating aid is incompatible with the common market pursuant to point 1.3 of the Guidelines.

174. The applicant further claims that, although the Commission referred to the 1992 Guidelines, it nevertheless applied those of 1994, [96] as is apparent from the text of the contested decision. It submits that, in the German text, when the question was examined as to whether there was operating aid, the conditions mentioned there (in point 1.3) were not listed as alternatives but rather had to be cumulatively fulfilled. In the German version, the disjunctive 'or' is missing, a synonym [97] of which is contained only in the 1994 version.

175. I consider that it is more likely that the conditions set out in point 1.3, as follows from the objective of that text, [98] need only be fulfilled alternatively. Apart from the fact that other language versions [99] require only that the conditions laid down be fulfilled alternatively, that conclusion follows from a teleological

95 — See, for instance, the above-cited (footnotes 74 and 3 respectively) judgments in Case C-86/89 *Italy* v *Commission* and Case C-301/87 *Boussac*.

96 — OJ 1994 C 368, p. 12.

97 — The 1994 German text contains the abbreviation 'bzw.', i.e. 'beziehungsweise' which corresponds to the disjunctive 'or'.

98 — The Court has pointed out that in the case of divergence between the language versions, 'the provision in question must be interpreted by reference to the purpose and general scheme of the rules of which it forms a part'; see, for instance Case 100/84 *Commission* v *United Kingdom* [1985] ECR 1169, paragraph 17; Case C-100/90 *Commission* v *Denmark* [1991] ECR I-5089, paragraph 8; and Case C-449/93 *Rockfon* v *Specialarbejderforbundet i Danmark* [1995] I-4291, paragraph 28.

99 — The differentiation in the German text can also be found, for example, in the English version, but not in the French, Italian, Spanish, Portuguese or Greek texts. The Court has already had occasion to address the issue of linguistic divergence in the rendering of conditions or the phrasing of legislation of the Community institutions. In Case 29/69 *Stauder* v *City of Ulm* [1969] ECR 419, for instance, it stated: 'When a single decision is addressed to all the Member States the necessity for uniform application and accordingly for the uniform interpretation makes it impossible to consider one version of the text in isolation but requires that it be interpreted on the basis of both the real intention of its author and the aim he seeks to achieve, in light in particular of the versions in all four languages' (paragraph 3). See Case 19/67 *Bestuur der Sociale Verzekeringsbank* v *van der Vecht* [1967] ECR 345. In its judgment in *Stauder*, the Court went on to state 'It cannot, moreover, be accepted that the authors of the decision intended to impose stricter obligations in some Member States than in others' (paragraph 4). In addition, in Case C-372/88 *Milk Marketing Board of England and Wales* v *Cricket St. Thomas Estate* [1990] ECR I-1345, paragraph 18, the Court stated that the text in one Community language (in that case, English) 'cannot serve as the sole basis for the interpretation of that provision, or be made to override the other language versions in this regard. Such an approach would be incompatible with the requirement for the uniform application of Community law'.

interpretation of the contested provision. Otherwise it would be very rare for all the alternative conditions provided for to be fulfilled and the result would be that only in a few instances could it be considered that such aid was incompatible with the common market because it distorted (or threatened to distort) competition. That would jeopardise the attainment of the objectives of the common fisheries policy and, more generally, the proper functioning of the common market and maintenance of the system of free and undistorted competition in the fisheries sector.

176. In view of the above, I am of the opinion that, despite the fact that the contested decision referred to the text (point 1.3) of the 1994 Guidelines rather than, as should have been the case, the 1992 version, nevertheless this does not entail the nullity of the decision because the content of both versions is essentially the same.

177. The last point which I would like to stress is the fact that the granting of a security, in other words, the granting of aid to Jadekost, was not accompanied by any specific obligations as to its use, in accordance with the criteria on the basis of which different categories of aid are considered compatible with the common market. Those criteria are set out in point 2.3 of the Guidelines, concerning aid to processing and marketing in the fisheries sector.

178. In particular, as can be seen from the documents before the Court, the aid granted to Jadekost was not aid to investment (point 2.3.3 of the Guidelines) or aid relating to product quality (point 2.3.4 of the Guidelines). Although a financing plan existed in order to demonstrate that the loan for which the security was granted was to be used for the operation of the undertaking, that cannot be regarded as an undertaking on the part of the recipient to use the aid, within the meaning of point 1.3, in conjunction with point 2.3, of the Guidelines. That is because, as I have already pointed out, the loan for which the security was granted was used to cover general operating costs which Jadekost had to bear in the course of its normal activities. Consequently the Commission's finding that the contested aid was not compatible with the common market is not manifestly wrong.

179. As a consequence, I would propose that the fourth plea in law be rejected in its entirety.

VI — Conclusion

180. In the light of the foregoing, I propose that the Court should:

(1) dismiss the application of the Federal Republic of Germany;

(2) order the Federal Republic of Germany to pay the costs.