JUDGMENT OF THE COURT OF FIRST INSTANCE (First Chamber)

10 March 2009 *

In Case T-68/05,

Aker Warnow Werft GmbH, established in Rostock (Germany),

Kvaerner ASA, established in Oslo (Norway),

represented by M. Schütte, lawyer, and B. Immenkamp, Solicitor, and then by M. Schütte,

applicants,

* Language of the case: English.

Commission of the European Communities, represented by L. Flynn and V. Kreuschitz, acting as Agents,

defendant,

APPLICATION for annulment of Commission Decision 2005/374/EC of 20 October 2004 on a State aid measure implemented by Germany for Kvaerner Warnow Werft (OJ 2005 L 120, p. 21),

THE COURT OF FIRST INSTANCE
OF THE EUROPEAN COMMUNITIES (First Chamber),

composed of V. Tiili (Rapporteur), President, F. Dehousse and I. Wiszniewska-Białecka, Judges,

Registrar: K. Pocheć, Administrator,

having regard to the written procedure and further to the hearing on 11 March 2008,

gives the following

Judgment

Legal context and the facts giving rise to the dispute

1 On 21 December 1990, the Council adopted Directive 90/684/EEC on aid to shipbuilding (OJ 1990 L 380, p. 27). That directive provided for the possibility of granting, in accordance with certain procedures, State aid for, first, operating and, second, restructuring, in favour of shipbuilding and ship conversion companies ('the shipyards') situated in the European Community.

2 As regards operating aid, which in the context of the present action is the only relevant aid, Article 4(1) of Directive 90/684 provides that 'production aid in favour of [shipyards] may be considered compatible with the common market provided that the total amount of aid granted in support of a [shipbuilding or ship conversion] contract does not exceed, in grant equivalent, a common maximum ceiling expressed as a percentage of the contract value before aid'. In addition, under Article 11(2)(a) of that directive, the Member States are required to notify the Commission of any new or existing aid scheme covered by Directive 90/684 before it is put into effect.

3 By letters of 24 May and 4 June 1991, the Federal Republic of Germany notified the Commission, in accordance with Article 11(2)(a) of Directive 90/684, of aid schemes in respect of shipyards situated on Germany territory and, in particular, those situated in the territory of the former German Democratic Republic.

4 By decision of 13 September 1991 addressed to the Federal Republic of Germany ('the 13 September 1991 decision'), the Commission decided not to raise any objections to the aid schemes notified. In that decision, the Commission found, inter alia, as regards 'production aids linked to contracts', referred to in Article 4(1) of Directive 90/684, that, 'under the programme of aids intended to counteract competition, [all] German shipyards [could] benefit from a subsidy of 9.5% of the contract value (8.7% of the contract value before aid), if these yards are in competition with yards from countries where more shipbuilding aid is provided'. The 13 September 1991 decision replaced the decision which the Commission had adopted by letter of 2 December 1987, which allowed the Federal Republic of Germany to grant aid to German shipyards to counteract competition (Wettbewerbshilfe, 'competition aid').

5 On 20 July 1992, the Council adopted Directive 92/68/EEC, amending Directive 90/684 (OJ 1992 219, p. 54). The purpose of Directive 92/68 was to allow only those shipyards situated on the territories of the former German Democratic Republic to benefit from a higher ceiling for aid than that provided for in Directive 90/684, and to facilitate their restructuring while reducing the excess capacity on the world shipbuilding market.

6 Directive 92/68 inserts, into Directive 90/864, Article 10a(1) to (3), which provide:

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

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

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

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

(c) [The Federal Republic of Germany] agrees to carry out, according to a timetable approved by the Commission and in any case before 31 December 1995, a genuine and irreversible reduction of capacity of 40% net of the capacity of 545 000 [compensated gross tonnes] existing on 1 July 1990;

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

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

7 By contract of 7 October 1992 ('the acquisition agreement'), concluded after a bid procedure followed by exclusive negotiations, the Treuhandanstalt ('the THA'), the public body responsible for restructuring and privatising the shipyards situated in the

former German Democratic Republic, sold the East German shipyard Neue Warnow Werft, the predecessor to Kvaerner Warnow Werft ('KWW'), to the Norwegian group Kvaerner. KWW is now Aker Warnow Werft.

8 On 30 October 1992, the Federal Republic of Germany notified the Commission of the acquisition agreement and, inter alia, a provisional plan for State aid payments to enable KWW to restructure the shipyard. It is apparent, essentially, from Articles 7 and 12 of the acquisition agreement that the State aid from which KWW was intended to benefit in order to restructure the Warnow Werft shipyard was to be paid in instalments, and that the payment of an instalment was subject to a prior authorisation from the Commission.

9 By decision of 10 February 1993, sent to the Federal Republic of Germany, the Commission decided, inter alia, on the basis of Article 4 of Directive 90/684, not to raise objections in respect of the amendments to the competition aid scheme which the Commission had approved in the 13 September 1991 decision.

10 In its decision of 10 February 1993, the Commission reiterates the subsidy ceilings authorised under the 13 September 1991 decision.

11 By decisions of 3 March 1993 ('the first approval decision'), 17 January 1994 ('the second approval decision'), 20 February 1995, 18 October 1995 and 11 December 1995, addressed to the Federal German Republic, the Commission authorised, in accordance with Directive 90/684 as amended by Directive 92/68, the grant by instalments of aid to KWW, on the one hand, for operating, and on the other, for restructuring the Warnow Werft shipyard.

12 Only the first and second approval decisions are relevant as regards the operating aid granted to KWW.

13 The first approval decision provided, inter alia, in regard to the operating aid granted to KWW:

'On 20 July 1992, the Council adopted Directive [92/68] amending Directive [90/84] on aid to shipbuilding. The new directive [92/68] provides for an exception to the operating aid rules in favour of shipyards in the former [German Democratic Republic] to enable them to carry out an urgent and comprehensive restructuring, so that they may become competitive again.

In relation to the privatisation of [the Warnow Werft shipyard], the Commission has received from the German Government the definitive version of [the acquisition agreement], together with explanatory notes. At a meeting on 2 February 1993, the German authorities provided further details. The Commission has thus received the necessary information to decide whether the conditions are met for a special arrangement under Directive [92/68] in the case of [the Warnow Werft shipyard] …

When the Commission approved that special arrangement, it assured the Council that it would use its powers of review and supervision to ensure that the shipyards [situated on the territory of the former German Democratic Republic] receive only that aid strictly necessary for restructuring.

…

The Commission has decided not to raise any objections, under the provisions of Directive [90/684] on shipbuilding and Directive [92/68], to the payment of the first instalment of aid [for the Warnow Werft shipyard] in Germany. That instalment consists of:

— DEM 45 500 000 operating aid, DEM 11 700 000 compensation for part of the losses from [shipbuilding] contracts entered into after 1 July 1990, which are currently being worked on, DEM 6 100 000 competition aid and a DEM 27 750 000 equity capital injection.

…'

14 The second approval decision stated, inter alia, as regards the operating aid granted to KWW:

'On the basis of the current commitments given by the German Government [in relation to the production capacity of the Warnow Werft shipyard], the Commission has decided, under … Directive [90/684] on aid to shipbuilding and Directive [92/68] amending Directive [90/684], not to raise objections to a second instalment for [the Warnow Werft shipyard] in Germany. That instalment consists of:

— DEM 617 100 000 operating aid, of which DEM 113 500 000 will be paid in cash, of which DEM 66 900 000 will be competition aid and of which DEM 46 600 000 will be to cover part of the losses on [shipbuilding] contracts signed after 1 July 1990. This operating aid is the highest amount of operating aid that the [Warnow Werft] shipyard can receive for contracts signed by 31 December 1993.

…'

15 On 8 July 1999, the Commission adopted Decision 1999/675/EC on State aid implemented by Germany in favour of KWW (OJ 1999 L 274, p. 23). That decision was amended by Commission Decision 2000/416/EC of 29 March 2000 (OJ 2000 L 156, p. 39) in which the Commission concluded, in essence, that since KWW exceeded the production capacity limitation authorised for 1998, the aid in the amount of DEM 82 200 000 implemented in their favour by Germany was incompatible with the common market.

16 On 15 February 2000, the Commission adopted Decision 2000/336/EC on State aid implemented by the Federal Republic of Germany in favour of KWW (OJ 2000 L 120, p. 12) in which it concluded, in essence, that since the applicants had exceeded the authorised production capacity limitation for 1997 as well, the aid in the amount of DEM 12 600 000 implemented in its favour was incompatible with the common market.

17 On 28 February 2002, in its judgment in Joined Cases T-227/99 and T-134/00 *Kvaerner Warnow Werft* v *Commission* [2002] ECR II-1205, the Court of First Instance annulled the two decisions referred to in paragraphs 15 and 16 above on the ground, in essence, that the Commission had wrongly treated the concept of a capacity restriction as a limit on actual production. On 29 April 2004, the Court of Justice, in its judgment in Case C-181/02 P *Commission* v *Kvaerner Warnow Werft* [2004] ECR I-5703, dismissed the appeal brought by the Commission against the judgment of the Court of First Instance.

18 On 20 October 2004, the Commission adopted Decision 2005/374/EC on a State aid measure implemented by Germany for KWW (OJ 2005 L 120, p. 21; 'the contested decision').

19 In recitals 1 and 2 of the contested decision, the Commission states that, on 16 June 1999, it requested information from the German authorities on the origin of funds which the German press reported on 12 June 1999 had enabled KWW to give a loan of around EUR 205 000 000 to Kvaerner. In that regard, the Commission states that it

requested that information in order to ensure that those funds 'did not originate from excess payments of restructuring aid paid to [KWW], or any other aid elements'.

20 Following its review, first, the Commission states, in recital 127 of the contested decision, that 'the cash movement [between KWW and Kvaerner] does not seem to result from excess aid granted during the restructuring period that ended in 1995'.

21 Second, the Commission states, in recitals 120 and 121 of the contested decision, that, according to the information it received from the Federal Republic of Germany, KWW received excess State aid of DEM 25 999 000, corresponding to the difference between the total amount of aid received by KWW 'during the restructuring period', that is to say, DEM 430 100 000, and the actual losses on shipbuilding and ship conversion contracts which KWW incurred ('contract losses'), that is to say, DEM 404 101 000.

22 The Commission concludes in the contested decision:

'*Article 1*

State aid granted by [the Federal Republic of] Germany for the benefit of [KWW] … amounting to EUR 13 293 077 (DEM 25 999 000) is incompatible with the common market.

Article 2

1. [The Federal Republic of] Germany shall take all necessary measures to recover from [KWW] the aid referred to in Article 1, which was unlawfully available to [KWW].

…'

Procedure and forms of order sought

23 By application lodged at the Court Registry on 16 February 2005 the applicants, Aker Warnow Werft GmbH and Kvaerner ASA, brought the present action.

24 Upon hearing the report of the Judge Rapporteur, the Court (First Chamber) decided to open the oral procedure and, by letters of 6 December 2007 and 7 January 2008, in the context of measures of organisation of procedure provided for in Article 64 of its Rules of Procedure, requested the parties to reply to written questions and to produce certain documents. The parties complied with those requests within the prescribed time-limits.

25 By letters lodged at the Court Registry on 11 February 2008, the applicants requested that a number of the documents submitted by the Commission, in reply to the measures of organisation of procedure taken by the Court, be removed from the case-file on the ground that those documents were not relevant to the outcome of the dispute ('the disputed documents'). By letter lodged at the Court Registry on 19 February 2008, the Commission contended that the documents were relevant in order to reply to the measures of organisation of procedure which the Court had sent to it.

26 At the hearing, which took place on 11 March 2008, the parties presented oral argument and their answers to the questions put by the Court. In addition, the Court rejected the applicants' request that the disputed documents be removed from the case-file, in so far as they had been produced by the Commission in reply to questions which were asked of it. Lastly, the Court requested the Commission to submit certain documents to it within a period of two weeks. The Commission complied with that request on 18 March 2008. By letter of 8 April 2008, the applicants submitted their observations on those documents.

27 The oral procedure was closed on 25 April 2008.

28 The applicants claim that the Court should:

— annul the contested decision;

— order the Commission to pay the costs.

29 The Commission contends that the Court should:

— dismiss the action as unfounded;

— order the applicants to pay the costs.

Substance

30 The applicants raise four pleas in support of their application. The first plea alleges that the Commission erred in law and committed a manifest error of assessment in that it wrongly called into question, in the contested decision, existing aid and could not order its repayment. The second plea alleges a manifest error of assessment linked to the fact that KWW did not receive any excess aid, inasmuch as the amount of aid granted to cover contract losses was actually lower than the amount of the losses actually incurred in that regard. The third plea alleges breach of the principles of legal certainty and the protection of legitimate expectations owing to the delay in initiating the procedure and the Commission's conduct before initiating it. The fourth plea, which is raised in the alternative, alleges a manifest error of assessment in the calculation of the amount of aid to be repaid.

31 At the outset, it should be pointed out that, in the context of the second plea, the applicants complain, in essence, that the Commission concluded that KWW received a total amount of DEM 430 100 000 in aid — corresponding to DEM 450 000 000 aid to cover contract losses plus DEM 62 500 000 competition aid, less an amount of DEM 82 400 000 operating aid authorised by the Commission but not paid to Kvaerner — to cover its contract losses in the amount of DEM 404 101 000. The second plea can be divided into two parts.

32 In the first part, the applicants claim, in essence, that KWW received, solely in relation to contract losses, a total amount of DEM 58 300 000 aid paid in cash, as is apparent from the first and second approval decisions, and not DEM 450 000 000, as the Commission found in the contested decision.

33 In the second part, the applicants assert, in essence, that the amount of DEM 62 500 000 received by KWW as compensation for competition aid not received should not have

been included in the calculation of the total amount of aid granted to cover contract losses.

34 Since those two parts seek to establish that the total amount of aid received by KWW to cover contract losses did not exceed the total amount of actual losses suffered in that regard, the Court considers it appropriate to begin its examination with the second part of the second plea.

The second part of the second plea, alleging a manifest error of assessment in the calculation of the aid received which could be taken into consideration in the contested decision

Arguments of the parties

35 The applicants claim, in essence, that the Commission committed a manifest error of assessment by including the amount of DEM 62 500 000, granted as compensation for competition aid not paid, in the total amount of aid which KWW received to cover contract losses alone. In those circumstances, the total amount of aid received to cover those operational contract losses is less than the actual amount of losses suffered in that regard, and, therefore KWW did not benefit from excess aid.

36 First, the applicants claim that, even if the competition aid constitutes operating aid, it was not intended to cover solely the contract losses, as is apparent from the first and second approval decisions, and the documents notified by the Federal Republic of Germany to the Commission. According to the applicants, competition aid was intended to enable all shipyards situated in the Community territory to remain competitive with the Asian yards which benefited from subsidies likely to distort competition on the world shipbuilding market. The fact that the amount of competition

aid was determined on the basis of the value of the shipbuilding contracts does not, however, mean that the grant of that aid depended upon the losses which might be incurred from those contracts. The applicants allege, consequently, that KWW was free to earmark the competition aid for operating costs other than those relating to contract losses.

37 In addition, the applicants point out, in reply to the written questions of the Court, that competition aid was approved in accordance with Article 4 of Directive 90/864 and with the guidelines for the grant of competition aid to shipyards set up in Germany on the territory referred to in Article 3 of the Unification Treaty (Richtlinen für die Gewährung von Wettbeverbshilfen an Werften in der Bundesrepublik Deutschland auf dem in Artikel 3 des Einigungsvertrages genannten Gebiet, 'the German guidelines') of 22 July 1991 (*Bundesanzeiger* 1991, p. 5153). The applicants argue that those guidelines were notified to and approved by the Commission. It is clear from them that, whether competition aid was granted on the basis of the signing, or not, of shipbuilding contracts, that aid could be earmarked for operating costs other than losses incurred from those contracts.

38 Lastly, the applicants claim that the competition aid constitutes a lump sum, which cannot be the subject of a recovery order. First, they point out that the German guidelines expressly provide that the competition aid granted was not recoverable. Second, they submit that the competition aid which was granted to KWW was not used to cover contract losses but was earmarked, from an accounting perspective, for KWW's reserves which had been reduced by other operating costs.

39 The Commission counters that it did not commit an error by including the amount of aid received as competition aid in the total amount of aid received by KWW to cover contract losses, since, as it stated in recitals 94 and 96 of the contested decision, competition aid was approved in order to cover 'losses during the restructuring' and,

moreover, was a 'form of income' which allowed KWW to reduce its contract losses and, therefore, its need for operating aid.

40 Furthermore, the Commission contends, in reply to the written and oral questions of the Court, that the competition aid was granted under Article 4 of Directive 90/684 and that its purpose was to enable all the shipyards situated on the Community territory to combat the unfair competition practised in certain Asian countries, which subsidised the yards situated on their territories. First, the Commission states in that regard, that while it was not necessary for KWW to incur contract losses to benefit from competition aid, it is nevertheless the case that that aid was calculated on the basis of the sale price set in each shipbuilding contract which was concluded. Therefore, according to the Commission, the grant of that aid had the effect of reducing contract losses. Second, the Commission takes the view that the competition aid had to be taken into consideration in the total amount of aid granted solely in respect of contract losses, since it is apparent from the letter which the Federal Republic of Germany sent it on 27 November 1992 that KWW accepted the amount of DEM 450 000 000 in aid in respect of contract losses — and not DEM 569 600 000 as had initially been contemplated by the THA and Kvaerner during their exclusive negotiations — only on account of the fact that competition aid would also be granted to it to cover its contract losses.

Findings of the Court

41 The applicants claim, in essence, that the Commission committed a manifest error of assessment by including, in the total amount of aid received to cover contract losses, the amount of DEM 62 500 000 granted as compensation for competition aid not received.

42 According to the case-law, in order to establish that the Commission committed a manifest error in assessing the facts such as to justify the annulment of the contested

decision, the evidence adduced by the applicant must be sufficient to make the factual assessments used in the decision at issue implausible (Case T-380/94 *AIUFFASS and AKT* v *Commission* [1996] ECR II-2169, paragraph 59).

43 In the present case, it must be held, at the outset, that the Commission's reasoning in the contested decision was carried out in three stages in order to reach the conclusion that KWW received an amount of DEM 25 999 000 as aid, categorised as excess having regard to the amount of its actual contractual losses.

44 First, after having recalled, in recitals 13 to 19 of the contested decision, the different types of aid approved, in particular, in the first and second approval decisions, the Commission states, at recital 118 of the contested decision, that it relied on the report from KWW's auditor concerning the use of aid until 31 December 1995, communicated by the Federal Republic of Germany to the Commission on 9 July 1996 ('the 9 July 1996 report'), for its finding that KWW received the following aid:

— DEM 450 000 000 to cover contract losses;

— DEM 62 500 000 in respect of compensation for the fact that KWW did not receive competition aid.

45 Regarding the amount of DEM 62 500 000 received as compensation for competition aid not received, it is clear from recital 116 of the contested decision that the Commission considered that competition aid had been approved in the first and second approval decisions for an amount totalling DEM 73 000 000, but that a part of that amount, namely DEM 10 500 000, had not been definitively granted to KWW, as only an amount of DEM 62 500 000 had been paid to it.

46 In addition, the Commission points out, in recitals 91 and 117 of the contested decision, that KWW did not have to carry out certain contracts for specific types of ships ('Kassettenschiffe') and that it did not receive any aid for that as a consequence. Therefore, the Commission states that in the contested decision it did not take account of the aid which it had approved up to the amount of those contracts, namely DEM 34 600 000, which was part of the total operating aid of DEM 617 100 000 approved in the second approval decision.

47 The Commission thus finds, at recital 118 of the contested decision, that the applicants received a total amount of aid, 'during the restructuring period', of DEM 512 500 000, corresponding to DEM 450 000 000 to cover contract losses and DEM 62 500 000 as compensation for competition aid not received.

48 Second, the Commission points out, in recital 119 of the contested decision, that the actual amount of KWW's contract losses, as is clear from the auditor's reports which were supplied to it by the Federal German Republic on 30 June 1999, totals DEM 404 101 000.

49 As a consequence, the Commission considers, in recital 120 of the contested decision, that KWW received aid in excess of the amount of its actual contract losses in the sum of DEM 108 399 000.

50 Third, the Commission notes, in recitals 116 and 121 of the contested decision, that KWW did not receive an amount of DEM 82 400 000 as 'operating aid [that the Commission had] approved for restructuring' and which corresponded to 'the waiver of old current liabilities'. In those circumstances, the Commission considers that '[c]ompensating excess aid for losses by non-received operating aid appears in line with the Commission's commitment [in] the authorising decisions to ensure that the beneficiary only receives the aid necessary to restructure'.

51 From that last finding, the Commission draws the conclusion, in recital 121 of the contested decision, that the amount of DEM 82 400 000 must be deducted from the excess aid in the sum of DEM 108 399 000 that KWW received for contract losses.

52 It is thus in the light of the three findings that KWW, first, received a total amount of aid 'during restructuring' of DEM 512 500 000, second, incurred actual contract losses in the total amount of DEM 404 101 000 and, third, did not benefit from payment of DEM 82 400 000 aid which had been approved, that the Commission concluded, in recital 121 of the contested decision that KWW benefited from excess aid in the amount of DEM 25 999 000 for which there must be an order of recovery.

53 Therefore, on the one hand, it must be observed that the Commission found in the contested decision that the amount of DEM 62 500 000 that KWW received in compensation for competition aid not received was part of the aid intended, and used, to cover the actual contract losses and that that amount could be the subject of a recovery order, at the very least, for a part of it.

54 On the other hand, if KWW received DEM 450 000 000 aid on the basis solely of contract losses and, as the applicants claim, the amount of DEM 62 500 000 competition aid should not have been taken into consideration in the contested decision, it would then be necessary to hold that the Commission wrongly found the existence of excess aid. In such a situation, the total aid received for contract losses would be, after deduction of the DEM 82 400 000 not paid, an amount of DEM 367 600 000, which is less than the total amount of DEM 404 101 000 corresponding to the actual losses incurred by KWW in that regard.

55 In the light of the findings in paragraphs 53 and 54 above, it must therefore be examined whether, in the circumstances, the Commission committed a manifest error of

assessment in taking into account the amount of DEM 62 500 000, granted to KWW as compensation for competition aid not received, in order to determine the total amount of aid which KWW received to cover contract losses.

56 In the first place, it is not in dispute that the aid approved to cover the contract losses and competition aid both come within the category of operating aid provided for in Article 4(1) of Directive 90/684.

57 However, it must be pointed out that it is apparent from the first and second approval decisions, the relevant passages of which are reproduced in paragraphs 13 and 14 of this judgment, that the Commission made a clear distinction between aid intended to cover contract losses and competition aid. First, those decisions provide for, respectively, an amount of 'competition aid' of DEM 6 100 000 and of DEM 66 900 000, or a total amount of DEM 73 000 000, of which only DEM 62 500 000 was paid, a fact which is not disputed by the parties. It is not stated that that aid had to be earmarked to cover contract losses. Second, those decisions provide for, respectively, an amount of DEM 11 700 000 and DEM 46 600 000 aid in respect of which it is specifically provided that it must be used solely to 'compensate part of the losses incurred from shipbuilding contracts signed after 1 July 1990'.

58 Moreover, it is apparent from the provisions of the acquisition agreement, on which the Commission relied in the first and second approval decisions referred to in paragraphs 13 and 14 of this judgment, that the aid intended for contract losses was different from that linked to competition. First, under Article 7(6) of the acquisition agreement, the THA was to grant aid in the amount of 'DEM 450 000 000 to finance the losses … during the restructuring period on account of [KWW's] lack of productivity and other losses linked to [KWW's] lack of competitivity [at that time]'. Second, in accordance with Article 18(1) of that agreement, the THA undertook to pay an amount of DEM 73 000 000 to KWW in the event that the latter did not receive shipbuilding aid. In addition, in the provisional plan for State aid payments, which was annexed to the acquisition agreement and notified to the Commission, the amounts of competition aid were envisaged separately from the amounts intended to cover other operating costs, including those linked to contracts.

59 Therefore, even if the aid intended to cover contract losses and the competition aid both come within the same category of operating aid referred to in Article 4(1) of Directive 90/684, it is nevertheless the case that the Commission, in its first and second approval decisions, and in accordance with the documents which the Federal Republic of Germany sent to it, differentiated between the two types of aid, which were to have different uses, that is to say, on the one hand, to cover KWW's contract losses, and on the other, to compensate for its lack of competitivity.

60 In the second place, the decision of 10 February 1993 — in which the Commission, on the basis of Article 4(1) of Directive 90/684, decided not to raise objections in regard to the amendments made by the German authorities to the competition aid scheme in favour of all German shipyards — does not at all mention that competition aid had to be earmarked exclusively to cover contract losses. It is clear from the contested decision that the competition aid scheme which the Federal Republic of Germany had notified to the Commission prior to the adoption of the first and second approval decisions sought to enable the German shipyards to remain competitive 'if these yards are in competition with yards from countries where more shipbuilding aid is provided', and that the Commission did not indicate the specific losses for which the competition aid had to be earmarked.

61 The Commission itself, furthermore, considers that the competition aid was not intended necessarily to cover contract losses.

62 First, the Commission acknowledges explicitly, in its reply to the written questions of the Court in relation to the scheme applicable to competition aid, that 'according [to Article 4 of Directive 90/684] the [ship]yards [situated on German territory] were allowed to receive [competition] aid, whether or not the [the shipbuilding] contract concerned was loss-making', that,'[i]n other words, it was not necessary to suffer losses on the [shipbuilding] contract to be eligible for [competition] aid', and again, in its reply to the Court's questions during the hearing, that 'anyone could obtain this aid, independently of whether there were losses or not'. Therefore, the Commission accepts, at the very least implicitly, that there is no causal link between the grant of competition aid and whether or not the signed contracts gave rise to losses or not. Therefore, the Commission's argument that competition aid had to be earmarked to

cover contract losses on the ground that the amount of that aid was calculated on the basis of the value each shipbuilding contract signed is inaccurate and thus must be rejected.

63 Second, it is clear from Article 3(1) of the German guidelines that '[c]ompetition aid (Wettbewerbshilfe) may be granted where orders for the construction or the conversion of [ships] have been concluded in a legally binding way by German shipyards between 1 July 1990 and 31 December 1993'. However, those guidelines do not indicate in any way that the competition aid had to be earmarked to cover only contract losses and not for other operational losses of the shipyards. Furthermore, the lack of such an indication is in accordance with the very purpose of competition aid which, as is clear from the Commission's decision of 10 February 1993 (see paragraph 10 above), was intended to enable European shipyards, and not only the Warnow Werft shipyard, to combat the competition practices of certain Asian countries on the world market, irrespective of whether those shipyards incurred losses on the contracts concluded for shipbuilding.

64 Therefore, it must be held that, in accordance with the first and second approval decisions, the Commission decision of 10 February 1993, the German guidelines, and the very purpose of competition aid, KWW was not required to earmark that aid for specific costs such as contract losses.

65 Third, the 9 July 1996 report indicates that KWW actually received an amount of DEM 62 500 000 as compensation for competition aid not paid, and that that aid was part of the operating aid. However, that report does not specify that that amount was intended, and used, to cover contract losses. In that regard, it should be pointed out that the Commission does not dispute the applicants' assertion that the amount which KWW received as compensation for competition aid was earmarked, from an accounting perspective, for KWW reserves and not to cover contract losses.

66 Therefore, the Commission could not rely on the 9 July 1996 report to find that the competition aid had actually been used to cover contract losses.

67 Fourth, it must be emphasised that, in reply to the questions of the Court at the hearing, the Commission did not dispute the applicants' arguments that, in essence, KWW could use the competition aid to cover costs other than those arising from contract losses.

68 It follows from the foregoing that, first, competition aid was an operating aid, for which KWW was free to determine the use and, second, the Commission did not establish that that aid actually had been earmarked by KWW to cover contract losses.

69 Therefore, it must be concluded that the Commission committed a manifest error of assessment in finding that the competition aid had to be accounted under aid granted to KWW to cover contract losses alone.

70 The arguments raised by the Commission in that regard cannot be accepted.

71 First, the Commission's arguments that the competition aid must be taken into account in the calculation of the amount of aid granted to cover contract losses because that aid was part of a total amount of aid authorised 'during the restructuring period', or because it constitutes a 'form of income' enabling the total amount of operating aid granted to KWW to be reduced, are irrelevant and thus must be rejected. Those arguments in no way invalidate the findings set out in paragraphs 68 and 69 above.

72 In addition, the Court must also reject as of no consequence the Commission's argument that Kvaerner — in the course of exclusive negotiations with the THA for the acquisition of the Warnow Werft shipyard by KWW — accepted that KWW would receive only DEM 450 000 000 for contract losses, and not DEM 569 600 000 as had originally been contemplated, only inasmuch as KWW would receive in addition competition aid. As was set out in paragraph 68 above, since the Commission expressly authorised the grant of competition aid to KWW, that aid cannot be assimilated with aid granted to KWW to cover just contract losses which had to be recovered in the event of excess payment.

73 Having regard to all the foregoing considerations, the contested decision must be annulled and there is no need for the Court to rule on the first part of the second plea or on the other pleas raised by the applicants.

Costs

74 Under Article 87(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings.

75 In the present case, as the Commission has been unsuccessful, it must be ordered to pay the costs, in accordance with the form of order sought by the applicants.

On those grounds,

THE COURT OF FIRST INSTANCE (First Chamber)

hereby:

1. Annuls Commission Decision 2005/374/EC of 20 October 2004 on a State aid measure implemented by Germany for Kvaerner Warnow Werft;

2. Orders the Commission to bear its own costs and pay those incurred by Aker Warnow Werft GmbH and Kvaerner ASA.

Tiili Dehousse Wiszniewska-Białecka

Delivered in open court in Luxembourg on 10 March 2009.

[Signatures]