OPINION OF ADVOCATE GENERAL DARMON

delivered on 15 June 1994 *

Mr President,
Members of the Court,

1. In the present proceedings for annulment, the Court is called on for the first time to interpret Council Directive 90/684/EEC of 21 December 1990 on aid to shipbuilding ('the seventh directive'), [1] adopted on the basis of Article 92(3)(d) of the EEC Treaty. [2] It provides an opportunity of clarifying the inter-relationship between the powers of the Council and the Commission in the sphere to which that directive relates.

2. In Chapter II of the directive, Article 4(1), concerning 'operating aid', provides: 'Production aid in favour of shipbuilding and ship conversion may be considered compatible with the common market provided that the total amount of aid granted in support of any individual contract does not exceed, in grant equivalent, a common maximum *ceiling*'. [3] That ceiling is fixed by the Commission. [4]

3. Article 4(7) is worded as follows:

'Aid related to shipbuilding and ship conversion granted as *development assistance* to a developing country shall not be subject to the ceiling. It may be deemed compatible with the common market if it complies with the terms laid down for that purpose by the OECD Working Party No 6 in its Agreement concerning the interpretation of Articles 6 to 8 of the Understanding referred to in paragraph 6 of this article or with any later addendum or corrigendum to the said Agreement.

The Commission must be given prior notification of any such individual aid proposal. It shall verify the particular development content of the proposed aid and satisfy itself that it falls within the scope of the Agreement referred to in the first subparagraph.' [5]

4. That provision is at the centre of this case.

* Original language: French.

1 — OJ 1990 L 380, p. 27.

2 — Now Article 92(3)(c) of the EC Treaty.

3 — Emphasis added.

4 — Article 4(2).

5 — Emphasis added.

5. In relation to a contract concluded between a consortium of shipyards in Bremen, Wismar, Kiel and Warnemünde, and the Chinese undertaking COSCO (China Ocean Shipping Company) for the construction of three container ships of 3 765 TEU (twenty-foot equivalent units) and a fourth of 2 700 TEU, the German authorities envisage granting a development aid loan in respect of the first three ships.

6. The conditions for the grant of the loan were notified to the OECD on 20 September 1991. [6]

7. Following a complaint from a Community shipyard alleging distortion of competition, and after exchanges of letters, the Commission, on 14 October 1991, ordered the German Government to notify to it its project for aid, [7] in accordance with the second subparagraph of Article 4(7) of the seventh directive, which it did on 21 October 1991. [8] The project is described as being intended to help the People's Republic of China cater for its considerably increased needs in the field of transport and obtain foreign currency through foreign trade. [9]

8. After a further exchange of correspondence, [10] the Commission decided, by letter of 22 November 1991, [11] to initiate the examination procedure provided for in Article 93(2) of the EEC Treaty in order to verify the genuineness of the 'development aid' aspect of the project and assess its general compatibility with the common market. That letter was set out in Notice 92/C22/07. [12] In it the Commission states that it is 'still not convinced of the genuine development aid character of the aid project under consideration in particular due to the lack of transparency of the pricing aspect'.

9. The German Government sent its reply on 26 February 1992. [13]

10. The United Kingdom, Denmark, various shipowners' associations of the European Community, the Danish association of ship-

6 — The development aid loan amounts to DM 203.22 million. The total price of the container ships is DM 604.14 million.

7 — Annex 4 to the application.

8 — Annex 3 to the application.

9 — Ibid.

10 — See the letter from the German Government of 4 November 1991 in which it seeks to show that the price charged is in line with the market price (Annex 5 to the application).

11 — Annex 6 to the application.

12 — Commission notice pursuant to Article 93(2) of the EEC Treaty to other Member States and interested parties regarding aid which Germany has decided to grant for the COSCO project (OJ 1992 C 22, p. 4). (Annex 8 to the application).

13 — Annex 7 to the application.

builders and the Danish association of shipowners submitted observations, to which the German Government replied on 13 April 1992. [14]

11. In Decision 92/569/EEC of 13 July 1992, [15] adopted pursuant to the first subparagraph of Article 93(2) ('the Decision'), the Commission stated that it had established that 'no development aid is involved in the COSCO contract for the construction of a 2 700 TEU container ship ... and that the export credit terms applied are compatible with the common market' (Article 1), and that the 'proposed aid for the contract to build three further container vessels for the State-owned Chinese shipping company COSCO, at the Bremer Vulkan yard, Bremen, and the Mathias Thesen yard, Wismar, cannot be regarded as genuine development aid within the meaning of Article 4(7) of Council Directive 90/684/EEC on aid to shipbuilding and is therefore incompatible with the common market' (Article 2).

12. As regards the first point, the Commission considers that the construction of the 2 700 TEU vessel is not the subject of development aid and is financed under the normal conditions laid down by the OECD.

13. As regards the second point, the reason it gives for its Decision is that COSCO is not a company that needs development aid in order to contribute to China's general development and that it has the necessary financial resources to buy new vessels on the normal market. The aid project does not therefore fulfil the condition of *necessity* laid down by the Court of Justice in its judgment in *Philip Morris*. [16]

14. The Commission adds that such aid involves the risk of serious distortion of competition to an extent contrary to the common interest.

15. By application received at the Court Registry on 26 November 1992, the Federal Republic of Germany seeks the annulment of that Decision and, *in the alternative*, the annulment of Articles 2 and 3, on the following grounds:

— the envisaged aid is development aid within the meaning of the Article 4(7) of the seventh directive. It conforms with

14 — Annex 10 to the application.

15 — Concerning proposed aid by Germany to the Chinese shipping company Cosco for the construction of container vessels (OJ 1992 L 367, p. 29).

16 — Case 730/79 *Philip Morris* v *Commission* [1980] ECR 2671.

the definition of development aid given by the OECD and interpreted by the Commission in its letter to the Member States of 3 January 1989. [17] The criterion of the necessity of the aid for the recipient undertaking, laid down in the judgment in *Philip Morris*, cited above, in relation to Article 92(3)(c) of the EEC Treaty, falls outside the scope of Article 4(7);

— the contested Decision is vitiated by an error of assessment;

— it infringes three fundamental principles of Community law:

— the principle of equal treatment;

— the principle of the protection of legitimate expectations;

— the applicant's right to a fair hearing.

16. Before refuting the applicant's substantive submissions, the Commission contends that the application is inadmissible in so far as it relates to Article 1 of the Decision.

17. Let us consider that contention.

18. The German Government maintains that the declaration that the aid for the 2 700 TEU vessel is compatible with the common market was superfluous because aid towards the payment of interest is automatically compatible with the common market by virtue of Article 4(6) of the seventh directive.

19. Having decided to consider the whole of the aid project, the Commission was also required to state its position regarding the purchase of the 2 700 TEU container vessel. Moreover, by stating that the latter did not involve development aid and that the credit terms were compatible with the common market, the Decision does not adversely affect the applicant Member State. [18]

17 — SG(89)D/311 applying the previous Council Directive 87/167/EEC of 26 January 1987, the wording of which was the same (OJ 1987 L 69, p. 5) (Annex 11 to the application).

18 — It might, on the other hand, affect the interests of the competitors of the shipyards to which the contract was awarded.

20. The application is therefore inadmissible in that respect.

21. As regards Articles 2 and 3 of the Decision, the following question must first be answered:

Does the envisaged aid constitute development aid within the meaning of Article 4(7) of the seventh directive? More particularly, in that regard, is the Commission right to take into account the criterion of the *necessity* of the aid?

22. It will then be necessary to consider whether, as it contends, the applicant is entitled to allege an error of assessment and breach of the principles of equal treatment, protection of legitimate expectations and the right to a fair hearing.

Is the envisaged aid development aid within the meaning of Article 4(7) of the seventh directive?

23. Article 92(3) provides:

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

(a) ...

(b) ...

(c) ...

(d) Such other *categories* of aid as may be specified by decision of the Council acting by a qualified majority on a proposal from the Commission.' [19]

24. In its judgment in *Belgium* v *Commission*, [20] the Court held in relation to Council Directive 87/167/EEC, [21] which, like the sev-

19 — Emphasis added.

20 — Joined Cases C-356/90 and C-180/91 *Belgium* v *Commission* [1993] ECR I-2323.

21 — Of 26 January 1987 on aid to shipbuilding (OJ 1987 L 69, p. 55).

enth directive which superseded it, was adopted on the basis of Article 92(3)(d), that

'... the Council, in accordance with the *ratio legis* of Article 92(3 and on the basis of a finding of the incompatibility of the aid for shipbuilding, took account of a number of requirements of an economic and social nature which prompted it to use the power granted to it by the Treaty nevertheless to consider such aid to be compatible with the common market, provided that it satisfies the conditions for a derogation laid down in the directive'. [22]

25. That reasoning can be transposed to the seventh directive, which differs from its predecessor only in minor respects (the two directives have, essentially, the same Article 4). This brings the matter therefore within '... exceptional arrangements, which necessarily presuppose that the aid in question is at the outset incompatible with the common market'. [23]

26. How are powers shared between the Commission and the Council when the latter applies Article 92(3)(d)?

27. As we know, when assessing the compatibility of aid in a given case, the Commission enjoys — subject to review by the Court — vested powers. [24] The Council, for its part, has powers which are available only in exceptional circumstances, by virtue of the third subparagraph of Article 93(2). [25]

28. Under Article 92(3)(d), the division of powers between the Council and the Commission is thus clear. Whereas the Council may extend the range of aid which may be declared compatible, by fixing an abstract and general framework ('categories of aid'), only the Commission undertakes a specific examination to determine whether or not aid falling within the category defined by the Council is compatible with the Treaty. The Council does not therefore substitute itself for the Commission in making a specific assessment of the compatibility of aid in a given case. Moreover, when it relies on the third subparagraph of Article 93(2), it gives a decision at the request of a Member State and does so *unanimously*, whereas, in order to extend the range of aid under Article 92(3)(d), it acts by a *qualified majority*.

29. What are the Commission's powers under that provision?

22 — Paragraph 30.

23 — Paragraph 33.

24 — See paragraph 1 of the judgment in Joined Cases C-72 and 73/91 *Sloman Neptun Schiffarts* [1993] ECR I-887.

25 — An example is Council Decision 73/209/EEC of 24 July 1973 concerning the present system of aid in the United Kingdom for the refining of raw sugar (OJ 1973 L 207, p. 47).

30. As we know, in order to declare compatible with the common market aid falling within the categories listed in Article 92(3)(a), (b) and (c), 'the Commission has a *discretion*, the exercise of which involves economic and social assessments which must be made in a Community context'. [26]

31. With respect to those categories of aid, the Court recognizes that the Commission's discretion is rather wide: thus, 'the use of the words "abnormally" and "serious" in the exemption contained in Article 92(3(a) shows that it concerns only areas where the economic situation is extremely unfavourable in relation to the Community as a whole. The exemption in Article 92(3)(c), on the other hand, is wider in scope inasmuch as it permits the development of certain areas without being restricted by the economic conditions laid down in Article 92(3)(a), provided such aid "does not adversely affect trading conditions to an extent contrary to the common interest"'. [27]

32. Certain authors have even maintained that the Commission enjoys considerable scope for intervention in that field, precisely in order to compensate for the legislative lacuna resulting from the lack of Council rules, based on Articles 92(3)(d) and 94 of the Treaty:

'The Commission has been obliged, *de facto*, to take the place of the intergovernmental authority, exercising in its stead an unknown type of regulatory power.' [28]

33. Be that as it may, what is the extent of the Commission's discretion when the Council determines, on the basis of Article 92(3)(d), the 'categories of aid' which *may* be considered to be compatible?

34. The Court has already implicitly taken the view in its judgment in *Belgium v Commission*, [29] cited above, that that discretion extended to those categories of aid. It stated:

'... Article 92(3)(d) allows the Council, acting by a qualified majority on a proposal from the Commission, to extend the range of aid which *may* be regarded as compatible with the common market, in addition to the cate-

26 — Judgment in *Philip Morris*, cited above, paragraph 24, emphasis added. See also the judgment in Case C-303/88 *Italy* v *Commission* [1991] I-1433, paragraph 34. The Court's case-law is consistent in that respect.

27 — Judgment in Case 284/84 *Germany* v *Commission* [1987] ECR 4013, paragraph 19.

28 — C. Blumann, 'Régime des aides d'Etat: jurisprudence récente de la Cour de Justice', *Revue du Marché commun*, 1992, p. 721.

29 — Footnote 20.

gories indicated in subparagraphs (a), (b) and (c)'. [30]

35. That power is apparent from the very wording of Article 4(7) of the seventh directive, which provides:

'It (aid related to shipbuilding and ship conversion granted as development assistance) *may* be deemed compatible with the common market, ...'. [31]

36. Let us now examine the way in which that provision is applied.

37. The situation in the shipbuilding sector is *sui generis*.

38. Distortions of competition affect this sector in the world market and the Community shipbuilding industry could not protect itself against outside competition '... by tariff measures or other measures of commercial policy without causing harm to Community shipowners who carry on their activity in a market of an international nature'. [32]

39. The successive Understandings concluded under the auspices of the OECD have made it possible to reduce those distortions by restricting and harmonizing export credit conditions for ships. [33]

40. In an annex to the resolution of the Council of the OECD of 3 August 1981 concerning an amendment of the Understanding on export credits for ships, paragraph 6 states that a contracting party may, in a special case, accord more favourable conditions 'for genuine aid reasons'. [34] That aid must, in particular, be notified with sufficient notice to the other partners. [35]

41. By a document entitled 'Revision of the definitions and administrative procedures concerning the understanding on export

30 — Paragraph 26, emphasis added.

31 — Emphasis added. See also Article 4(1).

32 — Third recital in the preamble to Council Directive 69/262/EEC of 28 July 1969 on aid to shipbuilding intended to correct distortions of Community on the international market (*Journal officiel* 1969 L 206, p. 25).

33 — See the sixth recital in the preamble to Council Directive 78/338/EEC of 4 April 1978 on aid to shipbuilding (OJ 1978 L 98, p. 19) and the fifth recital in the preamble to Council Directive 75/432/EEC of 10 July 1975 on aid to shipbuilding (OJ 1975 L 192, p. 27).

34 — Annex 12 to the application.

35 — For this reason the aid granted by the Federal Republic of Germany was notified to the OECD.

credits for ships' (C/WP6(84)3) of 18 January 1984, [36] Working Party No 6 of the Council on shipbuilding laid down the conditions for the implementation of the abovementioned paragraph 6.

42. The aid in question must be official development assistance. The actual owner must reside in the State receiving the aid and not be a non-operational subsidiary of a foreign company. Finally, it must undertake not to resell the ship without the approval of its government.

43. In an addendum of 30 January 1985, the working party clarified the definition of public development aid: [37]

'Official development assistance is defined as those flows to developing countries and multilateral institutions provided by official agencies, including State and local governments, or by their executive agencies, each transaction of which meets the following tests:

(a) It is administered with the promotion of the economic development and welfare of developing countries as its main objective;

and

(b) It is concessional in character and conveys a grant element of at least 25% (calculated at a rate of discount of 10%)' [38] of the contract value.

44. The Council conformed to those conditions by simply referring, in the first subparagraph of Article 4(7) of the seventh directive, to the provisions adopted by the abovementioned working party.

45. Those conditions were set out in the Commission's notice to the Member States, SG(89)D/311 of 3 January 1989. [39]

36 — Annex 13 to the application.
37 — Annex 14 to the application.
38 — Annex 14 to the application, point 18.
39 — Annex 11 to the application.

46. The Commission does not deny that those conditions have been observed in the present case.

47. The second subparagraph of Article 4(7) requires it, before checking that the aid fulfils the conditions laid down by the OECD, to verify 'the particular "development" content'.

48. What does that verification involve? Is the mere fact that the aid can be classified as 'public development aid' within the meaning of the OECD Understanding sufficient in that regard?

49. In its Decision, the Commission maintains that, quite apart from its examination of the OECD criteria laid down in the first subparagraph of Article 4(7), it must 'establish whether the aid granted ... constitutes development aid'. [40]

50. It observes that COSCO is a flourishing company — it ranks fifth in the world amongst container operators — and has the financial capacity to undertake any renewal of its fleet for itself. COSCO intends buying the 2 700 TEU container without aid. The aid is therefore incompatible since it is not *necessary* for the company receiving it. Moreover, the granting of unjustified aid carries the 'risk of creating a serious distortion of competition to an extent contrary to the common interest'. [41]

51. The Federal Republic of Germany contends, on the contrary, that the 'verification of the development component' involves no more than establishing that the minimum rate of the grant element (25%) prescribed by the OECD is observed. [42] Moreover, the criteria of the necessity of the aid, laid down in *Philip Morris* in entirely different circumstances, was not referred to in the Commission's letters of 3 January 1989 and 22 November 1991 and is inapplicable in the present case.

52. The wording of the second subparagraph of Article 4(7) gives valuable guidance. Whilst the Commission must ensure that the aid is within the scope of the OECD Understanding, it must also verify its particular 'development' component. It is therefore clear that whilst compatibility with the OECD criteria is a necessary condition for compatibility with the common market, fulfilment of that condition is not sufficient. If

40 — Contested Decision, VI, second paragraph.

41 — Contested Decision, VI, third paragraph, subparagraph 2.

42 — Paragraph 5 of the reply.

Article 4(7) laid down no other conditions than observance of the criteria laid down by the OECD, it would be drafted like Article 4(6) which, with regard to aid granted in the form of credit facilities, prescribes no other requirements than conformity with an OECD Council resolution. The particular 'development' component does not therefore merge with the OECD criteria.

53. In interpreting that concept, one consideration appears decisive: the *contrast* between the conditions laid down in general by the seventh directive for the grant of production aid — and in particular the fixing of a *ceiling* [43] — and those specifically prescribed for the grant of development aid linked with the construction and conversion of vessels, which fix a *floor*. Because of the development aim pursued, the aid under Article 4(7) is not subject to the same constraints as aid under Article 4(1) to (6).

54. The seventh directive allows development aid to be linked to the construction of merchant vessels in the Community.

55. Aid under Article 4(7) of the directive which did not pursue a genuine development objective might disguise indirect aid to Community shipyards — 'a subsidy to the shipbuilding industry' [44] — which would thus not be subject to the conditions laid down in Article 4(1) to (6).

56. The Commission found such an infringement in the procedure which gave rise to Decision 91/306/EEC of 12 December 1990 concerning two aid projects of the German Government in favour of a shipyard in financial difficulties, [45] in which it observed:

'The aim of Article 4(7) of [Directive 87/167/EEC] is to allow aid to reduce the prices of ships to certain developing countries in specific circumstances, and not to grant rescue aid to yards in the Community'. [46]

57. This shows the importance of the task entrusted by the Council to the Commis-

43 — Article 4(1). See 2 above.

44 — Contested decision, IV, second paragraph, subparagraph 1.

45 — OJ 1991 L 158, p. 71.

46 — Ibid., II, fourth paragraph.

sion: to inquire whether the aid is development aid or, in reality, indirect aid to the Community shipyards concerned. That is also the point which the Commission raised in its Notice 92/C22/07. [47]

58. If checking the 'development' component was limited, as contended by the German Government, to establishing that 'the aid ... was intended to help China to cover a greatly increased transport need and save hard currency by boosting exports' and that 'the container ships would further the development of an integrated transport system ...', [48] the checks undertaken would not enable any misuse of the procedure to be brought to light.

59. If, on the contrary, checking the 'particular "development" component' consists in examining closely the matter of the proportionality (is the planned aid capable of attaining the stated development objective, and could that objective be attained by a measure more in conformity with the competition rules? [49]), and assessing the *necessity* for the aid, having regard to the specific and precise conditions for its use, the Commission could then determine whether the aid in question was covered by Article 4(1) to (6).

60. The check undertaken by the Commission was of the latter kind, following which it concluded that 'COSCO is not a company which *needs* development aid in order to contribute to China's development'. [50]

61. In doing so, did it improperly add a condition to those laid down by Article 4(7) of the seventh directive for the grant of development aid?

62. Admittedly, 'a measure of general application cannot be implicitly amended by an individual decision'. [51] The Commission cannot therefore, by its Decision, add a condition, or even a criterion, to those set out in the directive for the grant of development aid.

63. I consider that, whatever the awkwardness in the drafting of the Commission Decision (which refers, in the French, italian, Portuguese, Spanish and Dutch versions, to

47 — Cited above, note 12; see in particular p. 5.

48 — Contested decision, II.

49 — And in particular, could the project not be financed by recourse to the market (cash flow)?

50 — Contested decision, VI, third paragraph, subparagraph 2 — emphasis added.

51 — Judgment of 24 March 1993 in Case C-313/90 *CIRFS and Others* v *Commission* [1993] ECR I-1125, paragraph 44. See also paragraph 130 of the Opinion of Advocate General Lenz.

the *criterion* [52] of necessity), that did not happen.

64. The Commission verified whether the envisaged aid *pursued a specific development objective*, which is precisely what it is asked to do by the Council. The German version of the second subparagraph of Article 4(7) of the seventh directive is unambiguous in that respect: 'Die Kommission prüft, welches besondere Entwicklungs*ziel* mit der geplanten Beihilfe verfolgt wird ...'. The Italian version is even more explicit: '(La) Commissione ... verifica la specifica *finalità* di "sviluppo" contenuta nell'aiuto prospettato ...'. [53]

65. Finding in particular that COSCO was in a position to provide its own financing and renew its fleet under normal market conditions, it concluded that the aid in question did not pursue such an objective and did not fall within Article 4(7): [54] *the same development aim could be attained without State aid (and therefore without the distortions of competition inevitably caused by it).*

66. By thus examining the matter of proportionality, the Commission established that the aid project did not fall within the scope of Article 4(7) (without thereby asserting that it came within other paragraphs of that article). Moreover, it observed the *ratio legis* of the directive, which seeks to limit aid granted in derogation from the rule of free competition. It also remained within the scope of the powers attributed to it for the purpose: moving from the general to the particular and checking whether there is *really* development aid where such is required.

67. Must not the Commission's discretion specifically enable it to refuse to declare particular aid compatible on the ground that the intended recipient has no need for it and that it is not necessary in order to attain the objectives laid down in Article 92(3)(a), (b) or (c) or those of a Council directive?

68. Let us recall the Opinion of Advocate General Caportorti in *Philip Morris*: [55]

'there is no reason for derogating from the prohibition of State aids if a particular investment ... may also take place irrespective of that benefit'. [56]

52 — That word does not appear in the German, English or Greek versions.

53 — Emphasis added.

54 — Contested decision, VI.

55 — Cited above, note 16.

56 — At p. 2701.

69. In its judgment in that case, the Court considered that the Commission was right to take the view that an aid granted on the basis of Article 92(3) should be *necessary* in order to be declared compatible. [57]

70. The legality of such a requirement is upheld — albeit by implication in some instances — in the case-law of the Court.

71. Thus, in its judgment in *Italy* v *Commission*, [58] the Court approved Decision 89/43/EEC by which the Commission found that the aid granted to the ENI-Lanerossi group in the form of the injection of capital into its subsidiaries engaged in the manufacture of men's clothing was incompatible with the common market. The Court held that the Commission had been right to take the view, following an extremely detailed analysis, that the aid in question was not appropriate to attainment of the Community objectives relating to sectoral aid to the textile industry or to the guidelines governing rescue aid for undertakings and could not, therefore, qualify for any of the derogations provided for in Article 92(3). [59]

72. Mention should also be made of the decision on the investment subsidy granted to Deufil for the production of polyamide yarns, in which the Commission refused to apply Article 92(3). The Court approved it, observing that:

'The Commission in no way exceeded the limits of its discretion by considering that the granting of aid for an investment which increases production capacity in a sector in which there is already considerable overproduction is contrary to the common interest and that aid of that sort is not of such a nature as to promote the economic development of the area at issue'. [60]

73. Of similar importance is the judgment of 21 March 1991 in *Italy* v *Commission*, [61] in which the Italian Republic contended that the aid granted to Alfa Romeo came within Article 92(3)(a) (because it was intended to promote economic development in the Mezzogiorno) or Article 92(3)(c) (because it was intended to develop certain activities or certain economic regions). The Court rejected that contention on the ground that:

'the disputed injections of capital constituted rescue aid which, in the absence of a genuine

57 — Paragraphs 17 and 26.
58 — Cited above, note 26.
59 — See paragraphs 30 to 39.
60 — Judgment in Case 310/85 *Deufil* v *Commission* [1987] ECR 901, paragraph 18.
61 — Case C-305/89 [1991] ECR I-1603.

restructuring plan, could not bring about the lasting development of regions where there was serious underemployment or of specific economic activities or economic areas.' [62]

74. The Commission's approach may be summarized as follows:

'... aid will only be declared compatible where it contributes to the attainment of one of the development objectives referred to in Article 92(3) and where it is proved that, without the intervention of the public authorities, the free interplay of market forces would not alone be capable of attaining the objectives in question. On the other hand, the Community authority will not authorize aid which is neither *necessary* nor *proportionate* to the attainment of those objectives.' [63]

75. The concept of necessity is inherent in that of aid. Thus, prior to considering the issue of proportionality under Article 92(3), where it is necessary to classify State aid for public undertakings, the Court has, in several of its decisions, used as a yardstick the approach of the *private investor in a market economy*: [64] the participation of the public authorities in the capital of an undertaking is not aid for the purposes of Article 92(1) of the Treaty where, in similar circumstances, a private investor, guided by the prospects of a return on capital, would have invested to the same extent. Does that not mean that State aid is provided only where there is no alternative financing by a private investor, and thus in case of need?

76. There is another reason for which the need for aid must be examined. The directive does not merely refer to Article 92(3). *It is also based on Article 113 of the Treaty.*

77. As was pointed out by the Commission, the commercial policy of the Community, which includes the conditions applicable to aid for exports to non-member countries, [65] falls exclusively within the powers of the Community. Accordingly, a Member State must not be able to frustrate that policy by means of generous State aid outside the strict

62 — Paragraph 36.

63 — G. M. Roberti, 'Le contrôle de la Commission des Communautés européennes sur les aides nationales', *AJDA*, 20 June 1993, p. 397, at 407 — emphasis added.

64 — For example, in *Italy* v *Commission*, cited above, note 61, paragraph 23.

65 — Opinion of 11 November 1975 (1/75, [1975] ECR 1355, at 1362.

framework defined by the Council directive or by evading the conditions laid down by the latter.

78. As the Court emphasized in Opinion 1/75:

'any unilateral action on the part of Member States would lead to disparities in the conditions for the grant of export credits, calculated to distort competition between undertakings of the various Member States in external markets. Such distortion can be eliminated only by means of a strict uniformity of credit conditions granted to undertakings in the Community, whatever their nationality.' [66]

79. It is therefore for the Commission, as guardian of the Treaty, to ensure that the Member States remain within the limits of the derogation and apply Article 4(7) only in those cases where they grant genuine development aid. By granting aid that is *not* necessary, a Member State would circumvent the Community rules and exercise a sort of parallel power, which is precluded by Article 113.

80. Finally, it will be noted that the Commission has set itself the objective of eliminating all aid to the shipbuilding sector [67] and that the issue here is a derogation from the general rule that aid is not permissible. Provisions under which aid may be declared compatible must therefore be interpreted strictly.

81. It follows, in my opinion, that in such circumstances the Commission is fully entitled to appraise the concept of development aid, as provided for in Article 4(7) of the directive, and that it will not exceed its powers by examining whether the aid is necessary.

82. When finding that the aid granted was not needed by the recipient undertaking and that it did not therefore pursue the development aid objective set by the Council, the Commission possessed sufficient information to say that the aid did not fall within the scope of Article 4(7) of the seventh directive and could not therefore qualify for the derogation allowed by the provision.

83. If we apply here the principle laid down in the Court's judgment in *Belgium* v *Com-*

66 — Ibid., at p. 1364.

67 — See the seventh recital in the preamble to the seventh directive.

mission, [68] failure to comply with the essential condition for aid based on Article 4(7) to be compatible with the common market (it must contribute to development) means that the aid concerned is *ipso facto* incompatible.

84. The Commission nevertheless took its reasoning further and observed that the grant of aid at issue was liable to bring about a twofold distortion of competition: by adversely affecting the Community shipyards other than those to which construction of the vessels was entrusted and also the Community shipping companies that would have to compete with COSCO.

85. Let us consider these two points.

86. It is clear that once it is established that the planned aid for the three container ships for COSCO cannot be regarded as genuine development aid within the meaning of Article 4(7), the distortion of competition which it necessarily produces in the common market for the benefit of the shipyards concerned can no longer be justified. It is symptomatic, in that connection, that the initial complaint made against the COSCO project emanated from a Community shipyard.

68 — Cited above, note 20, paragraphs 32 and 33.

87. Should the Commission also have found a risk of serious distortion of competition in the *sea freight* sector, on the ground that the vessels bought by COSCO will strengthen the latter's position on routes on which Community shipping companies operate?

88. I do not think that such an objection is appropriate.

89. By definition, the directive takes account of such a risk, it being inherent in any development aid, which can always have a 'rebound' effect to the detriment of Community operators. For that reason, it does not require that vessels bought with the benefit of development aid should be used on routes where there is no competition with Community shipping companies. Even if the aid were development aid actually needed by COSCO, a risk of that kind would have existed.

90. However, I do not see in that finding by the Commission any reason for the annulment of its Decision. It may go beyond what was required, but it does not detract from the principal grounds of the Decision: the absence of genuine development aid.

The error of assessment

91. According to the applicant, the Commission's Decision is vitiated by an error of assessment in that, contradictorily, it refers to a risk of serious distortion of competition between the Member States, both in the shipbuilding sector and in the sea freight sector, but nevertheless states that it is not in a position to show that the price charged reflects aid to the shipyards (VI, third paragraph, 1st subparagraph). [69]

92. The considerable discretion vested in the Commission in the matter of aid under Article 92(3) means that review by the Court must be limited: 'The fact that the review is limited does not, however, mean that there is no review: the material accuracy of the facts must be examined, as must the question of any error of assessment or any error of law, the propriety of the procedure and the possibility of misuse of powers'. [70]

93. As regards the risk of *serious distortion of competition* to an extent contrary to the common interest as far as shipowners are concerned, I have just said that that finding was superfluous. Let me say, for the sake of completeness, with regard to the shipyards concerned, that the Commission pointed out, without any evidence to the contrary having been produced, that they were able to obtain 'a price ... at the upper end of the prevailing market prices for this type of ship'.

The principles of equal treatment, protection of legitimate expectations and the right to a fair hearing

94. The Federal Republic of Germany alleges breach of the principles of equal treatment, protection of legitimate expectations and the right to a fair hearing.

95. Did the Commission take account of the need for the aid for the first time in its Decision of 31 July 1992, since it did not mention that aspect — according to the Federal Republic of Germany — either in its notice of 3 January 1989 on the interpretation of Article 4(7) of the seventh directive or in the notice by which it initiated the investigative procedure in this case, or in the exchanges of correspondence which preceded the adoption of the contested Decision?

69 — Application, paragraph 9.

70 — J. Biancarelli, 'Le contrôle de la Cour de Justice des Communautés européennes en matière d'aides publiques', *AJDA*, 20 June 1993, p. 412, at 423.

96. It is apparent both from the documents annexed to the application and from the oral procedure that the matter of the necessity for the aid was an underlying element or was referred to (1) in the letter of 22 November 1991 which gave rise to the notice, [71] (2) in discussions preceding the contested Decision between representatives of the Commission and of the German Government, and [72] (3) as early as the letter of 3 January 1989, in which the Commission emphasized the importance of verifying the particular 'development' component of the planned aid.

97. Germany's allegation as to breach of the principles of equal treatment, protection of legitimate expectations and the right to a fair hearing is closely linked with the absence of any requirement of necessity in the measures taken by the Commission before adopting the Decision.

98. It having been established that the Commission did refer to that requirement before 31 July 1992, the last three contentions call for only brief comment.

71 — '...it is not clear to the Commission based on the information received from the market whether the aid project for the COSCO container vessel contract is not more of an operating aid to the German shipyards involved rather than genuine aid to a developing country' (OJ 1992 C 22, p. 5).

72 — At the hearing, the Agent for the Commission mentioned, without being contradicted, a meeting held on 12 February 1992 at which the representatives of DG IV expressed doubts as to whether COSCO was an undertaking eligible for development aid.

Breach of the principle of equal treatment

99. The Court's case-law is consistent:

'... the general principle of equality, of which he prohibition of discrimination on grounds of nationality is a mere specific enunciation, is one of the fundamental principles of Community law. This principle requires that similar situations shall not be treated differently unless differentiation is objectively justified.' [73]

100. According to the Federal Republic of Germany, the application of a criterion not included in Article 4(7) of the seventh directive or in the letter of 3 January 1989 is contrary to the principle of equal treatment and is unlawful. [74]

101. Since examination of the need for the aid is inherent in that of the development component, there was no possibility that the Commission breached the principle of equal treatment by carrying it out.

73 — Judgment in Case 810/79 *Uberschar* [1980] ECR 2747, paragraph 16. See also the judgment in Case 147/79 *Hochstrass* v *Court of Justice* [1980] ECR 3005.

74 — Paragraph 7 of the application.

102. It will also be noticed that the applicant State does not refer to any State aid procedure in the arguments on which it bases its contention.

Breach of the principle of the protection of legitimate expectations

103. To invoke this principle successfully, the Federal Republic of Germany would have had to demonstrate a change in Community practice which had affected it adversely.

104. As we have seen, there was no such change. There is thus no evidence of any breach of this principle.

Breach of the right to a fair hearing

105. It has been consistently held that '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 procedure in question'. [75]

106. Whilst that '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', [76] it also requires that the Commission include in its decision only those matters on which the Member State concerned has been able to give its views.

107. It has not been shown that the German Government was not able to explain the need for the aid — quite the contrary.

108. This allegation, like the two before it, has thus not been substantiated.

75 — Judgment in Case C-301/87 *France* v *Commission* [1990] ECR I-307, paragraph 29. See the case-law cited. See also the judgment in Case 40/85 *Belgium* v *Commission* [1986] ECR 2321, paragraph 28.

76 — Ibid., paragraph 30.

109. I therefore consider that the application is inadmissible as regards Article 1 of the Decision and must be dismissed as regards the remaining pleas, and that the applicant should be ordered to pay the costs.