JUDGMENT OF THE COURT OF FIRST INSTANCE
(Fourth Chamber, Extended Composition)
28 February 2002 *

In Joined Cases T-227/99 and T-134/00,

Kvaerner Warnow Werft GmbH, established in Rostock-Warnemünde (Germany), represented by M. Schütte, lawyer, with an address for service in Luxembourg,

applicant,

v

Commission of the European Communities, represented by K.-D. Borchardt, acting as Agent, with an address for service in Luxembourg,

defendant,

* Language of the case: German.

APPLICATION for annulment of Commission Decision 1999/675/EC of 8 July 1999, as amended, and of Commission Decision 2000/336/EC of 15 February 2000 on State aid granted by the Federal Republic of Germany to Kvaerner Warnow Werft GmbH (OJ 1999 L 274, p. 23 and OJ 2000 L 120, p. 12 respectively),

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

composed of: P. Mengozzi, President, R. García-Valdecasas, V. Tiili, R.M. Moura Ramos and J.D. Cooke, Judges,

Registrar: D. Christensen, Administrator,

having regard to the written procedure and further to the hearing on 2 May 2001,

gives the following

Judgment

1 Council Directive 90/684/EEC of 21 December 1990 on aid to shipbuilding (OJ 1990 L 380, p. 27) provides for the possibility, subject to certain rules, of

granting State aid to shipbuilding undertakings for operating, investment, closure, and research and development.

2 Article 10a(2)(c) of Directive 90/684/EEC, as inserted by Council Directive 92/68/EEC of 20 July 1992 amending Directive 90/684/EEC (OJ 1992 L 219, p. 54), provides that operating aid to the shipbuilding and ship conversion activities of yards operating in the territories of the former German Democratic Republic on 1 July 1990 may, until 31 December 1993, be considered compatible with the common market provided that the Federal Republic of Germany agrees to carry out before 31 December 1995 a genuine and irreversible reduction of capacity of 40% net of the capacity of 545 000 cgt ('compensated gross tonnage') existing on 1 July 1990.

3 According to Article 6 of Directive 90/684, 'investment aid... may not be granted for the creation of new shipyards or for investment in existing yards unless it is linked to a restructuring plan which does not involve any increase in the shipbuilding capacity of the yard or unless it is directly linked to a corresponding irreversible reduction in the capacity of other yards in the same Member State over the same period.... [I]nvestment aid may be deemed compatible with the common market provided that... the amount and intensity of such aid are justified by the extent of the restructuring involved [and] is limited to supporting expenditure directly related to the investment.'

4 In 1992 Warnow Werft, an East German shipyard, was sold by the Treuhandanstalt, the body with the task of restructuring the undertakings of the former German Democratic Republic, to the Norwegian industrial group Kvaerner. According to the sales contract sent by Germany to the Commission, Kvaerner undertook until 31 December 2005, with regard to the Warnow yard, not to

exceed an annual building capacity of 85 000 cgt unless that restriction under Community legislation was relaxed. The 85 000 cgt capacity restriction was the amount allocated to the applicant by the Federal Republic of Germany in pursuance of Article 10a(2)(c) of Directive 90/684.

5 By decisions communicated to the Federal Republic of Germany by letters of 3 March 1993, 17 January 1994, 20 February 1995, 18 October 1995 and 11 December 1995 ('the authorising decisions'), the Commission authorised, in accordance with Directive 90/684 and Directive 92/68, planned aid from the Federal Republic of Germany to Kvaerner totalling DEM 1 246.9 million, on condition that the capacity restriction of 85 000 cgt per year was complied with. The authorised aid was broken down as follows:

N 692/D/91 — Commission letter of 3 March 1993 (SG (93) D/4052)

— DEM 45.5 million operating aid;

— DEM 82.4 million operating aid in the form of an exemption from previous liabilities;

— DEM 127.5 million investment aid;

— DEM 27 million closure aid;

N 692/J/91 — Commission letter of 17 January 1994 (SG (94) D/567)

— DEM 617.1 million operating aid;

N 1/95 — Commission letter of 20 February 1995 (SG (95) D/1818)

— DEM 222.5 million investment aid;

N 637/95 — Commission letter of 18 October 1995 (SG (95) D/12821)

— DEM 66.9 million investment aid;

N 797/95 — Commission letter of 11 December 1995 (SG (95) D/15969)

— DEM 58 million investment aid.

6 In 1977 the applicant's actual production was 93 862 cgt. In 1998, its actual production was 122 414 cgt.

7 The Commission took the view that the restriction of 85 000 cgt per year had been exceeded for 1998 and, by letter dated 16 December 1998, it informed the Federal Republic of Germany of its decision to initiate the procedure laid down in Article [88](2) of the EC Treaty. This letter was the subject of a communication published on 16 February 1999 in the *Official Journal of the European Communities* (OJ 1999 C 41, p. 23).

8 The German authorities submitted their observations on 18 February 1999.

9 On 14 January and 25 March 1999, Commission representatives visited the yard with an independant external expert.

10 By Decision 1999/675/EC of 8 July 1999 on State aid implemented by Germany in favour of Kvaerner Warnow Werft GmbH (OJ 1999 L 274, p. 23) the Commission decided as follows:

'*Article 1*

The state aid, which Germany has implemented in favour of Kvaerner Warnow Werft GmbH in an amount of EUR 41.5 million (DEM 83 million), is incompatible with the common market pursuant to Article 87(1) of the EC Treaty.

Article 2

1. Germany shall take the necessary measures to recover from the recipient the aid of EUR 41.5 million (DEM 83 million)

...

3. The sums to be recovered shall bear interest from the date on which they were made available to the recipient until their actual recovery. Interest shall be calculated on the basis of the reference rate used for calculating the grant-equivalent of regional aids.

...'

11 The Commission took the view that the capacity limit had also been exceeded in 1997 and, by letter dated 20 July 1999, notified the Federal Republic of Germany that it had decided to initiate the procedure provided for in Article 88(2) EC. This letter was the subject of a communication published on 28 August 1999 in the *Official Journal of the European Communities* (OJ 1999 C 245, p. 24).

12 The German authorities submitted their observations on 4 October 1999.

13 By Decision 2000/336/EC of 15 February 2000 on State aid implemented by Germany in favour of Kvaerner Warnow Werft GmbH (OJ 2000 L 120, p. 12), the Commission decided as follows:

'*Article 1*

Aid which Germany has implemented in favour of Kvaerner Warnow Werft GmbH amounting to EUR 6.3 million (DEM 12.6 million) is incompatible with the common market pursuant to Article 87(1) of the EC Treaty.

Article 2

1. Germany shall take the necessary measures to recover from the recipient the aid amounting to EUR 6.3 million (DEM 12.6 million).

...

3. The sum to be recovered shall bear interest from the date on which it was made available to the recipient until its actual recovery. Interest shall be calculated on the basis of the reference rate used for calculating the grant equivalent of regional aid.

...'

14 By Decision 2000/416/EC of 29 March 2000: on State aid implemented by Germany in favour of Kvaerner Warnow Werft GmbH (1999) and amending Decision 1999/675 (OJ 2000 L 156, p. 39) the Commission decided as follows:

'*Article 1*

Kvaerner Warnow Werft GmbH (KWW) complied in 1999 with the capacity limitation compliance with which is, pursuant to the Decision on State aid measure N 325/99, notified by letter of 5 August 1999, a condition for the compatibility of the aid with the common market.

Article 2

Article 1 of Decision 1999/675/EC shall be worded as follows:

"*Article 1*

The State aid which Germany has implemented in favour of Kvaerner Warnow Werft GmbH in an amount of EUR 41.1 million (DEM 82.2 million) is incompatible with the common market pursuant to Article 87(1) of the EC Treaty."

...'

Procedure and forms of order sought by the parties

15 By applications lodged at the Registry of the Court of First Instance on 11 October 1999 and 18 May 2000 the applicant brought the present proceedings, which were registered as Case T-227/99 and Case T-134/00.

16 By separate document dated 22 June 2000 the applicant amended the form of order sought in Case T-227/99 in the light of the decision of 29 March 2000 amending the decision of 8 July 1999. The defendant submitted its observations on the amendment.

17 By order of 10 November 2000, after hearing the parties, the President of the Fourth Chamber (Extended Composition) of the Court of First Instance decided to join Cases T-227/99 and T-134/00 for the purposes of the oral procedure and the judgment.

18 Upon hearing the report of the Judge-Rapporteur, the Court of First Instance (Fourth Chamber, Extended Composition) decided to open the oral procedure and, by way of measures of organisation of procedure, requested the parties to reply to written questions and to produce certain documents. The parties complied with those requests.

19 The parties presented oral argument and answered questions put to them by the Court at the hearing on 2 May 2001.

20 The applicant claims that the Court should:

— annul Decision 1999/675, as amended by Decision 2000/416, or, in the alternative, annul it in so far as the calculation of the amount of the aid to be refunded is based on the total amount of authorised aid and not on the total amount of operating aid actually granted;

— annul Decision 2000/336, or, in the alternative, annul it in so far as the calculation of the amount of aid to be refunded is based on the total amount of authorised aid and not on the total amount of operating aid actually granted, taking into account sums whose recovery has already been requested;

— order the Commission to pay the costs or, in the alternative and in the event of the rejection of the application in Case T-227/99, to pay the expenditure occasioned by the amendment of the application which was required as a result of the amendment of Decision 1999/675.

21 The defendant contends that the Court should:

— dismiss the application;

— order the applicants to pay the costs, including the costs relating to the amended application in Case T-227/99.

Law

22 It should first be observed that a rectification, in the course of proceedings, of the contested decision constitutes a new factor which allows the applicant to amend its pleas and the form of order sought (Case 14/81 *Alpha Steel* v *Commission* [1982] ECR 749, paragraph 8; Joined Cases T-46/98 and T-151/98 *CCRE* v *Commission* [2000] ECR II-167, paragraph 36). The applicant's amendment of its pleas and the form of order sought in Case T-227/99, referred to in paragraph 16 above, is therefore admissible.

23 In support of its applications for annulment, the applicant relies essentially on eight pleas. The first plea, which relates only to Decision 1999/675, alleges illegalities in the composition of the Commission. The second plea alleges factual errors in the application of Articles 87 EC and 88 EC and of Directive 90/684. The third plea alleges errors of law in the application of Articles 87 and 88 EC and of Directive 90/684. The fourth plea alleges abuse of power. The fifth plea alleges an inadequate statement of reasons. In the sixth plea the applicant complains of infringement of the principles of the protection of legitimate expectations and of legal certainty. The seventh plea alleges infringement of the principle of equal treatment. The eighth plea alleges infringement of the principle of proportionality.

The first plea: illegalities in the composition of the Commission

24 The applicant submits that Decision 1999/675 is unlawful because there was an illegality in the composition of the Commission when that decision was adopted. The irregularity is due to the fact, first, that Mr Martin Bangemann, who had been unlawfully given leave of absence by a Commission decision of 1 July 1999, was not part of the body of Commissioners and, second, that Mr Jacques Santer and Mrs Emma Bonino were part of that body despite the fact that their election to the European Parliament on 13 June 1999 and their decision, expressed on 6 July 1999, to exercise that electoral mandate had deprived them of the complete independence in the performance of their duties as Commissioners required by Article 213(2) EC.

The effect of Mr Bangemann's 'leave of absence' on the lawfulness of the composition of the body of Commissioners

— Arguments of the parties

25 The applicant observes that on 1 July 1999 the College of Commissioners voted in favour of granting Mr Bangemann leave of absence at his request but had no legal basis for doing so. That decision followed Mr Bangemann's announcement of his intention to become a member of the Administrative Board of the Spanish telecommunications company Telefónica and to resign from the Commission in order to do so. Mr Bangemann had not taken part in any meeting of the Commission after 1 July 1999 and, in particular, did not take part in the adoption of Decision 1999/675. His activities as member of the Commission with

responsibility for information technologies and telecommunications were assumed by Mr Karel van Miert, the Member of the Commission responsible for competition matters.

26 According to the applicant, Mr Bangemann's leave of absence resulted in an illegality in the composition of the Commission because by reducing the number of active members to 19 members the Commission infringed Article 213(1) EC, which provides that the Commission is to consist of 20 members. The Commission has no power to reduce the number of its members in that way. That power belongs to the Council under the second sentence of Article 213(1) EC, which states that the number of Members of the Commission may be altered by the Council, acting unanimously. Consequently, all Commission decisions adopted with effect from 1 July were void and that was the case until the time when the Council, by Decision of 9 July 1999, reduced the number of Commission members by one member with immediate effect for the duration of the mandate of the outgoing Commission, whose task was to dispose of current matters.

27 The applicant adds that its line of argument is not invalidated by the first paragraph of Article 215 EC, which provides for the possibility of the resignation of a Member of the Commission. It submits that this provision does not apply to the resignation of a Member of the Commission who is still in charge of current matters. On the contrary, the need to ensure that the Community will operate means that such a resignation must be excluded. The duties of such a Member of the Commission are to ensure that the Commission can continue to act until his successor takes up his functions and to avoid any damage to the Community during that period. A Member of the Commission with continuing responsibility for current matters cannot therefore avoid his obligations or claim to be relieved of them. To accept the contrary contention would, in the present case, be tantamount to accepting that after the resignation of the Commission as a body on 16 March 1999 there could have been a second collective resignation or a series of individual resignations of those members from their duties, the effect of which would have been to leave the Community without an executive.

28 The applicant also submits that the Commission cannot rely on a rule that by virtue of Article 213 EC in conjunction with Article 5 of the Commission's Rules of Procedure the Commission is lawfully composed where a majority of the number of its members is present. That rule applies only if the number of members of the Commission provided for by the Treaty exists, which was not the case here because Mr Bangemann had been given permanent leave of absence.

29 The defendant accepts that the Treaty does not expressly provide for the grant of leave of absence to a Member of the Commission and that, except in the case of a compulsory retirement, the Member continues in his functions until provision is made for his replacement.

30 The defendant submits, however, that Mr Bangemann could lawfully be given leave of absence, because, if it were otherwise, he would have been obliged to exercise his duties as a Member of the Commission even though it was no longer possible for him to observe the requirement for independence in the performance of his duties and comply with his duty of honesty and scrupulousness as regards the acceptance of certain posts or benefits after the cessation of his duties. The defendant submits that there would have been justifiable criticism of it, if, being aware of the conflicts of interest disclosed to it by Mr Bangemann, it had not granted him leave of absence. It also points to the doubts that existed in the present case with regard to the propriety of Mr Bangemann's plans for his activity in Telefónica; they are apparent in particular from the Council's decision of 9 July 1999 to bring the matter before the Court of Justice.

31 Moreover, the defendant notes that the applicant's argument relating to the reduction of the Commission to a body of 19 members does not mean that the Commission cannot grant leave of absence to one of its members where he cannot comply with the obligations associated with his duties. Such a decision would, in a way, prejudge the Council's decision under the second paragraph of Article 215 EC, which in the present case was taken on 9 July 1999.

32 In that regard, the defendant states that it did not reduce the number of its members of its own motion, but merely drew the necessary inferences from the factual situation resulting from Mr Bangemann's conduct so that the Commission would be able to maintain the proper functioning of the Community. The Commission's decision of 1 July 1999 is thus justified by its right to take all necessary measures to preserve the lawfulness of the decision-making procedure within the College of Commissioners.

33 The defendant points out that under the second paragraph of Article 219 EC and Article 5 of its Rules of Procedure, it may act by a majority of its members, which means that a Commission decision is valid if it is supported by 11 of its members. The defendant considers that, in an exceptional situation such as that in summer 1999, it has discretion to grant leave of absence to its members, provided that this does not call in question its capacity as such to carry out its deliberations.

— Findings of the Court

34 It is first necessary to set out the rules applicable to the resignation of a Member of the Commission and to his replacement, to recall the duties of a Member of the Commission during and after the cessation of his functions, and the rules relating to quorum and majorities which apply to the adoption of decisions by the Commission.

35 First, Article 215 EC envisages the possibility of the — voluntary — resignation of a Member of the Commission and lays down the rules for filling the vacancy created.

36 According to the first paragraph of Article 215 EC, '[a]part from normal replacement, or death, the duties of a Member of the Commission shall end when he resigns or is compulsorily retired.' The fourth paragraph of Article 215 states that '[s]ave in the case of compulsory retirement under Article 216, Members of the Commission shall remain in office until they have been replaced.'

37 The second paragraph of Article 215 EC lays down the rules for replacing a member of the Commission:

'[t]he vacancy thus caused shall be filled for the remainder of the Member's term of office by a new Member appointed by common accord of the governments of the Member States. The Council may, acting unanimously, decide that such a vacancy need not be filled.'

38 Second, Article 213 EC sets out the obligations of a Member of the Commission during and after his term of office.

39 By virtue of the first and second subparagraphs of Article 213(2) EC, the Members of the Commission are required, in the general interest of the Community, to be completely independent in the performance of their duties, not to seek or take instructions from any government or from any other body in the performance of those duties, and to refrain from any action incompatible with their duties.

40 Moreover, pursuant to the third subparagraph of Article 213(2) EC, Members of the Commission are required to 'give a solemn undertaking that, both during and after their term of office, they will respect the obligations arising therefrom and in

particular their duty to behave with integrity and discretion as regards the acceptance, after they have ceased to hold office, of certain appointments or benefits. In the event of any breach of these obligations, the Court of Justice may, on application by the Council or the Commission, rule that the Member concerned be, according to the circumstances, either compulsorily retired in accordance with Article 216 or deprived of his right to a pension or other benefits in its stead.'

41 Third, the second and third paragraphs of Article 219 EC, read in conjunction with the first and second subparagraphs of Article 213(1) EC and Article 5 of the Commission's Rules of Procedure, in the version applicable at the time of the adoption of the decision of 8 July 1999, determine the necessary quorum and majority required for a decision of the Commission.

42 According to the second paragraph of Article 219 EC, '[t]he Commission shall act by a majority of the number of Members provided for in Article 213 [EC]', the first subparagraph of the first paragraph of which provides that the Commission is to consist of 20 Members, and the second subparagraph of which states that the number of Members may be altered by the Council, acting unanimously.

43 In addition, the third paragraph of Article 219 EC provides that '[a] meeting of the Commission shall be valid only if the number of Members laid down in its Rules of Procedure is present.' According to Article 5 of those Rules of Procedure, '[t]he number of Members present required to constitute a quorum shall be equal to a majority of the number of Members specified in the Treaty.'

44 Before the applicant's complaint is examined, it is also necessary to note the circumstances in which Mr Bangemann was granted 'leave of absence' by the Commission.

45 By letter of 16 March 1999 Mr Santer, President of the Commission, informed the President of the Conference of the Representatives of the Governments of the Member States of the European Union of the decision by the Members of the Commission to resign as a body and to refer their appointment back to the Governments of the Member States. In that letter the President and Members of the Commission declared that pursuant in particular to the fourth paragraph of Article 215 EC they would discharge their duties until they had been replaced in accordance with the procedures laid down in the Treaties.

46 In a declaration of 22 March 1999 the Council stated that although it considered that a new Commission should be appointed as rapidly as possible, it wished the Commission to continue to discharge its duties until then as provided for in the Treaties.

47 By letter of 29 June 1999 Mr Bangemann informed the President of the Conference of the Representatives of the Governments of the Member States that he no longer intended to discharge his duties within the Commission and that he intended to take up an appointment with the Spanish telecommunications company, Telefónica. His letter states:

'By letter of 16 March 1999 the Members of the European Commission informed you that they had decided to resign as a body and to refer the appointments back to the Governments of the Member States. In accordance with Article 215, fourth paragraph, of the Treaty establishing the European Community and the corresponding provisions of the ECSC Treaty and the Euratom Treaty, I continued to perform my duties during that period.

I would like to inform you of my decision to assume an appointment with Telefónica, a company. In those circumstances, it is no longer possible for me to continue to perform my duties.

I therefore request you to initiate as soon as possible the procedure under Article 215(2) of the Treaty establishing the European Community and the corresponding provisions of the ECSC Treaty and the Euratom Treaty.'

48 It should be observed that the Commission was informed of that event as is evident from the letter dated 29 June 1999 from the Commission's Secretary-General to the Permanent Representative of the Federal Republic of Germany which enclosed Mr Bangemann's letter.

49 On 1 July 1999 the Commission decided to grant immediate 'leave of absence' to Mr Bangemann. That decision is recorded in Point 2 of the minutes of the 1 440th meeting of the Commission which took place in Brussels on 1 July 1999 in the following terms:

'The Commission decides that Mr Bangemann will be granted leave of absence with immediate effect until the completion of the procedure provided for in Article 215 [EC]. Note is taken of the requests by President Santer to transfer Mr Bangemann's portfolio to Mr van Miert. It points to the desirability of clarifying the future application of Article 213 [EC] to activities which former Members of the Commission take up after the cessation of their duties. It adopts the text of a declaration concerning the situation of Mr Bangemann.'

50 With that decision was a press release of the Commission dated 1 July 1999 (IP/99/447) containing a statement regarding Mr Bangemann's situation.

51 On 9 July 1999 the Council took note, under Article 215 EC in particular, of the request by Mr Bangemann to be relieved of his duties as a Member of the

Commission and decided that there was no need to replace him. That decision also states that it takes effect on the date of its adoption with regard to Mr Bangemann (EC/ECSC/ Euratom: Council Decision 1999/493/EC of 9 July on the composition of the Commission, OJ 1999 L 192, p. 53).

52 It is apparent from the abovementioned documents that Mr Bangemann, like the other Members of the Commission, resigned from his duties as Member of the Commission on 16 March 1999. In accordance with the fourth paragraph of Article 215 EC, Mr Bangemann remained in office from that date, awaiting a decision of the Governments of the Member States to appoint a new Member for the remainder of his term of office or a decision by the Council not to fill the vacancy.

53 After deciding to accept an appointment with Telefónica, Mr Bangemann took the view that it was no longer possible for him to continue to perform his duties within the Commission. For that reason, on 29 June 1999 he requested that a decision be taken as soon as possible with regard to his replacement.

54 Mr Bangemann therefore decided on his own initiative to cease to participate in the work of the Commission.

55 It should be observed in that regard that the Council considered that Mr Bangemann's decision to accept an appointment in Telefónica was an infringement of his duty of discretion deriving from his obligations as a Member of the Commission because he had been responsible since 1992 for the information technology and telecommunications sectors. On 9 July 1999 the Council thus decided to refer Mr Bangemann's case to the Court of Justice pursuant to the last sentence of the third subparagraph of Article 213(2) EC (Decision 1999/494/EC, ECSC, Euratom of the Council of 9 July 1999 on the referral of the case of Mr

Bangemann to the Court of Justice, OJ 1999 L 192, p. 55). That case was terminated by an order of the Court of Justice of 3 February 2000 which removed the case from the register (Case C-290/99 *Council* v *Bangemann*, not published in the ECR).

56 In those circumstances, by its decision of 1 July 1999 to grant Mr Bangemann immediate 'leave of absence' the Commission did no more than accept the result of his wish to cease to perform his duties within the Commission. The Commission press release of the same date also points out that 'it would not be possible for Mr Bangemann to take up his new position until such time as the procedure provided for under Article 215 [EC] has been completed. Mr Bangemann accepts this. The Members of the Commission have decided that in the meantime Mr Bangemann should take leave, in line with his own wishes'.

57 It must be observed that the 'leave' has no legal basis either in the provisions of the Treaty cited in paragraphs 35 to 42 above, or in the Commission's Rules of Procedure. The expression used in the Commission's decision of 1 July 1999 was merely a formula intended to enable the Commission to deal with the administrative and procedural difficulty caused by Mr Bangemann's decision to take up a post in Telefónica and thus to draw the consequences from the impossibility of Mr Bangemann's continuing to perform his duties. The use of that expression cannot therefore affect Mr Bangemann's status as a Member of the Commission or deprive the fourth paragraph of Article 215 EC (see paragraph 36 above) of its legal force.

58 The Commission's decision of 1 July 1999 cannot therefore be interpreted as a decision to reduce the number of Members of the Commission, a decision which only the Council, acting unanimously, may take under the second subparagraph of Article 213(1) EC. By its decision the Commission merely gave Mr Bangemann leave of absence, whilst awaiting the nomination by the Governments of the Member States, by common accord, of his replacement or the Council's decision not to fill the vacancy.

59 In the present case, it was the Council which, by Decision of 9 July 1999 and in accordance with the second paragraph of Article 215 EC, terminated Mr Bangemann's duties in the Commission by deciding that it was not necessary to fill the vacancy.

60 Therefore, the legality of Decision 1999/675, adopted in accordance with the second and third paragraphs of Article 219 EC and the provisions to which it refers, by a majority of the members of the Commission present, is not called in question by the Commission's decision of 1 July 1999.

61 The objection alleging irregularity in the composition of the Commission because of 'leave of absence' to Mr Bangemann must therefore be rejected.

The effect, on the lawfulness of the composition of the Commission, of the election to the European Parliament of Mr Santer and Mrs Bonino on 13 June 1999 and their wish expressed on 6 July 1999 to exercise their parliamentary mandate

— Arguments of the parties

62 The applicant considers that the outgoing president of the Commission, Mr Santer, and a Member of the Commission, Mrs Bonino, did not display the independence required by the first subparagraph of Article 213(2) EC during the vote on Decision 1999/675, as they had been elected to the European Parliament on 13 June 1999 and had informed the President of the Conference of the Representatives of the Governments of the Member States, on 6 July 1999, of

their intention to take up that mandate. The applicant submits that Members of the Commission who have committed themselves in such a way to the European Parliament can no longer be regarded as independent.

63 The applicant observes that the fact that the Parliament constituted itself only on 20 July 1999 is irrelevant, as the election of Mr Santer and Mrs Bonino and the announcement of their intention to take up their parliamentary mandates sufficed to create a risk of a conflict of interest between their activities as members of the Commission and those as representatives of a political party.

64 The defendant observes that the election of a Member of the Commission to the European Parliament does not call in question that person's independence during a period when the Parliament has not yet constituted itself. The European Parliament was elected on 13 June 1999 and, in accordance with the provisions of Article 3(2) and (3) of the Act concerning the election of the representatives of the European Parliament by direct universal suffrage, the mandates of Members of the Parliament began on the opening of the first session held after that election, that is to say, on 20 July 1999. According to the defendant, the Parliament could not therefore influence Mr Santer and Mrs Bonino prior to its constitutive session, through, for example, the active political groups or parties of which it is composed.

65 Moreover, the defendant submits that with regard to the question of independence of a Member of the Commission in the exercise of his duties, it cannot be a question of making an abstract assessment of the political interests of that Member. Instead it is necessary to set out precisely the specific nature of the risk to his independence. On that basis, the defendant considers that the applicant's objection is founded solely, and unacceptably, on the assumption that Mr Santer and Mrs Bonino would carry out their duties as Members of the Commission while taking into account their status as future Members of a future European Parliament.

66 This situation is different from that of Mr Bangemann. In his situation, there was a risk that the factual link between his duties within the Commission, where he was responsible for the information technology and telecommunications sectors, and the activities of his future employer, the Spanish telecommunications company Telefónica, would compromise his independence.

— Findings of the Court

67 Pursuant to the first and second subparagraphs of Article 213(2) EC, the Members of the Commission are required, in the general interest of the Community, to be completely independent in the performance of their duties, not to seek or take instructions from any government or from any other body in the performance of those duties, and to refrain from any action incompatible with their duties.

68 Moreover, according to the first sentence of the third subparagraph of Article 213(2) EC, the Members of the Commission may not, during their term of office, engage in any other occupation, whether gainful or not.

69 Before examining the applicant's complaint, it is necessary to recall the circumstances in which Mr Santer and Mrs Bonino were elected to the European Parliament.

70 Just like Mr Bangemann, Mr Santer and Mrs Bonino resigned as Members of the Commission on 16 March 1999 when Mr Santer informed the President of the Conference of the Representatives of the Governments of the Member States of the European Union of the decision by the Members of the Commission to resign as a body.

71 On 13 June 1999 Mr Santer and Mrs Bonino were elected to the European Parliament.

72 By letters of 6 July 1999 they informed the President of the Conference of Representatives of the Governments of the Member States of that fact, explained that they had decided in favour of their parliamentary mandates, membership of the European Parliament being incompatible with membership of the Commission, and requested that the procedure laid down in Article 215 EC be completed by 19 July 1999, the day before the inaugural session of the European Parliament.

73 On 9 July 1999 the Council took note, *inter alia* under Article 215 EC, of the request by Mr Santer and Mrs Bonino to be relieved of their duties as Members of the Commission and decided that there was no need to replace them. That decision took effect on 19 July 1999 (Decision 1999/493).

74 It follows that Mr Santer and Mrs Bonino did not fail to comply with their duty of independence under the first and second subparagraphs of Article 213(2) EC when they took part in the meeting of the College of Commissioners at which Decision 1999/675 was adopted. Their parliamentary mandate did not commence until 20 July 1999, the date on which the European Parliament held its inaugural session.

75 Similarly, there is no evidence of a credible risk to the independence of Members of the Commission before the new Parliament was constituted. The intention of Mr Santer and Mrs Bonino to exercise their electoral mandate cannot in itself prove the alleged loss of independence, no more than the mere statement that they belong to a political party.

76 The complaint that the composition of the Commission was unlawful because of the election to the European Parliament of Mr Santer and Mrs Bonino must therefore be rejected.

77 It follows from all the above considerations that the first plea must be rejected

The second and third pleas: errors of fact and of law in the application of Articles 87 and 88 EC and of Directive 90/684

78 It is appropriate to examine these pleas first inasmuch as in them the applicant alleges misapplication of the concept of 'capacity restriction'.

Arguments of the parties

79 The applicant submits that the concept of a 'capacity restriction', as used in the authorising decisions, does not impose a limit on actual production but merely requires compliance with a series of technical restrictions relating to the production plant. Consequently, in taking the view that this concept had to be interpreted as meaning that Kvaerner's production could not exceed the limit of 85 000 cgt per annum fixed in the authorising decisions, Decision 1999/675, as amended by Decision 2000/416, and Decision 2000/336 (hereinafter 'the contested decisions') are vitiated by errors of fact and of law in the light of Articles 87 EC and 88 EC and Directive 90/684. The contested decisions are vitiated by an error of fact inasmuch as the Commission failed to take account of the applicant's compliance with all the technical restrictions laid down in the

authorising decisions through the reduction, in particular, of its technical capacities from an initial figure of 134 000 cgt per annum to 85 000 cgt per annum.

80 Since the authorising decisions merely impose a technical 'straitjacket' and leave it open to the applicant to increase its productivity, the Commission committed an error in relying solely on the applicant's actual production without considering the question whether that production had been achieved in compliance with the technical limitations of capacity. The Commission's interpretation of the limit of 85 000 cgt per annum is impossible, as the authorising decisions were not adopted in the course of the constant review provided for by Article 88(1) EC. It was only in the course of such a review that the Commission could have imposed a production limit in the form of an 'appropriate measure'; in the authorising decisions the Commission could only impose mere technical conditions. In that same context, the applicant observes that, because the authorising decisions were adopted in the course of a preliminary examination procedure, it was unable to participate in it. It states that neither it nor the German authorities ever agreed to a limit on production.

81 The applicant also submits that, apart from the above error of fact, the Commission also erred in law in applying the concept of 'capacity restriction' in the sense of a limit of actual production. From a legal point of view too, the Commission failed to comply with Directive 90/684 and the authorising decisions.

82 The applicant states that according to the wording, sense and history of Directive 90/684, in particular of Article 10a(2)(c), a capacity restriction must be understood as being a limit on the technical installations of a shipyard which, under normally favourable conditions, restricts production to a certain tonnage per year (in the present case 85 000 cgt per annum) and the concept of the shipbuilding capacity of a shipyard must be understood as being the production

which it is possible to achieve using the available means of production in normally favourable production conditions. The applicant explains that during 1997 and 1998 it was able, while complying with the technical restrictions on capacity set out in the authorising decisions, to increase its actual production thanks to particularly favourable conditions, such as series effects and the optimal utilisation of personnel.

83 The applicant submits that the concepts of capacity and of production are quite separate, the first concerning the ability to produce whilst the second concerns actual production. In that regard, the applicant relies in particular on Case T-266/94 *Skibsvaerftsforeningen and Others* v *Commission* [1996] ECR II-1399. The applicant accepts that capacity may, in certain cases, mean the production which it is possible to achieve with the available means of production in optimal production conditions, so that actual production might reach the level of the capacity restriction but could never exceed it. Nevertheless, it considers that this interpretation cannot be adopted, because, if it had been the one adopted by the Council, the Council would have referred to production in the wording of Directive 90/684.

84 The applicant's interpretation of 'capacity restriction' is confirmed, it claims, by certain documents emerging from the negotiations between the Commission and the German authorities based on the expert's reports by A & P Appledore and CONOC. The applicant submits that those experts should be heard as witnesses.

85 The applicant also adds that only if capacity restriction is interpreted as a technical limit does that accord with the objectives which both the directive and the authorising decisions sought to reconcile, namely compensation for distortions of competition caused by operating aid and the implementation of

effective restructuring. Those two objectives were reconciled precisely by a system in which, on the one hand, production possibilities were limited by means of technical restrictions in order to protect the applicant's competitors, but in which, on the other hand, the applicant was allowed to produce as efficiently as possible with the plant at its disposal. If, on the other hand, the applicant had imposed on it a production restriction, it would have been obliged, in the event of an increase in productivity, to take measures which would have thwarted the restructuring, such as a temporary cessation of production at the shipyard and non-use of measures intended to increase productivity. If the Commission were right, no increase of productivity would be possible over a long period, despite general progress in productivity in the shipbuilding sector by all its competitors and particularly those in Korea.

86 On the other hand, the defendant submits that 'capacity restriction' refers to the maximum production achievable in good conditions having regard to the available installations. It did not therefore commit errors of fact or of law in deciding that Kvaerner had to repay part of the aid granted on the ground that its production had exceeded the limit of 85 000 cgt per annum laid down in the authorising decisions.

87 The defendant observes that the aim of the capacity restriction is to ensure an effective restructuring of shipyards in the former German Democratic Republic and to neutralise the anti-competitive effects of the significant State aid granted to those shipyards. It considers that this aim would be frustrated if the shipyard could, as the applicant has done, materially increase its production by using the capacity granted to it. Consequently, interpretation of the capacity restriction as a production limit is necessary in order to comply with the wording and purpose of Directives 90/684 and 92/68. The applicant's citation of dictionaries and the expert's report produced at the Commission's request are irrelevant in that regard.

88 That interpretation of the concept of capacity restriction is also shared by the German Government. In that regard, the defendant cites the minutes of a meeting held in 1993 concerning the privatisation of shipyards in the former German Democratic Republic, an explanatory note sent in 1994 by the Commission to the Federal Republic of Germany, monitoring reports sent by the German Government to the Commission in 1994, 1995 and 1997, and letters sent in 1997 by the German authorities to the applicant, from which it is clear that the German Government understood a capacity restriction to be a production limit. The same interpretation emerges clearly from the authorising decisions communicated to the Federal Republic of Germany on 18 October and 11 December 1995. Moreover, the defendant states that the distinction existing in other sectors between a capacity restriction and a production limit is not one practised in the shipbuilding sector.

89 The defendant also disputes that its interpretation of a capacity restriction as a production limit contradicts its previous practice and the case-law on shipbuilding. It recognises that a capacity restriction is ensured as far as possible by the introduction of technical restrictions, known as 'technical bottlenecks', but considers that that in no way undermines the interpretation that the capacity restriction is tantamount to a production limit. Nor does the test adopted by the Court of First Instance in its judgment in *Skibsvaerftsforeningen and Others* v *Commission* call that interpretation into question. Lastly, the supervision clause in the authorising decisions confirms the importance of a limit on actual production.

90 As regards the fact that the applicant complied with the various technical restrictions set out in the authorising decisions, the defendant states that that fact did not have to be mentioned in the contested decisions, since those decisions could be based on a simple finding that the applicant had largely exceeded its capacity restriction. The failure to comply with the capacity restriction results automatically in the unlawfulness of the aid and in an obligation to repay it.

Findings of the Court

91 It must be observed at the outset that Directive 90/684, as amended by Directive 92/68, does not define the concept of capacity and that, consequently, the Commission has a measure of discretion when interpreting that concept (*Skibsvaerftsforeningen and Others* v *Commission*, paragraph 172). However, it should also be noted that the applicant, rather than disputing the Commission's interpretation within the scope of that discretion, complains principally that the Commission failed to have regard in the contested decisions to the concept of capacity as imposed by it previously in the authorising decisions. The applicant in fact pleads that the Commission failed to comply with the authorising decisions (see, in particular, paragraphs 80, 81 and 85 above).

92 Consequently, when ascertaining in the present case whether there is a manifest error of assessment in the contested decisions, the Court must take into account the rule that the Community institutions must comply with the principle that they may not alter measures which they have adopted, so that the legal certainty of the persons affected by those measures may be ensured (Joined Cases T-80/89, T-81/89, T-83/89, T-87/89, T-88/89, T-90/89, T-93/89, T-95/89, T-97/89, T-99/89, T-100/89, T-101/89, T-103/89, T-105/89, T-107/89 et T-112/89 *BASF and Others* v *Commission* [1995] ECR II-729, paragraph 73, and Case T-229/94 *Deutsche Bahn* v *Commission* [1997] II-1689, paragraph 113). It cannot be accepted that the Commission can require recovery of aid to the detriment of a recipient of the aid who has complied with the aid conditions laid down by the Commission in the authorising decisions.

93 It is therefore first necessary to examine the legal framework within which the authorising decisions were taken and then to analyse those decisions in order to ascertain whether in the contested decisions the Commission has applied an

interpretation of the requirement for a capacity restriction which is different from, and more restrictive than, the definition applied in the authorising decisions.

94 As regards, first, the legal framework within which the authorising decisions were taken, it must be observed that the objective of the capacity reduction laid down by Article 10a(2)(c) of Directive 90/684 ('the German Government agrees to carry out... a genuine and irreversible reduction of capacity of 40% net of the capacity of 545 000 cgt existing on 1 July 1990'), of which the capacity restriction of 85 000 cgt per annum imposed on the applicant forms part (see paragraph 4 above), is to restore a normal market situation within the shipbuilding sector and the competitiveness of the shipyards of the former German Democratic Republic, while reducing excess capacity.

95 As the reason for inserting the new Article 10a into Directive 90/684, the Council stated in the third recital to Directive 92/68 that 'competition considerations dictate that the sector of the shipbuilding industry of the [former German Democratic Republic] should contribute significantly to the reduction of the excess capacity which, worldwide, continues to impede the restoration of normal market conditions for the shipbuilding industry'.

96 The wording of Directive 90/684 also reveals its objective of eliminating the structural overcapacity of shipyards in the European Community in order to make them more efficient and competitive. That objective may be deduced, in particular, from Article 6 of Directive 90/684 (see paragraph 3 above) and from the third, sixth, eighth and ninth recitals in that directive. According to the third recital, 'although since 1989 there have been significant improvements in the world market for shipbuilding, a satisfactory equilibrium between supply and demand has still not been established and the price improvements which have taken place are still insufficient in the overall context to restore a normal market

situation within the sector...'. According to the sixth recital, '[an agreement between the most important shipbuilding nations] must ensure fair competition at an international level among shipyards through a balanced and equitable elimination of all existing impediments to normal competition conditions...'. The eighth recital states 'a competitive shipbuilding industry is of vital interest to the Community...'. Lastly, according to the ninth recital, 'a tight and selective aid policy should be continued in order to support the present trend in production towards more technologically-advanced ships and in order to ensure fair and uniform conditions for intra-Community competition'.

97 It must be observed, next, that the reduction of excess capacity through the introduction of a capacity restriction is in essence ensured by the fixing of technical restrictions, known as 'technical bottlenecks'. That emerges clearly from the authorising decisions (see paragraph 5 above).

98 First of all, in its letter of 3 March 1993, which constitutes the first authorising decision, the Commission states that, 'although the independent expert's report ordered by the Commission has shown that the construction capacity [of the Warnow shipyard] will hardly exceed 85 000 cgt — the quota granted to the shipyard by the German Government out of the total of 327 000 cgt granted to the East German shipyards — monitoring of the carrying out of the investments is deemed necessary in order to ensure that the capacities will actually be reduced. The reduction is dependent upon the investments being carried out according to the plans and designs presented to the consultant. Kvaerner acknowledged that the following restrictions would have to be placed on the yard:

— the new steel cutting shop to stay as developed with no additions except for a mechanical edge preparation machine (milling machine type).

— the number of work stations on the large panel line and the double bottom line to be fixed at eight respectively six as defined in the designs in the consultant's report EECI:0001A.

— any increase in length of these lines should be allowed only if the commensurate area is deducted from the 600 tonne super unit shop. The converse must also be applied, that is, any reduction in large panel/double bottom line area could be accompanied by an increase of the super unit shop area equal to the reduction in the large panel/double bottom line area.

— the number of workstations on the curved panel line to remain at six as defined in the consultant's report EECI:0001A.

— the number of workstations on the small panel line to remain at a maximum of three as defined in the consultant's report EECI:0001A.

— only one 600 tonne crane to be fitted over the dock. The dockside cranes (two identified) to be of the jib type with a maximum lifting capacity of 50 tonnes.'

99 It is clear from that passage that the objective set out in it, namely an actual reduction of capacity, was to be achieved essentially through compliance with a series of technical restrictions concerning the production plant of the shipyard.

100 The Commission's letter of 17 January 1994, which comprises the second authorising decision, is to the same effect. The Commission states in it that 'the capacity restriction depends on the investments being made in accordance with the plans and designs presented to the consultants, in particular with regard to the adherence to the maximum steel consumption of 73 000 tonnes cgt and in accordance with the restrictions provided for in the consultant's report.' The fact that the capacity restriction of 85 000 cgt was based on a body of specific technical restrictions is also corroborated by the explanation in the same letter that 'in the event of a failure to comply with the capacity restrictions, the Commission will be obliged to require all the aid to be repaid' and in particular by the use of the plural ('capacity restrictions') in that sentence.

101 In that context it should be added that if the Commission had really wished to impose on the applicant, when it authorised the aid, an annual ceiling on actual production, it would have sufficed for it to use the terms 'production limit' or to specify that the capacity restriction referred, in the present case, to maximum production in optimum conditions. In the absence of such explanations, the applicant cannot be criticised for having exceeded the capacity restriction of 85 000 cgt per annum, since it is common ground that it complied, throughout the period in question, with all the technical restrictions.

102 However, in the authorising decisions there is no explanation of that kind. In particular, interpretation of the capacity restriction expressed in cgt per annum as being a restriction of actual production cannot be inferred from the following sentences in the letters of 20 February, 18 October and 11 December 1995 (the third, fourth and fifth authorising decisions respectively): 'Furthermore, the first production monitoring report sent to the Commission shows that it is also necessary to monitor compliance with the capacity restrictions at the time of the planning of production and of production itself'; 'In the light of the two production monitoring reports sent to the Commission to date, monitoring clearly remains necessary in order to ensure compliance with the maximum

capacity authorised in the framework of the planned production as in that of actual production'; 'In accordance with the production monitoring reports sent to the Commission to date, monitoring remains necessary in order to ensure compliance with the maximum capacity in the framework of actual production as in that of planned production'. Those sentences clearly indicate that the applicant must, in the planning and actual production phases, comply with the technical restrictions on capacity. If, for example, the applicant receives two orders which would lead it to produce more than 85 000 cgt in one year, it is permissible for it to accept and perform those orders within that year if it is able to do so while complying at the same time with the technical restrictions on capacity laid down (such as those set out in paragraph 98 above relating *inter alia* to the number of workstations on the curved panel line and to the presence of only one 600 tonne crane over the dock).

103 Furthermore, in the same letters some sentences clearly indicate that compliance with the capacity restriction of 85 000 cgt per annum is treated in the same way as compliance with the technical restrictions on the installations. Thus in the letter of 20 February 1995 (third authorising decision) the Commission explains that 'in carrying out the investment plan it is appropriate to monitor compliance with the capacity restriction applicable to shipbuilding. Such compliance is ensured only if the investment plan presented to the consultants is scrupulously observed; that applies in particular with regard to the maximum permissible output of 73 000 tonnes of steel, the double bottom line and the two panel lines. The German Government has given an assurance that the shipyard will comply with the capacity restriction.' In its letters of 18 October and 11 December 1995 (the fourth and fifth authorising decisions), the Commission observes, in almost identical terms, that the double bottom assembly line and the large panel line limit the shipyard's capacity to transform steel and by that very fact restrict the shipyard's production capacity to 85 000 cgt per annum. The Commission adds in those two letters that for the duration of that capacity restriction it is indispensable that the layout of the shipyard should not be amended and that the 'optional' equipment which has not yet been installed should comply with the specifications which the shipyard submitted for an opinion by the consultant.

104 Directives 90/684 and 92/68 and the authorising decisions are therefore consistent in showing that, in line with the Commission's administrative practice as shown by another case on which the applicant relies (*Skibsvaerftsforeningen and Others* v *Commission*, paragraph 177), the capacity restriction laid down in those authorising decisions corresponded to the production achievable under favourable normal conditions, given the facilities available. When accepting and executing orders for the construction of ships, the applicant therefore had to comply with the technical restrictions on its installations, restrictions which had been calculated and laid down in such a way that under favourable normal conditions it would not produce more than 85 000 cgt per annum. However, the authorising decisions did not prohibit the applicant from producing, under exceptionally favourable conditions such as those which might result from the receipt of orders which could be executed more quickly than normal, more than 85 000 cgt per annum, but merely required compliance with the technical restrictions set out in particular in the authorising decisions, such as those limiting the number of workstations on the curved panel line to six and the number of workstations on the small panel line to three.

105 Moreover, it has already been held by the Court of Justice and the Court of First Instance that although construction capacity — in the present case 85 000 cgt per annum — is by its nature capacity for production purposes, that concept is not in itself the same as 'actual production' (*Alpha Steel* v *Commission*, paragraph 22; Joined Cases 311/81 and 30/82 *Klöckner-Werke* v *Commission* [1983] ECR 1549, paragraph 23; Joined Cases T-164/96 to T-167/96, T-122/97 and T-130/97 *Moccia Irme and Others* v *Commission* [1999] ECR II-1477, paragraph 138) or 'maximum production achievable under optimum conditions' (*Skibsvaerftsforeningen and Others* v *Commission*, paragraph 174).

106 According to that case-law, a capacity restriction may, as is apparent in the present case from the wording of the authorising decisions, relate to 'production achievable under favourable normal conditions, given the facilities available' and not express an actual maximum production which may not be exceeded even

under exceptionally favourable conditions. The Commission cannot convincingly argue that the capacity restriction imposed on the applicant, even though relating to 'the production achievable under favourable normal conditions, given the facilities available', nevertheless indicates a maximum actual production which may not be exceeded in any event (see paragraph 87 above). If the capacity restriction reflects production achievable under favourable normal conditions, that in itself implies that the figure indicated by that restriction may be exceeded in periods of optimal conditions. Contrary to the Commission's assertions, that finding is not incompatible with the objective of Directive 90/684. That objective, reduction in excess capacity, is achieved by restricting the applicant's capacity at the level of its assembly lines, which ensures that in normal conditions 85 000 cgt per annum will not be exceeded.

107 Lastly, several documents submitted by the applicant confirm that the capacity restriction imposed on it relates to the production achievable under favourable normal conditions, given the facilities available.

108 Thus, the minutes of a meeting held on 1 June 1993 concerning privatisation of the shipyards in the former German Democratic Republic state as follows: 'The Danish, Italian and the UK delegates were expressing their worry that the actual production would exceed the assigned capacity after the investments would be implemented. The Commission was confident that future production would not exceed the agreed capacity limits because of the technical bottlenecks in the investment plans, because of the present and future monitoring of the investment plans together with the contractual capacity limits in the privatisation contracts, because of the German Government's undertaking to respect the limits and because all aid payments are conditional on respect of the capacity limits.' That discussion between the Danish, Italian and the UK delegations, on the one hand,

and the Commission, on the other, would be meaningless if the capacity restriction of 85 000 cgt were to be understood as an absolute limit on actual production. In such a case it would have sufficed for the Commission to explain that the 85 000 cgt limit per annum was a ceiling on actual production and that the applicant was quite simply prohibited from producing above that ceiling. The position adopted by the Commission at that meeting indicates, on the contrary, that its confidence that production would be lower or equal to 85 000 cgt was based simply on the calculation that the technical restrictions on the applicant's installations would normally prevent it from producing more than that tonnage per annum.

109 Likewise, the Commission's report on the monitoring of the privatisation of shipyards in the former German Democratic Republic annexed to the letter of 6 May 1993 addressed to the Permanent Representative of the Federal Republic of Germany states that, in the Commission's view, the capacity restriction was constituted by the entirety of the technical restrictions imposed:

'... the significant technical restrictions contained in the investment plans ensure compliance with the capacity restrictions for each shipyard, even though it seems necessary to maintain detailed monitoring when the investments are implemented. The main technical bottlenecks and conditions guarantee the capacity restriction...'.

110 It follows from the whole of the foregoing that the applicant has duly proved that the Commission committed a manifest error of appraisal in treating in the contested decisions, contrary to its approach in the authorising decisions, the concept of a capacity restriction as a limit on actual production. Since the

Commission based the contested decisions on the mere fact that the applicant's actual production in 1997 and 1998 exceeded 85 000 cgt (see, in that regard, points 60 and 108 of Decision 1999/675 and points 47 and 84 of Decision 2000/336), the operative parts of those decisions are vitiated in their entirety by that error of appraisal.

111 It should be observed in that regard that the sole basis for the contested decisions is the simple fact that actual production exceeded 85 000 cgt per annum. The Commission neither examined, nor alleged, that the excess production during the years in question is the result of a failure to comply with the restrictive conditions laid down in the authorising decisions.

112 It follows that Decision 1999/675, as amended by Decision 2000/416, and Decision 2000/336 must be annulled and it is not necessary to examine the applicant's other arguments and pleas or to hear witnesses.

Costs

113 Under Article 87(2) of the Rules of Procedure of the Court of First Instance, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the defendant has been unsuccessful, it must be ordered to pay the costs, in accordance with the form of order sought by the applicant.

On those grounds,

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

hereby:

1. Annuls Commission Decision 1999/675/EC of 8 July 1999 on the State aid implemented by the Federal Republic of Germany in favour of Kvaerner Warnow Werft GmbH, as amended by Commission Decision 2000/416/EC of 29 March 2000 on State aid implemented by Germany in favour of Kvaerner Warnow Werft GmbH (1999), and Commission Decision 2000/336/EC of 15 February 2000 on State aid implemented by the Federal Republic of Germany in favour of Kvaerner Warnow Werft GmbH;

2. Orders the Commission to pay the costs.

Mengozzi García-Valdecasas Tiili

Moura Ramos Cooke

Delivered in open court in Luxembourg on 28 February 2002.

H. Jung
Registrar

P. Mengozzi
President