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II

(Acts whose publication is not obligatory)

COMMISSION

COMMISSION DECISION

of 16 September 1998

authorising, subject to condition, aid granted by Italy to Italstrade SpA

(notified under document number C (1998) 2859)

(Only the Italian text is authentic)

(Text with EEA relevance)

(1999/269/EC)

THE COMMISSION OF THE EUROPEAN
COMMUNITIES,

controlled by the Italian Treasury. In 1993 IRI
decided, in the context of restructuring its engineering
and constructions,

Having regard to the Treaty establishing the European
Community, and in particular the first subparagraph
of Article 93(2) thereof,

— to put Iritecna into liquidation at a total cost of
ITL 4 490 billion (ECU 2,3 billion, and

Having regard to the Agreement on the European
Economic Area, and in particular Article 62(1)(a)
thereof,

— to set up a subholding company, Fintecna SpA
(‘Fintecna’), which was to privatise Iritecna’s
profitable businesses.

Having given notice to the parties concerned to submit
their comments⁽¹⁾, in accordance with the
aforementioned provisions,

Italstrade, despite heavy losses recorded in the period
from 1992 to 1994 was initially transferred to Iritecna
to be disposed of. Subsequently, it was considered
potentially attractive to private investors, largely
because of the size of its order book; the main items in
the order book derived from its membership of the
Iricav 1 and Iricav 2 consortia, the contractors for the
Rome-Naples and Verona-Venice stretches of the
projected Italian high-speed rail network. Accordingly
the entire share capital in the company was transferred
to Fintecna with a view to privatisation.

I

Italstrade SpA (‘Italstrade’) is a company operating in
engineering and civil infrastructure construction
(roads, railways, etc.); it was previously wholly
controlled by Iritecna SpA (‘Iritecna’), a wholly owned
subsidiary of IRI SpA (‘IRI’), which was itself wholly

In the period from 1991 to 1994, the company
recorded losses totalling ITL 267 billion (ECU 137
million). Its gross profit margin fell from 9 % of
turnover in 1991 to 15 % of turnover in 1994. In this

⁽¹⁾ OJ C 328, 30.10.1997, p. 3.

period Iritecna had to intervene frequently with financial support (capital injections and writing-off debts) amounting in all to ITL 450 billion (ECU 231 million).

The restructuring undertaken by the company (reduction in its work force from 1 447 to 866, writing down the value of work in hand, etc.) together with the prospects generated by the resumption of work on the high-speed rail network, led Fintecna to believe that the company could be quickly privatised. The restructuring plan submitted to the Commission made express provision for placing the business's construction sectors, including Italstrade, on the market as early as 1995. At the end of 1994 an advisor was appointed to sound out the market for potential buyers.

By Decision 95/524/EC⁽¹⁾, the Commission declared that the aid granted to Iritecna and Fintecna in connection with the Iritecna liquidation was compatible with the common market. It also authorised Iritecna to cover Italstrade's losses up to 31 December 1994, which amounted to ITL 450 billion (ECU 231 million).

Article 1 of the Decision required compliance with the restructuring plan approved by the Commission, which among other things called for the privatisation of Fintecna's subsidiaries, including Italstrade, within a reasonable time limit and without further State aid.

After the Decision was adopted, however, the Italian Government informed the Commission that the sale of the company had been suspended in order to allow time for an assessment of the legal implications of guarantees given by IRI in connection with the high-speed rail network.

When that assessment was completed, the procedure for the sale of the company was set in motion once again in November 1995, the objective now being to sell off a minority holding: the whole of the capital was to be sold only when IRI had discharged the guarantees for the work on the high-speed rail network.

In the meantime Italstrade continued to record substantial losses: these went from ITL 15 billion (ECU 8 million) in 1995 (including revaluations of over ITL 16 billion) to ITL 96 billion (ECU 49 million) in 1996.

In order to replenish Italstrade's share capital, which had been eroded by its losses, Fintecna was obliged to provide fresh funding totalling ITL 126 billion (ECU 64 million) in the period 1996 to 1997.

On 24 June 1997, in response to requests from the Commission, the Italian authorities informed it of the measures taken to replenish Italstrade's share capital and reported that negotiations for the sale of the company had resumed. The Italian authorities took the view that Fintecna's funding of Italstrade must be considered a duty (*atto dovuto*) within the meaning of the Civil Code, as Italstrade would otherwise have had to be put into liquidation.

Finally, in March 1997 Fintecna sold 49 % of the capital in Italstrade to a private investor, Astaldi SpA ('Astaldi'); the contract of sale includes the following clauses:

- Astaldi gives Fintecna the option to buy the remaining shares at a predetermined price, the option being valid from January 1999 until six months after the expiry of IRI's guarantees on the work on the high-speed rail network or, in the event of early discharge by IRI itself, until 30 June 1999,
- the selling price is based on an overall valuation of Italstrade amounting to ITL 30 billion (ECU 15 million),
- Fintecna must replenish Italstrade's share capital to bring it to ITL 30 billion at the time of the transfer.

In April and August 1997, in order to comply with the clause requiring it to replenish Italstrade's share capital, Fintecna provided further funding of ITL 27 billion (ECU 14 million).

The Commission now decided to initiate the procedure pursuant to Article 93(2) of the Treaty in respect of the fresh capital contributed in the years from 1995 to 1997, the unsatisfactory restructuring measures taken, and the terms of the privatisation of the company, which appeared to conflict with the conditions laid down in the Decision in 1995. It informed the Italian Government of its decision to initiate proceedings by letter of 1 August 1997⁽²⁾.

⁽¹⁾ OJ L 300, 13.12.1995, p. 23.

⁽²⁾ OJ C 328, 30.10.1997, p. 3.

The Italian Government submitted formal observations in a letter of 20 October 1997.

No other Member State or interested party submitted observations within the time allowed. By letter of 30 January 1998 the Commission requested more information from the Italian authorities. That information was supplied in a letter of 6 March 1998. Lastly, on 5 May the Commission received a copy of the company's balance sheet for 1997 and its industrial plan for the period 1998 to 2000.

The information furnished by the Italian authorities showed that on 31 December 1997 Fintecna provided Italstrade with a further capital injection amounting to ITL 52 billion as an adjustment for the purchaser following further falls in the value of Italstrade's assets. With this injection, the total funding provided by Fintecna to Italstrade after 1994 was brought to ITL 178 billion (ECU 91 million).

II

In its observations presented on the initiation of the procedure, the Italian Government argues:

- (i) that the Decision makes provision for injections of fresh capital into Italstrade;
- (ii) that Fintecna provided the fresh capital out of its own resources and acted as a private investor would have done, so that the funding does not constitute State aid; and
- (iii) that there has been no infringement of the conditions imposed by the Decision.

The Italian Government further argues that, even if the measures referred to are to be considered State aid, they should in any event be declared compatible with the common market pursuant to Article 92(3) of the Treaty.

First (point (i)), the Government contends that at the time of the Decision the Commission was already aware of the need for further funding for the company in order to allow privatisation to take place and that it was informed in good time of each of the recapitalisation operations at Italstrade and of the progress of the sale of the company.

The restructuring plan approved in the Decision provided that sound businesses, and those that could be returned to a sound footing, were to be transferred to Fintecna with a view to privatisation. The Government argues, therefore, that the Decision allowed for the need to finance a measure of restructuring, particularly in the construction industry, which is the industry in which Italstrade operates.

After the Decision, the Government contends, both Fintecna and its parent IRI kept the Commission regularly informed of the progress of the privatisation process. At a meeting in Rome in June 1997, for example, IRI and Fintecna supplied all the information needed for an assessment of the facts at issue in the present Article 93(2) proceedings.

Secondly (point (ii)), the Government argues that Fintecna helped Italstrade using resources generated by Fintecna's own activities, without any contribution on the part of the State, and that Fintecna acted in accordance with the private investor principle, so that its action cannot be considered State aid.

The Government states that Fintecna compared the cost of putting Italstrade into liquidation with the cost of recapitalising and privatising it. Where the foreseeable cost of a liquidation exceeds that of recapitalisation and sale of the company, the Government argues, there is no State aid caught by Article 92(1).

The Government states in particular that Fintecna estimated the cost of putting Italstrade into liquidation at ITL 535 billion, if the company were wound up in an orderly fashion, and at ITL 1 500 billion, if it were wound up in free fall. Fintecna concluded that it would be preferable to recapitalise Italstrade and to keep it in operation pending privatisation. With that end in view, Fintecna behaved as a private investor would have done, and the funds it injected into Italstrade do not constitute State aid.

Thirdly (point (iii)), the Government maintains that it has complied with all the conditions imposed by the Decision, with particular reference to the total cost of restructuring, the commitment to restructure the group, and the privatisation of Italstrade.

On the total cost of the plan approved by the Commission, the Government points out that the Decision authorised a total of ITL 4 490 billion in aid, ITL 1 090 billion being money already given to

subsidiaries, including Italstrade, in the period 1991 to 1993, and ITL 3 400 billion being the estimated cost of putting Iritecna into liquidation, after deduction of ITL 1 653 billion in proceeds from sales by Fintecna.

As things stand at present, the Italian authorities expect that the final cost will be less than the maximum just mentioned, despite the lower returns on the sale of Italstrade: the Decision has thus been complied with.

Turning to the restructuring operations provided for in the Decision, the Government argues that the action taken does in reality comply with the plan approved by the Commission. As regards the reduction in the workforce (and thus indirectly in production capacity), the forecast figures which the Commission cites in the decision initiating the proceedings refer to the active workforce on open-ended contracts, while the figures taken from the annual reports include other staff, such as those on fixed-term contracts and those laid off under the Cassa Integrazione Guadagni wage compensation scheme.

The Government argues that the decline in Italstrade's performance as compared with the forecasts in the plan (net profits of ITL 24 billion in 1995 and ITL 26 billion in 1996) was due to worsening market conditions, and not to a failure to restructure the company.

The Government contends that the results obtained by Italstrade in 1995 and 1996 cannot be compared directly with the restructuring plan which the Commission approved in the Decision. The failure to achieve the turnover called for in the plan caused a reduction of ITL 170 billion in Italstrade's gross margin over the two years. A number of non-operational items amounting to ITL 99 billion have to be added to that negative effect, items which were not foreseeable at the time the plan was drawn up; once this has been done, it can be seen that the restructuring effort provided for has actually been exceeded.

On the obligation to privatise laid down in the Decision, the Government points out:

- that the same question is pending before the Court of First Instance of the European Communities,

- that in any event Fintecna complied with the condition, having sold Italstrade within a 'reasonable time limit' as required by the Decision.

In its decision initiating the procedure, the Commission argued that on the basis of the information at its disposal the sale of Italstrade could not be considered a genuine privatisation: out of the shares in its possession Fintecna had sold only 49 % and had kept the remaining 51 %.

The Government argues that the privatisation of Italstrade must be considered genuine and definitive. The sale of 49 % is linked to specific contractual clauses which make the sale of the remaining 51 % inevitable. The decision to sell the company in two instalments is due to the presence of a contractual clause in the agreement between the high-speed rail company TAV SpA ('TAV') and the Iricav consortium, of which Italstrade is a member. The consortium has won the contracts awarded by TAV for the building of the Rome-Naples stretch of the high-speed rail network. The clause requires IRI to preserve its 'majority participation' in the consortium until the work is completed.

According to the Government, that clause could be cancelled by agreement between the Iricav consortium and TAV. In that event the contract for the sale of Italstrade would already entitle Fintecna to sell the remainder of its holding.

In support of its claim that the sale of Italstrade has to be considered definitive, the Government cites two other points:

- the fact that the Italian competition authority, the Autorità Garante della Concorrenza e del Mercato, found in the course of its own inquiry that, although the sale related to only 49 % of the capital, it nevertheless directly transferred managerial responsibility to the purchaser,
- the fact that the auditors certifying Italstrade's accounts intended to exclude the company's 1997 results from Fintecna's consolidated accounts on the grounds that there was no effective control.

The Decision also required that the privatisation of Italstrade be carried out without further aid. The Government maintains that the financing that Fintecna gave to Italstrade after 1994, amounting to some ITL

178 billion (about ECU 91 million) , should not be considered State aid within the meaning of Article 92, on the grounds explained with reference to point (ii). Alternatively, any aid should be considered compatible with the common market because:

- the funds were provided in connection with a restructuring plan aimed at restoring the company to profitability, as is confirmed by its privatisation,
- the funds were limited to what was strictly necessary to ensure that Italstrade returned to market viability.

III

In the light of what has been said, it will first have to be determined whether or not the measures described infringe the conditions laid down in the Decision. If they do, the question of the compatibility of the aid given to Italstrade up to 1994, which was approved in that Decision, will have to be reconsidered. In order to determine whether the conditions laid down in Article 1(4) and (5) of the Decision have been complied with, it will also have to be established whether the funds given to Italstrade after 1994 constitute State aid caught by Article 92 of the Treaty, and, if more State aid has in fact been granted, whether the measures taken as a whole are compatible with the common market.

As has been explained, the Decision found that the aid granted to Italstrade up to 1994 (ITL 450 billion or ECU 231 million) was compatible with the common market subject to a series of conditions, including the following:

- (i) Italstrade was to carry out the measures called for in the restructuring plan approved by the Commission;
- (ii) Fintecna and its subsidiaries, including Italstrade, were to be privatised in accordance with the time-scale submitted to the Commission, and in any case within a reasonable time limit;
- (iii) the income from the sale of companies was not to be used to assist companies in difficulty which had not yet been sold;

- (iv) no further State aid was to be granted in connection with the privatisations,

- (i) the obligation to carry out the restructuring measures called for in the plan.

In the decision initiating the procedure, the Commission argued that the reorganisation of Italstrade called for by the restructuring plan had not been completed. In particular, it observed that:

- the number of employees on open-ended contracts in 1994 was 866 (a figure reduced to 793 in 1995) and thus exceeded the total for the construction sector laid down in the restructuring plan,
- this increase in staff coincided with a very unfavourable economic situation, while the company incurred losses of ITL 15 billion in 1995 and ITL 96 billion in 1996.

In its observations, the Italian Government contends that the figures used by the Commission include workers who are on the company's payroll but are not actually working, such as those laid off under the Cassa Integrazione Guadagni scheme. According to the Government, comparing comparable figures gives the following picture:

	1993	1994	1995	1996	1997
Staff provided for in restructuring plan (average)	1 003	759	550		609
Staff at end of year (as shown in personnel register)	854	645	680	642	543

NB: Figures for entire construction sector (Società Italiana per Condotte d'Acqua SpA and Italstrade).

According to the Italian Government, these figures show that the efficiency objective in the plan has been achieved.

To make a proper comparison, however, the figure that must be looked at is the average number of employees over the year (estimated on the basis of the arithmetic average of the end-of-year figures for two successive years):

	1993	1994	1995	1996	1997
Annual average staff (Commission estimate)	n.a.	750	663	661	592

It will be seen that only in 1994 was the real average figure in line with the restructuring plan; subsequently, in both 1995 and 1996, it easily exceeded the figure in the plan.

At the same time, and partly as a consequence, Italstrade's financial results were heavily negative, in contrast to what had been provided for in the plan. The plan anticipated a net profit of ITL 24 billion in 1995, when there was in fact a net loss of ITL 15 billion, and a net profit of ITL 26 billion in 1996, when there was in fact a net loss of ITL 96 billion. Only in 1997 did the company generate a net profit, of ITL 2 billion, but that was in fact accounted for by extraordinary items of income, in the form of funds amounting to ITL 66 billion largely injected by Fintecna.

It is not sufficient to say here, as the Italian Government does, that the worsening situation was due to an unforeseeable decline in the market. The plan provided that, beginning in 1995, the internal restructuring measures would enable Italstrade to achieve a gross industrial margin, before structural costs, equal to 7 % of turnover. In theory, that margin would have allowed the company to generate a profit of about ITL 12 billion in 1995 and ITL 13 billion in 1996, despite the fall in revenue that actually took place.

With an industrial margin of 7 % the Commission took the view that, even on a relatively pessimistic forecast of the market (which proved to be justified), the company would be able to maintain a substantial economic balance without resort to further capital injections. However, Italstrade's 1995 and 1996 industrial margins were negative and indeed in 1996 it made at net loss in excess of its corporate assets.

However, the years 1996 and 1997 were among the more difficult periods experienced by the construction industry in Italy (where Italstrade won over 60 % of its orders) and there was a significant fall in major contracts awarded (above all in the area of public procurement) and a drastic reduction in profit margins. Italstrade undertook a more stringent effort than that in the plan that had been approved in order to deal with the manifest deterioration in market

conditions; it cut its operating costs and thereafter rationalised its organisational structure.

Italstrade's effort included reducing its structural costs more drastically than assumed in the restructuring plan approved by the Commission. As can be seen from Table 1, despite a deterioration in its gross margin as in 1995 and 1996, the company cut its structural costs from ITL 15 billion in 1995 (6 % below the cut envisaged in the plan) to ITL 13 billion in 1997 (35 % below the cut envisaged in the plan).

By dint of those restructuring measures, Italstrade maintained a gross margin of around 6 % of turnover although its income remained at a level 70 % below that anticipated in the plan. As a result of those restructuring measures the company was able to achieve a profit, albeit modest, for the first time in many years.

Table 1
Italstrade's financial results

(in ITL billion)						
	1995 plan	1995 outturn	1996 plan	1996 outturn	1997 plan	1997 outturn
Net turnover	503	197	790	239	854	330
Gross margin	28	(10)	35	(2)	35	18
Structural costs	(16)	(15)	(19)	(16)	(20)	(13)
Operating loss	24	(15)	26	(96)	27	2

Source: Italstrade's annual accounts for 1995, 1996 and 1997 reclassified in the IRI note of 19 January 1998.

In fact, much of the company's net losses in the period resulted from writing down assets in line with the smaller margins which were all that could be generated on work in progress and work already completed.

Moreover, Italstrade's rationalisation measures were made even more stringent, particularly regarding central structural costs, than those prescribed in the plan presented to the Commission.

It can be concluded that the condition imposed by Article 1(2) of the Decision has been complied with, more especially in view of the action taken by the company to contend with a market less favourable than that anticipated in the restructuring plan.

- (ii) The obligation to privatise Italstrade in accordance with the time-scale submitted or, in any case, within a reasonable time limit

One of the factors which was felt to justify the Decision was the Italian Government's undertaking to privatise Italstrade rapidly in accordance with the restructuring plan; on the basis of the information submitted it was considered in the Decision that privatisation would be possible in a very short time⁽¹⁾. The intention to sell off Italstrade rapidly was a major factor in the assessment of the aid granted to Iritecna, among other things, in view of the enormous aid given to Iritecna's construction sector up to that time.

The Commission accepted that some restructuring of the construction sector was still going on at the time of the Decision but, in the light of the Iritecna plan, it expected that this 'should be completed by the end of 1995'⁽²⁾, allowing the companies to be sold off. For this reason Article 1(3) and (5) of the Decision expressly required that Fintecna's subsidiaries be privatised in accordance with the time-scale submitted to the Commission or, in any event, within a reasonable time and that no further State aid be given.

But the procedure for the sale of the companies was suspended shortly after the Decision was adopted, and set in motion again only in November 1995. According to the Italian Government, this was because of the need to study the legal implications of the contractual guarantees given by IRI for the work on the high-speed rail network.

Only in March 1997 was a contract concluded for the sale to Astaldi of 49 % of the capital of Italstrade, being part of Fintecna's holding. When it initiated the present procedure, the Commission did not have sufficient information to establish whether the sale could be considered genuine and irreversible so as to satisfy requirements of the Decision. The Commission raised doubts regarding the following aspects in particular:

- the transfer from Fintecna to the buyer of power to appoint the management,
- the financial implications for Fintecna of any further losses by Italstrade,

— the terms of the transfer of the remaining 51 % of the capital,

— the possibility that the IRI guarantees in respect of the high-speed rail network contracts might have to be met.

In its reply the Italian Government has supplied sufficient information to dispel the doubts raised by the Commission.

As regards the transfer of managerial power, the buyer is given the responsibility for appointing the managing director (*amministratore delegato*), who has the power to manage the company subject to the authorisation of the board of directors (*consiglio di amministrazione*). The only restrictions relate to acts which might be damaging to Fintecna or IRI in connection with the work on the high-speed rail network. The board of directors itself is made up of seven members, three of them, including the managing director, being appointed by Astaldi, three by Fintecna, and the chairman by Astaldi, subject to Fintecna's agreement.

On the basis of this information it can be concluded that the buyer takes over from Fintecna full power to manage Italstrade.

Turning now to the possibility that Fintecna might have to meet future losses by Italstrade, the contract lays down that the shareholders are to meet any financial liabilities incurred by Italstrade in proportion to their holdings in the company's capital up to the transfer of the residual holding owned by Fintecna. Naturally, from that point Astaldi undertakes entire financial responsibility for Italstrade's results.

Under this arrangement Fintecna will be again under an obligation to inject public funds into Italstrade in the case of any further capital increase. However, under the terms of the contract, those capital increases will entail the joint participation of Fintecna and Astaldi in proportion to their holdings. Moreover, the presence of a private shareholder ensures that any investment in Italstrade will be made on the basis of the return expected on the funds injected; if Italstrade's prospects appear poor, a private investor will not provide further funding and will prefer to wind up the company.

However, it is possible that Italstrade will receive further public funds through Fintecna; those would

⁽¹⁾ See Part III, point 6.

⁽²⁾ See Part IV, point 3.

nevertheless, be regarded as normal investments on market conditions in so far as they are provided with a significant (almost equal) contribution from a private investor: those funds cannot be considered State aid within the meaning of Article 92 of the Treaty.

When capital injections are provided, the Commission presumes that State aid is not involved where public funds are provided along with a similar investment by private shareholders⁽¹⁾.

In the present case, Fintecna and Astaldi will participate in any increase in Italstrade's capital on the sole basis of their holdings in the company. It may be assumed here that any capital Fintecna injects into Italstrade will be on terms acceptable to a private investor operating on normal market conditions.

Regarding the terms for the transfer of the remaining 51 % of Fintecna's capital to Astaldi, under the contract Fintecna is entitled to transfer its 51 % to Astaldi at the pre-determined price between 1 January 1999 and 30 June 1999 or until six months after the discharge by IRI of the guarantees for the high-speed rail network.

On the basis of the information provided by the Italian Government, there is manifestly no legal obligation on the parties to complete the transfer of Italstrade. Fintecna is merely entitled to transfer the remaining capital holding and only when it exercises that right is the other party obliged to complete the transaction. However, Fintecna may conceivably refrain from exercising its right: in that case the transfer of Italstrade would not be completed and the conditions laid down in the Decision would not have been complied with.

However, the Italian Government has given an undertaking that Fintecna will transfer the remaining holding in Italstrade on the contractual conditions, with particular reference to the deadlines for the exercise of the option itself. In view of that commitment Fintecna's remaining holding in Italstrade can be considered a temporary one only, serving merely to protect IRI with respect to the guarantees it gave in connection with the contracts for the high-speed rail network regarding the acquirer's possible failure to complete.

⁽¹⁾ See application of Articles 92 and 93 of the Treaty to public authorities' holdings in company capital, EC Bull. 9-1984, point 3.2.

Although Fintecna continues to hold 51 % of Italstrade, the condition laid down in Article 1(3) of the Decision has been complied with. The delays in the sale were due to circumstances beyond Fintecna's control (the contractual clause in respect of the work on the high-speed rail network); as far as was in its power, Fintecna acted with the objective of privatising Italstrade as rapidly as possible. That objective has been achieved, as explained above, by virtue of the clauses in the contract of sale and the commitment given by the Italian authorities that the transfer of the remaining holding will be completed as soon as possible.

Regarding the clauses concerning work on the high-speed rail network, the Commission notes that negotiations are taking place between IRI and TAV, the company which awarded the contract, with a view to removing the clause that requires IRI to continue holding an absolute majority of the capital in Italstrade. It notes that a positive outcome to those negotiations could speed up the formal transfer of the entire capital of Italstrade to Astaldi.

- (iii) The prohibition on using the proceeds of the asset sales by Fintecna to assist companies in difficulty, and (iv) the prohibition on granting further State aid in connection with privatisations.

In order to decide whether Fintecna has complied with the conditions set out in Article 1(4) and (5) of the Decision, and in particular with the prohibition on the granting of further aid, it has to be established whether the funding Italstrade received after 1994 can be considered an investment on market lines or whether it constitutes State aid for the purposes of Article 92(1) of the Treaty.

When it has to determine whether the financial relations between a State and a public enterprise include a State aid component caught by Article 92, the Commission applies the private-investor test to the financial flows between them. In the present case this means considering whether the funds given to Italstrade were public resources and, if so, whether they would have been invested applying the private-investor test.

Under the Iritecna plan, Italstrade was transferred to Fintecna, a wholly owned subsidiary of IRI, an industrial holding company itself wholly owned by the Italian Treasury. The Italian Government appoints the board of directors of IRI, which in turn appoints the board of Fintecna.

According to the settled case law of the Court of Justice of the European Communities, in particular its judgment in Case C-305/89 Italy v. Commission⁽¹⁾, in order to establish whether an aid measure can be considered State aid within the meaning of Article 92 of the Treaty, 'no distinction should be drawn between cases where aid is granted directly by the State and cases where it is granted by public or private bodies established or appointed by the State'. So, even if the funds given to Italstrade did not come directly from the State, it may nevertheless be that they are public funds.

It is not enough to affirm here, as the Italian Government does in its observations, that the financial measures taken by Fintecna used resources generated by the operation of its own business and not obtained from the State. If Fintecna's operating cash flow is used for an unprofitable purpose, as it was in the case of Italstrade, that reduces the profit accruing to Fintecna's shareholder, IRI, and thus ultimately to the State. Fintecna might have used its own funds for activities with a better return, which would have enabled IRI, and consequently the State, to obtain a better economic return on its investment.

A smaller return on IRI's investment in Fintecna will ultimately be reflected in a loss of profit to the State so that, even though the funds given to Italstrade were not provided directly by the State, they can nevertheless be said to constitute State resources. In order to establish whether or not they are caught by the prohibition in Article 92(1), then, they have to be studied in the light of the private-investor principle⁽²⁾.

According to that principle, a financial transaction between the State and a public undertaking contains a State aid component if it would not have been acceptable to a private investor operating under normal market economy conditions. In particular, the presence of State aid can be presumed 'where the financial position of the company, and particularly the structure and volume of its debt, is such that a normal return (in dividends or capital gains) cannot be expected within a reasonable time from the capital invested'⁽³⁾.

Accordingly, an analysis has to be made of Italstrade's financial position in the years before the increases in capital; this is shown in Table 2.

Table 2

Italstrade's financial results

(in ITL billion)

	1993	1994	1995	1996
Net turnover	n.a.	245,1	197,3	238,9
Gross margin	n.a.	(37,5)	18,9 ⁽²⁾	(2,0)
Net profit (loss)	(183,0)	(19,3) ⁽¹⁾	(15,0) ⁽²⁾	(96)
Net worth	n.a.	(30,0)	15,0	32,0

⁽¹⁾ After writing off debts of ITL 186 billion by Iritecna.⁽²⁾ Taking account of extraordinary items amounting to ITL 45,8 billion including ITL 22 billion relating to the sale of businesses to controlled companies and Iritecna.

Source: Italstrade's annual accounts.

The figures set out above show that Italstrade was not a profitable concern when Fintecna provided the funds. Fintecna provided further funding in 1996 although, given Italstrade's results, Fintecna could not reasonably expect any significant return on its investment.

It is not sufficient to invoke the fact that the costs of putting the company into liquidation would have been higher than those of the recapitalisations carried out. A private shareholder faced with declining market prospects and the impossibility of a return to viability would have put the company into liquidation well before 1996, and indeed before 1994, thus avoiding costly recapitalisations and substantially reducing the costs of the liquidation itself.

The financial resources given by Fintecna to Italstrade after 1994 therefore constitute State aid within the meaning of Article 92(1) of the Treaty. Thus the condition laid down in Article 1(5) of the Decision has not been complied with; consideration will accordingly have to be given not only to the compatibility of the fresh aid granted, but also to the compatibility of the aid received by Italstrade and approved in the Decision (ITL 450 billion).

In assessing compliance with the Decision, it is not enough to say that the total volume of aid approved has not been exceeded. Article 1(5) of the Decision expressly provided that the individual privatisation operations were not to be financed by further State aid. The purpose of this obligation was to reduce the distorting effect of the aid granted, and consequently, to ensure that any resources acquired as a result of the

⁽¹⁾ [1991] ECR I-1603, paragraph 13.⁽²⁾ Commission communication to the Member States on the application of Articles 92 and 93 of the EC Treaty and of Article 5 of Commission Directive 80/723/EEC to public undertakings in the manufacturing sector, OJ C 307, 13.11.1993, p. 3, see Part III.⁽³⁾ Ibid., paragraph 16.

sell-offs were devoted to reducing the costs of putting the Iritecna/Fintecna group into liquidation.

In addition, given that the businesses likely to be most attractive to potential private investors had been transferred to Fintecna primarily with a view to sale, and only within limits with a view to restructuring, the Decision expressly prohibited further aid to those businesses.

In principle, when State-owned businesses are privatised it may be permissible to grant State aid for acquirers where the sale does not take place on market conditions or for the business where the contract of sale requires the acquirer of the business to carry on unprofitable segments which would have been discontinued by an investor operating on market conditions.

Regarding the sale of Italstrade to a private investor, that sale was carried through in compliance with the relevant Community rules. Both the 1994 procedure, which was subsequently abandoned, and the 1995 procedure, which terminated in the sale of the company to Astaldi, entailed public bids to buy the business. Thus about 20 investors were initially interested in the sale of Fintecna's civil engineering businesses. Of the 20, 13 submitted offers, of which three were placed on a short list. Only Astaldi submitted a binding offer and therefore it alone was admitted to the due diligence stage.

In the procedure followed by Fintecna all potential investors were placed on an equal footing in the sale and the best offer was chosen. That gave the Commission reason to conclude that the sale took place at the market price and thus that no aid was given to Astaldi in the acquisition of Italstrade.

Moreover the contract of sale does not contain any clauses specifically obliging the acquirer to continue any loss-making activities. In any case no element of aid for Italstrade can be discerned in the terms of sale.

On the basis that the aid granted to Italstrade after 1994 constitutes State aid within the meaning of Article 92(1) and, as a result the aid received by the company before 1994, which the Commission approved in the Decision, is in principle likewise unlawful, it has now to be considered whether all the grants of aid, taken as a whole, are compatible with the common market.

IV

Pursuant to Article 92(2) and (3) of the Treaty certain aid is, or may be considered, compatible with the common market.

Article 92(2), (3)(a) and (3)(b) of the Treaty cannot be applied to measures of the kind under consideration here. In view of the variety of Italstrade's activities and locations, and the fact that the aid does not have a regional objective, the only possible exemption is that provided for in Article 92(3)(c), which deals with aid to facilitate the development of certain economic activities. By its very nature, the aid in this case must be considered aid for the restructuring of firms in difficulty.

Regarding such aid, the Commission has published guidelines on State aid for rescuing and restructuring firms in difficulty⁽¹⁾. In practice, if the Commission is to approve one-off measures to restructure a firm in difficulty, the following conditions must be satisfied:

- (i) the measures must restore the long-term viability of the firm;
- (ii) the measures must avoid undue distortion of competition;
- (iii) the measures must be in proportion to the costs and benefits of restructuring and thus limited to the strict minimum needed;
- (iv) the restructuring plan must be fully implemented;
- (v) the implementation of the restructuring plan must be monitored and verified by the Commission.

Only if all of these tests are satisfied can the Commission take the view that the effects of the aid are not contrary to the Community interest and approve the aid pursuant to Article 92(3)(c).

As regards condition (i), the restoration of viability, the Italian authorities submitted a restructuring plan in the context of the Decision which was intended to restore Italstrade to profitability from 1995 onward. The aid granted to Italstrade up to 1994 (ITL 450

⁽¹⁾ OJ C 368, 23.12.1994, p. 12.

billion) was held to be compatible with specific regard to that plan and to the Community guidelines. But Italstrade did not achieve the financial results expected and so had to fall back on public assistance once again (receiving ITL 178 billion, as has been explained).

Italstrade's restructuring plan, which the Commission approved in the Decision, was based on prudent estimates of the future development of the company's order book. On 31 December 1992 that portfolio of work amounted to ITL 2 377 billion, of which more than ITL 558 billion related to contracts connected with the high-speed rail network. On the basis of the work schedule laid down by the company awarding the contracts, it was reasonable to expect Italstrade's turnover and financial results to develop as shown in Table 3.

Table 3

Forecast financial results of Italstrade

	(in ITL billion)		
	1995	1996	1997
Net turnover	503	790	854
Gross margin	28	35	35
Operating result	12	16	15
Net profit (loss)	24	26	27

Source: Iritecna's restructuring plan.

However, the difficulties of the Italian civil engineering sector proved to be more serious than expected and the contracts already secured for the high-speed rail network were delayed for reasons beyond the company's control. In fact, as is shown in Table 1, Italstrade's turnover was substantially lower than forecast:

- in 1995 it amounted to ITL 197 billion, or 39 % of the figure forecast,
- in 1996 it amounted to ITL 239 billion, or 30 % of the figure forecast.

In both those cases, as in 1994, Italstrade's actual turnover was about 50 % less than in 1992, a year in which the crisis in the industry in which Italstrade operates was already very serious. Indeed, the fall in Italstrade's turnover in the period in question was more severe than the downturn in the market as a whole. Faced with that crisis on the market around it, Italstrade reacted by taking further restructuring measures, more stringent than the terms of the plan.

In 1996 the company produced a new internal restructuring plan (see Table 4) with a view to returning the business to a stable level of profitability. The plan provided for a gradual resumption of operations, linked partly to work on the high-speed rail network but mainly based on measures to contain further structural costs below the provisions of the plan approved in the context of the Decision.

Table 4

Italstrade's industrial plan 1998 to 2000

	(in ITL billion)		
	1998	1999	2000
Net turnover	370	400	453
Gross margin	21	28,5	31
Structural costs	(15)	(15)	(16)
Operating loss	6	7,5	9,5

Source: Italstrade's 1998 to 2000 restructuring plan.

Structural costs are to be kept at 25 % below the level fixed in the plan in order to maintain sufficient profitability despite a turnover appreciably below what was originally anticipated.

Italstrade was to generate a net profit about 2 % of turnover in the period in spite of a production level of less than 50 % of the level fixed in the Iritecna plan for 1996. The company was able to do so by making further cuts in structural costs, through additional reductions in headquarters' staff and restructuring of operational processes.

The fact remains that, in 1996, Italstrade recorded a loss both in operating terms and in overall results; however, even in 1996 there were positive signs in the form of a reduction in operating losses indicating that the company was improving its own competitiveness. In 1997 those signs were confirmed both by a favourable gross margin and by net profits.

As a result of the company's restructuring, particularly in the period 1996 to 1997, in addition to the restructuring in the plan approved by the Commission Decision, Italstrade will be able to reach a satisfactory level of profitability despite the forecast deterioration in market conditions. Nevertheless, it must be kept in mind that long-term profitability is being attained through the crucial contribution of internal

rationalisations (reductions in capacity, etc.) rather than on the basis of favourable market prospects.

It can be considered that the first condition for approval of aid for restructuring is thus satisfied.

The Commission notes that the company has been transferred to a private shareholder, so that the State will not, under the contractual terms, be made financially liable for any losses that Italstrade may incur. The presence of a private controlling shareholder (see Part III(ii)) also provides a better assurance of Italstrade's prospects of profitability.

Condition (ii) is that the aid avoids undue distortion of competition. In principle, any aid granted by a State to a firm causes undue distortion of free competition since it leaves that firm in a more favourable economic situation than its competitors. This effect consequently has to be balanced by reductions in production capacity, especially in an industry such as construction, where there is substantial overcapacity.

In the present case the restructuring plan approved by the Commission in the Decision already provided for significant cuts in production capacity. The production capacity of a construction firm, both in terms of its ability to plan and design and in terms of its ability to implement its plans, is based mainly on its human resources; the significant reduction in the size of Italstrade's human resources base at the time of the Decision, along with the relevant decline in production, pointed clearly to a substantial fall in its market share. The Commission accordingly held that the aid given to Italstrade up to 31 December 1994 satisfied the tests for restructuring aid.

But Italstrade received further aid after the Decision, and it must therefore be asked whether these new resources have not affected trade between Member States in a manner contrary to the common interest; this would be the case if Italstrade had been put in a position to use the resources to finance trading practices enabling it to increase its own market share at the expense of competitors without State aid.

As has been explained, however, Italstrade reduced its staff and thus its production capacity in the period 1995 to 1997, and the reductions went beyond what was provided for in the plan.

The Commission took the view that the development of turnover provided for in the plan (see Table 3) would not affect trade to an extent contrary to the common interest. As it turned out, Italstrade's turnover in the period 1995 to 1997 was about 30 % of what was called for in the plan, and the pace of incoming orders was a great deal slower, as shown in Table 5.

Table 5

Italstrade's turnover and order book

	<i>(in ITL billion)</i>				
	1993	1994	1995	1996	1997
Net turnover	660	245	197	239	370
Order book	1 653	1 284	1 256	1 077	1 036
Including high-speed rail network	558	530	480	380	n.a.

Source: Italstrade's annual accounts.

It is clear from these figures that, as a result of its restructuring, Italstrade has been competing less and less on world markets. The pace of acquisition of orders foreseen in the restructuring plan approved in the Decision was largely equivalent to turnover in each of the years covered in the plan. That level of production and of orders was considered compatible with the common market in view of the significant restructuring already undertaken by the company.

Despite reducing turnover to about 70 % of the level anticipated in the plan, Italstrade reduced its order book by around 40 % of its level as at 31 December 1993, limiting its competitive activities on reference markets to levels significantly below those in the Iritecna plan. Accordingly, its ultimate competitive position will not affect trade to an extent contrary to the common interest.

Condition (iii) is that aid be in proportion to costs and benefits: if State aid is to be declared compatible, it must be limited to the strict minimum needed to finance the return to viability and must not be used to finance aggressive competitive practices, except to the extent necessary to restore the firm itself to profitability.

From the information supplied by the Italian Government it can be concluded that the funding

provided by Fintecna to Italstrade was needed to cover losses due mainly to the writing-down of assets and to the costs of reducing production capacity (staff cuts). During the delays in the sale of Italstrade, Fintecna financed further restructuring, going beyond what was laid down in the Iritecna plan, in order to cope with the unexpected worsening in market prospects.

The Commission takes the view, therefore, that the aid granted did not bring the company additional liquidity which was unrelated to the process of restructuring and might have helped to finance aggressive commercial or investment practices not necessary to the restructuring operation.

The Commission would also observe that Italstrade will not qualify for any tax credit in respect of the losses covered by the funds contributed by Fintecna.

Lastly, the recipient will make a significant contribution to the financing to the restructuring operation, as any further burdens are to be borne by both owners of holdings in the company in proportion to those holdings until the point when the remaining 51 % of the share capital is transferred.

The Italian Government should be required to submit periodic reports on the progress of privatisation and on the implementation of the restructuring plan drawn up for Italstrade,

HAS ADOPTED THIS DECISION:

Article 1

The aid of Italstrade, namely the capital injections granted in the years 1995 to 1997 totalling ITL 178 billion (ECU 78 million), and the aid granted up to 1994 already approved by the Commission amounting to a total of ITL 450 billion, constitute State aid within the meaning of Article 92(1) of the Treaty and Article 61(1) of the EEA Agreement.

The aid satisfies the tests laid down in the Community guidelines of 27 July 1994 on State aid for rescuing and restructuring firms in difficulty. It is consequently declared exempt pursuant to Article 92(3)(c) of the Treaty and Article 61(3)(c) of the EEA Agreement from the prohibition imposed by Article 92(1) of the Treaty and Article 61(1) of the EEA Agreement, being aid that is compatible with the common market, provided that Article 2 is complied with.

Article 2

Italy shall transfer its remaining shares in Italstrade held by Fintecna to the private shareholder on the terms and conditions stipulated in the contract of sale, in particular the time when the option must be exercised.

Article 3

In order to secure full cooperation in the arrangements for monitoring this Decision, Italy shall provide the Commission with half-yearly reports on Italstrade's economic and financial situation and communicate to it in good time the main steps in the sale of Fintecna's remaining holding in Italstrade.

The first report shall set out Italstrade's economic and financial results at 30 June 1998 and shall reach the Commission by 31 December 1998.

Article 4

This Decision is addressed to the Italian Republic.

Done at Brussels, 16 September 1998.

For the Commission

Karel VAN MIERT

Member of the Commission

COMMISSION DECISION

of 2 December 1998

on German aid to the coal industry for 1998

(notified under document number C(1998) 4026)

(Only the German text is authentic)

(Text with EEA relevance)

(1999/270/EC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Coal and Steel Community,

Having regard to Commission Decision No 3632/93/ECSC of 28 December 1993 establishing Community rules for State aid to the coal industry⁽¹⁾, and in particular Article 2(1) and Article 9 thereof,

Whereas:

I

By letter of 28 October 1997, Germany notified the Commission, in accordance with Article 9(1) of Decision No 3632/93/ECSC, of the aid it intended to grant to the coal industry in 1998. By letters of 26 March 1998, 28 April 1998, 27 August 1998, 23 October 1998 and 4 November 1998, Germany submitted the additional information requested by the Commission.

By letter of 26 March 1998, Germany submitted, in accordance with Article 8(4) of Decision No 3632/93/ECSC, the new guidelines for its coal policy up to the year 2002, which modify the plan approved by the Commission by Decision 94/1070/ECSC⁽²⁾ on aid to the coal industry in 1994 (hereinafter referred to as 'the 1994 restructuring plan').

In accordance with Decision No 3632/93/ECSC, the Commission first gives an opinion on the compatibility of the plan for the modernisation, rationalisation and restructuring of and reduction of activity in the coal industry with the general and particular objectives of the Decision.

Secondly, it gives its opinion, in accordance with the Decision, on the following financial measures for 1998:

- (a) operating aid within the meaning of Article 3 of the Decision totalling DEM 5 171 million;
- (b) aid for the reduction of activity within the meaning of Article 4 of the Decision totalling DEM 3 164 million;
- (c) aid within the meaning of Article 3 of the Decision totalling DEM 81 million to maintain an underground labour force ('Bergmannsprämie');
- (d) aid within the meaning of Article 5 of the Decision totalling DEM 1 011 million to assist the undertakings RAG Aktiengesellschaft, Saarbergwerke AG, Preussag Anthrazit GmbH and Sophia Jacoba GmbH to cover exceptional costs. This aid includes:
 - aid to cover additional drainage costs, as part of restructuring, to assist the undertakings RAG Aktiengesellschaft, Saarbergwerke AG and Preussag Anthrazit GmbH totalling DEM 161 million,
 - aid totalling DEM 850 million to assist the undertakings RAG Aktiengesellschaft, Saarbergwerke AG and Sophia Jacoba GmbH to cover the costs arising from or having arisen from the restructuring of the coal industry which are not related to current production (inherited liabilities).

The financial measures proposed by Germany for the coal industry comply with the provisions of Article 1(1) of Decision No 3632/93/ECSC. In accordance with Article 9(4), the Commission is therefore

⁽¹⁾ OJ L 329, 30.12.1993, p. 12.

⁽²⁾ OJ L 385, 31.12.1994, p. 18.

required to give an opinion on these measures. For this purpose, it checks whether they conform to the general objectives and criteria defined in Article 2 and the specific criteria defined in Articles 3 and 4 of the Decision and whether they are compatible with the functioning of the common market. Furthermore, in accordance with Article 9(6) of the Decision, the Commission has to decide whether the notified measures are compatible with the plan for modernisation, rationalisation, restructuring and the reduction of activity.

On 20 July 1998, the coal-mining undertaking RJB Mining Plc, an undertaking within the meaning of Article 80 of the ECSC Treaty, brought an action before the Court of First Instance of the European Communities against the Commission Decision of 10 June 1998 on German aid to the coal industry in 1997⁽¹⁾.

II

On 13 March 1997, agreement was reached on the new guidelines for the German coal industry for the period from 1998 to 2005 between the Federal Government, the Federal State Governments of North-Rhine Westphalia and the Saar, the coal undertakings and the trade union federations for mining and electricity production in the framework of Article 8(4) of Decision No 3632/93/ECSC.

This agreement provides for a continuing reduction in annual production to 37 million tonnes of coal equivalent (tce) in 2002 and a reduction of 30 000 in the workforce to a total of 56 000, including subsidiary activities. Production will then be provided by 12 mines. Although the planning is for the period up to 2005, the individual measures agreed in November 1997 only apply up to the expiry of Decision No 3632/93/ECSC. The changes in costs, the prices of imported coal and above all the sales opportunities cannot be foreseen with sufficient accuracy to be able to lay down precisely the rate at which activity in this sector subsequently needs to be reduced.

The plan for modernisation, rationalisation, restructuring and the reduction of mining activity has been checked by the Commission as regards the individual mines of the undertakings RAG Aktiengesellschaft, Saarbergwerke AG and Preussag Anthrazit GmbH.

Plan for modernisation, rationalisation, restructuring and the reduction of activity in coal mining for the period from 1998 to 2002

The planning behind the plans for the modernisation, rationalisation, restructuring and reduction of activity in the German coal industry is based on the following objectives:

- optimum use of the lower financial resources,
- reduction of production and costs,
- according to the current plans, the retention of access to the main reserves and the option of moving northwards,
- ensuring supplies to customers of appropriate quality and in good time,
- a socially acceptable reduction in staff avoiding laying off for operational reasons,
- consideration of the regional impact of measures.

To implement these objectives, the situation with regard to the mines was assessed by the undertakings on the basis of the following criteria:

- extent of the deposits,
- coal quality,
- costs.

These standard criteria should make it possible to provide an objective assessment of the current situation and the future development of the production units. On this basis, the undertakings concerned have submitted the following information to the Commission.

Restructuring of the production units of RAG Aktiengesellschaft

A. Closures

- the Emschermulde with the mines Hugo/Consolidation and Ewald/Schlängel & Eisen,
- the Lippemulde with the mines Fürst Leopold/Wulfen and Westerholt,

⁽¹⁾ Case T-110/98; OJ C 299, 26.9.1998, p. 38.

- the Bereich Ost (eastern zone) with the mines Haus Aden/Monopol and Heinrich Robert,
- the Westfalen mine.

1. The Emschermulde with the mines Hugo/Consolidation and Ewald/Schlägel & Eisen

The first measure in the abovementioned areas, the reorganisation of the Emschermulde with the creation of the amalgamated mine Ewald/Hugo, was agreed and implemented as long ago as 1 July 1997.

This is the last of several stages of restructuring which this mining area has undergone since the undertaking RAG Aktiengesellschaft was founded.

According to the plan, mining at the Ewald/Hugo mine will cease before 23 July 2002, by which date the high-quality coking coal in this deposit will have been extracted. The Emschermulde coalfield will thus be finally closed down.

In 1997, production amounted to 4,4 million tce, and the number of employees was 6 832.

2. The Lippemulde with the mines Fürst Leopold/Wulfen and Westerholt

The following measures are planned for the Lippemulde:

- (a) on 1 April 1998, the mines Fürst Leopold/Wulfen and Westerholt will be merged to form the amalgamated mine Lippe. The Fürst Leopold production site is to be maintained until the amalgamated production site has been completed in 2001;
- (b) up to 2001, activity in the mine Fürst Leopold/Wulfen will be gradually reduced by mining the economically extractable reserves and allowing pits to be closed. The closure of pits and the corresponding open-cast sites will optimise the infrastructure both below and above the ground. The remaining activity will be concentrated on the Westerholt production site.

In 1997, production amounted to 4,9 million tce and the number of employees was 6 035.

3. The Bereich Ost with the mines Haus Aden/Monopol and Heinrich Robert

The following measures are planned for this area:

- (a) on 1 April 1998, the mines Haus Aden/Monopol and Heinrich Robert were combined to form the amalgamated mine Ost, while abandoning the northern pit of Haus Aden. Up to the year 2000, the production site Haus Aden will be retained for the Monopol pit;
- (b) in 2000, production in the Haus Aden/Monopol and Heinrich Robert pits will be concentrated on the Heinrich Robert production site on completion of the underground link. This involves the abandonment of mine sections and the closure of pits and open-cast mines.

This measure will ensure the production of coking coal in the eastern coalfield and, for the time being, the option of moving to the north.

In 1997, production amounted to 5 million tce and the number of employees was 6 857.

4. The Westfalen mine

The Westfalen mine will be closed down in the year 2000. Up to that date, optimum economic use will be made of the site. This process has already begun and is ensuring low cost.

In 1997, production amounted to 2,5 million tce and the number of employees was 2 809.

B. Other measures

In addition to the measures described above for the final reduction of production capacity, the modernisation, restructuring and rationalisation process will be continued in all remaining pits. This will bring about additional costs reductions.

The Friedrich Heinrich/Rheinland mine

Following the completion of the amalgamation of the two pits during the first half of the 90s with the disposal of infrastructure and the closure and redevelopment of the open-cast pits which were no longer required, substantial progress has been made as regards productivity by means of further rationalisation.

By concentrating activity on the highest-yield pits and thereby achieving a progressive increase in the face output, it has been possible to reduce the number of faces operated. As the downstream areas were optimised at the same time, the mine is today among those with the lowest deficit.

In 1997, production amounted to 3,7 million tce and the number of employees was 4 117.

The Niederberg mine

Despite the cutback in production, there has been a positive development in recent years at the Niederberg mine as regards the reduction of production costs. Further rationalisation will stabilise the mine's situation. In 1997, production was 2,2 million tce and the number of employees was 2 424.

The Walsum mine

The Walsum mine is one of the undertaking's richest and most efficient mines. The targeted selection of seams and certain technical measures should help to overcome the mine's temporary operational problems as regards mining and to guarantee its performance. In 1997, production amounted to 2,9 million tce and the number of employees was 3 802.

The Lohberg/Osterfeld mine

Although the rationalisation measures are currently a burden as regards the cost and performance data at this production site, the Lohberg/Osterfeld mine does produce high-quality coking coal. It is in the process of consolidation and will shortly have disposed of the elaborate underground infrastructure which was the result of the amalgamation with the former Osterfeld mine. In 1997, production amounted to 2,9 million tce and the number of employees was 4 262.

The Prosper/Haniel mine

The Prosper/Haniel mine has recorded production costs in recent years which are among the undertaking's lowest. Further operational rationalisation is expected over the next few years. In 1997, production amounted to 3,7 million tce and the number of employees was 4 078.

The Auguste Victoria mine

The Auguste Victoria mine is one of the undertaking's high-deposit efficient mines. Following its sale by the undertaking BASF in 1992 and its full integration into the undertaking's mining sector in 1996, the potential for rationalisation was exploited. This development is

positive in overall terms, but is temporarily impaired by geological difficulties. In 1997, production amounted to 3,1 million tce and the number of employees was 4 173.

The Blumenthal/Haard mine

The Blumenthal/Haard mine is currently also faced with production difficulties due to geology. The resulting loss of production is temporarily increasing costs. The concentration of the pits operated together with a future plan for the continuing option of moving northwards should permanently reduce the costs. In 1997, production amounted to 3,3 million tce and the number of employees was 4 447.

C. Impact of the planned measures

The result of the measures described above is to reduce the number of jobs in the undertaking's mining sector as a whole by about 44 500 from an average of 89 500 in 1992 to 45 500 in 2002. This corresponds to the shedding of about 4 500 jobs per annum. Compared with the 1994 restructuring plan, this means an actual reduction in 14 500 jobs by 2002. The proposed change to the labour force is based on an annual productivity increase of 4 %. In 1997, the number of employees was 60 820.

Expressed at 1992 prices, the reduction in production costs up to 2002 will be DEM 37 per tce, more than twice as much as envisaged in the 1994 restructuring plan (DEM 16 per tce). Up to 31 December 1997, real costs had fallen by about DEM 21 per tce.

Production is to be reduced from 47,6 million tce in 1992 to 30,1 million tce in 2002. Compared with the 1994 restructuring plan, this means a reduction of a further 8,2 million tce during this period. In 1997, production amounted to 38,7 million tce.

Restructuring of the production units of the undertaking Saarbergwerke AG

The agreement on the new guidelines for the German coal industry of 13 March 1997 will lead to a further reduction in production and make it necessary to close one of the company's mines in the year 2000.

A. Closures

The Göttelborn/Reden mine

Despite considerable investment during the period from 1990 to 1995 to amalgamate the Reden, Göttelborn and Camphausen mines, the production site must be closed down in the year 2000 because of geological difficulties.

In 1997, production amounted to 1,9 million tce and the number of employees was 2 899.

B. Other measures

The Ens Dorf mine

It has been possible to maintain a high level of productivity thanks to the programme for the modernisation of this production site which was started in the early 1990s. The Ens Dorf mine was traditionally the most productive German mine and is expected to maintain its productivity during the period under review. The conditions for this are in place and are to be guaranteed in the medium term by means of continuing increases in productivity. In 1997, production amounted to 2,5 million tce and the number of employees was 2 231.

The Warndt/Luisenthal mine

The mine is expected to increase its performance, since:

- two pits are to be closed at the end of 1999
- and
- new layouts in the future pits and the use of new technology will result in substantial optimisation.

In 1997, production amounted to 2,2 million tce and the number of employees was 3 504.

C. Impact of the planned measures

The labour force will be reduced from 18 671 to 8 478 in 2002, a reduction of 10 193 workers. Compared with the 1994 restructuring plan, this means that the labour force will be reduced by an additional 6 000 up to 2002. In 1997, the number of employees was 14 220.

Expressed at 1992 prices, the reduction in production costs will be DEM 100 per tce in 2002, DEM 40 per tce higher than envisaged in the 1994 restructuring

plan. By 31 December 1997, real costs had fallen by DEM 44 per tce.

The production capacity will be reduced from about 8 million tce in 1992 to 5,1 million tce up to 2002. Compared with the 1994 plan, this is a fall of a further 2,2 million tce. In 1997, production amounted to 6,7 million tce.

Restructuring of the production units of Preussag Anthrazit GmbH

The undertaking expects its costs to continue to fall gradually during the period from 1998 to 2002. Compared with the last plan submitted for this period in August 1994, production has, however, been revised downwards due to a downward trend in sales (from 2,05 million tce per annum to about 1,7 million tce per annum). Given the situation now achieved with regard to pit operation, the undertaking believes that the performance by shift can be significantly improved, therefore reducing production costs to some extent. In 1997, production amounted to 1,7 million tce.

The basis for this improvement is provided by the implementation of the restructuring plan drawn up in 1990.

This plan provides for the following measures:

- conversion of the extraction process from advancing working to retreating working. The preliminary work required (preliminary driving of accompanying roads) was for the most part carried out in 1991 to 1994 and extended during the following two years to the desired degree. This conversion means that the entire output from retreating workings can be extracted,
- equipping of the workings and headings with more efficient extraction and driving equipment. The re-equipping has how largely been completed,
- adaptation of the infrastructure to the lower production volume and its consolidation. This process tends to depend on the layout, but has already largely been completed and should have an impact on the level of the fixed costs,
- the labour force of 4 024 in 1992 will be reduced to 2 667 in 2002. This corresponds to a reduction of 33 % instead of approximately 25 % as foreseen in the 1994 restructuring plan. In 1997, the production unit had a labour force of 2 757.

III

According to the plan notified by Germany, the reduction in State aid will lead to a permanent reduction in coal production. Production is expected to fall from 47 million tce in 1997 to 37 million tce in 2002. Even if the average production costs in the German coal industry have fallen slightly, taking account of Article 3(3) of Decision No 3632/93/ECSC, the production costs, expressed at 1992 constant prices, are still too high as they should be DEM 242 per tce in 2002 as compared with DEM 288 per tce in 1992. Compared with the 1994 plan, which showed a cost reduction of DEM 28 per tce, the reduction of DEM 46 per tce now planned is much higher. World market prices should remain relatively stable at about DEM 80 per tce, which would allow the unfavourable relationship between imported coal and German coal to continue.

Production in 2002 will be reduced to 37 million tce, as compared with 48 million tce in the 1994 restructuring plan.

The number of employees will fall to about 56 000 by 2002 instead of the figure of approximately 82 400 envisaged in the 1994 plan.

On the basis of the above, it can be concluded that a substantial reduction in aid can largely be achieved by means of measures to reduce mining activity.

When implementing the plan for the period from 1998 to 2002, Germany must therefore keep track of the changes in the production costs of the undertakings which receive State aid pursuant to Article 3 of the Decision. Germany has given its assurance that, if the objective of a realistic downward trend cannot be achieved, it will propose the necessary corrective measures to the Commission such as a review of the classification of mines pursuant to Article 3 and 4 of Decision No 3632/93/ECSC.

In its assessment of the plan, the Commission has taken account of the need to minimise the social and regional impact of the reductions in the German coal industry as far as possible.

In the light of the above, the Commission takes the view that the plan submitted by Germany is compatible with the objectives and criteria of Decision No 3632/93/ECSC.

IV

The aid pursuant to Article 3 totalling DEM 5 171 million is intended for the operation of the mines owned by the undertakings RAG Aktiengesellschaft, Saarbergwerke AG and Preussag Anthrazit GmbH, Dr Arnold Schäfer GmbH and Merchweiler GmbH.

In the case of RAG Aktiengesellschaft, the aid is intended to assist the mines Friedrich Heinrich/Rheinland, Niederberg, Walsum, Lohberg/Osterfeld, Prosper/Haniel, Westerholt, Auguste Victoria, Blumenthal/Haard and Heinrich Robert. In the case of Saarbergwerke AG, the measure is intended for the mines Ensldorf and Warndt/Luisenthal. In the case of Preussag Anthrazit GmbH, the measure is intended for the site Ibbenbüren.

This aid totalling DEM 5 171 million is intended to cover the difference between production costs and the sales price freely agreed on the basis of the conditions prevailing on the world market for coal of similar quality from third countries.

According to the information supplied by Germany and taking account of Article 3(3) of Decision No 3632/93/ECSC, the average production costs in the mines covered by Article 3 should in real terms be 5,4 % lower in 1997 than in 1995 at 1992 prices, i. e. DEM 253 per tce as compared with DEM 268 per tce.

In its assessment of the operating aid pursuant to Article 3 of Decision No 3632/93/ECSC, the Commission has also taken account of the need to minimise the social and regional impact of the restructuring of coal mining in regions which are already affected by above-average structural unemployment.

The fact is that unemployment in the coalfields of the Ruhr stands at about 15 % (district of Duisburg 15,8 %, Recklinghausen 13,7 %, Gelsenkirchen 16,4 %), which is far above the West German average of 9,7 %. In the Saar too, unemployment is above average in the coalmining areas (Saarbrücken 13,9 %, Saarlouis 11 %).

The coalmining areas are also target areas for Community regional support (Objective 2, regions whose industrial development is lagging behind) and at the same time areas to be developed within the meaning of Article 92(3)(c) of the EC Treaty.

On the basis of the information provided by Germany and the undertakings given (see Section VIII of this Decision), the aid proposed for 1998 is compatible with Decision No 3632/93/ECSC, in particular Articles 2 and 3 thereof.

V

The aid totalling DEM 3 164 million proposed for the reduction of activity pursuant to Article 4 of Decision No 3632/93/ECSC is tended to cover the difference between production costs and the sales price freely agreed on the basis of the conditions prevailing on the world market for coal of similar quality from third countries. In the context of the undertaking RAG Aktiengesellschaft, it will assist the mines Fürst Leopold/Wulfen, Ewald/Hugo, Haus Aden/Monopol and Westfalen. In the context of the undertaking Saarbergwerke AG, the measure is intended for the Göttelborn/Reden mine.

This aid is part of a programme for the complete or partial closure of the abovementioned mines.

The abovementioned closures are part of the Agreement of 13 March 1997 which will reduce production capacity by 10 million tonnes (21 % of total production capacity) and lead to the shedding of 30 000 jobs between 1998 and 2002.

In accordance with the provisions of Article 4 of Decision No 3632/93/ECSC, the production sites Göttelborn/Reden, Ewald/Hugo and Westfalen will be completely closed down before the Decision expires. The amalgamation of mines will result in partial closures that will provide a continuous and presumably significant reduction in mining activity before the Decision expires. In accordance with the second indent of Article 2(1) of Decision No 3632/93/ECSC, this aid will help to solve the social and regional problems associated with the complete or partial reduction of activity.

According to the information supplied by Germany, the production decrease between 1992 and 1998 is expected to be 22 %. The aid proposed for 1998 is compatible with Decision No 3632/93/ECSC, in particular Articles 2 and 4 thereof.

VI

The aid totalling DEM 81 million to cover extra payments to German miners ('Bergmannsprämien'),

which amount to DEM 10 per underground shift, is intended to provide an incentive for qualified staff to work underground and to help rationalise production. According to the German notification, this aid to miners is a pecuniary benefit. Although the extra payments are not part of the production costs of the coalmining undertakings, the aid helps to reduce the undertakings' wage costs. It is therefore aid which must be examined on the basis of Article 3 of Decision No 3632/93/ECSC.

The proposed aid helps to maximise productivity and therefore facilitates the restructuring and rationalisation of mining. It therefore also helps to achieve the objective referred to in the first indent of Article 2(1), namely to make, in the light of coal prices on international markets, further progress towards economic viability with the aim of decreasing the aids.

In its assessment of the aid, the Commission has taken account, in accordance with the second indent of Article 2(1) of Decision No 3632/93/ECSC, of the need to minimise the social and regional impact of restructuring.

The aid helps, in accordance with the provisions of Article 3 of the abovementioned Decision, to slightly improve the insufficient competitiveness of the undertakings concerned since the increase in productivity as a result of the maintenance of a qualified underground labour force reduces production costs.

Germany gives its assurance that the aid together with any other aid for current production will not exceed the difference between production costs and expected income in any undertaking or production unit.

In the light of the above and on the basis of the information provided by Germany, the aid proposed for 1998 is compatible with the objectives of Decision No 3632/93/ECSC, in particular Articles 2 and 3 thereof.

VII

The aid to assist the undertakings RAG Aktiengesellschaft, Saarbergwerke AG, Preussag Anthrazit GmbH and Sophia Jacoba GmbH to cover exceptional costs in accordance with Article 5 of Decision No 3632/93/ECSC amounts to DEM 1 011 million.

This financial measure includes, firstly, aid amounting to DEM 161 million to cover exceptional costs to assist the undertakings RAG Aktiengesellschaft, Saarbergwerke AG and Preussag Anthrazit GmbH.

The aid is intended to cover additional drainage costs in mines closed down as part of restructuring and near to working pits. Since little or no water is pumped out of the closed-down mines, water which has nothing to do with the existing production flows into the working pit nearby, thereby giving rise to additional costs. This water also has to be purified.

This aid, which is not related to current production and is specifically provided for in Section I(i) and Section II(b) of the Annex to Decision No 3632/93/ECSC, covers expenditure, resulting from restructuring, on the supply of water and the removal of waste water. To meet the requirements of Article 5 of the Decision, the special aid may not exceed the expenditure.

The Commission has examined the agreements between the public authorities and the undertakings concerned and, as part of an audit, the information given with regard to costs and has ascertained that the aid does not exceed the earmarked resources.

This will make it possible to reduce the pressure on the undertakings concerned, which will reduce their financial imbalance and enable them to continue their activities. The aid therefore complies with the objectives given in Article 2(1) of Decision No 3632/93/ECSC.

The abovementioned financial measure includes, secondly, aid to cover exceptional costs amounting to DEM 850 million to assist the undertakings RAG Aktiengesellschaft, Saarbergwerk AG and Sophia Jacoba GmbH.

The aid is intended to cover the costs arising from or having arisen from the restructuring of the coal industry which are not related to current production (inherited liabilities).

This aid is the result of decisions taken by mining undertakings and electricity producers, the Federal Government, the State Governments of North Rhine-Westphalia and the Saar and the trade unions representing the mining industry and the electricity

producers during the negotiations ('Kohlerunde') on 11 November 1991.

It is intended to cover the following costs, except the costs of social benefits which the State has taken on as a special contribution within the meaning of Article 56 of the ECSC Treaty: the costs of paying social welfare benefits resulting from the pensioning-off of workers before they reach statutory retirement age, other exceptional expenditure on workers who lose their jobs as a result of restructuring and rationalisation, the payment of pensions and allowances outside the statutory system to workers who lose their jobs as a result of restructuring and rationalisation and to workers entitled to such payments before the restructuring, supply of free coal to workers who lost their jobs as a result of restructuring and rationalisation and to workers entitled to such supply before the restructuring. From a technical and financial viewpoint, it is intended to cover additional underground safety work resulting from restructuring and exceptional intrinsic depreciation provided that it results from the restructuring of the industry.

This aid to cover the costs expressly referred to in Section I(a), (b), (c), (d), (f) and (k) of the Annex to Decision No 3632/93/ECSC may not exceed the said costs if it is to be in conformity with the provisions of Article 5 of the abovementioned Decision.

The Commission has examined the information regarding the costs as part of an audit and has ascertained that the aid does not exceed the earmarked resources.

This will make it possible to reduce the pressure on the undertakings concerned, which will reduce their financial imbalance and enable them to continue their activities. The aid therefore complies with the objectives given in Article 2(1) of Decision No 3632/93/ECSC.

VIII

The aim is to minimise the aid. Pursuing the principle applied by Germany that aid is only to be paid for production which is supplied for electricity generation and to the Community iron and steel industry, Germany undertakes to sell the production intended for use by industry and as domestic coal at prices (net prices without discounts) which cover the production costs.

The Commission notes that Germany has included in regulations the measures needed to ensure that the aid granted under this Decision does not exceed the difference between production costs and the selling price for delivery to user undertakings freely agreed between the contracting parties on the basis of the conditions prevailing on the world market. The aid per tonne of current production may not cause prices for Community coal to be lower than those of coal of a similar quality from third countries. Germany will also take care to ensure that the aid does not distort competition or produce discrimination between coal producers or between coal buyers and users in the Community.

Germany gives its assurance pursuant to the provisions of Article 86 of the ECSC Treaty that the aid will be limited to what is absolutely essential, taking account of social and regional considerations relating to the decline of coalmining in the Community, and that it will not provide an economic advantage, either directly or indirectly, for any activity other than coalmining — for example, for industrial activities relating to the mining or processing of coal from the Community.

Furthermore, the Commission would remind Germany that an essential feature of the aid rules is that the aid must be in the Community interest and must not disturb the functioning of the common market.

To enable the Commission to examine whether the production units which receive operating aid pursuant to Article 3 of Decision No 3632/93/ECSC actually generate a trend towards a reduction in production costs at world prices, Germany undertakes to notify the Commission no later than 30 September of each year of the production costs during the previous year and of all information pursuant to Article 9 of Decision No 3632/93/ECSC. If the conditions laid down in Article 3(2) of Decision No 3632/93/ECSC cannot be met, Germany will propose the necessary corrective action to the Commission such as a review of the classification of mines pursuant to Articles 3 and 4 of Decision No 3632/93/ECSC.

The Commission is required, in accordance with the second indent of Article 3(1) and Article 9(2) and (3) of Decision No 3632/93/ECSC, to verify whether the aid granted for current production achieves the objective set out in Articles 3 and 4 of the Decision. Germany must therefore provide notification no later

than 30 September 1999 of the level of aid actually paid in 1998 and of any changes to the sums originally notified. In this annual list, Germany will provide all information required for verifying compliance with the criteria laid down in the abovementioned Articles.

In approving the aid, the Commission has taken account of the need to minimise the social and regional impact of restructuring,

HAS ADOPTED THIS DECISION:

Article 1

Germany is hereby authorised to take the following measures to assist the coal industry:

- (a) operating aid as defined in Article 3 of Decision No 3632/93/ECSC totalling DEM 5 171 million;
- (b) aid for the reduction of activity as defined in Article 4 of Decision No 3632/93/ECSC totalling DEM 3 164 million;
- (c) aid as defined in Article 3 of Decision No 3632/93/ECSC totalling DEM 81 million to maintain an underground labour force ('Bergmannsprämie');
- (d) aid as defined in Article 5 of Decision No 3632/93/ECSC totalling DEM 161 million to assist the undertakings RAG Aktiengesellschaft, Saarbergwerke AG and Preussag Anthrazit GmbH to cover exceptional costs;
- (e) aid as defined in Article 5 of Decision No 3632/93/ECSC totalling DEM 850 million to assist the undertakings RAG Aktiengesellschaft, Saarbergwerke AG and Sophia Jacoba GmbH to cover exceptional costs to enable the undertakings to cover the costs arising from or having arisen from the restructuring of the coal industry which are not related to current production.

Article 2

In accordance with Article 86 of the ECSC Treaty, Germany undertakes to take all appropriate measures, whether general or particular, to ensure fulfilment of the obligations arising from this Decision. Germany shall ensure that the aid granted is used only for the

specified purposes and that any unused, over-estimated or misused expenditure in relation to any items referred to in this Decision is repaid to Germany.

Article 3

Germany shall provide information no later than 30 September 1999 about payments actually made during the 1998 financial year and shall forward the information pursuant to Article 9 of Decision No 3632/93/ECSC.

Article 4

This Decision is addressed to the Federal Republic of Germany.

Done at Brussels, 2 December 1998.

For the Commission

Christos PAPOUTSIS

Member of the Commission

COMMISSION DECISION

of 9 December 1998

relating to a proceeding pursuant to Article 85 of the EC Treaty

(IV/34466 — Greek Ferries)

(notified under document number C(1998) 3792)

(Only the Greek and Italian texts are authentic)

(Text with EEA relevance)

(1999/271/EC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community,

Having regard to Council Regulation (EEC) No 4056/86 of 22 December 1986 laying down detailed rules for the application of Articles 85 and 86 of the Treaty to maritime transport⁽¹⁾, as amended by the Act of Accession of Austria, Finland and Sweden, and in particular Articles 11 and 19 thereof,

Having regard to the Commission decision of 21 February 1997 to open a proceeding in this case,

Having given the parties the opportunity to make known their views on the objections raised by the Commission in accordance with Article 23 of Regulation (EEC) No 4056/86, and with Commission Regulation (EEC) No 4260/88⁽²⁾ on the communication, complaints and applications and the hearings provided for in Regulation (EEC) No 4056/86, as last amended by the Act of Accession of Austria, Finland and Sweden,

After consulting the Advisory Committee on Agreements and Dominant Positions in the field of Maritime Transport,

Whereas:

PART I

THE FACTS

A. The background to this Decision

- (1) This Decision arises from a complaint made to the Commission by a member of the public on

23 August 1992 that ferry prices were very similar on routes between Greece and Italy. The Commission, acting pursuant to Article 18(3) of Regulation (EEC) No 4056/86, carried out investigations at the offices of six ferry operators, five in Greece and one in Italy. During the investigations the Commission discovered documentary evidence showing that a number of ferry operators had been agreeing on prices for several years. Requests for information, pursuant to Article 16 of Regulation (EEC) No 4056/86 were sent later to Minoan Line, Strintzis Lines, and Anek asking for further details concerning the documents found during the investigations. The Commission opened formal proceedings on 21 February 1997 by sending a statement of objections to the seven addressees of this Decision as well as to Med Link and Hellenic Mediterranean Lines. An oral hearing was held on 13 and 14 May 1997.

B. The undertakings

- (2) The undertakings involved in this procedure are roll-on roll-off ferry operators, who provide passenger and freight services on a number of routes between Greece and Italy, namely: Minoan Lines, of Iraklio, Crete, Greece (hereinafter referred to as 'Minoan') Strintzis Lines, of Piraeus, Greece (hereinafter 'Strintzis'), Anek Lines, of Hania, Crete, Greece (hereinafter 'Anek'), Marlines SA, of Piraeus, Greece (hereinafter 'Marlines'), Karageorgis Lines, of Piraeus, Greece (hereinafter 'Karageorgis'), Ventouris Group Enterprises SA, of Piraeus, Greece (hereinafter 'Ventouris Ferries'), and Adriatica di Navigazione SpA, of Venice, Italy (hereinafter 'Adriatica').

⁽¹⁾ OJ L 378, 31.12.1986, p. 4.

⁽²⁾ OJ L 376, 31.12.1988, p. 1.

C. The market

- (3) The relevant market is that for the provision of roll-on roll-off ferry services between Greece and Italy.
- (4) There are three major routes between Italy and Greece where regular services are offered for passengers, cars and trucks. These routes are the route between Ancona (Italy) and Patras (Greece), the route between Brindisi (Italy) and Patras (Greece) and the route between Bari (Italy) and Patras (Greece). In addition Trieste, and – more recently – Venice, are served from Patras.
- (5) It is clear that these routes are not operated in isolation as separate markets, and there is a degree of substitutability between them depending on the points of origin and destination of the traveller or goods, and preferences regarding journey time, etc. However, for the purposes of this procedure the Commission does not consider it necessary to examine in depth the degree of substitutability between these routes, since the practices at issue here covered all three main routes for at least part of the period in question.
- (6) On the Ancona-Patras route, during at least part of the time of the suspected infringement, there were five major operators – Minoan, Strintzis, Marlines and Karageorgis. Of these, Karageorgis ceased operating in 1993. At least one other operator – Superfast Ferries – has recently entered the market and is not implicated in the present procedure. On the routes between Patras and Bari and Brindisi there are a large number of regular operators (at least 11), and some seasonal operators. Minoan, Anek, Strintzis, Marlines and Karageorgis have between them had a share of traffic which was close to 100 % on the Patras-Ancona route during the period of the infringement. For 1993, Ventouris Ferries, Adriatica, Hellenic Mediterranean Lines and Marlines had a combined share of traffic of approximately 75 % for passengers and 60 % for freight on the Patras-Bari/Brindisi routes⁽¹⁾.
- (7) Approximately 1 258 000 passengers and 229 000 freight vehicles were transported during 1996 from Greece to Italy, of which around 38 % and 46 % respectively was carried on the Patras-Ancona route. On the Patras-Brindisi

route the respective percentages were 35 % and 26 %, with 13 % and 16 % having been transported on the route Patras-Bari. For 1993, the figures were 1 316 003 passengers and 213 839 freight vehicles. From them, approximately 49 % and 38 % were transported through the Patras-Ancona route, 35 % and 38 % on the Patras-Brindisi one as well as 10 % and 19 % on the Patras-Bari route. A comparable number of passengers and vehicles is transported per year from Italy to Greece, too.

D. Evidence

- (8) The main evidence on which this Decision is based includes:
 - (a) messages sent, mostly by telex, between various operators relating to the introduction, and calculation, of prices;
 - (b) admissions made by Anek and Strintzis in their replies to the Commission's request for information and in their replies to the Commission's statement of objections.

Evidence for 1987/1988/1989

- (9) From a telex sent by Minoan to Anek, dated 15 March 1989, provided by Anek upon request for information, it appears that consultations on prices took place in 1987 for the 1988 tariffs for the Patras-Ancona route. An agreement on prices was reached on 18 July 1987. Minoan reports in that telex that 'The pricing policy for 1988, as mutually established with the other interested parties, was decided on 18 July 1987. This has in fact been the usual practice.'
- (10) Anek began to operate ferries between Patras and Ancona for the first time in 1989. In 1989, consultations took place as to the tariffs they would apply. In the telex mentioned in paragraph 9, Minoan says 'We regret that your refusal fully to accept the proposals we put forward in our earlier [message] at least for the time being prevents the conclusion of a broader agreement which would be extremely advantageous to our companies ... We refer of course to your refusal of our proposals concerning the definition of a joint pricing policy for the Patras-Ancona route; and we ask you to understand the positions we set out below, which are intended as a response to your view that you cannot accept the 1989 tariff in

⁽¹⁾ Source: Cruise & Ferry Info.

force for goods vehicles and that the pricing policy for the forthcoming year 1990 cannot be defined immediately'.

- (11) Minoan then attempted to persuade Anek to join in the agreement on fares by informing it of how successfully it had been applied: 'in the last three months on the particular route two readjustments of the fares for goods vehicles have been agreed jointly by all the shipowners on the Patras-Ancona route, amounting to a total of 40 %, and have certainly caused no agitation or difficulties with our driver colleagues'.
- (12) Having failed, for the moment, to persuade Anek to join in the agreement, Minoan, Karageorgis, Marlines and Strintzis decided to charge collectively, from 26 June 1989, exactly the same goods vehicle tariffs as those applied by Anek. Very detailed tables were exchanged between the parties, and Anek was informed of the outcome both orally and in writing. Indeed, Minoan sent Anek a telex on 22 June 1989, announcing the four other companies' intention to apply Anek's tariffs as from 26 June 1989.

Evidence for 1990

- (13) The parties began to discuss passenger fares for 1990 in June 1989. On 20 June 1989, Minoan sent to Anek, Karageorgis, Strintzis and Marlines detailed proposals for a common price policy for 1990 for passengers, cars and truck vehicles. A telex sent by Anek to Minoan, Karageorgis, Marlines and Strintzis on 6 July 1989 says 'we agree to the establishment of a uniform tariff for passengers by all five companies on the Patras-Ancona ... we can discuss the subject of goods vehicles in October'.
- (14) Strintzis sent a message to Minoan, Karageorgis, Marlines and Anek on 12 June 1989 in which it states that 'the prices were calculated on the basis of the telexes recently exchanged, following the agreement of all our companies to stick to a common price policy'. This fax contains the prices and discounts for passengers and for vehicles, and the port taxes, in drachmas and in 10 foreign currencies.
- (15) Anek confirmed its agreement 'on the proposed tariffs for the Patras-Igoumenitsa-Corfu-Ancona route based on our decision concerning a common tariff policy', in a telex of 14 July 1989 addressed to the four other companies.

Consultations continued later on some minor points, e.g. the prices for jeeps were discussed in a telex from Strintzis to the other companies on 17 July 1989 and a telex from Anek to the other companies on 22 September 1989.

- (16) A fax sent by Strintzis on 8 December 1989 to Minoan, Anek, Karageorgis and Hellenic Mediterranean Lines⁽¹⁾ details the new prices, by category of truck, to be applied from 10 December 1989 for the Patras-Ancona route and the Patras-Bari and Brindisi routes. This fax also indicated that the photocopy was signed 'also by Ventouris Ferries', and the table of tariffs bears six signatures.
- (17) Another telex shows again the common price policy in force in 1990. This document, dated 11 April 1990, sent by Anek to Karageorgis, Minoan and Strintzis, refers to the 'telexes exchanged between the four companies regarding the price policy for the Patras-Ancona route' where Anek confirms that 'our agreement concerns the passenger, passenger cars and truck vehicles fares, but does not concern the agents' commission and the rebates for groups'.
- (18) Consultations took place again to increase commonly the truck fares during 1990. The companies exchanged a number of telexes during September and October and Strintzis organised a meeting at its premises. In a telex of 5 September 1990 addressed to Anek, Karageorgis and Minoan, Strintzis states that 'a condition for the application of the proposed increase is a proportional increase in fares for the Bari and Brindisi routes; nevertheless, it is necessary to reach an agreement in principle between our four companies'. In a telex sent to Anek, Minoan and Strintzis, Karageorgis states that 'following our common decision ... we are obliged to readjust prices for trucks as from 20 October 1990'. It follows a detailed list of prices. Karageorgis also states: 'Please send the above telex as it stands to your port agents and your clients as soon as possible'.

⁽¹⁾ Although there is evidence that Hellenic Mediterranean Lines participated in the infringement, the present Decision is not addressed to this undertaking because the Commission has been unable to send it the statement of objections.

(19) Agreement was reached and a fax was sent by Strintzis on 30 October 1990 to eight companies operating ferries between Greece and Italy (Adriatica, Anek, Hellenic Mediterranean Lines, Karageorgis, Minoan, Med Lines, Strintzis and Ventouris Ferries). This fax states: 'We communicate the final agreement for truck fares. Please acknowledge your agreement as to the contents and we suggest to announce the prices on 1 November and to put them into effect, as it has been agreed, from 5 November 1990.' A table follows with prices in drachmas and Italian lire for various categories of trucks for the routes Patras to Ancona, Bari and Brindisi.

under the surface the existing agreement could well collapse. We would suggest to you that the tariff for the Patras-Trieste trip should be put at 20 % above that for the Patras-Ancona (as indeed was the case in the past), so as to harmonise fully with the differentials between Ancona and the more southerly ports ... our companies are obliged to notify you that if you insist on applying the same price from Trieste and Ancona for Greece, our agreement for a common price policy concerning the Ancona route will cease and each company will determine its own price policy'.

(20) Minoan sent on 2 November 1990 a document to its agent with the new prices, valid from 5 November 1990 where they clearly state that these prices were agreed by the companies on all the Greece-Italy routes.

(23) The reply of Anek to this telex, dated 18 November 1991, confirms the existence of an agreement: 'The threat to abandon the common prices on the Ancona route cannot be based, from our point of view, on the non-application by Anek of this illogical and inadmissible increase of 20 %. We will accordingly ask you not to persist in your position, in order to avoid disturbing the climate of cooperation between the four companies, which would have destructive consequences for all of us. To conclude, we would assure you that if in the future Anek should decide to schedule a vessel on the Patras-Trieste route without including Ancona, the tariff will of course be higher than that for the Patras-Ancona route, but not by 20 %, which on any impartial judgement is at least unrealistic.'

Evidence for 1991

(21) That tariffs continued to be agreed for 1991 is evidenced by several documents. Karageorgis sent a letter on 10 August 1990 to Anek, Minoan and Strintzis concerning the 1991 list prices for the Patras-Ancona route. It states: 'Following the agreement by the four companies that there should be a 5 % increase on top of the first 5 %, please find attached the new price schedules with the final 10 %.'

Evidence for 1992

(22) A telex was sent to Anek from Karageorgis, Minoan and Strintzis on 22 October 1991, in which it is stated that '... we note that you want to apply to the Patras-Trieste route the same fare that we have all agreed for the Patras-Ancona route. You will realise that the obscurity in the wording causes us great concern, because it raises the prospect of a collapse of the equilibrium in tariffs which we have succeeded, with considerable difficulty, in establishing for all the Italian ports. Let us remind you that by a joint effort - to which you yourselves contributed - we reorganised the tariffs as best we could and established differentials on the basis of the distances in nautical miles to the ports of Brindisi, Bari and Ancona ... We would accordingly entreat you to defend - as you ought to do - the agreement between the 11 companies and the 36 vessels on the Greece-Italy crossing because given the intense differences which are smouldering away

(24) The collusion continued during 1992. On 22 July 1991 Strintzis sent a highly detailed schedule of passenger fares to Anek, Karageorgis and Minoan saying 'We attach the 1992 schedule as agreed at our meeting of (illegible) July. Please confirm if you agree'. A number of telexes were subsequently exchanged in which ways were discussed of dealing with the depreciation of the drachma.

(25) After a meeting held on 7 October 1991 between Strintzis, Anek, Karageorgis and Minoan, Strintzis sent the list prices 'as agreed' for 1992 (Patras-Igoumenitsa-Corfou-Ancona route) to the three other companies requesting

their agreement. This list contained the prices for passengers, detailed by high or low season and cabin categories, and for all the vehicle categories. The parties had also agreed the periods of high and low season, and the prices of meals. Anek sent its agreement by telex on 16 October 1991. This reply was forwarded to Karageorgis and Minoan.

Moreover, a letter, dated 18 October 1991, was found at the premises of Strintzis, sent by Anek to port agents saying 'We enclose for you the drachma tariffs for 1992 for the Patras-Ancona route as agreed with the Strintzis, Minoan Lines and Karageorgis companies'. A similar letter was sent by Strintzis.

- (26) The four companies also agreed on the validity period of their commonly agreed tariffs for the transitional year-end period. A telex sent by Anek to Karageorgis, Minoan and Strintzis states that '... we agree with the extension of the 1992 prices for the Patras-Ancona route until 10 January 1992'. Anek informed its port agents by telex on 21 October 1991 that '... following agreement with our competitors the 1991 prices for the Patras-Ancona-Patras route are valid until 10 January 1992'.
- (27) A telex dated 7 January 1992, found at the premises of Minoan, from Minoan to Anek, Strintzis and Karageorgis, warns them that several importers of motor vehicles are 'endeavouring to lure our companies into tariff competition ... we propose to you that we should stick to a common policy which will keep us off the slippery slope'. It proposes a price to be quoted by all the companies and requests agreement 'in order to reply to the Calberson company which, as you know, has been in contact with all of the companies'. Strintzis agreed to adhere to a common policy and proposed a common price for all unaccompanied cars. Anek also agreed with Strintzis.
- (28) A document dated 25 February 1992, found at the premises of Minoan, indicates that the agreement to maintain differentials between the tariffs applied on the various Greece-Italy routes

continued during 1992. In this document European Trust Agencies (hereinafter 'ETA') reports to the head office of Minoan on 'the latest development concerning the Italy routes'. After mentioning new ships introduced, and the problems that the extra tonnage is likely to cause, it is stated: 'we are concentrating our efforts on the tariff policy to be implemented by the Ventouris company on the Otranto route. We have already commenced discussions on the matter. To make things clearer we give you present fares for Bari, Otranto and Ancona and our own proposed Otranto fares.' A table of fares for different sized goods vehicles follows.

- (29) Furthermore, a telex dated 7 January 1993 from Minoan to Strintzis, Anek and Karageorgis, suggested an adjustment in tariffs for vehicles on the Greece-Italy-Greece routes. It says 'We point out that two years have passed since the vehicle tariff was last adjusted'.

Evidence for 1993

- (30) Consultations about the new tariff for 1993 took also place in 1992. ETA informed Minoan on 21 May 1992 that a 'conference of representatives of the Patras-Ancona route shipping companies is to be convened to discuss the drafting of the new tariff for 1993'. This document contained also the agenda of this meeting. A telex from ETA to the head office of Minoan, dated 27 May 1992, says 'we inform you concerning the proposals that we put to the meeting of the four shipping companies and which, with minor differentiations for the Karageorgis and Strintzis companies, were accepted. Anek is reserving its position and will reply in 10 days time'. A series of specific price increases for various types of traffic followed.
- (31) Discussions continued later. A letter from ETA to the head office of Minoan dated 30 July 1992, stated that a meeting would take place of representatives of the four 'collaborating companies on the Greece-Italy route' on 4 August 1992, at which 'all relevant matters will be discussed'.

- (32) Strintzis sent to Anek, Karageorgis and Minoan a telefax message on 6 August 1992 announcing that prices in European currencies would be drafted on the basis of the drachma tariff and specifying the currency rate in German marks. It proposed also to not divulge the drachma tariff before 30 September 1992. Anek agreed by telex on 7 August 1992. This reply was also sent to Strintzis, Karageorgis and Minoan.
- (33) Minoan sent a letter on 29 September 1992, to Anek, Karageorgis and Strintzis, in which it expressed concern about the fluctuations of foreign currencies in relation to the drachma, and asked the others to reply as to whether they should adapt the prices, otherwise the list prices in German marks, Italian lire and drachmas would diverge widely. Minoan sent to Anek, Karageorgis and Strintzis on 12 October 1992 several proposals which had already been discussed orally or by telex exchanges. A telex dated 15 October 1992 from Minoan to Anek, Strintzis and Karageorgis says 'further to our conversation concerning the final arrangement of tariffs in DEM, ITL and GRD, we add our decisions'. An increase of 5 % in the Italian lire tariff was suggested. Anek replied by telex on 16 October 1992 that it agreed as regards the prices in German marks and Italian lire. Strintzis also agreed on 16 October 1992. Karageorgis replied by telex on 26 October 1992 indicating its agreement and adding 'we insist, further, on an increase in the vehicle rates and await your decision'. Anek replied by telex on 6 November 1992 indicating its agreement.
- (34) In November 1992, having received a request for information from the Commission concerning prices on Greece-Italy routes, Minoan sent a telex to Anek, Karageorgis and Strintzis stating: 'Because of the sensitive situation brought about by the Commission's question concerning our price schedules on the Greece-Italy route and after the verbal exchange of views, we propose the following: Of the 17 categories in our schedule, "deck" should be disregarded, since this is where none of us wants anyone to be cheaper; as for the remaining 16, each company should take four categories each (to be chosen by Mr Sakellis) (Strintzis) and reduce its schedule by 1 %.' Minoan sent also to Anek a copy of its reply to the abovementioned request for information.
- (35) A telex dated 9 December 1992 from Strintzis to Anek, Minoan and Karageorgis, says 'regarding the 1992 fares we remind you that it was agreed that these should apply from 11 January 1993'.
- (36) A telex dated 7 January 1993 (mentioned in paragraph 29) from Minoan to Strintzis, Anek and Karageorgis, suggested an adjustment in tariffs for vehicles on the Greece - Italy routes. It says 'our decision to proceed to an agreement with you on the readjustment without first consulting with the companies on the other Italian routes is motivated by a desire to avoid the interminable discussions that would ensue if we were to embark on that consultation. We believe that this joint agreement will be looked upon positively by those companies ... We await your agreement'. A table of proposed tariffs was attached. Karageorgis replied by telex of 8 January 1993 stating 'we agree totally'. Minoan sent another telex to Anek, Karageorgis and Strintzis on 14 January 1993 which suggested that Anek should apply an increase of 15 % to its goods vehicle tariff on the Trieste route. Strintzis agreed with Minoan on both issues, on 15 January 1993. Anek replied on 15 January 1993 agreeing with the proposals regarding the Patras-Ancona route, but saying it had already publicised an increase of 8 % on the Trieste route from 1 February 1993 and would find it difficult to retract this.
- (37) On 24 November 1993 a meeting was held which was attended by 14 companies. The purpose of this meeting was to readjust the prices on the routes Patras to Ancona, Brindisi and Bari for 1994. A telex from ETA to the head office of Minoan, dated 24 November 1993, says 'We are pleased to inform you that at today's meeting we achieved agreement on a readjustment of the vehicle tariff by approximately 15 % ... to be given immediate effect from 16 December 1993. We are very pleased because we began with the problem of the collapse of the previous agreement'. This last sentence implies that an agreement was in place concerning the differentiation between Ancona, Bari and Brindisi earlier in the year.

Evidence for 1994

- (38) On 24 November 1993 a meeting was held which was attended by 14 companies. The purpose of this meeting was to achieve agreement on prices on the routes Patras to Ancona, Brindisi and Bari. A telex from ETA to the head office of Minoan, dated 24 November 1993, says 'We are pleased to inform you that at today's meeting we achieved agreement on a readjustment of the vehicle tariff by approximately 15 % ... to be given immediate effect from 16 December 1993. We are very pleased because we began with the problem of the collapse of the previous agreement on account of the opposition of the companies of Kosma-Giannatou and Ventouris A., we repaired the situation bit by bit, overcoming the 5 % to 10 % (positions of Strintzis, Ventouris G. and Adriatica), and finally got to the percentage stated above. In addition we balanced out the various conflicts which, as you know, exist concerning the discrepancies from one port to another. Truly, we are very pleased, given that on 1993 throughput figures this will provide our company with an immediate yield of new net receipts in the order of GRD 600 000 000 annually'. Further on, the note mentions that 14 companies were present at the meeting.
- (39) The 'Kosma-Giannatou' mentioned in paragraph 38 is interpreted by the Commission to be a reference to the company known as Med Lines, since both Mr Kosmas and Giannatos were members of its board. Ventouris G. is believed to be a reference to Ventouris Ferries, while Ventouris A. is taken to be a reference to AK Ventouris, a different company. The Commission has not included AK Ventouris in this Decision as it has no evidence other than the above note that this company actually infringed the competition rules. Moreover, the Commission has not been able to identify other small companies which eventually participated in this meeting.
- (40) A telex from Minoan to Anek and Strintzis of 13 May 1994, mentions that a new type of trailer was becoming common on the Ancona route and it suggested a new category of fare and a common implementation date. This is

followed by further telexes of 25 May 1994 and 3 June 1994 on the same subject requesting agreement.

- (41) A telex from ETA to the head office of Minoan dated 26 May 1994 says 'We have embarked on an initiative to get a new tariff implemented on the Italy routes with differing rates for cash payment and two-month cheques. The problem is that we have to get the agreement of 16 companies. Nevertheless, we are optimistic'.
- (42) The Commission investigation took place in July 1994. There is no evidence that the companies continued their collusion after that date.

E. The arguments of the parties*General arguments of the parties**Strintzis*

- (43) According to Strintzis, the agreements on prices took place under the influence of the Greek legal and regulatory framework for coastal shipping, in particular Law 4195 of 11 to 13 July 1929, Strintzis argues that, owing to the following factors:
- the Greek regulatory framework,
 - the practice and obligations imposed by the Greek Ministry for the Merchant Navy ('YEN'),
 - the need for a regular schedule,
 - the uncertain length of the tourist period,
 - the danger of drastic changes in cost levels as a result of unexpected yearly devaluations of the drachma,
 - the necessary disclosure of the business plans of Strintzis through the obligatory meetings for the domestic part of the line Greece-Italy,
 - the need to adhere to the directive of the YEN that lays down that increases in freight rates for the international part of the Greece-Italy market must be within the limits of inflation,

it had to protect itself from unrestricted competition against which it would not have been able to react by suspending or reducing its activities.

(44) In any case, all the abovementioned factors restricted the autonomy of the parties in defining their fares policy. According to Strintzis, YEN guidelines on the companies' pricing policy should be regarded as restrictive measures within the meaning of Greek Law 4195/29. Furthermore, the company was unaware that its activities constituted an infringement of Community competition law.

(45) Strintzis contends that the agreements did not include obligations or negative clauses, that it effectively competed with the other companies by offering discounts, and that a significant part of its net profit derived from the on-board services that were not the subject of the agreements.

(46) In the opinion of Strintzis, the YEN's actions defined all factors of competition except prices on the international part of the Greece-Italy routes. Consequently, residual competition was very limited or even unworkable. In fact, the agreement on prices was a government-led and supervised cartel and not a cartel of individuals operating with the intention of maximising the profit of the participants. On the contrary, prices on Greece-Italy routes were lower than those on other international routes within the Community. As regards the gravity of the infringement, Strintzis submits that the involvement of the Greek authorities created confusion among the parties as to the applicable legal framework, and the price levels would have been the same even without the alleged price arrangements.

Ventouris Group Enterprises

(47) Ventouris Ferries argues that it determined independently its own commercial and price policy taking into account the market conditions, inflation and operating costs, and the policy of the YEN which imposed important public service obligations on the companies that operated in Greece. The company claims in effect that it determined its business behaviour and practice in accordance with the provisions

of national and Community law with due respect to the rules of competition law and to the Greek maritime legal framework. Also, Ventouris alleges that it operated only on the Patras-Ingoumenitsa-Corfu-Bari line where it faced not substantial competition and, therefore, it had no reason to form an agreement with companies that operated on different routes under different conditions and with different buyers. Ventouris argues that any kind of cooperation between the companies was limited to the operations on the Patras-Ancona route.

(48) Finally, Ventouris Ferries draws attention to the policy of the YEN and to the Greek legal and regulatory framework as well as the particular situation in this market (transparency, competition on discounts, etc.) owing to which, even if there had been agreement, the situation in the market in relation to price competition would have been the same.

Anek

(49) Anek acknowledges that from 1990 it participated in an agreement to establish common prices on certain routes, although at the time the agreement was entered into it was not aware that it violated any applicable law. Anek also suggests that the Commission should take into account, with respect to all operators, the domestic regulatory environment in which the companies operated, the involvement of the national authorities in setting the stage for the arrangements, and the limited effect on competition at issue. Furthermore, Anek suggests that the Commission should take into account Anek's participation, Anek's limited presence on the relevant market, and Anek's serious commitment to future compliance with the law.

(50) Anek maintains that for all the shipping routes where cabotage applies, consultations among the operators on price and other issues have been mandatory for the domestic part of international shipping routes. Although the Ministry for the Merchant Navy has not required the ferry operators to agree on prices for the international part of the route to Italy, Anek claims that the

ferry operators perceived the ministry as having encouraged them to enter into discussions on this topic. Moreover, Anek emphasises that its participation was limited to the period 1990-1994.

- (51) Anek argues that it did not act as the instigator or play a leading role in the determination of prices and that sometimes it objected to certain acts proposed by others, notably when it considered proposed tariffs to be unfair or excessive. For example, in late 1991 Anek resisted attempts by other ferry operators to agree to apply a 20 % increase in fares for the Patras-Trieste route compared to the Patras-Ancona route.
- (52) As regards price, Anek argues that fares per mile between Greece and Italy remained at levels below other comparable international routes in Europe, and significantly below domestic fares. Moreover, Anek contends that the agreements on prices concerned only fares and did not extend to other areas, such as services on board, prices on board, advertisements, and agents' commissions. Also, Anek argues that it did not have a significant market share on the market between Patras and Brindisi and between Patras and Bari, and hence that its cooperation on those routes could not be considered to have had a major impact on competition.

Minoan

- (53) Minoan argues that the alleged agreements had no binding character but simply confirmed the existence of a general framework of business practice that was in any case predefined by the existing legislative framework for shipping and the policy of the Ministry for the Merchant Navy (YEN). From the YEN's correspondence with the Commission, Minoan concludes that fares for the international part of the Greece-Italy routes were influenced by the YEN's decisions regarding prices for the internal part as well as YEN's recommendations regarding international fares. In particular, Minoan refers to the YEN's policy as preventive measures within the meaning of Greek Law 4195/29. In the opinion of Minoan, the alleged agreements dealt only with the fares for the international lines that were publicly announced and did not include any other parameters regarding the business behaviour of the

companies, such as the organisation of the commercial network, the policy of discounts and advertising, the prices offered for on-board food and services and the policy of upgrading. Minoan asks the Commission to take into consideration the cumulative effect of all these factors in the economic and legal context in this case.

- (54) As to the implementation of the relevant agreements, Minoan maintains that these were never followed in practice. Furthermore, Minoan contends that ETA represented an independent company which acted as its agent. Therefore, Minoan challenges the legality of the investigation in the offices of ETA and of the documents that were collected by the Commission. the company draws attention to the letter of 14 September 1993 that was found during the investigation of 5 and 6 July. In the opinion of Minoan, this letter proves that many of the activities which are attributed to Minoan, and especially those related to the pricing policy, were ETA's initiatives and were implemented without Minoan's approval.
- (55) As to the gravity of the alleged infringement, Minoan states that the existence of agreements on prices would not in reality play an important role due to the transparency of the market. As regards the duration, Minoan submits that the alleged agreements were not applied.

Adriatica

- (56) Adriatica acknowledges its representative's participation in discussions with the companies operating on the routes between Greece and Italy. However, Adriatica argues that it determined independently its own commercial and price policy in the light of market conditions. Indeed, there was sufficient competition in the market since the operators were competing through rebates, commissions, supplementary charges for dangerous cargoes, etc., while market shares have never been the subject of negotiations. As a result, Adriatica's market share was declining from 1990.
- (57) Finally, Adriatica argues that it did not play any role in the determination of prices and that it never implemented any agreement on prices. These agreements were, according to Adriatica, negotiated between the Greek operators.

Consequently, if the Commission were to conclude that Adriatica participated in such agreements, its participation should be regarded as limited to 1991.

Marlines

- (58) Marlines states that it is not a shipowner but an agency company established in Liberia and described under the Greek Law 89/67 as an 'offshore' company. Marlines maintains that it always offered lower prices than its competitors according to the instructions of its principals, as can be concluded from its brochures of 1987, 1988 and 1989.

Arguments of the parties relating to specific allegations

1987, 1988, 1989

- (59) Strintzis accepts that in 1987, 1988 and 1989 it participated in consultations on prices. However, it argues that the meetings between the companies in 1987 related exclusively to the fares for 1988. As regards the fares for goods vehicles for 1989, Strintzis admits that it followed the fares of Anek, since the companies that operated on the Greece-Italy line occasionally followed the published prices of their competitors.
- (60) As regards the attempt to persuade Anek to join in the alleged agreement, Strintzis mentions that under the Greek regulatory framework, Anek could not charge prices that were significantly lower from those available at the port of Patras. Thus, the companies proposed a joint pricing policy to Anek so as to avoid significant price differences downwards and the intervention of the Greek authorities.
- (61) Strintzis maintains that the meetings for the fares of 1988 and 1989 did not lead to an agreement for a common tariff for passengers, since its published fares for passengers differed from those published by the other companies.

- (62) Minoan argues that the behaviour of the other companies towards Anek should be considered under the Greek legal and regulatory framework and the policy of the YEN. It also contends that any possible readjustment of the fares was not motivated by the desire to increase profits but by other factors, such as inflation, the increase in the prices of fuel and the relationship between the drachma and other currencies.

1990

- (63) Strintzis accepts that it agreed common prices for passengers and goods vehicles for 1990 with Minoan, Anek, Karageorgis and Marlines. However, it argues that the relevant agreements were never followed, since Strintzis applied autonomously its own pricing policy.
- (64) In particular, as regards the telex of 6 July 1989, Strintzis draws attention to Anek's explanation that each company could freely apply its own group policy. Anek regarded as 'group' every group of at least 24 people travelling with the same ticket. On the contrary, Strintzis did not impose such a limitation but it freely offered group discounts to its customers, irrespective of the number of persons. Strintzis claims that its discounts policy and the other fidelity rebates were never revealed to its competitors and, therefore, that it did not implement the agreement on prices for 1990.
- (65) As regards the fax of 12 June 1989, Strintzis argues that the exchange of information was necessary because the YEN advised the five companies to keep the price increases within the limits of inflation for every currency in which tickets were issued. It also mentions that it was responsible for the readjustment of the fares within the limits of inflation for every currency, because it had better infrastructure and logistical methods.
- (66) In relation to the fax of 8 December 1989, Strintzis maintains that these signatures had no obligatory force other than that the signatories were informed of the proposed prices. According to Minoan, the signatures on the fax of 8 December 1989 did not imply that there was a typical written agreement. The signature is attributed to the fact that the relevant

- documents, which expressed the logical deviations between the prices for Ancona and Bari or Brindisi, were also taken into account by Ventouris which operated on the southern lines. According to Minoan, the proposed prices for the various categories of trucks provided an 'ideal' model for the calculation of the price differences that depended on the distance in miles, and there was not intention to fix a particular price for every line and every category of trucks. In support of this argument, Minoan claims that it did not strictly follow the relevant prices on the line to Ancona but it followed its own policy of discounts.
- (67) Ventouris argues in relation to the fax of 8 December 1989, that it had already determined its pricing policy for 1990 and that the signatures below the prices did not imply that there was an agreement since the price list was not legally binding. Indeed, this list contained Ventouris Ferries' suggestion of general indicative prices. Nevertheless, the company had already notified this list to its agents on 4 December 1989.
- (68) Moreover, as regards the telex of 11 April 1990, Strintzis argues that this proves, on the one hand, the existence of an agreement on prices, and, on the other hand, the freedom of the participating parties to determine independently their policy of discounts and commission to their agents.
- (69) According to Minoan, the telex of 11 April 1990 refers to an agreement on some parameters of the pricing policy that could nevertheless easily become known to the competitors.
- (70) In relation to the telex of 6 September 1990, Strintzis states that the readjustment of the fares can be attributed to inelastic factors, such as the fluctuation in the prices of fuel, and to other objective factors that relate to the policy of the Greek Government, such as the increase in the transport of heavy goods by road, due to the problems in Yugoslavia, the decision of the Ministry of Transport in relation to the export of goods and the need to increase the fares so as to enable the companies to operate in the Greece-Italy market during the winter.
- (71) In the opinion of Strintzis, Minoan had confirmed by fax of 13 September 1990 that the increase in the fares was made on the basis of an analysis of the economic data that make up the operational costs of the ships. The companies knew in detail the relevant economic components, owing to the publication of their operational licences and the necessary meetings for the domestic lines in which they participated under the aegis of the YEN, Strintzis argues that the parties were forced to discuss these economic elements in order to remain in the Greece-Italy market during the winter period.
- (72) As regards the telex of 5 September 1990 and the telex of 10 October 1990, Minoan argues that owing to the increase in the price of fuel, the problems in Yugoslavia and the need to continue to operate during the winter period, the four companies had been forced to consider a readjustment of the fares for the Corfu-Ancona part in order to reduce the negative effects of the costs of transport.
- (73) In relation to the fax of 30 October 1990, Strintzis accepts that it applied the agreed prices for trucks. However, it argues that the relevant prices were based on the real expenditure of the itineraries between Greece and Italy, namely the increase in the cost of fuel and the need to rationalise the difference between the domestic and international fares per mile and per metre of transported truck.
- (74) In relation to the fax of 30 October 1990, Ventouris Ferries claims that it never received it, and that its truck fares were included in the list by the other companies which has probably received them from an agent of Ventouris Ferries.
- (75) Adriatica admits that it took part in a meeting on 25 October 1990 dealing with truck fares, although it had already decided its fares for 1991 before this meeting. In fact, Adriatica's purpose was to monitor its competitor's policy, taking into account that the Greek operators had already reached an agreement one year earlier, on 10 December 1989. Adriatica also argues that it did not follow the fares agreed in the meeting, as can be shown from the fares it actually charged at the end of 1990.

1991

(76) Strintzis argues that the 'climate of cooperation' to which it refers in the telex of 18 November 1991, and the 'pricing stability' that is mentioned by Karageorgis, Minoan and Strintzis in the telex of 22 October 1991, concern the general framework of compulsory meetings between the companies and the exchange of confidential information for the formation of a framework agreement on prices for the next period. Also, Strintzis claims that Anek's wish to set up for the first time a route on the Patras-Trieste line, offering fares of exactly the same amount as those for the route Patras-Ancona even though the distance from Trieste is about 20 % longer, was treated by Karageorgis, Minoan and Strintzis as attracting a risk of intervention by the Greek Government.

(77) Strintzis draws attention to the telex of 18 November 1991 which, in its opinion, indicates that the amount of the fares must be relevant to the distance of every journey, a principle that was adopted by YEN for the calculation of the domestic fares. According to the view of Strintzis, the prevention of painful competition 'with the known effects', which is referred to at the end of the relevant fax, concerns the prevention of a commercial war in the Greece-Italy market and the consequent intervention of the Greek Government. Finally, Strintzis alleges that Anek did not apply an increase of 20 % to its prices for the Patras-Brindisi route. It is claimed that according to the Greek regulatory framework for shipping, especially Law 4195/29, the policy of extremely cheap prices disproportionate to the services offered in a given international line might lead to the imposition of fines on the contraveners.

(78) Finally, Strintzis contends that the above framework agreement on prices for 1991 had not been followed in practice, since Strintzis had followed its own independent discount policy.

(79) Minoan alleges that in the relevant period the increase of 10 % was dictated by the increase in inflation. It also claims that under the influence of the YEN and on the basis of the distance in miles, the prices for Trieste were 20 % higher than the price for Ancona. According to Minoan, the correspondence between the parties related to Anek's decision to fix the fares for Patras-Trieste at the same level as the fares for Patras-Ancona and it was therefore intended to ensure an appropriate differential and to avoid unfair competition. Minoan also argues that it followed its own policy of discounts.

(80) Adriatica states that during 1991 it had had no contact with the other companies and continued to set its fares according to market conditions. Moreover, Adriatica submits that during 1991, its market share had declined owing to the intense competition from the Greek operators in the form of discounts, rebates, etc.

1992

(81) As regards the fax of 22 July 1991, and the correspondence that is mentioned at points 26 to 32 of the statement of objections, Strintzis claims that the relevant exchange of information took place within the framework of the compulsory meetings for the prices of 1992.

(82) In relation to the telex of 7 January 1992, Strintzis argues that despite the initial agreement with Minoan not to offer the Calberson company the requested discount, this agreement was not followed in practice, since Strintzis finally offered a higher discount. Strintzis contends that the relevant agreement was made orally and that the largest number of the relevant vehicles was transported by Marlines. In the opinion of Strintzis, the above proves that there was price competition between the participating companies at the level of discounts. Again, Strintzis claims that the above agreement on prices for 1992 was not followed in practice, since Strintzis followed its own independent discount policy.

(83) Minoan contends in relation to the similarity in the prices for passengers and passenger vehicles that this can be attributed to their publication in the companies' brochures. Also it claims that the oligopolistic nature of the market and the policy of the YEN led to homogeneous prices. It is the view of Minoan that competition took place not through the published prices but through the policy of discounts, the offers and the other incentives provided by the company.

- (84) In relation to Calberson, Minoan argues that it was logical for the companies to react and to try to ascertain whether their competitors had offered such excessive discounts. As regards the document of 25 February 1992, Minoan alleges that it is not proof of an agreement and that the relevant prices were not applied in practice. Also, according to Minoan, ETA's suggested price list for Ortona was intended to secure the approval of Minoan, in case the latter company decided to operate a ship on the Ancona route.
- (85) As regards the telex of 7 January 1993, Minoan claims that it related to the price balancing between drachmas and Italian lire and not to any price increase in either currency.
- (86) Finally, Minoan claims that there is no proof of an agreement between itself and Ventouris, Hellenic Mediterranean Lines and Med Link for 1992.
- (87) Adriatica claims that in 1992 it had no contact with the other companies and continued to set its fares according to market conditions, as could be shown from the fares it actually applied. According to Adriatica, the ETA document of 25 February 1992 shows that consultations took place between the Greek operators but not with Adriatica. Furthermore, Adriatica submits that during 1992, its market share declined due to the lower prices charged by the Greek companies.
- (88) For 1992, Ventouris argues that there is no specific evidence of its participation in price agreements.
- (90) As for the telex of 6 November 1992, Strintzis maintains that the proposal of Minoan was not followed in practice, since the differences in the fares of the companies were not based on the proposal of Minoan but on their autonomous discount policies.
- (91) Minoan admits that there were discussions between the companies. As regards the telex of 6 November 1992, Minoan claims that it was sent by ETA without the knowledge or approval of Minoan. Furthermore, in relation to the meeting of 24 November 1993, Minoan claims that the alleged 'previous agreement' was a non-binding declaration by various companies that there should be a differential between the distance in miles and the applied fares and that they should avoid unfair competition by any devaluation. However, it is alleged that the above declaration was not followed in practice.
- (92) As regards 1993, Adriatica states that it continued its independent policy, readjusting its truck fares by 4,03 % in relation to 1992 fares owing to exchange rates fluctuations. From 1 January 1993, Adriatica was also obliged, unlike the Greek operators, to introduce the VAT pursuant to the relevant Community regulation. Nevertheless, Adriatica admits that it was represented in the meeting of 24 November 1993 between the ferry operators but argues that it decided not to enter the proposed agreement on tariffs in view of the possible infringement of Community competition rules.
- (93) As for 1992, Ventouris Ferries argues that there is no specific evidence of its participation in price agreements in 1993. Nevertheless, in relation to the fax of 24 November 1993, Ventouris Ferries concedes that it participated in the relevant meeting, but claims that it had already determined its pricing policy for that year.

1993

- (89) As regards the meetings with the companies operating on the other lines of the Greek-Italian market, Strintzis accepts that there was an attempt to agree prices on the basis of the principles for the determination of domestic fares. However, Strintzis does not know whether the companies of the other lines applied such fares or not.

1994

- (94) Strintzis does not know whether the relevant fares were followed by the companies. As regards the Patras-Ancona route, Strintzis admits that the framework agreement on prices

was applied. However, it claims that the relevant agreement was not followed in practice, since Strintzis followed its own autonomous discount policy.

- (95) Again, Minoan denies the existence of an agreement on prices. In relation to the telex of 13 May 1994 which refers to the new category of 12-14 metres for trailers, Minoan argues that, as is evident from the telex of 23 June 1994, it had modified the relevant category of trailers from 12-14 metres to 12,5-14 metres. In its opinion, this indicates that the trailers of 12,5 metres represented a different category of lower fares. Finally, as regards the telex of 26 May 1994, Minoan claims that it did not approve the alleged 'initiative' of ETA and that it had applied a different policy as is shown by other documents available to the Commission.

- (96) Adriatica argues that it did not increase its prices during 1994, although it had readjusted the rate between US dollars and Italian lire by 1,22 %.

F. The Commission's assessment of the evidence and the parties' arguments

Conclusion

- (97) The Commission concludes that ferry companies operating the Ancona/Bari/Brindisi-Greece routes participated in a price fixing cartel for several years. This was an ongoing agreement described by the companies as 'the usual practice' (telex of Minoan dated 15 March 1989). There is strong evidence to suggest a broad agreement including a large number of companies (such as Minoan's document of 2 November 1990 stating that prices were agreed by the companies on all the Greece-Italy routes, the telex sent to Anek on 22 October 1991 stating 'the agreement between 11 companies and 36 vessels', the ETA telex of 24 November 1993 referring to 14 companies, the ETA telex dated 26 May 1994 referring to 'the agreement of 16 companies'). The Commission has been able to prove that certain companies operating on the Ancona-Greece route participated in the price-fixing cartel regarding fares for passengers and vehicles from 18 July 1987 the latest. Although consultations took place before that date, there is no indication of the exact date on which price-fixing negotiations were initiated. Moreover, the Commission proved that certain

ferry operators in Bari/Brindisi-Greece routes participated in the cartel at the latest from 8 December 1989, at least as regards the level of fares for trucks. The collusion lasted from 8 December 1989, at least as regards the level of fares for trucks. The collusion lasted at least until July 1994. The cartel operated in the form of regular meetings and exchange of correspondence in order to readjust collectively prices for passengers and vehicles. The Commission has been able to identify seven companies that participated in the cartel: Minoan, Karageorgis, Marlines, Strintzis, Anek, Ventouris Ferries and Adriatica. The involvement and the duration of the participation for each of these companies are discussed at paragraphs 111 to 139.

Assessment to the general arguments of the parties

Involvement of the Greek authorities

- (98) In their answers to the requests for information addressed to them by the Commission, Minoan, Strintzis and Anek, on 9 and 10 February 1995, stated, *inter alia*, that the tariff agreement in question had been concluded within the applicable legislative framework under the aegis of the Ministry for the Merchant Navy (YEN).
- (99) In support of this argument, the three companies produced a copy of the text of Law 4195/29, relating to unfair competition, as well as a series of decisions and recommendations of the YEN concerning the Greece-Italy maritime lines; these related to the public-service obligations in this sector and, in particular, the connection frequency, the priority, according to the seasons, to be granted to the transport of fresh agricultural products, the minimum number of ships to be maintained in operation as well as the starting schedules of the ships.

- (100) In a letter of 28 October 1994, the Commission asked the Greek Ministry for the Merchant Navy to provide certain statistics relating to traffic on the Greece-Italy routes as well as to clarify whether the Ministry had ever threatened to withdraw operating licences for domestic routes if companies failed to agree prices on international routes.
- (101) On 23 December 1994, the Ministry replied to the Commission that the sea corridor between Greece and Italy should be regarded as being of paramount national and Community importance, while tariff rates should be competitive but at the same time at a level where transportation costs would be kept low. Nevertheless, the Ministry denied any connection between the revocation of operating licences and the companies' price agreements on international routes.
- (102) On 13 January 1995, the Commission addressed to the Greek Permanent Representation to the European Union a copy of the information forwarded by the companies, asking for the comments of the Greek Government on its possible involvement in agreements on the maritime lines between Greece and Italy and, in particular, tariff fixing on these same lines.
- (103) On 17 March 1995, the Greek Permanent Representation replied to the Commission that the Greek Government considered services provided on the route in question to be services of public interest and that consequently, the government's primary concern was the viability of the route and the avoidance of any possible 'price war' which could possibly hinder the smooth promotion of export and import trade or the transport of vehicles and passengers. However, the involvement of the YEN in tariff fixing concerned only internal routes (cabotage). In the case of the maritime lines between Greece and Italy, which include a national part (for example Patras-Corfu-Ancona), only the national part (Patras-Corfu) is covered by the tariff policy of the YEN. For the international part of the maritime lines, the YEN does not intervene in any way, and prices are fixed freely by the companies concerned, account being taken of the fact that the fare fixed by the State for the domestic part of the route has an indirect and partial impact on the total fare to and from Italy. Moreover, the Permanent Representation stressed that the YEN encourages the companies, informally, to maintain the tariffs at low levels and the annual increases within the limits of inflation. Lastly, the freedom of the companies to set their prices is restricted by Law 4195/29 where it leads to unfair competition. Article 2 of that Law prohibits any devaluation of fares for passengers and goods in the external (international) routes to a level which would be derisory and disproportionate to the level of service provided, with the object of unfair competition. According to Article 4, if the freedom in fixing fares on these routes degenerates into unfair competition, the Ministry for the Merchant Navy is entitled to impose upper and lower levels of fares.
- (104) Consequently, the Commission rejects the argument of some of the Greek companies that they did not act autonomously in the field of tariff policy owing to the relevant regulatory arrangements in Greece.
- (105) In this case, it is clear that Greek companies operating on the Greece-Italy routes are subject to a rigid legal and regulatory framework concerning the domestic part of the routes, in particular as regards the grant of operating licences and the fixing of fares by the Ministry for the Merchant Navy. This, however, has no direct effect, as the Greek authorities confirmed, on the tariff policy of the companies concerning the international part of the routes. Moreover, the Greek authorities have strongly denied that, through their administrative practice in relation to the application of these rules, they obliged the Greek companies to enter into price agreements for international fares. In his reply of 23 December 1994 to a Commission letter, Director Manos of the Ministry for the Merchant Navy stated: '... there is no involvement of the Ministry in the rate-fixing policy which is followed by the companies in the international routes. Our involvement is strictly confined in the fixing of prices in domestic routes only ... It is unthinkable and it is out of question that the Ministry threatens to withdraw operating licences for domestic routes if companies fail to agree prices on international routes.'

(106) It is also clear that Law 4195/29 does not eliminate price competition. On the contrary, it presupposes that price competition exists and that companies are free to set their prices. It is only when this freedom is used for unfair competition purposes that Article 4 of the Law entitles the Ministry for the Merchant Navy to intervene. Even in this case, the Ministry may only define upper and lower prices and not impose a specific level of fares. Moreover, it is to be noted that this Law has never been applied.

(107) The Commission considers it significant that, although the parties argue that many of their discussions were motivated by a desire to satisfy the requirements of the YEN and to avoid unfair competition (as with the discussions with Anek when it opened the Trieste route for example), not one of the contemporary documents quoted in evidence by the Commission makes any mention whatsoever of the YEN or of Law 4195/29. Consequently, the argument that the Greek companies were obliged by the Ministry's preventive measures to enter into collusive practices owing to the fear that Article 4 of the Law might be applied, is rejected.

(108) It is also difficult to accept that the Ministry's recommendations to the companies relating to the fare increases within the limits of inflation had any relation whatsoever with the abovementioned law. It is clear from Article 2 of the Law that it applies only when fares are derisory but not when fares are high. As the Ministry explained, its recommendations were based on other considerations relating to Greece's international trade patterns. In conclusion, the Greek maritime transport companies, carrying out activities on the Adriatic, must be regarded, in the field of tariff policy, as having acted autonomously.

Assessment of other general arguments of the parties

(109) It is also ingenuous for certain of the parties to contend that the companies' price initiatives were the result not of collusion but of natural market forces (for instance the impact of fuel costs) or other specific events like the war in the former Yugoslavia or sudden fluctuations of foreign currencies. This assertion is wholly against the weight of documentary evidence of price fixing collusion. The argument of certain

parties that they were merely following price increases of which they had knowledge through their agents' network can similarly be rejected. It is clear that almost all the 'price increase' correspondence was obtained by direct exchanges between competitors and not from agents.

Assessment of the arguments relating to the duration of the infringement

(110) As regards the duration of the infringement, most of the companies on the Patras-Ancona route argued that although a price-fixing agreement was reached during 1987, it exclusively concerned fares for 1988. Similarly, Anek argues that it entered into the agreements in 1989 but in relation to fares for 1990. The Commission rejects this argument, since entering into price-fixing agreements is in itself an infringement of Article 85 of the EC Treaty.

Assessment of the arguments relating to specific allegations

The involvement of individual companies

(111) It is necessary to establish in respect of each addressee of this Decision that it participated in the infringement. This does not, however, as some undertakings have argued, require direct proof that every alleged participant expressly gave its consent to, or committed some overt act of support for, each and every individual aspect of the price arrangements throughout their duration. The whole gravamen of the infringement lies in the association of the companies, over several years, in a joint unlawful enterprise pursuant to a common design.

(112) The proper approach in a case such as this one is to demonstrate the existence, the operation and the salient features of the collusion in question and then to determine: (a) whether there is credible and persuasive proof to link

each individual company to the common scheme; and (b) for what period each company participated⁽¹⁾.

- (113) There is ample direct evidence to prove the adherence of every addressee of this Decision to the infringement. The 'core' documents which prove the existence of the overall cooperation or individual manifestations thereof usually identify participants by name.
- (114) Evidence of the participation of each undertaking in the infringement is provided by: (a) explicit references to that undertaking in the correspondence exchanged between the parties; (b) its participation in meetings and subsequent concerted price initiatives; and (c) the internal documentation of that undertaking, or another undertaking, linking it to the collusion. In no significant respect was any of that evidence contradicted or shown to be anything but reliable during the administrative procedure.
- (115) Several documents (in particular, Minoan's fax of 15 March 1989, Strintzis' fax of 12 July 1989, fax sent to Anek on 22 October 1991, Anek's reply of 18 November 1991, Minoan's letter to its agents of 2 November 1990, Anek's letter to its agents of 21 October 1991, Minoan's telex of 7 January 1993, ETA's telex of 24 November 1993) demonstrate that consultations and agreements on prices were continuously taking place, for several years, between all the addressees of this Decision.
- (116) Minoan, Strintzis and Anek admit their participation in the alleged collusion while Karageorgis did not submit any arguments in its defence.
- (117) As regards the Bari/Brindisi operators, Adriatica and Ventouris Ferries admit their participation in meetings where fares have been discussed and agreed between competing ferry operators. Moreover, certain documents (Strintzis' faxes of 8 December 1989, 5 September 1990 and 30

October 1990, Minoan's letter of 2 November 1990, the fax sent to Anek on 22 October 1991, Minoan's document of 25 February 1992, Minoan's telex of 7 January 1993, ETA's telex of 24 November 1993) indicate ongoing negotiations and agreements between the Ancona and the Bari/Brindisi operators. Only Minoan's telex of 7 January 1993 refers to an agreement between the Ancona operators, expressly stating that other companies were not, at that time, aware of it. However, even this document refers to discussions involving the Bari/Brindisi companies which, as the document indicates, were to be consulted subsequently by the Ancona operators. The Commission has not been able to identify other companies operating in the Bari/Brindisi lines which eventually participated in the collusion. In particular, this Decision is not addressed to AK Ventouris and Hellenic Mediterranean Lines because there is not sufficient evidence that they actually infringed the competition rules (both companies are mentioned only once in other companies' documents).

Marlines

- (118) Marlines' participation in the collusion from 1987 until 1989 is proved by eight documents (referred to in sections relating to the agreements for 1988 and 1989) received by Marlines or indicating Marlines as party to the relevant agreements. The Commission concludes from the above that Marlines negotiated and agreed every year with Strintzis, Minoan and Karageorgis common prices for passengers and goods vehicles on the route Patras-Ancona as early as 18 July 1987 and for 1988 and 1989. The last occasion on which Marlines is mentioned in the documentary evidence is in a telex sent by Anek to Marlines on 22 September 1989. There is no evidence that Marlines took part in any further consultations with other companies nor is there conclusive evidence of its subsequent involvement in the cartel. The Commission concludes that Marlines participated in the infringement, at most, from 18 July 1987 to 8 December 1989, when the other companies agreed to readjust their prices.

⁽¹⁾ Judgment of the Court of First Instance in Case T-1/89, Rhône-Poulenc v. Commission [1991] ECR II-867, at paragraph 126.

- (119) The argument of Marlines that it is an offshore company under Greek law must be rejected. The Commission never alleged that the infringement was limited only to Greek companies.

Adriatica submits that its fares were approximately 10 % lower than the Greek companies' fares on the same route.

Med Link

- (120) Med Link argues that it has no relationship whatsoever with the companies mentioned in the statement of objections addressed to Med Link Lines by the Commission as Mediterranean Lines Inc. or Med Line. Moreover, Med Link also claims that it did not participate in any of the alleged infringements. In particular, the representative of Med Link, Mr Giannatos, whose name is mentioned in the telex of 24 November 1993 from ETA to the head office of Minoan, states that he did not take part in the meeting referred to in that telex. He states that Med Link was established in Liberia on 15 July 1993 and established its headquarters in Greece after 31 December 1993.
- (121) The Commission accepts that there is no clear evidence of an organic link between Med Link and Mediterranean Line. In particular, Med Link cannot be regarded as the successor to Mediterranean Line in its activities in the relevant market. Consequently, this Decision is not addressed to Med Link.

- (124) Upon the Commission's request, Adriatica submitted on 27 October 1992 two lists of its truck fares for 1991. In the first list, categories of vehicles are indeed different from those used in Strintzis' fax. However, the second list is identical to the one included in that fax. Moreover, differences between Adriatica's and the Greek operators' fares in the same route are evidenced in Strintzis' fax, too. Consequently, the Commission rejects Adriatica's arguments that only Greek operators were involved in the preparation of truck fares for 1991 and that Adriatica did not follow the agreed fares.

- (125) As regards the meeting of 24 November 1993, Adriatica acknowledges its participation but argues that it subsequently instructed its representative to avoid any collusive practice since this could be considered by the Commission as a cartel arrangement. However, an internal note is not sufficient evidence to allow Adriatica to escape liability for the remaining period of the infringement⁽¹⁾. Nevertheless, the Commission takes into account the evidence provided by Adriatica that it did not in practice follow the agreed readjustment of 15 % for 1994.

Adriatica

- (122) Adriatica admits its participation in price-fixing consultations with its competitors in Greece-Italy routes. In particular, Adriatica concedes that it participated in two meetings, on 25 October 1990 and 24 November 1993 respectively, where prices were agreed between ferry operators. Nevertheless, Adriatica denies that it had other contacts with its competitors in the Italy - Greece routes.
- (123) As regards the meeting of 25 October 1990 and Strintzis' fax of 30 October 1990, Adriatica claims that did not follow the fares discussed in the meeting and listed in Strintzis' fax, even though Strintzis' fax included Adriatica's truck fares for the Brindisi-Greece route. Furthermore,

- (126) According to the Commission, strong evidence indicates an ongoing agreement between the Ancona and the Bari/Brindisi operators. There is direct evidence that Adriatica joined the cartel from 30 October 1990 at the latest, by agreeing to readjust its truck fares for 1991. There is also sufficient direct evidence of its involvement for 1993. On 24 November 1993, Adriatica negotiated and agreed with its competitors the readjustment of its truck fares as from December 1993. As regards, the periods between 30 October 1990 and 24 November 1993, there is evidence of the Bari/Brindisi

⁽¹⁾ See judgment of the Court of First Instance in Case T-141/89, Trefileurope v. Commission [1995] ECR II-791, at paragraph 85.

operators' participation in the ongoing collusion and there is no evidence that Adriatica, having joined the cartel, left it during this period. The telex sent to Anek on 22 October 1991 refers to the collusion between 'the 11 companies and the 36 vessels on the Greece-Italy crossing'. Consequently, the Commission concludes that Adriatica participated in the infringement until July 1994.

Hellenic Mediterranean Lines

- (127) Hellenic Mediterranean Lines is mentioned once in a Strintzis' telex dated 30 October 1990. As no other evidence of its participation in the collusion exists, this Decision is not addressed to Hellenic Mediterranean Lines.

Ventouris Group Enterprises

- (128) There is evidence of Ventouris Ferries' participation in the collusion from 8 December 1989 until July 1994. The Commission rejects Ventouris Ferries' arguments that it did not receive the relevant documents or that it had already decided on its pricing policy before taking part in the consultations in question (see paragraphs 47 and 48).

- (129) In relation to its second argument, Ventouris Ferries submitted a telex sent to one of its agents on 4 December 1989 including the prices listed in Strintzis' fax of 8 December 1989 for the Bari-Greece route. Ventouris Ferries claims that Strintzis' fax simply reproduced Ventouris' fares established before 8 December 1989. However, it is undeniable that Strintzis' fax simply related to an agreement between several companies, including Ventouris. It is thus clear that Ventouris Ferries participated in price fixing. It is to be noted that the two documents not only contain the same list of fares but both explicitly mention that those fares were valid as from 10 December 1989.

- (130) Furthermore, Ventouris Ferries submitted letters addressed to its clients or agents dated 8

October 1990 and 11 October 1990 containing the truck fares listed in Strintzis' fax of 30 October 1990. However, these letters confirm the evidence contained in Strintzis' fax. Strintzis refers to 'a final agreement for truck fares' and proposed to 'announce the prices on 1 November and put them into effect, as it has been agreed, from 5 November 1990'. In its letters Ventouris Ferries stated that those fares were 'indicative' and that Ventouris intended to put them into effect 'from end of October/beginning of November 1990'. Indeed, the letters confirm that the infringement was an ongoing agreement and that Ventouris participated in it.

- (131) There is strong evidence to indicate an ongoing agreement between the Ancona and the Bari/Brindisi operators. Even for 1992, for which Ventouris Ferries argues that there is no evidence against it, ETA's document dated 25 February 1992 demonstrates that Ventouris participated in the collusion, discussing fares for the Otrando route, too. As regards 1991, the telex sent to Anek on 22 October 1991 refers to the collusion between 'the 11 companies and the 36 vessels on the Greece-Italy crossing'. The Commission concludes that Ventouris Ferries continued to participate in the collusion during 1991, as there is sufficient direct evidence of Ventouris' involvement for the remaining years of the infringement, namely the telex of Strintzis dated 8 December 1989, the telefax from Strintzis dated 30 October 1990, ETA's document dated 25 February 1992, telex from ETA to the head office of Minoan dated 24 November 1993, and there is no evidence that Ventouris Ferries dissociated itself from the agreement in 1991.

Strintzis

- (132) Strintzis did not contest its participation in the alleged collusion. Its arguments refer to the involvement of Greek authorities and to the non-binding character of the agreements. The Commission concludes that Strintzis participated in the alleged price-fixing collusion from, at the latest, 18 July 1987 up to July 1994.

Anek

- (133) Anek did not contest its participation in the alleged collusion. Its arguments refer to the involvement of Greek authorities and to the non-binding character of the agreements. The Commission concludes that Anek participated in the alleged price-fixing collusion from 6 July 1989 to July 1994.

Karageorgis

- (134) Karageorgis did not submit any arguments in its defence. The Commission concludes that Karageorgis participated in the alleged price-fixing collusion from, at latest from 18 July 1987 until 27 December 1992 when Karageorgis definitively withdrew its vessels from the Greece-Italy routes.

Minoan

- (135) Minoan did not contest its participation in the alleged collusion. Its arguments refer to the involvement of Greek authorities, the market conditions and the non-binding character of the agreements. The Commission concludes that Minoan participated in the alleged price-fixing collusion from, at latest, 18 July 1987 until July 1994.
- (136) Minoan refers to its contractual relationship with ETA, its exclusive managing agent for all Minoan ships operating on international routes. Minoan argues that several of the activities referred to in this Decision were ETA's own initiatives, not approved by Minoan, sometimes outside the scope of the ETA-Minoan contracts, and that Minoan should not be regarded as responsible for them. The Commission does not accept this argument. As regards the relationship between ETA and Minoan, it is clear from all the contracts between the two parties available to the Commission that ETA is the exclusive central managing agent for Minoan which operates under Minoan's instructions and supervision. Under all these contracts ETA represents Minoan before all national and

international authorities and organises the local and port agents' network of Minoan. If Minoan so requests, ETA must use all its endeavours to ensure Minoan's cooperation with other companies. Commissions payable to ETA by Minoan and to other Minoan or tourist agents by ETA precisely (in percentage terms or in fixed amounts) defined by several provisions.

- (137) Consequently, ETA should be described as the *longa manus* of Minoan, operating as a representative of Minoan, as an intermediary who acts exclusively on behalf of Minoan and does not undertake business on its own account. In all the documentary evidence used in this Decision, Mr Sfinias, the legal representative and manager of ETA, represented Minoan (Athens), signing all relevant documents, even a reply dated 20 November 1992 to a request for information addressed to Minoan by the Commission. Indeed, Mr Sfinias acted as the representative of a functional unit inside Minoan. All other companies replying to fax or telex messages signed by Mr Sfinias addressed their replies to 'Minoan' or 'Minoan Athens' and never to ETA. In all these documents, Mr Sfinias referred to ETA only when addressing Minoan headquarters in Heraklion, Crete. Nevertheless, Minoan refers to the documentary evidence used in this Decision, arguing that only 6 out of 17 Minoan documents relate to ETA's informing Minoan of the arrangements in question and that in only two of them does ETA request Minoan's approval of its suggestions. However, the Commission rejects the argument that the documents do not allow ETA's anti-competitive actions to be imputed to Minoan. It is clear from the Minoan documents emanating from its headquarters in Heraklion as well as from Mr Sfinias' messages to Minoan Heraklion that Minoan was aware of the collusion and participated in it (such as ETA documents dated 25 February 1992, 21 May 1992, 30 July 1992 where ETA acts as Minoan's representative vis à vis the other companies).
- (138) In the Commission's view, Mr Sfinias' letters to Minoan Heraklion concerning their contractual relationship does not prove, as Minoan argued, that ETA acted autonomously in its own interest, outside the scope of ETA-Minoan

contracts. On the contrary, this correspondence, as well as Mr Sfinias' requests for Minoan's approval, proves that Minoan was always kept informed of the collusion and that it could in any case influence the conduct of its managing agent in a decisive manner. In conclusion, the Commission rejects the argument that ETA which was addressed as 'Minoan Athens' or simply as 'Minoan' in all relevant documentary evidence, enjoyed such a high degree of commercial autonomy that its conduct cannot be imputed to its principal⁽¹⁾. For the purposes of this Decision, ETA and Minoan are considered to form a single legal and economic unit.

agreements between undertakings or concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition, and in particular those which directly or indirectly fix purchase or selling prices or any other trading conditions.

- (139) As a procedural point, Minoan contends that ETA is an independent company which acted as its agent. Accordingly, Minoan challenges the legality of the investigation in the offices of ETA and of the documents that were collected by the Commission. This argument cannot be accepted. The Commission considers that there is sufficient documentary evidence that ETA, whilst representing Minoan, described itself as 'Minoan Athens' or simply 'Minoan'. It is significant that in ETA's premises in Athens, ETA used Minoan's logo and trademarks. More importantly, before the investigation in question, Mr Sfinias replied to a Commission request for information, signing a document in the name of Minoan. At the top of the document, the ETA premises' address appears under the logo and trademark of Minoan, with no mention of ETA whatsoever. The Commission concludes that, independently of ETA's occupation and use of the premises in question, Minoan permitted ETA to use these premises as 'Minoan Athens' premises', too.

- (141) It is not necessary, in order for a restriction to constitute an agreement within the meaning of Article 85(1) for the agreement to be intended to be legally binding on the parties. An agreement exists if the parties reach a consensus on a plan which limits their commercial freedom by determining the lines of their action in the market. No contractual sanctions or enforcement procedures are required. Nor is it necessary for such an agreement to be made in writing. It is clear from the evidence in this case that the parties engaged in regular, direct consultations aimed at fixing passenger fares and freight rates between Greece and Italy. Regular, detailed discussions took place each year to decide the tariff levels for the following year, and ad hoc consultations took place to decide how the parties should react to issues that arose during the year, such as currency devaluation or new categories of vehicles. It is also clear that these discussions took place at senior levels between the parties. There can be no doubt that this arrangement amounted to an agreement, the object of which was to fix selling prices and other trading conditions between the parties thereto.

PART II

LEGAL ASSESSMENT

Article 85

- (140) Article 85(1) of the EC Treaty prohibits as incompatible with the common market all

- (142) In order for Article 85 to apply, it is necessary that the agreement or concerted practice between the parties has the object or effect of restricting competition. The clear object of the agreement between the parties in this case was to bring about the imposition of common prices, thereby restricting their ability to act independently in the market. As the Court of Justice has consistently held, it is unnecessary to consider the actual effects of an agreement if it is apparent that it has the object of preventing,

⁽¹⁾ See judgment of the Court of Justice of 25 October 1983 in Case 107/82, AEG-Telefunken v. Commission [1983] ECR 3151, at paragraph 49; and the judgment of 14 July 1972 in Case 48/69, ICI v. Commission [1972] ECR 619, at paragraphs 132 and 133 as to the imputation of subsidiaries' conduct to their parent companies.

restricting or distorting competition⁽¹⁾. Moreover, in this case, the agreement does not fall within any applicable block exemption and, furthermore, does not fulfil the conditions for individual exemption.

Greece. These should therefore not be regarded as separate infringements but as aspects of a single continuous infringement.

FINES

Effect on trade between Member States

Article 19(2) of Regulation (EEC) No 4056/86

(143) The services affected by the practices in issue in this procedure are the roll-on roll-off ferry services between Greece and Italy. The sea routes between Greece and Italy have assumed even more importance in 1992 when the beginning of the war in the former Yugoslavia effectively closed the overland routes for imports and exports between Greece and the rest of the European Union. In 1993, 1 316 003 passengers and 213 839 freight vehicles were transported in Greece-Italy routes. Of these, 49 % and 38 % were transported via the Patras-Ancona route, 35 % and 38 % on the Patras-Brindisi one, and 10 % and 19 % on the Patras-Bari route. Five of the undertakings covered by this procedure accounted for almost 100 % of traffic at one time or another on the Patras-Ancona route. Any agreement which affects demand for services between two Member States (such as an agreement fixing price levels between the major providers of that service) is likely to deflect demand both within the group of undertakings involved in the agreement, and those outside this group, and thus alter the pattern of trade in that service between Member States.

(145) Under Article 19(2) of Regulation (EEC) No 4056/86, the Commission may by decision impose on undertakings fines of from ECU 1 000 to ECU 1 000 000, or a sum in excess thereof but not exceeding 10 % of the turnover in the preceding business year of each of the undertakings participating in the infringement, where either intentionally or negligently they infringe Article 85(1) of the Treaty. In fixing the amount of the fine, regard shall be had both to the gravity and to the duration of the infringement. In this case, the infringement has been committed intentionally, which is to say that it was designed to restrict price competition. Direct documentary evidence indicates that the parties were aware that the collusion aimed to or at least was liable to eliminate price competition (for instance Minoan's telex of 15 March 1989, Strintzis' fax of 12 June 1989, Minoan's telex of 7 January 1992, Minoan's telex of 7 January 1993). The deliberate nature of the parties' practice can be seen further in the measures for monitoring the adjustments in tariffs (for instance, Minoan's telex of 22 June 1989, Karageorgis' telex of 10 October 1990, telex sent to Anek on 22 October 1991, Minoan's telex of November 1992).

Conclusion

(144) On the basis of the above, the Commission considers that Minoan, Anek, Karageorgis, Marlines and Strintzis, participated in an agreement contrary to Article 85 by agreeing prices which would be applied to roll-on roll-off ferry services between Patras and Ancona. The Commission also considers that Minoan, Anek, Karageorgis, Strintzis, Ventouris Ferries and Adriatica agreed on the levels of fares for trucks to be applied on the Patras to Bari and Brindisi routes. These agreements formed part of a broader scheme of collusion in the setting of fares for the ferry services between Italy and

Gravity

(146) In assessing the gravity of the infringement, account must be taken of its nature, its actual impact on the market, where this can be assessed, and the size of the relevant geographic market.

(147) An agreement by which the price of transporting passengers and freight by roll-on roll-off ferries was agreed by some of the most important ferry operators in the relevant market constitutes, by its nature, a very serious breach of Community law.

⁽¹⁾ See, for instance, the judgement of 11 January 1990 in Case C-277/97, Sandoz v. Commission [1990] ECR I-45, at paragraph 39.

(148) However, the infringement had a limited actual impact on the market. The Commission accepts that the parties did not apply in full all the specific price agreements and that they engaged, during the period of the infringement, in price competition through discounting. Moreover, the Greek Government, during the period of the infringement, encouraged the undertakings to keep fare increases within the inflation rates. Fares were kept at one of the lowest levels within the common market for maritime transport from one Member State to the other.

(149) Moreover, the infringement produced its effects within a limited part of the common market, namely three of the Adriatic Sea routes. Even if all Greece-Italy routes are taken into account, the market is still small compared to other markets within the Community. The following list shows the number of passengers, cars and trailers transported during 1996 in this market and along other Community routes ⁽¹⁾.

1996	Passengers	Cars	Trailers
Italy-Greece	1 258 000	245 983	229 000
France/ Belgium-UK	28 352 635	4 944 644	1 944 028
Denmark- Germany	9 698 357	1 363 940	279 274
Denmark- Sweden	23 132 174	2 628 311	498 916
Eurotunnel	8 399 463	2 076 954	519 003

(150) Consequently, the Commission concludes that the infringement is a serious breach of Community competition rules.

(151) In setting the level of fines, the Commission may take account of the effective capacity of offenders to cause significant damage and set the amount of fine at a level which ensures that it has a sufficiently deterrent effect. The Commission considers it appropriate that larger

fines be imposed on the larger undertakings than on the smaller because of the considerable disparity between their sizes ⁽²⁾. Table 1 indicates the relative size of each of the undertakings concerned in 1993, the last full year of the infringement for all undertakings (except for Marlines and Karageorgis ⁽³⁾), as compared to Minoan, the largest operator in the market. The comparison is made on the basis of 1993 turnover in respect of roll-on roll-off services in the Adriatic routes. This is the appropriate basis for the comparison of the relative size of the undertakings because it enables the Commission to assess the specific weight and importance of the undertakings in the relevant market and, therefore, to evaluate the real impact of the offending conduct of each undertaking on competition

Table 1

Large carriers	Minoan	1,00
	Anek	0,76
Medium carriers	Strintzis	0,45
	Adriatica	0,40
	Ventouris	0,30
	Karageorgis	0,26
Small carriers	Marlines	0,12

⁽²⁾ It is to be noted that Marlines and probably Ventouris may be categorised as small and medium-sized enterprises according to the Commission's Recommendation 96/280/EC of 3 April 1996. According to the Commission notice on agreements of minor importance (OJ C 372, 9.12.1997, p. 13) agreements between SMEs are not, in general, caught by the prohibition in Article 85(1). However, in this case, only two of the parties, i.e. Marlines and Ventouris, can be described as SMEs. Moreover, it is certain that the agreement significantly impedes competition in a substantial part of the relevant market (see Part III of the notice on agreements of minor importance).

⁽³⁾ Karageorgis' size is calculated on the basis of the information which Karageorgis provided as to the number of passengers and vehicles carried by its vessels during 1992, which according to Karageorgis was the last full year of its activities in Greece. For Marlines, this base is its total turnover for 1989. For the purposes of this comparison, it is of no consequence whether one considers Marline's turnover for 1989 or for 1993.

⁽¹⁾ Source: Cruise & Ferry Info.

- (152) Following this grouping, the medium carriers' fines relating to the gravity of the infringement will amount to 65 % of the large carriers' fines. For Marlines, the same percentage will be 20 %.

Duration

- (153) The Commission considers the agreement to date from, at latest, 18 July 1987 up to July 1994 (the date of the Commission investigations), in the case of Strintzis and Minoan, and for Anek from 6 July 1989 to July 1994. In the case of Marlines, its participation in the agreement is considered to have been from, at the latest, 18 July 1987 up to at least 8 December 1989. Karageorgis appears to have left the market during 1993. The duration of the infringement for that company is therefore considered to be from, at the latest, 18 July 1987 until 27 December 1992.

- (154) In respect of Ventouris Ferries, the Commission considers that as from 8 December 1989 it entered into the pricing-fixing cartel by agreeing, with four of the companies operating on the Patras-Ancona route, the level of fares for trucks to be applied on the Patras to Bari and Brindisi routes. Ventouris participated in the infringement until July 1994. Moreover, the Commission considers that Adriatica participated in the cartel referred to above as from 30 October 1990 at the latest until July 1994.

- (155) The Commission concludes that the infringement was of long duration for Minoan, Strintzis and Karageorgis, and of medium duration for the rest of the undertakings.

- (156) These considerations justify an increase of the fines by 10 % for every year of the infringement for Minoan and Strintzis, by 20 % for Marlines and by 35 % to 55 % for the other undertakings. Table 2 indicates the relevant adjustments per company.

Table 2

Large carriers	Minoan	+ 70 %
	Anek	+ 45 %
Medium carriers	Strintzis	+ 70 %
	Adriatica	+ 35 %
	Ventouris	+ 40 %
	Karageorgis	+ 55 %
Small carriers	Marlines	+ 20 %

Conclusion on the basic amount of fines

- (157) The Commission concludes that the parties committed a serious infringement of Article 85. Consequently, a fine has to be imposed which penalises this serious breach in an appropriate way and which, by its deterrent effect, prevents any repetitions.

- (158) Table 3 sets out the calculation of the level of fines taking into account the elements set out in paragraphs 146 to 156. Column 1 sets out the basic fine calculated on the basis of the gravity of the infringement. Column 2 sets out the basic fine per individual company taking into account the duration of the infringement.

Table 3

	Gravity (million ECU)	Duration (million ECU)
Minoan	2	3,4
Anek	2	2,9
Strintzis	1,3	2,21
Adriatica	1,3	1,75
Ventouris	1,3	1,82
Karageorgis	1,3	2,01
Marlines	0,4	0,48

Aggravating circumstances

(159) It is clear from the documentary evidence that Minoan acted as the instigator of the cartel. Minoan tried to persuade Anek to join the cartel (Minoan's telex of 15 March 1989), discussed with Ventouris the latter's tariff policy in the Otranto route (ETA's document of 25 February 1992) and organised and directed meetings with the companies involved in the infringement (ETA's telex of 21 May 1992, ETA's telex of 24 November 1993). This company not only monitored the cartel's operations but also tried to extend the scope of the companies' collaboration (telexes dated 15 March 1989, 7 January 1992, 25 February 1992, 7 January 1993, 24 September 1993, 26 May 1994). These considerations justify an increase of the fine by 25 % for Minoan.

(160) In November 1992, after the parties had received requests for information from the Commission, Minoan proposed that each company should differentiate its prices by 1 % for four cabin categories. Each company would differentiate four different categories of price.

(161) This fact not only demonstrates Minoan's role as the instigator of the cartel but also amounts to an attempt to obstruct the Commission in carrying out its investigation. These considerations justify an increase of the fine by 10 % for Minoan.

Mitigating circumstances

(162) The Commission accepts that the parties did not apply in full all the specific price agreements and that they engaged, during the period of the infringement, in price competition through discounting. However, these considerations have already been taken into account in assessing the gravity of the infringement.

(163) The usual practice – not directly imposed by the legal or regulatory framework – of fixing domestic fares in Greece through a consultation of all domestic operators (whereby they were expected to submit a common proposal) and the *ex post* decision of the Ministry for the Merchant Navy may have created some doubt among the Greek companies operating also on

domestic routes as to whether price fixing consultation for the international route did indeed constitute an infringement. These considerations justify a reduction of the fines by 15 % for all the undertakings.

(164) Marlines, Adriatica, Anek and Ventouris played an exclusively 'follow my leader' role in the infringement. These considerations justify a reduction of the fines by 15 % for those undertakings.

(165) Table 4 below sets out the amount of fines after the aforementioned adjustments.

Table 4

	Adjustment (%)	Fines after adjustment (million ECU)
Minoan	+ 20	4,08
Anek	– 30	2,03
Strintzis	– 15	1,87
Adriatica	– 30	1,22
Ventouris	– 30	1,27
Karageorgis	– 15	1,08
Marlines	– 30	0,33

(166) According to Article 19(2) of Regulation (EEC) No 4056/86, the Commission may not impose fines exceeding ECU 1 000 000 or 10 % of the turnover in the preceding business year of each of the undertakings participating in the infringement. For all undertakings except Karageorgis, the fines set out in the column headed 'Fines after adjustment' do not exceed 10 % of the turnover of the undertakings involved in the present infringement.

(167) Karageorgis ceased its operations in January 1993 and subsequently closed all its branches in Greece. The Commission has no information regarding Karageorgis' turnover for 1997. Under Article 19(2) of Regulation (EEC) No 4056/86, the Commission may by decision impose on undertakings fines of from ECU 1 000 to ECU 1 000 000 (or a sum in excess thereof but not

exceeding 10 % of the turnover in the preceding business year). Accordingly, the fine for Karageorgis is set at ECU 1 000 000.

(168) By virtue of the Commission notice on the non-imposition or reduction of fines in cartel cases⁽¹⁾, fines imposed in cartel cases may be significantly reduced in several cases. Such cases include the following: (a) before a statement of objections is sent, an enterprise provides the Commission with information, documents or other evidence which materially contribute to establishing the existence of the infringement; (b) after receiving a statement of objections, an enterprise informs the Commission that it does not substantially contest the facts on which the Commission bases its allegations.

(169) In this case, the documents submitted by Anek before the Commission's issuance of the statement of objections have confirmed, to a significant extent, the existence of the infringement in question. Moreover, none of the companies contested the factual basis of the Commission's statement of objections. These considerations justify a reduction of the fines by 45 % for Anek and by 20 % for the other undertakings.

Conclusion: the final amount of fines

(170) Table 5 shows the final level of fines taking into account the elements set out in paragraphs 146 to 169.

Table 5

	Final amount of fines (million ECU)
Minoan	3,26
Anek	1,11
Strintzis	1,5
Adriatica	0,98
Ventouris	1,01
Karageorgis	1,00
Marlines	0,26

⁽¹⁾ OJ C 207, 18.7.1996, p. 4.

HAS ADOPTED THIS DECISION:

Article 1

1. Minoan Lines, Anek Lines, Karageorgis Lines, Marlines SA and Strintzis Lines have infringed Article 85(1) of the EC Treaty by agreeing prices to be applied to roll-on roll-off ferry services between Patras and Ancona.

The duration of these infringements is as follows:

- (a) in the case of Minoan Lines and Strintzis Lines, from 18 July 1987 until July 1994;
- (b) in the case of Karageorgis Lines, from 18 July 1987 until 27 December 1992;
- (c) in the case of Marlines SA, from 18 July 1987 until 8 December 1989;
- (d) in the case of Anek Lines, from 6 July 1989 until July 1994.

2. Minoan Lines, Anek Lines, Karageorgis Lines, Adriatica di Navigazione SpA, Ventouris Group Enterprises SA and Strintzis Lines have infringed Article 85(1) of the EC Treaty by agreeing on the levels of fares for trucks to be applied on the Patras to Bari and Brindisi routes.

The duration of these infringements is as follows:

- (a) in the case of Minoan Lines, Ventouris Group Enterprises SA and Strintzis Lines, from 8 December 1989 until July 1994;
- (b) in the case of Karageorgis Lines, from 8 December 1989 until 27 December 1992;
- (c) in the case of Anek Lines, from 8 December 1989 until July 1994;
- (d) in the case of Adriatica di Navigazione SpA, from 30 October 1990 until July 1994.

Article 2

The following fines are hereby imposed on the following undertakings in respect of the infringement found in Article 1:

-
- | | |
|---|---|
| — Minoan Lines, a fine of ECU 3,26 million, | — Minoan Lines
25 th August 17
GR-71202 Heraklion, Crete |
| — Strintzis Lines, a fine of ECU 1,5 million, | |
| — Anek Lines, a fine of ECU 1,11 million, | — Strintzis Lines
26 Akti Possidonos
GR-18531 Piraeus |
| — Marlines SA, a fine of ECU 0,26 million, | |
| — Karageorgis Lines, a fine of ECU 1 million, | — Anek Lines
Nikolaou Plastira & Apokoronou
GR-Hania, Crete |
| — Ventouris Group Enterprises SA, a fine of ECU 1,01 million, | |
| — Adriatica di Navigazione SpA, a fine of ECU 0,98 million. | — Marlines SA
38 Akti Possidonos
GR-18531 Piraeus |

Article 3

The fines shall be paid within three months of the date of notification of this Decision to the following account:

Account No 310-0933000-43.
European Commission
Banque Bruxelles-Lambert
Agence Européenne
Rond-Point Schuman/Schumanplein 5
B-1040 Brussels.

After three months, interest shall automatically be payable at the rate charged by the European Central Bank on its ecu transactions on the first working day of the month in which this Decision was adopted, plus 3,5 percentage points, namely 7,5 %.

Article 4

This Decision is addressed to:

- | |
|---|
| — Karageorgis Lines
Karageorgis Buildings
Akti Kondyli 26—28
GR-18503 Piraeus |
| — Ventouris Group Enterprises SA
91 Leoforos Pireos & Kithiron 2
GR-18541 Piraeus |
| — Adriatica di Navigazione SpA
Zattere 1411
I-30123 Venice |

Done at Brussels, 9 December 1998.

For the Commission

Karel VAN MIERT

Member of the Commission

COMMISSION DECISION

of 9 December 1998

on the measure planned by Austria for the clean-up of the Kiener Deponie Bachmanning landfill

(notified under document number C(1998) 4195)

(Only the German text is authentic)

(Text with EEA relevance)

(1999/272/EC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community, and in particular the first subparagraph of Article 93(2) thereof

Having regard to the Agreement on the European Economic Area, and in particular Article 62(1)(a) thereof,

Having called on interested parties to submit their comments pursuant to the abovementioned provisions,

1. PROCEDURE

By letter dated 23 September 1997, Austria informed the Commission that the province of Upper Austria intended to part-finance the clean-up of the contaminated Kiener Deponie Bachmanning landfill site, which had been abandoned. By letter dated 20 October 1997, the Commission requested further information. Austria's reply was received on 18 November 1997. Following a meeting in Brussels on 12 December 1997, the Commission wrote on 18 December 1997 requesting further information on matters that had still not been clarified. The information was provided by Austria by letter dated 21 January 1998; the letter also contained formal notification of the planned part-financing of the project by the Federal Government

By letter dated 22 April 1998, the Commission informed Austria that Article 93(2) proceedings were being initiated on the notified measure.

The Commission's decision was published in the *Official Journal of the European Communities* ⁽¹⁾. The Commission called on interested parties to submit their comments. The Commission received no such comments.

2. DETAILED DESCRIPTION OF THE MEASURE

The abandoned and contaminated Kiener Deponie Bachmanning landfill is situated in Upper Austria. The land is registered under No 345/2 in the land register of 51101 Aichkirchen.

The landfill was operated by Kieba BaugmbH (in liquidation), Unterseling 19, A-4672 Bachmanning ('Kieba') in the period from 1975 to 1983. Kieba is an SME within the meaning of the Commission recommendation of 3 April 1996 concerning the definition of small and medium-sized enterprises ⁽²⁾ and is currently in the process of being wound up. Kieba's main shareholder was the late Herbert Kiener.

The current owner of the land is Atlas ImmobilienverwaltungsgmbH, Unterseling 19, A-4672 Bachmanning ('Atlas'). Atlas was set up specifically in connection with the contamination and was aware of it. Atlas is an SME within the meaning of the Commission recommendation concerning the definition of small and medium-sized enterprises. The main shareholder was once again Mr Kiener.

The necessary permits for carrying out the clean-up operation at the landfill site are held by ASA

⁽¹⁾ OJ C 201, 27.6.1998, p. 8.

⁽²⁾ OJ L 107, 30.4.1996, p. 4.

Oberösterreich Holding GmbH ('ASA'), which specialises in the decontamination of land. ASA belongs to the French group Electricité de France (EDF) and is a large firm within the meaning of the Commission recommendation concerning the definition of small and medium-sized enterprises.

The total costs of the clean-up are estimated at ATS 313,2 million (ECU 22,7 million). ASA applied to the Federal Government on 22 May 1995 and to the province of Upper Austria on 23 January 1996 for public funding of the clean-up operation. The measure is to be financed entirely by the State.

- (a) The Federal Government undertook to provide ATS 206,7 million (ECU 15,0 million) pursuant to a decision taken on 12 June 1996 under the assistance guidelines 1991 for the cleaning-up or making safe of contaminated sites ('assistance guidelines 1991') and concluded an assistance agreement with ASA for this purpose on 20 December 1996.
- (b) The province of Upper Austria undertook to provide ATS 106,5 million (ECU 7,7 million) pursuant to a decision taken by the Government of the province of Upper Austria on 7 November 1996 and concluded assistance agreements with ASA for this purpose on 23 and 28 April 1997.

Payments will be made in the period from 1998 to 2000 on presentation of the invoices.

3. INITIAL COMMISSION POSITION

In the decision on the initiation of Article 93(2) proceedings, the Commission took the following position:

- (a) Austria should have notified the planned State funding as *ad hoc*, since it is doubtful whether the Federal Government applied the assistance guidelines 1991 in accordance with all the provisions contained therein and since the guidelines do not allow the province of Upper Austria to grant funding.
- (b) The State funding can no longer confer any benefit on Kieba, since the firm is in the process of being wound up.
- (c) The State funding may indirectly confer an unjustified benefit on Atlas in the form of an increase in the value of the land and the saving of decontamination costs.

(d) The fee for ASA may confer an unjustified benefit on the firm, since Austria has not sufficiently demonstrated that the fee matches the market price.

(e) It is not clear whether any aid for Atlas and/or ASA can be exempted on the basis of the derogations provided for in Article 92 of the EC Treaty.

4. AUSTRIA'S POSITION

By letter, dated 14 July 1998, Austria stated its position on the Commission's decision to initiate proceedings.

Austria again emphasised that the pollution had already resulted in dangerous contamination of the groundwater and that a thorough decontamination operation was urgently required. As supporting evidence of the urgency of the clean-up, Austria submitted in particular a report drawn up on 14 May 1998 by an expert in water resources, a report drawn up on 22 April 1998 by an official expert in hydrochemistry and a report drawn up on 13 May 1998 by a medical expert.

Austria also pointed out that State funding for cleaning up contaminated sites was intended solely to ensure environmental protection and not to provide assistance for firms. The State funding provided by the Federal Government and the province of Upper Austria did not therefore constitute State aid within the meaning of Article 92 of the EC Treaty. Even if this were the case, the aid was covered by the assistance guidelines adopted in 1991. It did not matter whether the documents referred to in Article 4 (3) of the assistance guidelines 1991 had been submitted at the time when the assistance was approved. The stipulation in the assistance agreement with the ASA that certain individual provisions of the assistance guidelines 1991 did not apply had been included for reasons of legal certainty and was in accordance with the assistance guidelines 1991. Austria also stated that, under the assistance guidelines 1991, up to 100 % of eligible clean-up costs could be financed and that the sharing of the assistance between the Federal Government and other public bodies, in particular the province of Upper Austria, was immaterial.

Furthermore, Kieba and Atlas were financially not in a position to assume even part of the clean-up measures. It was also pointed out that the administrative procedure took an average of ten years from the time

when the authorities first took action until the time when the clean-up measures were completed. Austria had accordingly concluded an agreement with ASA on the financing of the clean-up measures.

As regards the legal instruments which Austria wished to use in order to recover the clean-up costs from Kieba, Atlas and their shareholders, Austria had submitted a legal opinion drawn up by two law firms on 24 June 1998, which had concluded that the proposed legal measures offered good prospects of success.

Austria also presented an extract from the register of companies and demonstrated that Kieba was in liquidation. As is evident from the copy of a letter from Kieba's bankruptcy administrator, dated 11 May 1998, the end of the bankruptcy proceedings is not yet in sight.

An extract from the register of companies was also presented for Atlas. An assessment of Atlas's financial situation by a credit protection association was also submitted. This showed that, apart from the contaminated landfill site, Atlas had no other significant assets. According to the explanations presented by Austria, Atlas had largely ceased its business activity. Doubts were also expressed as to whether Atlas could be held liable for cleaning up the site. This assessment was confirmed in a legal opinion drawn up by two law firms on 24 June 1998.

According to the explanations presented by Austria, the relevant land is designated as grassland in the Upper Austria Regional Planning Act⁽¹⁾ and the land-use plan (Zl. 610-1/1996) of the municipality of Aichkirchen. In Austria's view, it is to be assumed that, once the clean-up operation has been successfully completed, the land will be put to agricultural and forestry use. An opinion drawn up by a court-approved expert was submitted on this point, in which the market value following the clean-up was determined under a comparative value procedure on the basis of the Land Valuation Act⁽²⁾.

Austria also made it clear that ASA receives remuneration for its services. In the report by two court-approved experts on tendering and award procedures, which it had attached, the remuneration was deemed to be appropriate.

5. ASSESSMENT OF THE STATE MEASURE

The Commission based its assessment of the aid case on the information provided by Austria by letter dated 14 July 1998.

5.1. Notification obligations

Austria approved the State funding of the clean-up measures on 12 July 1996 and concluded an assistance agreement with ASA on 20 December 1996. The funding was made available in accordance with the assistance guidelines 1991.

The assistance guidelines 1991 were notified to the EFTA Surveillance Authority on 2 March 1993 as an existing scheme and registered by it under number ESA 30-151. Under the scheme, the Federal Government can finance up to 100 % of clean-up measures relating to contaminated sites. The scheme expired when the Commission approved, by letter dated 10 February 1997, the new assistance guidelines for 1997. Accordingly, the assistance guidelines 1991 applied in the case at issue.

However, the Commission notes that, at the time when the Federal Government approved the financing and signed the assistance agreement, the optimised clean-up procedure had not yet been completed. Agreements on such a procedure were signed on 17 and 18 June 1997 and on 14 July 1997. Under Article 4(3) of the assistance guidelines 1991, however, this information should have been available when the assistance agreement was signed. Consequently, Austria did not fulfil all the requirements provided for in the existing aid scheme.

Furthermore, the assistance agreement between ASA and the Federal Government excluded a number of provisions contained in the assistance guidelines 1991. Austria explained that this had been necessary, because the assistance agreement between ASA and the Federal Government could not impose any obligations on Kieba and Atlas, since the two firms had not been involved in the assistance agreement. In the Commission's view, however, the exclusion of such provisions confers an advantage on the polluter Kieba and the landowner Atlas. The assistance guidelines 1991 clearly impose certain obligations on landowners and polluters. In effect, the Federal Government can grant State funding under the scheme only if the polluter and landowner are prepared or are compelled to fulfil the obligations provided for in the scheme. However, since a number of provisions were excluded, the Federal Government did not comply with all the

⁽¹⁾ LGBL No 114/1993.

⁽²⁾ BGBl. No 150/1992.

conditions laid down in the assistance guidelines 1991.

Furthermore, under the assistance guidelines 1991, the province of Upper Austria is not allowed to provide funding. Consequently, the financing measure of the province of Upper Austria is not covered by this existing scheme.

Since the Federal Government did not comply with all the requirements laid down in the assistance guidelines 1991 and since the funding provided by the province of Upper Austria is not covered by an existing or approved scheme, Austria was obliged to notify the planned State funding by the Federal Government and the province of Upper Austria as *ad hoc* aid pursuant to Article 93(3) of the EC Treaty. Austria did not comply with this obligation.

5.2. Kieba

Austrian administrative law, and in particular the Water Law Act⁽¹⁾ the Federal Waste Management Act⁽²⁾ and the Industrial Code⁽³⁾, contains a number of different provisions on liability. At all events, however, under the environmental provisions applicable to contaminated landfills, the polluter (tortfeasor), namely the legal person whose activity has led to the relevant hazard, bears the primary responsibility. The polluter (tortfeasor) is deemed to be either the operator of the landfill or the person who abandoned it.

The Wels-Land district administrative authority (*Bezirkshauptmannschaft*) granted Kieba, on 29 May 1978 and on 22 May 1979 (Zl. Wa 1-16-1976) under the Water Law Act, a licence to operate a household and special waste landfill site. It was also Kieba which abandoned the landfill. According to information provided by Austria, there is abundant evidence that the firm did not comply with the licences issued to it either in terms of type of waste or in terms of the period covered. Although the licence pursuant to the Water Law Act expired on 31 December 1981 activities were continued, in all probability until April or May 1983. According to the information provided by Austria, Kieba is the only ascertainable polluter.

(1) BGBl. No 215/1959, amended version BGBl. No 85/1997.

(2) BGBl. No 325/1990, amended version BGBl. No 115/1997.

(3) BGBl. No 50/1974.

In accordance with Article 31(1) and Article 138(1) of the Water Law Act, Article 32(1) of the Federal Waste Management Act and Article 83(3) of the Industrial Code, the Austrian administrative authorities must hold this undertaking primarily liable. They therefore ordered Kieba as early as 9 August 1991 to clean up the contaminated landfill site. Kieba successfully appealed against this order on procedural grounds.

The Austrian authorities did not issue any further order, nor did they intend to do so in the near future, since the Wels regional court had initiated bankruptcy proceedings against Kieba on 29 September 1996. The estate of Kieba's main shareholder, Herbert Kiener, was also the subject of insolvency proceedings. No one has so far taken possession of the inheritance.

The Commission notes that the Austrian Federal Government and the province of Upper Austria, by financing the clean-up, have assumed the obligations of the polluter, Kieba. It must be borne in mind, however, that Kieba is being wound up and no longer exercises any business activity. Consequently, Kieba can no longer derive any benefit from the State financing, and any benefit pursued in the past can no longer affect trade between Member States.

For the rest, the Commission takes note of the fact that Austria has undertaken to use all available legal means to recover the costs of the clean-up from Kieba. In order to reclaim improperly made payments, an action on grounds of unjust enrichment is to be brought pursuant to Article 1042 of the Civil Code and damages claimed pursuant to Article 1295.

5.3. Atlas

The Water Law Act and the Federal Waste Management Act contain provisions on the liability of landowners. Austria doubts, however, that Atlas can be made liable on the basis of these environmental provisions. This conclusion is also drawn in the two legal opinions.

The Commission would once again point out, however, that Atlas was specially set up in connection with the contamination and that Atlas was aware of it. Furthermore, there is a close shareholder link between Kieba and Atlas. In the Commission's view, therefore, Atlas and Kieba are jointly and severally liable under a repayment order. If therefore ASA carries out the clean-up operation with State assistance, the aid measure could confer a benefit on Atlas, since it would not have to pay for the clean-up costs.

The Commission notes that, according to the information provided by Austria, the firm does not carry out any significant business activity and might indeed be in difficulty. The danger that the abovementioned benefit might distort competition is therefore at present slight. However, the Commission cannot rule out the possibility that a third party might take over the shares in the firm and extend its business activity to the point where trade between Member States might be affected. State funding of the clean-up operation by ASA would strengthen Atlas's position compared with competitors on the EEA market that do not have the benefit of being able to carry out clean-up operations on their contaminated sites free of charge. Consequently, the Commission cannot rule out the possibility that the benefits accruing to Atlas through State funding might in future distort competition on the EEA market. With regard to Atlas, therefore, the financing may constitute State aid within the meaning of Article 92(1) of the EC Treaty and Article 61(1) of the EEA Agreement.

Article 92(1) of the EC Treaty and Article 61(1) of the EEA Agreement established the principle that aid having the characteristics set out therein is incompatible with the common market. Article 92(2) and Article 92(3) of the EC Treaty and Article 61(2) and Article 61(3) of the EEA Agreement specify which types of aid may exceptionally be considered to be compatible with the common market. In this instance, it is evident that none of these derogations applies.

The derogations provided for in Article 92(2) of the EC Treaty and Article 61(2) of the EEA Agreement are not applicable, since the aid is not aid having a social character, granted to individual consumers, or aid to make good the damage caused by natural disasters or aid granted to the economy of certain areas of the Federal Republic of Germany affected by the division of Germany.

The derogations provided for in Article 92(3)(a) of the EC Treaty and Article 61(3)(a) of the EEA Agreement, and the regional derogations provided for in Article 92(3)(c) of the EC Treaty and Article 61(3)(c) of the EEA Agreement are not relevant, since Atlas is situated outside an assisted area.

As regards the derogations provided for in Article 92(3)(b) of the EC Treaty and Article 61(3)(b) of the EEA Agreement, the Commission notes that the relevant project does not fulfil the criteria which the Commission normally apply to 'projects of common European interest' and that the aid is not intended to remedy a serious disturbance in the economy of a Member State.

The first part of the derogation provided for in Article 92(3)(c) of the EC Treaty and Article 61(3)(c) of the EEA Agreement concerning aid to facilitate the development of certain economic areas is not applicable, since the aid is not intended to contribute to the development of certain sectoral economic activities.

Similarly, the derogations provided for in Article 92(3)(d) of the EC Treaty and Article 61(3)(d) of the EEA Agreement do not apply, since the aid is not intended to promote culture and heritage conservation.

The Commission also notes that it is clearly not compatible with the 'polluter pays' principle enshrined in Article 130r of the EC Treaty that a polluter should sell his contaminated land to one of his firms in order to avoid the clean-up costs, that the firm responsible for the contamination should file for bankruptcy and that the business activity should be carried on by the newly established firm.

The Commission therefore considers that none of the derogations apply in this case.

However, the Commission takes note of the fact that Austria has undertaken to use all available legal means to recover the costs of the clean-up from Atlas. Repayment of the clean-up costs by Atlas would, in the Commission's view, mean that the State funding of the clean-up operation did not confer a benefit on Atlas and that no State aid within the meaning of Article 92 of the EC Treaty was involved.

5.4. ASA

On 29 December 1994, ASA Inerta Abfallbehandlungs GmbH applied, on its own initiative, for all the necessary permits under Article 32(4) of the Environmental Protection Act⁽¹⁾ for carrying out the decontamination of the landfill site. That Act had been notified to the EFTA Surveillance Authority as an existing aid scheme. The permits (UR-450000/323-1996) were issued on 22 February 1996 under the Waste Management Act and on 8 March 1996 under the Upper Austria Nature and Countryside Protection Act. Subsequently, ASA took over the permits issued to ASA Inerta Abfallbehandlungs GmbH.

⁽¹⁾ BGBl. No 185/1993.

Austria concluded assistance agreements with ASA, since ASA was the only company that had the necessary permits. The Commission notes, however, that the assistance agreements with ASA were concluded without giving other Austrian or foreign competitors the opportunity of tendering for the agreements. It must therefore be examined whether the fee for ASA corresponds to the market price.

The Commission notes that ASA is not carrying out the decontamination itself, but is acting as general contractor with responsibility for planning and coordinating the clean-up measures. For its services as general contractor, ASA will receive a fee of ATS 37,3 million (ECU 2,7 million), which is included in the overall clean-up costs of ATS 313,2 million (ECU 22,7 million).

Austria has provided evidence that the fee for ASA was determined in accordance with the 'fee guidelines for general contractors', which in turn are based on the regulations governing fees for project management and the building industry. Austria has also shown that under the agreement ASA will receive only 85 % of the amount calculated in accordance with these regulations. The opinions of two court-approved experts which have been submitted confirm that the fee corresponds to the market price.

After careful examination of the information provided, the Commission concurs with Austria's view that ASA will receive an appropriate fee for its planning and coordination work and that the fee does not comprise any aid component within the meaning of Article 92 of the EC Treaty.

The Commission would point out that the investigations into whether Austria complied with Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts⁽¹⁾ have not yet been concluded. This Decision is wholly without prejudice to the outcome of such investigations.

On the carrying-out of the clean-up work by subcontractors, the Commission notes that, on the basis of the conditions laid down in the assistance agreements, ASA is required to apply Directive Ö-Norm-A-2050 on the coordination of procedures for the award of public service contracts. Austria has provided a detailed list of the work to be performed by subcontractors and has demonstrated that most of the work to be carried out is being awarded through public tendering procedures. The Commission

therefore concludes that the remuneration for the subcontractors does not contain any State aid component within the meaning of Article 92 of the EC Treaty.

6. CONCLUSIONS

In view of the above assessment of the State funding of the clean-up of the contaminated Kiener Deponie Bachmanning landfill site, the Commission notes the following:

- (a) the polluter Kieba is in liquidation and no longer pursues any business activity. Consequently, Kieba can no longer derive any benefit from State financing;
- (b) if ASA carries out the clean-up measures with State assistance, this measure could confer a benefit on Atlas, since the firm would then be spared the clean-up costs. This would constitute State aid for Atlas, for which none of the derogations provided for in Article 92(2) and (3) of the EC Treaty is applicable. Recovery and reimbursement of the clean-up costs by Atlas would exclude the possibility of the State funding constituting State aid within the meaning of Article 92 of the EC Treaty;
- (c) the firm responsible for cleaning up the contaminated site, ASA, is to receive an appropriate fee for its planning and coordination work. The fee does not contain any aid component.

Consequently, the Federal Government and the province of Upper Austria may, in accordance with the notification, finance the clean-up measures in full, subject to the condition that Atlas reimburses the clean-up costs. The clean-up costs must be reclaimed in full from Atlas in accordance with national procedures and legal provisions, with interest running from the date of disbursement until such time as the amount has been fully reimbursed, at the rate used as the reference rate for calculating the net grant-equivalent of regional aid in Austria,

HAS ADOPTED THIS DECISION:

Article 1

The planned State financing of the clean-up, at an estimated cost of ATS 313,2 million (ECU 22,7

⁽¹⁾ OJ L 209, 24.7.1992, p. 1.

million), of the abandoned and contaminated Kiener Deponie Bachmanning landfill site does not constitute State aid, subject to the conditions stipulated in Article 2.

Article 2

Austria shall order Atlas to repay the State financed clean-up costs and shall ensure that it receives them. Repayment shall be made in accordance with national procedures and legal provisions, with interest running from the date of disbursement until such time as the clean-up costs have been repaid by Atlas, at the rate used as the reference rate for calculating the net grant-equivalent of regional aid in Austria.

Article 3

Austria shall inform the Commission within two months of notification of this Decision of the measures it has taken to comply with it.

Article 4

This Decision is addressed to the Republic of Austria.

Done at Brussels, 9 December 1998.

For the Commission

Karel VAN MIERT

Member of the Commission
