

# DECISIONS

## COMMISSION DECISION (EU) 2018/563

of 20 November 2017

on State aid SA.34308 (2013/C) (ex 2013/NN) implemented by the Hellenic Republic for Hellenic Defence Systems S.A. (EAS — Ellinika Amyntika Systimata)

(notified under document C(2017) 7361)

(Only the English text is authentic)

(Text with EEA relevance)

THE EUROPEAN COMMISSION,

Having regard to the Treaty on the Functioning of the European Union, and in particular the first subparagraph of Article 108(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 provisions cited above <sup>(1)</sup>,

Whereas:

### 1. PROCEDURE

- (1) In the context of its economic adjustment programme, Greece has undertaken a privatisation programme <sup>(2)</sup>. Hellenic Defence Systems S.A. ('HDS'), a State-owned company, was originally included with a view to being privatised.
- (2) In January 2012 the Hellenic Republic Asset Development Fund ('HRADF') <sup>(3)</sup> informed the Commission about the proposed privatisation of HDS. In order to clarify whether any State aid issues could arise in that context, the Commission opened a case *ex officio* and initiated a preliminary examination on 1 February 2012.
- (3) The examination showed that HDS could have benefitted from State measures in the past. The Commission requested information by letters dated 16 February 2012, 4 April 2012, by email dated 10 April 2012 and by letters dated 4 May 2012, 4 July 2012 and 24 July 2012. The Greek authorities replied on 9 March 2012, 18 July 2012 and 20 August 2012. Meetings between the Commission services and representatives of the Greek authorities and HRADF took place on 26 March 2012, 30 April 2012 and 11 September 2012.
- (4) By letter dated 6 March 2013 ('the decision of 6 March 2013'), the Commission informed Greece that it had decided to initiate the procedure laid down in Article 108(2) of the Treaty on the Functioning of the European Union ('TFEU') in respect of certain aid measures described in Section 2.2 ('the formal investigation procedure').
- (5) The Commission decision of 6 March 2013 to initiate the procedure was published in the *Official Journal of the European Union* <sup>(4)</sup>. The Commission invited the Greek authorities and interested parties to submit their comments on the aid measures.
- (6) The Commission received comments from the Greek authorities on 1 July 2013. The Commission received no comments from interested parties.

<sup>(1)</sup> OJ C 152, 30.5.2013, p. 1.

<sup>(2)</sup> See the *Second Economic Adjustment Programme for Greece — First Review December 2012*, [http://ec.europa.eu/economy\\_finance/publications/occasional\\_paper/2012/pdf/ocp123\\_en.pdf](http://ec.europa.eu/economy_finance/publications/occasional_paper/2012/pdf/ocp123_en.pdf)

<sup>(3)</sup> The Hellenic Republic Asset Development Fund (HRADF) is a 'Société Anonyme' S.A. entity established on 1 July 2011 in order to manage the privatisation process.

<sup>(4)</sup> Cf. footnote 1.

- (7) The Commission requested additional information from Greece by letters dated 23 July 2013, 21 August 2014, 11 November 2014, 28 January 2016, 27 May 2016 and 8 June 2017. The Greek authorities replied on 7 August 2013, 22 September 2014, 16 December 2014, 25 February 2016, 24 June 2016, 17 November 2016 and 3 July 2017. During the period from August 2013 to August 2014 the Greek authorities also provided, on several instances, additional information regarding, in particular, the separation of HDS' activities into civil and military. Several meetings between the Commission services and representatives of the Greek authorities took place during September 2013 in Athens. In addition, on 17 March 2016 a telephone conference took place between the Commission departments and the Greek authorities.
- (8) By letter dated 30 March 2017, the Greek authorities accepted that the present decision be adopted and notified in the English language only.

## 2. DETAILED DESCRIPTION OF THE AID

### 2.1. The beneficiary

#### 2.1.1. Presentation of HDS

- (9) HDS was a company active in the manufacturing of defence-related and civil-use products. It was 99,8 % owned by the Greek State, 0,18 % by Piraeus Bank (a private financial institution) and 0,02 % by individuals. HDS was established in 2004, after the merger of 'Greek Power and Cartridge Company SA' ('PYRKAL') and 'Hellenic Arms Industry SA' ('EBO'). On 31 July 2011, HDS had approximately 1 000 employees and therefore qualified as a large enterprise <sup>(5)</sup>. According to the Greek authorities its production breakdown, expressed in an average percentage of turnover for the period 2004-2011, was as follows:
- (a) Military production <sup>(6)</sup>: 94,34 %;
- (b) Civil production <sup>(7)</sup>: 5,66 %.
- (10) HDS had five industrial facilities in various places in Greece: [...] <sup>(\*)</sup>. The civil production was carried out in a factory in the Lavrion industrial facility and a production line in the Hymettus facility.
- (11) HDS had two main 100 % subsidiaries, Electromechanica Kymi Ltd manufacturing dual use products <sup>(8)</sup> and Ipiros Metalworks Industry SA manufacturing civil use products <sup>(9)</sup>, and nine smaller ones.
- (12) The Commission will refer to HDS at the level of the Group in the present Decision.

#### 2.1.2. Financial results of HDS

- (13) According to the information provided by the Greek authorities, HDS' key financial data during the period covered by the measures under investigation in the decision of 6 March 2013, namely 2004-2011, were as identified in Table 1.

Table 1

**HDS' key financial data 2004-2011 (in EUR million) on group level**

	2004	2005	2006	2007	2008	2009	2010	2011
Turnover	97,3	91,4	94,7	63,8	62,1	53,9	31,3	39,2
EBT	- 132,1	- 94,7	- 110,5	- 118,9	- 146,9	- 173	- 138,7	10,9

<sup>(5)</sup> Commission Recommendation 2003/361/EC of 6 May 2003 concerning the definition of micro, small and medium-sized enterprises (OJ L 124, 20.5.2003, p. 36).

<sup>(6)</sup> Including infantry weapons, ammunition, weapon systems, and aircraft fuel tanks.

<sup>(7)</sup> Including small pistols, explosives for construction works and fireworks.

<sup>(\*)</sup> [...] business secrets.

<sup>(8)</sup> Uniforms and accessories.

<sup>(9)</sup> Process of copper alloys for coin blanks etc.

	2004	2005	2006	2007	2008	2009	2010	2011
Registered capital	400,3	461,4	489,0	493,0	493,0	493,0	493,0	651,2
Own equity	41,2	7,7	- 75,3	- 282,7	- 418,7	- 594,0	- 676,3	- 537,7
Losses of previous years	215,96	348,06	442,7	553,2	672,1	819,0	992,0	1 130,7

Source: Letter of 3 July 2017 from the Greek authorities

## 2.2. Description of the measures

- (14) By the decision of 6 March 2013, the Commission informed Greece that it had decided to initiate the formal investigation procedure in relation to the following three measures.

### 2.2.1. Measure 1: State guarantees

- (15) According to the information provided by the Greek authorities, between 2004 and 2011 the State guaranteed eleven loans to HDS from several banks based in Greece with various interest rates for a guarantee premium ('fee') of 1 % which had to be paid to Greece along with the repayment of the loans instalments to the banks. The Greek authorities have explained that no assets were pledged for those loans. The total amount of the loans appeared to be EUR 942,05 million, out of which HDS has defaulted on total payments of over EUR 246 million, with a subsequent triggering of the respective State guarantee. None of those State guarantees were notified to the Commission for a State aid assessment.
- (16) In their letters of 9 March 2012 and 3 July 2017, the Greek authorities provided a list of the State guarantees and the default payments, as set out in Tables 2 and 3:

Table 2

### Greek State guarantees for loans to HDS

State Guaranteed Loans								
Notice	Bank	Type of Loan	Disbursement Date	Date of Guarantee Granted	Commission Fee (%)	Total Amount	Duration	Interest rate
Amounts in EUR								
1	National Bank	Bond loan	2009	23.7.2009 (GOVERNMENT GAZETTE 1554/28-9-2009)	1	195 000 000	5 years	2,6055 % + 1,85 %
2	National Bank	Loan	2005	17.3.2005 (GOVERNMENT GAZETTE 387/24-3-2005)	1	30 000 000	10 years	3,54 % + 0,14 %
3	Alpha bank	Bond loan	2006	18.4.2006 (GOVERNMENT GAZETTE 550/3-5-2006)	1	164 000 000	12 years	4,019 % + 0,12 %

## State Guaranteed Loans

Notice	Bank	Type of Loan	Disbursement Date	Date of Guarantee Granted	Commission Fee (%)	Total Amount	Duration	Interest rate
4	National Bank	Loan	2004	3.3.2004 (GOVERNMENT GAZETTE 494/5-3- 2004)	1	10 000 000	10 years	EUR 6M + 0,135 %
5	National Bank	Bond loan	2008	21.4.2008 (GOVERNMENT GAZETTE 788/6-5- 2007)	1	213 000 000	15 years	4,63 % + 0,29 %
6	Emporiki Bank	Bond loan	2007	25.4.2007 (GOVERNMENT GAZETTE 720/8-5- 2007)	1	175 000 000	20 years	4,605 % + 0,06 %
7	National Bank	Loan	2004	15.12.2004 (GOVERNMENT GAZETTE 1886/20-12- 2004)	1	15 050 000	10 years	3,36 % + 0,14 %
8	National Bank	Loan	2004	21.6.2004 (GOVERNMENT GAZETTE 963/28-6- 2004)	1	40 000 000	10 years	EUR 6M + 0,135 %
9	Alpha bank	Loan	2005	28.6.2005 (GOVERNMENT GAZETTE 911/4-7- 2005)	1	60 000 000	10 years	2,974 % + 0,09 %
10	National Bank, Alpha bank, EFG Eurobank	Bond loan	2011	29.7.2011 (GOVERNMENT GAZETTE 1823/12-8- 2011)	1	30 000 000	2 years	9,70 %
11	Tbank	Bond loan	2011	4.11.2011 (GOVERNMENT GAZETTE 2495/4-11- 2011)	1	10 000 000	2 years	12 %
<b>Total</b>						<b>942 050 000</b>		

Source: Letters of the Greek authorities of 9 March 2012 and 3 July 2017

Table 3

**Payments by the Greek State on guaranteed loans defaulted by HDS**

Default date	Payment (amounts in EUR)	Default date	Payment (amounts in EUR)
2004		2008	
[...]		[...]	
<b>Total</b>	<b>583 288,89</b>	<b>Total</b>	<b>10 953 074,99</b>
2005		2009	
[...]		[...]	
<b>Total</b>	<b>3 449 021,79</b>	<b>Total</b>	<b>31 578 868,23</b>
2006		2010	
[...]		[...]	
<b>Total</b>	<b>4 703 698,18</b>	<b>Total</b>	<b>89 679 233,21</b>
2007		2011	
[...]		[...]	
<b>Total</b>	<b>15 307 189,45</b>	<b>Total</b>	<b>90 305 615,31</b>

Source: Letter of the Greek authorities of 9 March 2012

#### 2.2.2. Measure 2: 2003 grant

- (17) According to the information provided by the Greek authorities, the State provided a grant of EUR 10 million to HDS in 2003 for the implementation of an investment plan [...], exclusively used for military production. This grant was not notified to the Commission for a State aid assessment.

#### 2.2.3. Measure 3: 2011 capital increases

- (18) According to HDS' financial statement of December 2011, its share capital was increased by EUR 158,2 million during the course of 2011.
- (19) In particular, according to HDS' semi-annual report of June 2011, during the first half of 2011 there were two capital increases, namely of EUR 50,6 million (March 2011) and EUR 62,5 million (May 2011). Given the total share capital increase of EUR 158,2 million during the course of 2011, it appeared that a third capital increase of EUR 45,1 million took place in the second half of 2011. Only the State, as main shareholder, contributed to those capital increases.

### 2.3. Grounds for initiating the procedure

- (20) In the decision of 6 March 2013, the Commission preliminarily concluded that the three non-notified measures were imputable to Greece, granted through State resources and selective. Furthermore, they had the potential to distort competition and affect intra-community trade. In addition, the Commission reached the preliminary conclusion that HDS was a firm in difficulty within the meaning of the 2004 Rescue and Restructuring Guidelines<sup>(10)</sup> when the measures identified above were granted. The Commission had doubts that a market economy investor would have provided such funding (guarantees, grant and capital increases) to HDS. The Commission, therefore, preliminarily concluded that the three measures conferred an advantage on HDS.

<sup>(10)</sup> Communication from the Commission — Community guidelines on State aid for rescuing and restructuring firms in difficulty (OJ C 244, 1.10.2004, p. 2).

- (21) The Commission, furthermore, noted that, while HDS was mainly producing military products for the Greek army, Greece had never substantiated or formally invoked the application of Article 346(1)(b) TFEU in the course of the preliminary examination of the case and that that Article could, therefore, not be taken into account in its assessment at that stage.
- (22) Against this background the Commission preliminarily concluded that the three measures constitute State aid within the meaning of Article 107(1) TFEU. The Commission, furthermore, expressed doubts as to the compatibility of this aid with the internal market and in particular the 2004 Rescue and Restructuring Guidelines, which was and remains the relevant legal framework for assessing State aid to companies in difficulty granted between 2004 and 2011.

### 3. COMMENTS BY GREECE

#### 3.1. Distinction of military and civil production — Essential security interests of Greece

- (23) In their comments in the context of the formal investigation procedure, the Greek authorities argued that the three measures aimed only at supporting the military production of HDS and were, in their entirety, necessary for the protection of the essential interests of the security of Greece.
- (24) The Greek authorities provided a breakdown of the company's total revenues for the period 2004-2011, which showed that out of a total revenue of EUR 482,4 million, 91,23 % resulted from contracts for military products sold to the Greek Armed Forces or related to obligations of the Greek Armed Forces and national defence and security, 3,11 % resulted from contracts for exported military products (including to Cyprus) and 5,66 % resulted from the sale of civil products.
- (25) As regards the civil production of HDS, the Greek authorities argued that it was carried out in production lines that were physically and organisationally separate from the military production ([...]) and that HDS kept separate accounts for the costs and revenues of the military and civil production.
- (26) Regarding the military production, the Greek authorities submitted that it was intrinsically linked with the requirements and supply of the Greek Armed Forces and that it exclusively concerned products covered by the list of the arms, munition and war material, drawn up by the Council in 1958 ('the 1958 Council list') <sup>(1)</sup>. In this context Greece provided a summary of all the contracts and sales of military production of HDS since 2003, which consisted in ammunition, including light ammunition, grenades, tank ammunition, weapon systems, infantry weapons including pistols, guns, mortars and aerospace products including fuel tanks and aircraft external pylons. The Greek authorities, furthermore, explained that HDS' military production was carried out exclusively in the context of specific contracts, in the sense that HDS was not stocking military products.
- (27) According to the Greek authorities, HDS' military production lines comprise the only national industrial complex used to manufacture arms and ammunition in Greece and are, therefore, an essential part of Greece's national industrial defence infrastructure. HDS was established as defence company and has operated since its establishment as such. Its infrastructures were always included in the national defence planning of Greece, with a view to serving the interest of national defence and security. In this sense, HDS needed to maintain a fully operational stand-by capacity of its military production lines for products in the 1958 Council list even beyond actual and current demand in order to protect essential security interests of Greece, such as to ensure security of supply of the Greek armed forces and their operational autonomy as well as to be able to meet demand in times of crisis, mobilisation or war.
- (28) Against this background the Greek authorities argued that due to Greece's geopolitical position, which demands a basic self-sufficiency in essential weapons and ammunition, HDS' military production was essential for its national security.
- (29) As regards the exports of military products, the Greek authorities underlined that the total revenue stemming from exports during the time period from the establishment of the company in 2004 until 2011, amounted to EUR 15,02 million (i.e. 3,1 % of the total revenue or 3,3 % of the revenue from defence activities). [...].

<sup>(1)</sup> In 1958, the Council drew up a list of the arms, munitions and war material, to which the first sentence of Article 346(1)(b) TFEU applied, as Appendix 1 to Annex D of Council Decision 255/58. The list was never officially published, but is now part of the public domain.

- (30) The Greek authorities argued that the remaining part of the exports, representing a very small percentage of HDS' total turnover, relates to exports to third countries [...] on the basis of contracts that were directly awarded to HDS. [...].
- (31) In conclusion, as regards the military production, the Greek authorities explained that the three measures aimed at the support of a military producer, which plays a crucial role in the supply of arms and ammunition for the Greek Armed Forces. Thus, its operation is important for the essential security interests of Greece. The Greek authorities supported their argumentation by citing a series of Greek legal acts, which established EBO's and PYRKAL's role in serving the Greek essential security interests <sup>(12)</sup>, later transferred to HDS.
- (32) Through those arguments, the Greek authorities explicitly invoked Article 346(1)(b) TFEU with regard to the measures under investigation and argued that those were necessary for the protection of essential interests of Greece's security connected with the production of or trade in arms, munition and war material.
- (33) [...]
- (34) The Greek authorities admitted that also HDS' civil production was loss-making. They explained that those losses were caused by HDS' high operating costs, which were linked to the fact that part of the civil production was subcontracted to the military production for contracts with the Greek Armed Forces. This was done without issuing a corresponding debt towards the military production accounts. In addition, the military and civil production lines were at times both using the administrative and distribution services of HDS.

### 3.2. Measure 1: State guarantees

- (35) The Greek authorities argued that measure 1 aimed exclusively at supporting the military production of HDS, as the loans were spent only for military purposes directly linked with protecting essential security interests of Greece. According to the Greek authorities it follows that measure 1 should not be subject to a State aid assessment, as it would be covered by the exception of Article 346(1)(b) TFEU. The Greek authorities in this regard argued that the military production was separate from the civil production and that the legal acts providing the State guarantees included a reference whereby the guaranteed loans aimed at the 'coverage of operating needs of the company for the production of military material for the country'.
- (36) The Greek authorities also explained that it would have been impossible for HDS to provide any assets as a pledge for the loans in question, because the installations of HDS were protected by national security rules which did not allow access thereof. As such, the provision of the company's real estate as collateral would, according to the Greek authorities, contradict the national security purposes served by the company and would potentially entail disclosure of classified information. It follows that HDS could not attempt to secure loans from banks by providing part of its real estate as collateral. Thus, the Greek authorities argued that the reason why the company did not attempt to secure bank loans without State guarantees was not its inability to obtain such funds, but rather the fact that it was precluded from providing collateral due to the risk that would result for the national security interests.
- (37) As regards the State guarantee for a loan of EUR 30 million by the National Bank of Greece, Alpha Bank and EFG Eurobank in 2011 (loan number 10 in Table 2 above), the Greek authorities clarified in their submissions of 7 August 2013 and of 3 July 2017 that eventually HDS only received an advance payment of EUR 6 million on 8 September 2011, and that after the withdrawal of the banks, only EUR 7 095 858 from that bond loan was issued on 19 March 2013. Therefore, any advantage from this State guarantee should not exceed that amount.
- (38) Similarly, as regards the State guarantee for a loan of EUR 10 million by Tbank in 2011 (loan number 11 in Table 2 above), the Greek authorities clarified in their submission of 3 July 2017 that HDS received an advance payment of EUR 6 million (out of which EUR 3 million on 5 July 2011 and another EUR 3 million on 2 November 2011). As the bond loan was never issued, the Greek authorities allege that the advance payment was not covered by a State guarantee.
- (39) Thus, according to the Greek authorities the total State guarantees for loans in 2011 was EUR 7 095 858, instead of EUR 40 million as originally mentioned in the decision of 6 March 2013. The Greek authorities did not contest the guarantees and the loans for the other years.

<sup>(12)</sup> Presidential Decree 514/1977 (official journal reference A/165/14.6.1977); Law 3978/2011 (official journal reference FEK A/137/16.6.2011).

### 3.3. Measure 2: 2003 grant

- (40) The Greek authorities argued that measure 2 also aimed only at supporting the military production of HDS and should not be subject to a State aid assessment, as it would be covered by the exception of Article 346(1)(b) TFEU.
- (41) The Greek authorities based their argumentation on the fact that the [...] industrial facility, which was the object of measure 2, is exclusively used for military production of products [...] <sup>(13)</sup>.

### 3.4. Measure 3: 2011 capital increase

- (42) The Greek authorities argued that the decision of the Greek state, as majority shareholder, to carry out the relevant capital increases was in line with the behaviour of a market economy investor in a similar situation. The Greek authorities argued that their decision as a shareholder to increase the company's share capital with a view to ensuring its viability was a fair commercial decision, given its decisive role in national defence and security. Thus, in their view, the capital increases did not involve State aid. However, in their letter of 3 July 2017, the Greek authorities confirmed they did not possess additional information or documents to support their observations on the capital increase, by reference to the request of the Commission to produce, if available, (i) any restructuring plan for HDS drawn up before the decision to increase the company capital, (ii) any *ex ante* economic analysis carried out by the State as to whether the conversion of the claims stemming from the calling of the guarantees into capital was economically more advantageous than keeping or enforcing those claims, and (iii) any *ex ante* return analysis carried out by the State as regards the fresh capital provided for the capital increases.
- (43) In any event, just as with the other two measures, the Greek authorities in addition argued that also measure 3 aimed only at supporting the military production of HDS and should not be subject to a State aid assessment, as it would be covered by the exception of Article 346(1)(b) TFEU.
- (44) As regards the total amount of the relevant capital increases, the Greek authorities, in their submission of 1 July 2013, claimed that they amounted to EUR 107,6 million. However, in their submission of 7 August 2013, the Greek authorities finally clarified that the capital increases covered by measure 3 included a total capital increase of EUR 158,19 million, as identified in the decision of 6 March 2013.
- (45) Out of the total capital increase of EUR 158,19 million, EUR 154,19 million were the result of capitalisation of debts that HDS had towards the State. Those debts stemmed from the calling of guarantees, provided in the context of measure 1, because HDS failed to repay the loans. The remaining EUR 4 million were provided as fresh capital.
- (46) The general assembly of 25 October 2010 agreed that HDS' capital needed to be increased. However, the precise amounts of different capital increases were decided by the general assembly in various meetings during 2011, at dates on which Greece committed the relevant funds. According to the Greek authorities, the distribution of the capital increases in the context of measure 3 and their granting dates were as follows:

Table 4

#### Granting dates of 2011 capital increases

Date of general assembly decision	Amount in EUR	Comments
4 May 2011	109 052 604,87	Capitalisation of debts stemming from the calling of guarantees
19 October 2011	42 255 180,01	
16 December 2011	2 882 919,33	
4 May 2011	4 000 000	Payment in cash
<b>Total</b>	<b>158 190 704,21</b>	

<sup>(13)</sup> [...].



- (47) The Greek authorities argued that the capital increase of EUR 154,19 million resulting from the capitalisation of debts stemming from called guarantees should not be considered 'new' State support to HDS, because it was, in the reasoning of the Commission in the decision of 6 March 2013, already considered State support in the context of measure 1.

### 3.5. Split of HDS

- (48) In the context of the regular review of its economic adjustment programme by the institutions representing the creditors of the country (European Commission, European Central Bank and the International Monetary Fund), in mid-2013 Greece undertook the commitment to adopt an irrevocable decision about the future of HDS by the end of August 2013. On 27 August 2013, the Greek authorities submitted their proposal for the future of HDS.
- (49) According to that proposal, HDS would be divided into two parts, civil and military. This exercise was referred to as 'split'. The civil part would be liquidated. The military part would be restructured and its production would be limited to products that are necessary for the essential security interests of the country.
- (50) Following discussions with the Commission departments and those of the other institutions, the Greek authorities undertook, in a letter of 16 December 2013, the commitment to carry out the split and submitted an action plan.
- (51) By Board Decision of 26 February 2014, the process of splitting the company began and 28 February 2014 was set as the date for restructuring (date of the 'restructuring balance sheet'). By Board decision of 21 May 2014 it was established that the successor public limited company which would in the future exclusively engage in the production of and trade in arms, munitions and war material necessary for the essential security interests of Greece will be called *Hellenic Defence Systems Industrial Commercial Ltd* ('HDS military'). By the same decision it was established that the successor public limited company which would take over the original company's purely civilian activities will be called *Hellenic Civilian Production Systems Industrial Commercial Ltd* ('HDS civil').
- (52) The Board decision of 26 May 2014 approved the plan to split the company, the restructuring balance sheet and the Board's explanatory report. The company's authorised representatives signed the plan to split the company on the same day and the plan was submitted to the supervisory authority. On 7 July 2014 an official auditor's report was submitted for the purpose of assessing and determining the book value of the assets held by the company's defence and military divisions.
- (53) The general assembly of 28 August 2014 approved the decision to split the company, the restructuring balance sheet, the Board's explanatory report, the auditors' report on the book value of the assets held by the original company and the terms of reference of both successor companies. In addition, the Boards of the two successor companies were appointed.
- (54) The assets and production capacity of the original company were split based on the restructuring balance sheet of 28 February 2014. All assets related to the military production of the original company were transferred to HDS military. The Greek authorities submitted that all those assets are exclusively related to production of defence products as defined in Article 346 TFEU.
- (55) All assets exclusively related to civil production were transferred to HDS civil. This included, in particular,
- (a) all land exclusively used for civil production (including production facilities, warehouses, etc. on that land);
  - (b) all machinery, equipment, means of transport, etc. involved exclusively in civil production;
  - (c) finished and semi-finished products for civilian use, relevant raw materials and the original company's claims from clients of civilian products.
- (56) By Decision No 22153/2014/2.10.2014 the Attica Region approved the split of the company, the dissolution of the original company and the set-up of the two new companies. This decision was registered in the General Trade Register and following this the two successor companies and their statutes were also entered in the General Trade Register.

#### 4. MARKET CONDITIONS REGARDING STATE GUARANTEES TO HDS (MEASURE 1)

- (57) The Greek authorities explained that HDS did not attempt to secure bank loans without State guarantees but that the reason was not its inability to obtain such funds (recital 36). Therefore, as regards measure 1, the formal investigation could not reveal contemporary quotes of interest rates for loans to HDS as from 2004 without the State guarantee or quotes for the latter guarantee provided by a market guarantor. In order to have a factual basis to assess whether the State guarantees on loans granted to HDS provided the latter with an advantage which it would not have obtained at market conditions and given HDS's financial situation in 2004-2006 (Table 1), the Commission investigated at what market conditions companies with a rating of CCC+ (high risk company in difficulty), D (company having defaulted) or SD (selective default) could have obtained funding from financial markets. To that effect, the Commission collected financial data from the database *S&P Capital IQ Platform* <sup>(14)</sup> and in particular credit default swaps (CDS) spreads as well as bond yields between 2004 and 2006.
- (58) The CDS is a financial swap agreement that the seller of the CDS will compensate the buyer (usually the creditor of the reference loan) in the event of a loan default (by the debtor). In other words, the seller of the CDS insures the buyer against some reference loan defaulting. This instrument is relevant to give an indication of what would be the risk premium/guarantee fee a market operator would require to ensure the risk of default of a loan. The collected data show that CDS spreads for maturities of 5 years to financially high risk companies varied from 4,4 % to 33,5 % between 2004 and 2006.
- (59) A bond yield is the amount of return an investor realises on a bond which gives a good indication of the 'all-in' cost of borrowing (representing the cost of the loan combined with the cost of any associated guarantee) for a company. The collected data indicate that in 2004-2006 the rates varied between 12,9 % and 43,2 % for 1-year maturity bonds issued by financially high risk companies.

#### 5. ASSESSMENT

- (60) This decision addresses as a preliminary point the issue of the application of Article 346(1)(b) TFEU, and, subsequently, with regard to activities or measures not covered by the exception of that Article, the existence of State aid within the meaning of Article 107(1) TFEU and, finally, whether such aid might be compatible with the internal market.

##### 5.1. Application of Article 346(1)(b) TFEU

- (61) According to Article 346(1)(b) TFEU, 'any Member State may take such measures as it considers necessary for the protection of the essential interests of its security which are connected with the production of or trade in arms, munitions and war material; such measures shall not adversely affect the conditions of competition in the internal market regarding products which are not intended for specifically military purposes.'
- (62) The 1958 Council Decision drawing up a list of products to which Article 346(1)(b) TFEU applies ('1958 Council Decision'), includes, among others, portable and automatic firearms, artillery, ammunition for such weapons, bombs, torpedoes, rockets, powders and explosives (points 1, 2, 3, 4, 8 and 13 of the list). This implies that, for the purpose of this case, Articles 107 and 108 TFEU do not apply for measures related to products included in the 1958 Council Decision, provided that those measures are considered necessary for the protection of the essential security interests of the Member State in question.
- (63) In accordance with the case law a Member State which seeks to rely on the exception of Article 346(1)(b) TFEU must provide evidence that the measures do not go beyond what is necessary for their essential security interests <sup>(15)</sup>.
- (64) The Greek authorities have argued that the military production of HDS falls within the scope of the 1958 Council Decision, in particular points 1, 2, 3, 4, 8 and 13, and is necessary for essential security interests of Greece, because HDS provides specialised military products to the Greek Armed Forces. As regards measure 2,

<sup>(14)</sup> <https://www.capitaliq.com>

<sup>(15)</sup> See Judgment of the Court of Justice of 16 September 1999, *Commission v Spain*, C-414/97, ECLI:EU:C:1999:417, paragraph 22 and Judgment of the Court of Justice of 8 April 2008, *Commission v Italy*, C-337/05, ECLI:EU:C:2008:203, paragraphs 42-44.

the Greek authorities demonstrated that the modernisation of the Aeghion industrial facility was necessary for the fulfilment of a specific contract by the Greek Armed Forces for the specific production of military products included in the 1958 Council list, in particular point 1.

- (65) The Greek authorities have also argued that the civil production lines of HDS were separated from the military production lines and that the measures under investigation had only benefited the military production, mainly sold to the Greek Armed Forces.
- (66) In the light of the arguments submitted by Greece, the Commission accepts that the part of HDS' production which concerns military material can be considered to fall within the scope of application of Article 346(1)(b) TFEU.
- (67) The Commission also does not contest the physical separation of the civil and military production lines. However, the data provided by the Greek authorities did not support the argument that HDS had separate accounts for the civil and military production for the relevant period. In addition, the Greek authorities admitted that the civil production lines were occasionally used also for military production without adequate remuneration, as should have been the case if there was proper separation of accounts, and that the military and civil production lines were at times both using the administrative and distribution services of HDS.
- (68) In the light of the above, and in the absence of separate accounts for civil and military activities, the Commission cannot exclude that measures aimed at the military production may have also benefitted HDS' civil production and thereby created a distortion of competition in the relevant market. This is the case regarding measures 1 and 3 which, regardless of their aim, have essentially benefitted HDS as a whole and thus its civil production as well, which was not financially separated from its military production.
- (69) The Commission therefore considers that, measures 1 and 3, in so far as they may have benefitted the civil production of HDS, must be assessed in light of the State aid provisions of the Treaty. However, insofar as those measures have benefitted the production and supply of military products to the Greek Armed Forces, the Commission accepts that they are exempt from an assessment under the State aid provisions of the Treaty on the basis of Article 346(1)(b) thereof.
- (70) As regards measure 2, the Commission observes that the evidence provided by Greece shows that the grant in question [...] did not benefit in any way the civil production.
- (71) Consequently, the Commission accepts that measure 2 only benefitted the production of military products covered by the 1958 Council Decision and that it was necessary for the provision of those products to the Greek army. The Commission, therefore, accepts that measure 2 is exempt from an assessment under the State aid provisions of the Treaty on the basis of Article 346(1)(b) thereof.

## **5.2. Assessment of the existence of aid within the meaning of Article 107(1) TFEU**

- (72) Article 107(1) TFEU lays down that 'any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between Member States, be incompatible with the internal market'.
- (73) On the basis of this provision, the qualification of a measure as State aid requires the following cumulative conditions to be met: (i) the measure is imputable to the State and is financed through State resources; (ii) the measure is selective; (iii) the measure confers an economic advantage on an undertaking; and (iv) the measure distorts or threatens to distort competition and is likely to affect trade between Member States.

### **5.2.1. Measure 1: State guarantees**

#### **5.2.1.1. State resources and imputability**

- (74) The State guarantees were granted directly by the Greek State and, as such, measure 1 is imputable to the State.

- (75) State guarantees by definition put State resources at risk, as any public guarantee involves a potential loss of resources by the State. Moreover, any guarantee that is not properly remunerated implies a direct loss of financial resources for the State. The fee of 1 % charged by the State to HDS cannot be considered sufficient, given the company's financial situation and the potential default. Besides, HDS had defaulted on several loans already in 2004, after which most of the guarantees were granted. As such, the guarantees involved State resources both in terms of guarantee fees possibly foregone and also in terms of exposure of the public budget in case of default of HDS.
- (76) Consequently, the criterion of State resources and imputability to the State is fulfilled for measure 1. This was also not disputed by the Greek authorities.

#### 5.2.1.2. Selectivity

- (77) As the guarantees were provided to an individual beneficiary, namely HDS on an *ad hoc* basis and not as part of a measure of general economic policy potentially available to all Greek companies and economic sectors, the measure is selective.

#### 5.2.1.3. Existence of an economic advantage

- (78) It is settled case-law that, in order to determine whether a State measure constitutes aid within the meaning of Article 107(1) TFEU, it is necessary to establish whether the recipient undertaking received an economic advantage which it would not have obtained under normal market conditions <sup>(16)</sup>.
- (79) An economic advantage exists whenever the financial situation of an undertaking is improved as a result of a State intervention. However, an intervention by a public authority does not necessarily confer an advantage on the beneficiary, and as such does not constitute aid, if it is carried out under normal market conditions, in other words, if the public authority acted as a prudent operator in a market economy would have done in similar circumstances. In that respect, the Greek State was the controlling shareholder of HDS at the time of the facts and remains so. In that capacity, the Greek State has guaranteed eleven loans granted by five different banks between 2004 and 2011. It cannot be ruled out that it may be in the interest of a controlling shareholder to provide guarantees on loans granted to its holding, insofar as less costly funding may provide higher remuneration (dividends) or increases in the value of its holding, at the cost of increasing its risk as guarantor. In the case of HDS, however, the State could not expect any such return, given the difficult financial situation of HDS during this period, as shown in the figures in Table 1, and in particular the continuous losses since 2004. It follows that the rationale and potential remuneration associated to the State guarantees have to be assessed on a stand-alone basis, leaving aside any potential expectation of shareholder returns.
- (80) In particular, by reducing the risk that banks having lent to HDS between 2004 and 2011 were taking, the eleven guarantees in question were liable to reduce the interest rate charged on the underlying loans. Those interest rates were different but all, except two, below 5 % during that period. In view of HDS' poor performance, even on a stand-alone basis, no prudent operator in a market economy would have granted funding to HDS in the period 2004-2011 at the conditions associated with the eleven loans granted between 2004 and 2011 without the guarantees of the State.
- (81) In that respect, as regards the claim of the Greek authorities that HDS would have been able to have access to market funding without the State guarantee, a distinction must be made between: (i) the period from 2004 to 2006, and (ii) the period from 2007 to 2011. In the period from 2004 to 2006, based on HDS' financial data in Table 1, the Commission considers that HDS could have had access to funding from the market, albeit in terms less favourable than those resulting from the State guarantees. On the other hand, in the period from 2007 to 2011, HDS' significantly deteriorated financial data in Table 1 indicate that it would not have access to funding from the market at any terms, absent the State guarantees.
- (82) In 2004-2006, although HDS had significant losses from previous years and negative EBT, it still had a relatively stable annual turnover of approximately EUR 91-97 million. Furthermore, HDS' own equity was still positive and it only turned negative in 2006 for the first time. Therefore, although HDS showed signs of financial difficulty

<sup>(16)</sup> Judgment of the Court of Justice of 29 June 1999, *DMT*, C-256/97, ECLI:EU:C:1999:332, paragraph 22.

in the period 2004-2006, those difficulties were not of such magnitude as to preclude entirely its access to funding during that period. As regards the level of such funding, the CDS spreads and bond yields indicated in recitals 58 and 59 confirm that certain financially high risk companies had access to financial markets in the 2004-2006 period under consideration and provide an order of magnitude of the conditions at which such companies could obtain funding. Such market data suggests that, absent the State guarantees, HDS would still have had access to funding from the market, but at a guarantee premium significantly higher than 1 %.

- (83) Likewise, the loans to HDS shown in Table 2 have quite significant differences between them in terms of exposure to risk of default by the guarantor, from EUR 10 million principal amount (loan 4 from National Bank in 2004) to EUR 164 million principal amount (loan 3 from Alpha Bank in 2006). Yet such differences were not translated into higher guarantee fees. It follows that the fixed fee of 1 % provided by HDS to remunerate the State for the guarantees does not constitute a market based rate, as it does not reflect the increased risk of the guaranteed loans in case of default.
- (84) Therefore, the guarantees granted in 2004-2006 conferred an economic advantage on HDS, which it would not have obtained at market conditions. The amount of the advantage corresponds to the difference between the cost of funding that HDS would have obtained from the market without the State guarantees and the price (base rate plus premiums) actually paid for those State guarantees and the respective loans <sup>(17)</sup>.
- (85) However, the investigation has not revealed specific contemporary quotes of interest rates for loans to HDS without the State guarantee or market quotes for the latter guarantee. The market data available (recitals 58 and 59) portrays financial instruments which are different from the loans and guarantees contracted by HDS, notably as to maturity and amount and has been retrieved from companies which did not have financial data similar to those shown for HDS in Table 1 above (for 2004-2006) and a history of default similar to that of HDS as shown in Table 3 above (for 2004-2006). Furthermore, in contrast to those companies, the nature of HDS' military production and the activity of its main client, namely the Greek Armed Forces, could have been seen by Greek banks as an additional commercial reason to provide funding to HDS. It follows that the market data in this case does not provide of itself a robust indication and precise benchmark of the cost at which HDS could have obtained the same loans between 2004 and 2006 at market conditions.
- (86) Therefore, in order to determine that hypothetical cost of funding from the market for the six loans granted during the years 2004-2006 (i.e. loans 2, 3, 4, 7, 8 and 9 shown in Table 2), the Commission has taken into account also the indications in the Communication on the reference and discount rates ('the 2008 Communication') <sup>(18)</sup>.
- (87) Given HDS' financial situation in 2004-2006 as portrayed in HDS' financial data in Table 1 and the fact that the Greek authorities were unable to provide the Commission with any plan credibly showing positive developments for the future of the company, HDS' creditworthiness (rating) must be considered the lowest of the five possible ratings provided for in the 2008 Communication, namely 'Bad/Financial difficulties (CCC and below)'. Furthermore, the loans in question had no collateral and have therefore to be qualified as 'low collateral' in the three step scale provided for in the 2008 Communication. The market interest rate must therefore be calculated for each loan as the result of the sum of the 1-year IBOR at the time the loan was granted plus 1 000 basis points as defined in the 2008 Communication.
- (88) The reliability of the result of the above calculation is further confirmed in the present case by the fact that such result is within the ranges of CDS spreads and bond yields identified in recitals 58 and 59.
- (89) Therefore, the amount of the advantage linked to the guarantees granted by the State for the loans obtained by HDS during the years 2004-2006 (as identified in recital 87 above) must be calculated separately for each loan according to the following methodology: the difference between: (i) the market interest rate based on the 2008 Communication calculated as explained in recital 87 applied to the loan principal, and (ii) the actual

<sup>(17)</sup> See also in that regard the Commission Notice on the application of Articles 87 and 88 of the EC Treaty to State aid in the form of guarantees, in particular Section 4.2 (OJ C 155, 20.6.2008, p. 10).

<sup>(18)</sup> Communication from the Commission on the revision of the method for setting the reference and discount rates (OJ C 14, 19.1.2008, p. 6).

financing cost due by HDS taking into account the interest rate applied by the banks to the loan principal and the 1 % guarantee premium applied by the State (see Table 2), calculated and charged for the period during which the different amounts were made available to HDS.

- (90) On the other hand, HDS' financial situation was substantially different in the period from 2007 to 2011. According to Table 1, in 2007, HDS lost a third of its turnover as compared to previous years, had losses (negative earnings before tax 'EBT') double its turnover, a negative equity more than quadruple its turnover and losses of previous years almost 9-fold its turnover. HDS' negative own equity in 2007 became almost four times higher than in 2006, thus not only stabilising that negative development but also largely increasing its intensity. After 2007, the financial data only further significantly deteriorated. HDS' turnover gradually shrank to EUR 39 million in 2011 from EUR 95 million in 2006, while losses of previous years accumulated to EUR 1 131 million in 2011, as compared to EUR 443 million in 2006. In 2011 HDS had a negative equity almost 14-fold its turnover and losses of previous years almost 29-fold its turnover. In addition, Table 3 shows that the amounts on which HDS defaulted reached double-digit EUR million amounts as of 2007, consistently rising from EUR 15 million in 2007 to EUR 90 million in 2011.
- (91) In light of this evidence, the Commission considers that as of 2007, HDS' risk of default on loans which were not collateralised was so high that, absent the State guarantees, it could not have obtained such a loan from the market at any rate. Indeed, no market lender presented with HDS' financial data in the period 2007-2011 and its history of default would have agreed to provide any funding without a solid guarantee or collateral to HDS, since every market lender would anticipate that such funding would eventually be lost. In turn, no market guarantor would have provided to the lenders any guarantee on the loans to HDS after 2007 without upfront one-off premiums of 100 % of the loan principals, which would be fully securing the loss that the guarantor would face with certainty when HDS would default on the loans, sooner or later. Therefore, the aid element in the State guarantees granted to HDS in the period 2007-2011 is equivalent to a one-off guarantee premium equal to the full amount of the principal of the guaranteed loans and charged upfront when each guarantee was granted, minus the guarantee premium actually paid by HDS on each loan <sup>(19)</sup>.
- (92) The Commission takes note of the clarification of the Greek authorities with regard to the amount that was actually made available to HDS in relation to the loan of EUR 30 million by the National Bank of Greece, Alpha Bank and EFG Eurobank in 2011 (guarantee number 10 in Table 2 above) which was EUR 7 095 858, instead of EUR 30 000 000 originally mentioned in the decision of 6 March 2013.
- (93) The Commission also takes note of the clarification of the Greek authorities with regard to the State guarantee for the loan of EUR 10 million by Tbank in 2011 (guarantee number 11 in Table 2 above), according to which the bond loan was never issued.
- (94) The Commission also observes that, even if only EUR 7 095 858 of loan 10 and EUR zero of loan 11 in Table 2 above have been actually made available to HDS, the State guarantees were granted for the full amount of EUR 40 million. However, only the amounts of the loans actually disbursed play a role for the determination of the amount of aid to be recovered, as explained in recital 135 of the present decision. As regards the granting dates, they are provided in Table 2 above.
- (95) The Commission in addition notes that some of the guarantees under measure 1 were called and thus the State became creditor of HDS (measure 3). However, to the extent those defaults occurred after the relevant guarantee had been provided, this is irrelevant for the State aid qualification of the measure and for the total amount of economic advantage. This is because the calling of a guarantee is a natural consequence of the provision of such a guarantee by a guarantor. In other words, the economic advantage of a State guarantee priced below market conditions lies in the difference between the guarantee premium charged by the State and the premium that a market guarantor, if any, would have charged. A possible advantage in the guarantee premium may exist, therefore, independently of whether the guarantee is called and even if the underlying loan is duly repaid and the guarantee is not called by the lender. Nevertheless, to the extent the defaults had already occurred when new guarantees would be provided, a market guarantor would have taken into account those past defaults of HDS and would have at least reflected the increased risk in the guarantee fee to be paid by HDS on new loans, or would not have provided any guarantee or loan <sup>(20)</sup>.

<sup>(19)</sup> See Case C-334/99 *Germany v Commission* EU:C:2003:55, para. 138; Case C-288/96 *Germany v Commission* EU:C:2000:537, paras 30-31.

<sup>(20)</sup> See recital 90 of the present Decision.

- (96) Finally, the Commission considers that the argument put forth by the Greek authorities that HDS could not provide collateral for the relevant loans due to security reasons is irrelevant for the qualification as State aid of the guarantees constituting measure 1. Since the notion of State aid is an objective notion, it is not relevant why HDS could not provide any collateral, but merely that HDS could not have obtained the loans described in Table 2 on the same terms without the guarantees. In turn, non-collateralised loans are riskier for the lender than collateralised ones and, thus, attract a higher interest rate remunerating the risk taken. This objective fact is captured by the interest rate calculated in accordance with the 2008 Communication, which is inversely proportional to the quality of the collateral provided.
- (97) Consequently, the Commission concludes that measure 1 conferred an advantage on HDS corresponding to the amount calculated on the basis of the methodology explained, for the guarantees granted for loans obtained in the period 2004-2006, in recital 89 above and, for guarantees granted for loans obtained in the period 2007-2011, in recital 91 above.
- (98) With respect to the arguments by the Greek authorities summarised in recitals 33 and 34 of the present decision, the Commission considers that the financial difficulties of a firm have to be assessed objectively on the basis of the financial and economic indicators of the specific firm in question. Therefore, the reasons behind the financial difficulties should not, as such, alleviate the level of seriousness of those financial difficulties, as shown by the relevant financial and economic indicators <sup>(21)</sup>.

#### 5.2.1.4. Effect on competition and trade between Member States

- (99) The measures in question enabled HDS to finance both its military and its civil production below normal market rates. The measures in question are thus liable to distort competition, as other companies active in the same markets needed to finance their operations at market conditions and operate without similar State support.
- (100) Also, irrespective of the relevance of the military production of HDS for the essential security interests of Greece, HDS was active in a sector in which products for civil use are traded among Member States.
- (101) Consequently, measure 1 was capable of affecting competition and trade between Member States.

#### 5.2.1.5. Conclusion with regard to the existence of State aid within the meaning of Article 107(1) TFEU for measure 1

- (102) In light of the above, the Commission concludes that the guarantees defined as measure 1, granted to HDS by Greece and described in recitals 15 to 16, constitute, to the extent that they benefitted the civil activities of HDS, State aid within the meaning of Article 107(1) TFEU.

#### 5.2.2. Measure 3: 2011 capital increases

##### 5.2.2.1. State resources and imputability

- (103) The Commission notes that the capital increases in question were provided by the Greek State. As such the granting of measure 3 is imputable to the Greek State and it is financed through State resources.
- (104) As to the amount of State resources involved, the Commission does not agree with the Greek authorities that a part of the capital increases should not be counted in measure 3, because it was the capitalisation of debts stemming from the calling of State guarantees (measure 1). That is because the capitalisation of debt stemming from the calling of a guarantee is not an automatic conversion, but rather an active decision by the State not to enforce that debt.

<sup>(21)</sup> See the recent judgment in Case T-220/14 *Saremar v Commission* EU:T:2017:267, para. 175.

- (105) Such a conversion implies a potential loss of value, considering that the State exchanged its position as creditor to that of shareholder, thereby foregoing State resources in the form of debts it decided not to enforce. In addition, in case of a potential liquidation of the company, a shareholder would by definition be less likely to collect its capital than a creditor, so that the conversion of debt owed to the State into capital has the effect of foregoing potential State resources.

#### 5.2.2.2. Selectivity

- (106) Since the measure was provided to an individual undertaking, namely HDS, the Commission concludes that it was selective.

#### 5.2.2.3. Existence of an economic advantage

- (107) As stated above, an advantage within the meaning of Article 107(1) TFEU is any economic benefit which an undertaking could not have obtained under normal market conditions. In this regard, the Commission has not received any convincing evidence from the Greek authorities which would justify their argument that since the State acted as a reasonable market investor, the capital increases in question were obtained under normal market conditions and could, therefore, not constitute an advantage.
- (108) The Commission observes that the various capital increases subscribed in the course of 2011 between May 2011 and December 2011 by the Greek State as a shareholder were not supported by any prospective analysis of returns on the purported investment that a rational investor would have examined and taken into account before deciding on the investment. The capital increases were conducted, as explained by Greece, with a view to ensuring HDS viability given its decisive role in national defence and security. In any event, the amount of the capital increases were insufficient to cover the negative equity of HDS and could, therefore, not be seen as a measure protecting the company's value and supporting its restructuring.
- (109) In that respect, it follows from the information transmitted by Greece that there is no evidence of any *ex ante* economic analysis carried out by the State as to whether the conversion of the claims stemming from the calling of the guarantees into capital was economically more advantageous than keeping or enforcing those claims. A market creditor would normally examine which course of action is economically more advantageous before deciding it.
- (110) For the assessment of whether the State granted an advantage to HDS when providing the capital increases in question, it must be established whether it acted in the same way as a market economy operator in a similar situation. Such a market economy operator would not take public policy considerations into account. In this regard, the argument presented by the Greek authorities regarding the preservation of a company which is relevant for the essential security interests of the country can, therefore, not be taken into account as a consideration a market economy investor would take into account and is, as such, not relevant for the assessment of the capital increases in question.
- (111) Even in the absence of contemporary evidence that the Greek authorities carried out the analysis mentioned in recital 108, it is manifest from the figures available that the conversion was less advantageous than the status quo of keeping the debt claims. Indeed, as a matter of fact, the amount of long-term and short-term liabilities owed in 2011 by HDS as reported in its balance sheet was EUR 1 008 million. Given the already negative equity of EUR 537 million recorded the same year and the inability to sell the company's military assets, the State would most likely not have recovered any portion of the increased equity totalling EUR 154,19 million in case of liquidation of the company or continuation without prospects of return. A market creditor would have thus maintained the debt claims which had a necessarily higher probability, however low, of producing a positive return than the conversion into equity. Debt claims (even unsecured ones) are ranked higher, in terms of priority of creditors, than shareholders' claims.
- (112) The same considerations are applicable *mutatis mutandis* to the injection of additional fresh capital totalling EUR 4 million. No market investor would forego the amounts subscribed in the absence of any *ex ante* perspective of returns. This stems from the fact that the Greek authorities have failed to provide any *ex ante* economic analysis of future profitability and also from the examination of the past and present financial performance of HDS in terms of actual or potential returns for the shareholder portrayed in Table 1. Indeed, it is



manifest from the financial performance of HDS since 2004 that the company did not provide any return in terms of dividends from the capital invested. Meanwhile, until 2011, the shareholder equity went from slightly positive (EUR 41 million) to significantly negative (minus EUR 537 million), thus consuming all the capital invested by the shareholders and cancelling out, in the absence of a credible business restructuring plan, any hypothetical expectation of future increase of the value of the holding.

- (113) Consequently, the Commission considers that a reasonable market investor would not have participated in HDS' share capital increases under those conditions, in particular without a credible business restructuring plan showing an *ex ante* prospect of restoring HDS' viability and an adequate return on the investment for the State as a shareholder and any foreseeable prospect of such return from the figures provided by Greece. As such, the Commission concludes that the State's participation in the 2011 capital increases provided the beneficiary with an advantage, corresponding to the full amount of the capital increases. The tranches of the measure and the granting dates are provided in Table 4.

#### 5.2.2.4. Effect on competition and trade between Member States

- (114) The Commission considers that for the reasons set out in recitals 99 and 100, measure 3 was capable of affecting competition and trade between Member States.

#### 5.2.2.5. Conclusion with regard to the existence of State aid within the meaning of Article 107(1) TFEU for measure 3

- (115) In light of the above, the Commission concludes that the capital increases defined as measure 3, granted to HDS by Greece and described in recitals 42 to 47, constitute, to the extent that they benefitted the civil activities of HDS, State aid within the meaning of Article 107(1) TFEU.

#### 5.2.3. Conclusion on existence of State aid

- (116) In the light of the above and to the extent to which measures 1 and 3 benefitted the civil production of HDS, the Commission considers that they constitute State aid within the meaning of Article 107(1) TFEU.

### 5.3. Unlawful aid

- (117) Measures 1 and 3 constitute State aid and were granted in breach of the notification and stand-still obligations established in Article 108(3) TFEU. Consequently, those measures constitute unlawful State aid.

### 5.4. Compatibility of the aid

- (118) The prohibition of State aid laid down in Article 107(1) TFEU is neither absolute nor unconditional. In particular, paragraph 2 and 3 of Article 107 TFEU constitute legal bases allowing some aid measures to be considered compatible with the internal market.
- (119) According to the case-law of the Court of Justice, it is up to the Member State to invoke possible grounds of compatibility and to demonstrate that the conditions for such compatibility are met <sup>(22)</sup>.
- (120) The Greek authorities did not invoke any possible grounds of compatibility. They insisted that measures 1 and 3 aimed exclusively at supporting the military production relevant for the essential security interests of Greece and, as regards measure 3, that it did not in any event constitute State aid within the meaning of Article 107(1) TFEU since it did not grant any advantage to HDS but was carried out in line with the behaviour of a market economy investor.

<sup>(22)</sup> Judgment of the Court of Justice of 28 April 1993, *Italy v Commission*, C-364/90, ECLI:EU:C:1993:157, paragraph 20.

- (121) However, given that the measures constitute State aid, the Commission has considered it appropriate to, nevertheless, assess them with regards to their compatibility under Article 107(3)(c) TFEU, according to which 'aid to facilitate the development of certain economic activities or of certain economic areas, where such aid does not adversely affect trading conditions to an extent contrary to the common interest' may be considered compatible with the internal market.
- (122) In order to be found compatible with the internal market under that Article, aid must meet a clearly-defined objective of common interest, be necessary and proportional to this objective, have an incentive effect, must not affect competition and intra-EU trade to an extent contrary to the common interest and comply with the transparency principles.
- (123) However, the Commission observes that it cannot identify any objective of common interest that might have been pursued by the aid, which, as was stated above, was also not argued by the Greek authorities. Even if HDS were to be considered a firm in difficulty, in which case the compatibility of the aid would need to be assessed under the 2004 Rescue and Restructuring Guidelines, the Commission observes that the compatibility conditions under those Guidelines are clearly not fulfilled for measure 1 (State guarantees) as well as measure 3 (capital increases).
- (124) The aid was not terminated after 6 months and the Greek authorities did not notify, or indeed draw up, a restructuring plan that would restore the company's viability, whilst there were no compensatory measures implemented in order to mitigate the distortions of competition created by the aid. There is no evidence that the aid was limited to the minimum necessary, notably through a significant own contribution of the aid beneficiary. Finally, the authorities did not provide a liquidation plan either.
- (125) The Commission has not identified any other possible grounds for the compatibility of measures 1 and 3.
- (126) In the light of the above, the Commission concludes that the State aid granted to HDS through measures 1 and 3 is incompatible with the internal market.

#### 5.5. Aid amount to be recovered

- (127) According to the Treaty and established case-law, the Commission is competent to decide that the Member State concerned must abolish or alter aid when it has found that it is incompatible with the internal market <sup>(23)</sup>. The Court has also consistently held that the obligation on a Member State to abolish aid regarded by the Commission as being incompatible with the internal market is designed to re-establish the previously existing situation <sup>(24)</sup>.
- (128) In this context, the Court has established that this objective is attained once the recipient has repaid the amounts granted by way of incompatible aid, thus forfeiting the advantage which it had enjoyed over its competitors on the market and the situation prior to the payment of the aid has been restored <sup>(25)</sup>.
- (129) In accordance with the case-law, Article 16(1) of Council Regulation (EU) 2015/1589 <sup>(26)</sup> lays down that that '(w)here negative decisions are taken in cases of unlawful aid, the Commission shall decide that the Member State concerned shall take all necessary measures to recover the aid from the beneficiary [...]'.
- (130) Consequently, since measure 1 and measure 3 were implemented in breach of Article 108 TFEU and are to be considered aid that is unlawful and incompatible with the internal market, the amount of undue advantage disbursed on the basis of those measures must be recovered in order to re-establish the situation that existed on the market before the aid was granted. As such, recovery must cover the period during which the advantage was conferred on the beneficiary; that is to say from the time the aid was made available to the beneficiary until it

<sup>(23)</sup> See Judgment of the Court of Justice of 12 July 1973, *Commission v Germany*, C-70/72, ECLI:EU:C:1973:87, paragraph 13.

<sup>(24)</sup> See Judgment of the Court of Justice of 14 September 1994, *Spain v Commission*, joined Cases C-278/92, C-279/92 and C-280/92, ECLI:EU:C:1994:325, paragraph 75.

<sup>(25)</sup> See Judgment of the Court of Justice of 17 June 1999, *Belgium v Commission*, C-75/97, ECLI:EU:C:1999:311, paragraphs 64 and 65.

<sup>(26)</sup> Council Regulation (EU) 2015/1589 of 13 July 2015 laying down detailed rules for the application of Article 108 of the Treaty on the Functioning of the European Union (OJ L 248, 24.9.2015, p. 9).

was actually recovered. The sums to be recovered should therefore include interest due until recovery takes place. In accordance with the relevant case-law, the recovery interest accrues from the date on which the aid was actually made available to the beneficiary <sup>(27)</sup>.

- (131) However, the Commission has concluded that the part of HDS' production which concerned military material can be considered to fall within the scope of application of Article 346(1)(b) TFEU. To the extent that they benefitted this part of the production, measures 1 and 3 are exempt from an assessment under the State aid provisions of the Treaty. It is, therefore, necessary to apportion the public funding between the two sides of the production, namely military and civil, in order to be able to establish the amount of incompatible aid to be recovered from the civil side.
- (132) In order to determine to which extent the State aid identified in measures 1 and 3 benefited the civil production in the absence of separate accounts, the Commission, following relevant case practice <sup>(28)</sup>, will rely on a proxy and will consider the division between HDS' sales of military products and those of civil products and allocate accordingly the advantage deriving from measures 1 and 3.
- (133) The Commission considers it appropriate to use the percentage of military and civil product sales for the period 2004-2011 as provided by the Greek authorities (see recital 24 above) given that it covers the period during which the measures were granted. During that period, the military production represented 94,34 % of the sales, while the civil production represented 5,66 %.
- (134) As regards measure 1, this means that the State aid granted in relation to the civil activity, which has to be recovered as incompatible aid, corresponds to 5,66 % of the amount calculated on the basis of the methodology of determination of the economic advantage explained in recital 89 for the guarantees granted for loans obtained in the period 2004-2006 and in recital 91 for the guarantees granted for loans obtained in the period 2007-2011. The advantage has been materialised in the form of payments of lower guarantee fees. Therefore, the Commission considers that the aid has been put at the disposal of the beneficiary at the time when the guarantee fees were due by the original HDS (i.e. prior to the split between HDS civil and HDS military).
- (135) As regards the parts of the guaranteed loans of 2011 that were not used <sup>(29)</sup>, the Commission observes the following regarding the amount of the loan principal that should be used in the methodology described in recital 91 <sup>(30)</sup>. Since the Greek State committed to grant guarantees for the full amount of EUR 40 million, the guarantee must be considered to have been granted for EUR 40 million. Indeed, at the moment of that commitment by the Greek State, HDS was conferred the legal right to receive the aid on the basis of an amount of EUR 40 million to be borrowed. However, since not the full amount of EUR 40 million was taken up as loans by HDS, the aid should be regarded as disbursed only for the amount actually borrowed under the guaranteed loans, namely EUR 7 095 858 for loan 10 and zero for loan 11. Therefore, while the full amount of aid granted (even if not disbursed) must be abolished for the future <sup>(31)</sup>, it is only the amount actually disbursed to date on the basis of those guaranteed loans that must be used as the loan principal for the calculation of the amount to be recovered on the basis of the methodology described in recital 91 <sup>(32)</sup>.
- (136) For measure 3, the corresponding State aid to be recovered amounts to EUR 8 953 593,86 <sup>(33)</sup>.
- (137) As regards the recovery interest, the Commission considers that it has to be calculated on the basis of the dates on which the aid was actually made available or materialised for each measure (guarantee or capital increase).
- (138) Furthermore, the Commission has considered in a similar case <sup>(34)</sup> that the recovery of the incompatible aid should only be provided by the civil part of the aided company, in order to ensure that the recovery is not covered by funds that would otherwise benefit the military activity <sup>(35)</sup>.

<sup>(27)</sup> Judgment of the General Court of 30 January 2002, *Keller and Keller Meccanica v Commission*, T-39/99, ECLI:EU:T:2002:19, paragraphs 106 to 109.

<sup>(28)</sup> See recitals 55-60 of Commission decision of 24 March 2009 on State aid C 47/2005 (ex NN 86/2005) implemented by Greece for Hellenic Vehicle Industry S.A. (ELVO), OJ L 118, 12.5.2010, p. 81.

<sup>(29)</sup> Adapted of course to reflect the non-military part of the activities as explained in recital 134.

<sup>(30)</sup> I.e. the difference between the full amount for which a guarantee was granted, namely EUR 40 million, and the actual amount that was borrowed, namely EUR 7 095 858. See recitals 92-94 above.

<sup>(31)</sup> I.e. the right to two State guarantees of total EUR 40 million.

<sup>(32)</sup> I.e. the amount of EUR 7 095 858.

<sup>(33)</sup> EUR 158 190 704,21 × 0,0566.

<sup>(34)</sup> See ELVO, footnote 29 above.

<sup>(35)</sup> See Commission decision on ELVO, *ibid.*

- (139) In the present case, the Commission takes note of the split of HDS into two succeeding companies, namely HDS military and HDS civil. Based on the allocation of the assets and production capacity (see recitals 54-55), HDS civil is the successor of the civil production of HDS. This is, in particular, based on the fact that all assets related to the civil production of the original HDS were transferred, as a whole, to HDS civil, including all land and production facilities, machinery, equipment, means of transport, finished and unfinished products, raw materials and claims from clients of civil products of the original HDS. Moreover, the liabilities seem to have been allocated in line with the allocation of the assets between HDS military and HDS civil. Thus, the incompatible aid resulting from measures 1 and 3 must be recovered from the revenues and assets of HDS civil and any aid resulting from measure 1 which would still materialise in the future has to be abolished.
- (140) Lastly, the Commission recalls that it is settled case-law that the fact that undertakings might be in difficulties or bankrupt does not affect the obligation of recovery of incompatible aid <sup>(36)</sup>. In such circumstances the restoration of the situation on the market before the aid was granted and, thereby, the elimination of the distortion of competition may, in principle, be achieved by registration of the liability relating to the repayment of the aid in the schedule of liabilities <sup>(37)</sup>. Where the State authorities are unable to recover the full amount of aid, the registration of the liability meets the recovery obligation only if the insolvency proceedings result in the winding up of the undertaking concerned, i.e. the definitive cessation of its activities <sup>(38)</sup>.

## 6. CONCLUSION

- (141) Measure 2 is exempt from the State aid provisions of the Treaty on the basis of Article 346(1)(b) thereof. Also the parts of measures 1 and 3 apportioned to the military production of HDS are exempt from the State aid provisions of the Treaty on the basis of Article 346(1)(b) thereof.
- (142) Measures 1 and 3, to the extent that they benefited the civil production of HDS, constitute State aid within the meaning of Article 107(1) TFEU. Greece unlawfully implemented this State aid in breach of Article 108(3) TFEU and it is incompatible with the internal market. The amounts apportioned to the civil production of HDS must be recovered.

HAS ADOPTED THIS DECISION:

### Article 1

The public grant provided by Greece to Hellenic Defence Systems S.A. in 2003 for the implementation of an investment plan for the modernisation of the Aeghion industrial facility is exempt from the State aid provisions of the Treaty on the Functioning of the European Union on the basis of Article 346(1)(b) thereof.

The measures granted to Hellenic Defence Systems S.A., to the extent the measure relates to its military production, in the form of (i) State guarantees during the period 2004-2011 and (ii) the State's participation to the company's capital increases in 2011 are exempt from the State aid provisions of the Treaty on the Functioning of the European Union on the basis of Article 346(1)(b) thereof.

### Article 2

The State aid granted to Hellenic Defence Systems S.A., to the extent the measure relates to its civil production, in the form of (i) State guarantees during the period 2004-2011 and (ii) the State's participation to the company's capital increases in 2011 was unlawfully granted by Greece in breach of Article 108(3) of the Treaty on the Functioning of the European Union and is incompatible with the internal market.

<sup>(36)</sup> Judgment of the Court of Justice of 14 September 1994, *Spain v Commission* ('Merco'), C-42/93, ECLI:EU:C:1994:326, paragraph 33; Judgment of the Court of Justice of 17 November 2011, *Commission v Italy*, C-496/09, ECLI:EU:C:2011:740, paragraph 72.

<sup>(37)</sup> Judgment of the Court of Justice of 29 April 2004, *Germany v Commission* ('SMI'), C-277/00, ECLI:EU:C:2004:238, paragraph 85.

<sup>(38)</sup> Judgment of the Court of Justice of 11 December 2012, *Commission v Spain* ('Magefesa'), C-610/10, ECLI:EU:C:2012:781, paragraph 104 and the case-law cited.

*Article 3*

1. Greece shall recover the incompatible aid referred to in Article 2 from the successor of the beneficiary, i.e. Hellenic Civilian Production Systems Industrial Commercial Ltd
2. The sums to be recovered shall bear interest from the date on which they were put at the disposal of the beneficiary until their actual recovery.
3. The interest shall be calculated on a compound basis in accordance with Chapter V of Commission Regulation (EC) No 794/2004 <sup>(39)</sup> and Commission Regulation (EC) No 271/2008 <sup>(40)</sup> amending Regulation (EC) No 794/2004.
4. Greece shall cancel all outstanding payments of the aid referred to in Article 2 with effect from the date of adoption of this Decision.

*Article 4*

1. Recovery of the aid referred to in Article 2 shall be immediate and effective.
2. Greece shall ensure that this Decision is implemented within 4 months following the date of notification of this Decision.

*Article 5*

1. Within 2 months following notification of this Decision, Greece shall submit the following information:
  - (a) the total amount (principal and recovery interests) to be recovered from the beneficiary;
  - (b) a detailed description of the measures already taken and planned to comply with this Decision;
  - (c) documents demonstrating that the beneficiary has been ordered to repay the aid.
2. Greece shall keep the Commission informed of the progress of the national measures taken to implement this Decision until recovery of the aid referred to in Article 2 has been completed. It shall immediately submit, on simple request by the Commission, information on the measures already taken and planned to comply with this Decision. It shall also provide detailed information concerning the amounts of aid and recovery interest already recovered from the beneficiary.

*Article 6*

This Decision is addressed to the Hellenic Republic.

Done at Brussels, 20 November 2017.

*For the Commission*  
Margrethe VESTAGER  
*Member of the Commission*

---

<sup>(39)</sup> Commission Regulation (EC) No 794/2004 of 21 April 2004 implementing Council Regulation (EU) 2015/1589 laying down detailed rules for the application of Article 108 of the Treaty on the Functioning of the European Union (OJ L 140, 30.4.2004, p. 1).

<sup>(40)</sup> Commission Regulation (EC) No 271/2008 of 30 January 2008 amending Regulation (EC) No 794/2004 implementing Council Regulation (EC) No 659/1999 laying down detailed rules for the application of Article 93 of the EC Treaty (OJ L 82, 25.3.2008, p. 1).