

COMMISSION

COMMISSION DECISION

of 21 April 1999

concerning aid granted by Greece to two fertiliser companies

(notified under document number C(1999) 1120)

(Only the Greek text is authentic)

(Text with EEA relevance)

(2001/88/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 given notice to the parties concerned to submit their comments in accordance with the same Article ⁽¹⁾, and having regard to those comments,

Whereas:

I

The Commission's attention was drawn by a complaint to aid given by the Greek authorities to two fertiliser companies: Protypos Ktimatikif Touristiki Ltd, also known as Moretco (Model Real Estate and Tourism Co., (PKT)), and Anonimi Eteria Biomihania Azotouhon Lipasmaton, also known as AEVAL (Nitrogen Fertiliser Industry Ltd (NFI)).

On 3 October 1996, the Commission decided to initiate the procedure provided for in Article 93(2) of the EC Treaty with respect to the aid under consideration. The Greek authorities were informed by letter of 16 October 1996 that the procedure had been initiated. Their reply was received by the Commission in a letter dated 7 January 1997, which was registered on 15 January.

The text of the letter to the Greek authorities was published in the *Official Journal of the European Communities* ⁽²⁾ and prompted reactions from three interested parties, namely two European industrial associations in the field concerned and a chamber of commerce from one Member State. The views of the interested parties were conveyed to the Greek authorities for their observations in a letter of 23 September 1997. In this letter, the Commission also asked for further information regarding

certain specific points in the case. The Greek authorities' reply was received in a letter dated 21 November 1997.

II

A. THE RECIPIENTS

PKT and Drapetsona Fertilisers (DF)

According to the Commission's original information as submitted when the procedure was launched, until 1992 PKT was called Anonimi Elliniki Eteria Himikon Proiondon ke Lipasmaton (Hellenic Chemical Products and Fertilisers Ltd (AEEHPL)). This company was placed in the hands of the receiver for failing to pay off an outstanding debt of GRD 18 billion to the National Bank of Greece (NBG). Its fixed assets were bought by the NBG for GRD 9 billion and used to set up PKT. At the same time, the bank wrote off the remaining GRD 9 billion of unpaid debt.

The assets were transferred to PKT on certain conditions, of which the main ones were that it should continue to operate the fertiliser factory on a temporary basis and later refund the purchase price of the assets to the NBG. According to the available information, the factory continued to operate and the NBG allowed unlimited time for payment of the first instalments.

Furthermore, PKT was in a poor financial position. The balance sheets for 1994 and 1995, covering the first two years of operation, show that losses greatly exceeded the company's equity, with the result that its overall net position came out as negative from the first year. The second financial year also closed with substantial losses even though PKT had, on 30 November 1995, ceased to engage in fertiliser production, which was taken over by a newly established subsidiary, Lipasmata Drapetsonas (Drapetsona Fertilisers (DF)). In 1995, DF registered losses of GRD 1,3 billion, reducing its equity to approximately GRD 1,2 billion.

⁽¹⁾ OJ C 82, 14.3.1997, p. 5.

⁽²⁾ footnote 1.

NFI

According to the information which the Commission holds and which was submitted to it when the procedure was launched, NFI belongs to the Agricultural Bank of Greece (ABG), which is controlled by the Greek State. NFI has been running at a loss since 1992. In 1993, its equity came, in practice, to nil. From then on the equity became largely negative, owing to further losses. There was doubt as to whether the company could meet its short-term obligations, as a serious liquidity problem had already arisen in 1994.

B. THE AID

These proceedings have been initiated in respect of the following measures:

- The writing off of the abovementioned GRD 9 billion debt by the NBG and the indefinite postponement of payment of at least the first instalment of the refund of the purchase price of GRD 9 billion paid by the NBG.
- The loan of GRD 500 million made to PKT by the NBG on 7 September 1995 and the corresponding State guarantee granted on 18 October 1995.
- The loan of GRD 1,2 billion made to DF by the NBG on 16 January 1996, and the corresponding State aid; this loan was intended to cover the losses the company sustained in 1994 (GRD 500 million) and 1995 (GRD 700 million), although, it should be noted, the company had not yet been set up at that time.
- The loan of GRD 600 million also made to DF by the NBG in 1996, and the corresponding State aid granted on 30 July 1996.
- The capital injection of GRD 1 billion which the ABG carried out in favour of NFI and the support given by National Electricity Board in not enforcing payment of the outstanding debts of GRD 4,5 billion.
- The quota system brought into operation in 1995 by Synel, a fertiliser marketing organisation in Greece which is controlled by the State-owned bank ABG, for the purpose of ensuring a certain level of outlet and turnover for PKT/DF and NFI which they would not have been able to achieve under ordinary market conditions.

III

The interested third parties unanimously backed the Commission's position, stressing the difficulties which Community producers face on the Greek fertiliser market because of the State support which certain local companies receive.

IV

The position of the Greek authorities in these proceedings can be summarised as follows:

- (a) The NBG did not write off any of AEEHPL's debts. The assets of that company, which was placed in the hands of the receiver, have already been liquidated, virtually in their entirety. The NBG was admitted as a creditor both for claims prior to the commencement of receivership and in respect of loans granted while the company was being wound up.
- (b) Payment of the purchase price for the factory by PKT was made following an increase in its equity by an amount equal to each annual instalment, with the amount of the increase covered by its shareholder the NBG. The first three instalments (1995 to 1997) were paid normally and the balance will be paid on the agreed payment dates. The statements of discharge in respect of these payments have been passed on to the Commission.
- (c) The difficulties faced by PKT and subsequently DF were due to the annulment by the Council of State of the Government order granting the then AEEHPL company authorisation to modernise its plant. Following the annulment, the State ordered certain production units to cease operating for environmental reasons (contaminating activity in a densely populated area). This led to a 50 % fall in production, which meant that enough sales could not be made to reach break-even point.

The purpose of the NBG loans and the Greek State guarantees was to enable the company to cope with the operating difficulties it was facing after certain production units were shut down. Furthermore, the factory is operating on a temporary basis, as the Prefecture of Piraeus has ordered it to cease operating for good by 31 July 2000 at the latest. In other words, the object of the State contribution was to enable the firm to restructure while scaling down production for environmental reasons.

The Greek authorities consider that the aid measures under consideration may be regarded as compatible with the Treaty by virtue of the exemptions allowed in Article 92(3)(a) and/or (c) and in the Community rules on State aid for environmental protection⁽³⁾, particularly point 3.4, which refers to operating aid.

- (d) The aid does not affect trade between Member States, since Greece's share of this trade is only minimal, fluctuating between 0,4 % and 1,1 %.
- (e) As regards NFI, in February 1995 its chief shareholder, the ABG, increased its equity so that it could launch an investment plan to modernise its plant with a view to manufacturing new products. By increasing production the company hoped that it would improve its financial situation. The scheme did not produce the results hoped for and the company failed to overcome its financial difficulties; in August 1997, in fact, it was forced to close down its operations. The bank's contribution does not fall within the category of State aid since the bank's object in investing in its subsidiaries is to maximise its profits.

⁽³⁾ OJ C 72, 10.3.1994, p. 3.

(f) Synel is a private company. At no time (since 1992, when the fertiliser market was liberalised) has it imposed production quotas on the fertiliser manufacturers who supply it. Payment terms are fixed by agreement and may vary depending on the quantities of fertiliser purchased. Synel is a nationwide company with customers all over Greece; the factor which determines its choice of suppliers is therefore the comparative advantage of their physical location. Thus, PKT/DF is more competitive in terms of the cost of transporting the product to Central and Southern Greece, since its competitors are established in Northern Greece.

V

A. THE EXISTENCE OF STATE AID WITHIN THE MEANING OF ARTICLE 92(1) OF THE TREATY

Operations by the NBG, the Greek State, the ABG, the National Electricity Board and Synel need to be considered in this context.

(a) *The actions of the NBG*

According to the complaint in this case, the NBG is indirectly controlled by the Greek State. Another complaint tangentially related to this case and also referring to the activities of the NBG claims that the bank is to all intents and purposes identical with the Greek State, since to a large extent the shares in it belong to the State and to legal persons governed by public law.

According to the information in the second complaint, although it is true that the State holds approximately 5 % of the bank's capital, holdings by organisations controlled by the State come to 43,67 %. Therefore the total State holding is 48,779 %. The remaining 51,221 % is divided up among a great many shareholders who have no real control over the running of the bank.

According to the same source, the board of directors is elected by the general meeting of shareholders. However, at least four of the total of 15 board members, namely the governor and the three deputy governors of the bank, who are simultaneously the chairman and vice-chairmen of the board respectively, are appointed by the Government before appearing before the general meeting. Other members of the board represent public interests, as, for example, a bishop representing the Greek Church, which, under the Constitution, is not separate from the State.

In other cases (particularly State aid cases NN 137/97 and NN 138/97 — Greece), the Commission has asked the Greek authorities whether the NBG is a public-sector or private-sector body. From the answers received, particularly those from the bank, it emerges that under Article 91 of Law No 1892/1990

the NBG is no longer within the public sector, since the State no longer holds either the whole of its capital or a majority stake in it. Direct State participation in the bank's capital comes to 5,097 %, while total State participation comes to 49,194 %. The shares held by the public sector do not confer any special rights.

The board of directors is elected freely and is controlled by the general meeting of shareholders. All the provisions entitling the State to appoint certain members of the board were repealed by Law No 2076/1992. The same law also repealed the provisions requiring public-sector organisations to be represented at the general meeting of shareholders by the Ministries of Finance, Labour, etc., or by a shared representative. Consequently, the Greek authorities maintain that it can no longer be argued that the acts of the bank's governing bodies are acts of the State. The bank's decisions do not, therefore, constitute State aid.

The Commission takes into account the composition of the bank's capital, the larger share of which belongs to the private sector. In so far as none of the information passed on to it shows that a majority of the members of the board of directors of the NBG are representatives of the public sector, the Commission concludes that the bank is not controlled by the Greek State.

The board of directors' decisions do not, therefore, fall within the scope of Article 92(1) of the Treaty. The Commission has already notified the Greek authorities of this conclusion, in the context of another case, on 24 April 1997. Consequently, neither the possible writing off of the GRD 9 billion debt in favour of AEEHPL nor the possible deferment of PKT's debt payments to the NBG — which the Greek authorities deny took place — constitutes a State aid measure. The Commission can therefore close the procedure in respect of those matters and of the loans granted to PKT and DF. It remains to be considered, however, whether the bank would have granted loans to those two firms if there had not been the State guarantees.

(b) *The State guarantees in favour of PKT and DF*

These guarantees were given by ministerial decisions of 16 October 1995 and 16 January and 23 June 1996, and were published in the Greek Government Gazette ⁽⁴⁾. As these were ad hoc measures, they favour certain undertakings or certain production units within the meaning of Article 92(1) of the EC Treaty.

In the course of the procedure, the Greek authorities have given an assurance that no guarantee was ever given for the GRD 500 million loan in 1995. The authorities produced a letter from the Ministry of Finance to the Ministry of Economic Affairs, dated 7 October 1997, which showed that the guarantee for the loan in question was withdrawn for lack of first-rate security. It has to be concluded, then, that the PKT did not receive a State guarantee for a loan of GRD 500 million. The Commission is therefore able to close the procedure relating to this matter.

In their observations in the course of the procedure, the Greek authorities have not denied that the guarantees in favour of the PKT (evidence of the cancellation of which was produced only later) and DF did constitute aid. They consider that they constituted operating aid granted for the purpose of meeting environmental requirements.

⁽⁴⁾ Refs FEK 876, 20.10.1995; FEK 34, 19.1.1996; FEK 658, 30.7.1996.

The Greek authorities also maintain that the State contributions under consideration did not have any impact on trade between Member States, since Greece's share in that trade was limited in scope, as described by the Commission in the course of the procedure. It might, therefore, be concluded, although the Greek authorities, contradicting their own line of argument, do not do so, that the measures in question do not constitute aid within the meaning of Article 92(1) of the Treaty.

This argument does not stand up Greece does in fact have a share, albeit slight, in intra-Community trade, as the Commission stated in initiating the procedure. The Commission there showed that trade on the Community fertiliser market was substantial: 16.8 million tonnes in 1992 and 19,5 million tonnes in 1994. Greece's exports to the other Member States accounted (in terms of volume) for 0,66 % of the intra-Community trade in 1993 and 0,44 % in 1994. Still in terms of volume, Greece's imports came to 1,1 % of the intra-Community trade in the sector in 1993 and 0,89 % in 1994. The Commission concluded its survey of the fertiliser market with the information that imports from other Member States meet from 10 % to 15 % (depending on estimates) of the country's requirements.

The importance of the trade has also been stressed by third parties who have played a part in the procedure. According to one of the European fertiliser producers' associations involved in this case, Greece's fertiliser imports fluctuate between 350 000 and 400 000 tonnes, of which 150 000 tonnes involve types of fertilisers produced in Greece. Of these 150 000 tonnes, 90 % comes from members of the association in question.

Furthermore, according to another producers' association involved in the procedure, Greece imported 63 700 tonnes of fertiliser from other Member States in 1996, which comes to roughly 5 % of domestic consumption.

In so far as the Greek authorities acknowledge that DF used to export part of its production to the other Member States, the Commission concludes that the State intervention for the purpose of sustaining the company's viability had an effect on its production and, therefore, on its exports. Consequently, the State intervention in question affects trade between Member States.

As regards distortion of the rules of competition, the 1997 *Survey of Community Industry* ⁽⁵⁾ reports that the fertiliser trade in Western Europe shrank in the first half of the 1990s, hit by a fall in consumption and slightly higher prices. The financial situation of producers in Western Europe deteriorated with the rise in imports into the European Union and competition on overseas markets from producers in Central and Eastern Europe.

This development led to many factories restructuring or closing down more rapidly. The trend continues in certain Member States even today. In 1983, the Community fertiliser industry

employed 140 000 people, while in 1995 the figure had dropped to 20 000.

Since the mid-1990s, the industry has recovered its competitiveness and is once again technically and financially in a position to service the European market in terms of the quantities and qualities of fertiliser in demand. According to the forecasts, the market appears stable for the near future. This trend was apparent in 1995, as the *Survey of Community Industry* for that year ⁽⁶⁾ reported that production would stabilise over the coming few years, following a number of years of excess production capacity and low demand.

In so far as the purpose of the State intervention is to speed up the restructuring of the industry in question in Greece, while the process has already been carried through in the other Member States or is still under way in some of them, the Commission concludes that the aid distorts competition.

This view is shared by the interested third parties who have submitted comments, who have also stressed that they suffer from a comparative disadvantage compared with undertakings in receipt of aid, since State support enables the latter to carry on selling at a loss.

According to figures supplied by these third parties, which the Greek authorities have not disputed, the difficulties faced by PKT and DF did not prevent them (or NFI) from selling their output, in 1994 and 1995, at prices from 9 % to 25 % below the prevailing market prices. According to the same source, this was because the firms in question pursued a steady policy of systematically charging lower prices than those charged by other suppliers. It should not be forgotten that this grievance was among those which first prompted the complainant to act in this case.

It is therefore concluded that the aid in the form of State guarantees affects trade between the Member States. The State guarantees in favour of DF therefore constitute State aid caught by Article 92(1) of the EC Treaty.

Although this analysis is in itself sufficient to demonstrate that the measures under consideration are State aid, the Commission has felt it advisable to add further comments on certain contentions put forward by the Greek authorities. The Greek authorities do refer to figures which could be taken as grounds for supposing that the guarantees in question are not aid within the meaning of Article 92(1) of the Treaty. At no point, however, do they explicitly make any such assertion.

In their letter of 21 November 1997, the Greek authorities say that when DF was wound up its assets were sufficient, on being auctioned off, to cover not only its liabilities to the NBG but also its liabilities to third parties. Furthermore, again according to the Greek authorities, the objective value of DF's real estate and other immovable property came to GRD 16,34 billion. This is certified by a declaration submitted to the Piraeus Revenue Office.

⁽⁵⁾ Office for Official Publications of the European Communities, 1997.

⁽⁶⁾ Office for Official Publications of the European Communities, 1995.

This declaration actually dates from 1993 and is not consistent with the purchase price paid by the NBG (or PKT) for the assets in question, i.e. GRD 9 billion, also in 1993. According to the Greek authorities, the purchase of the property by the NBG took place on the basis of a public call for bids. Consequently, the second of these figures must be taken, where necessary, as a market estimate for 1993. In fact, a sum of that order was entered in the PKT balance sheet.

The Greek authorities say that any charge registered on DF's property in respect of the loans made to DF by the NBG is therefore covered without difficulty by the objective value of the company's land and other immovable property. They state, lastly, that the value of the NBG's charge on DF's property was GRD 5 billion. Furthermore, in their letter of 7 January 1997, the Greek authorities certify that no problem ever arose with the company's creditworthiness, without it being possible to ascertain whether they mean PKT or DF; they say that thanks to the company's turnover and the property available for liquidation which it was able to mortgage, it was in a position to obtain the requisite working capital from any bank.

Remembering that the Greek authorities at no point assert that the security which DF was able to offer would have enabled it to obtain the loans intended for covering its losses without needing to have recourse to a State guarantee, the matters referred to above require a detailed commentary.

To begin with, DF, which was set up exclusively for the purpose of exploiting the factory, uses the plant belonging to PKT on leasehold terms and is not, therefore, the owner. This is demonstrated by a reading of DF's balance sheets, which do not contain any reference to land or buildings under immovable assets. DF does not, therefore, possess GRD 16,34 billion in fixed property assets. This makes one wonder how DF's slender fixed assets (GRD 36 million in 1995 and GRD 40 million in 1996), particularly when the figure for its equity position is negative, could be enough to cover its debts (GRD 5,67 billion in 1995 and GRD 7,5 billion in 1996). The current figures for property assets are slightly higher, but still not enough (GRD 4,45 billion in 1995 and GRD 4,5 billion in 1996).

It should also be noted that, in contrast to what happened with the State guarantee on the GRD 500 million loan in favour of PKT, there is no evidence that the Greek State required DF to take out a mortgage on all the Drapetsona Fertilisers factory's immovable property.

One might imagine PKT being guarantor for DF, for example mortgaging part of the abovementioned fixed property assets. That has been neither maintained nor demonstrated by the Greek authorities in the course of this procedure. One might in any case wonder how PKT would have given such a guarantee, when it was unwilling to offer security to the State in return for the State guarantee on the GRD 500 million loan referred to above.

As far as the NBG's notice of a charge on DF Ltd's property assets, to a value of GRD 5 billion, the documents produced by the Greek authorities show that the Mortgage Registry

certified that on 17 July 1995 the NBG had a charge for that amount against the PKT, which was registered in 1994. The charge in question in no way relates to the property assets of DF, which had not yet been set up at that time.

The Greek authorities also explain that the grants of financing to PKT and, from 1996 onwards, DF by the NBG were made on the basis of financial and credit criteria of a purely bank-related kind. The terms (interest rates, security etc.) on the loans granted as working capital are those the NBG usually applies in respect of companies with a creditworthiness similar to that of the undertaking under consideration.

One might legitimately wonder what was the economic rationale behind these loans. The purpose of a grant of working capital to an undertaking is, in reality, to enable it to settle its current debts, not to carry out structural changes in order to improve its position. Furthermore, given that there were plans for the fertiliser factory to be closed down, it is doubtful whether other banking institutions would have made any long-term loans to DF.

In their letter of 21 November 1997, the Greek authorities say that: 'with the guarantees it had been given for loans of GRD 1,2 billion and GRD 0,6 billion respectively, the Drapetsona factory took loans for those amounts from the NBG to cover its losses in 1994, 1995 and 1996'.

This assertion calls for detailed commentary. Firstly, it implies that the loans were given only after the State had consented to act as guarantor for the company. In fact, according to the Greek authorities' letter of 21 November 1997, the loan of GRD 1,2 billion was made to DF on 16 January 1996, the date on which the ministerial decision approving the guarantee was issued. The text of the decision actually uses the future tense to refer to the granting of the loan, stating that 'the loan will be granted and serviced in accordance with the National Bank (NBG) document of 7 September 1995...'. If DF could have obtained this capital from the market without a State guarantee, it is curious that the NBG waited until 16 January 1996, i.e. the very date on which the State guarantee was given, while, according to the instruction quoted above, the terms of the loan had been known since 7 September 1995. It needs to be pointed out once again that DF was not yet in existence on that date, as it was set up on 30 November 1995.

Secondly, the Commission finds it somewhat hard to believe that the NBG does not take into account the financial and credit situation of a company to which it proposes to make a loan or that the bulk of the NBG's clients are in the same financial and credit situation as DF. Like any other bank, the National Bank should, normally speaking, take account of the financial risk attaching to a company in such difficulties and adjust the possible lending terms to allow for that risk. It is therefore perfectly understandable that the NBG should have reserved the same treatment for DF as for other companies, since it had first received the State guarantee which removed all risk to the creditor bank.

It is also somewhat hard to believe the claim that DF had no problems obtaining a loan on normal market terms, since its accounts for 1996 show that it did not succeed in paying off a debt of GRD 3,76 billion which fell due for payment in that year. The only logical explanation is to be sought in a note to the 1996 balance sheet by the auditors stating that the whole of the GRD 3,76 billion was covered by a State guarantee. This means that, in 1996, 87,6 % of the short-term debts to banks represented payments due which were guaranteed by the State.

The 1995 balance sheet already shows that DF faced serious difficulties in repaying its bank loans, as the due date for repayment of a GRD 1,16 billion debt with a State guarantee had already arrived. This by itself represented 82 % of its short-term bank debt. There is no evidence that the remaining amount in short-term bank debts was not also covered by a State guarantee, nor have the Greek authorities put forward any such claim.

In view of the above, the Commission finds that the Greek authorities have failed to show that DF could have obtained loans to cover its operating losses in 1994, 1995 and 1996 without a guarantee from the Greek State.

As a result, the guarantees in question affect trade between the Member States and distort competition. They made it possible for the fertiliser factory to cope with the operating difficulties it was facing, while the cut in production capacity which the State imposed on it made it impossible for it to achieve sufficient sales to reach break-even point.

The guarantees under consideration consequently impede the natural restructuring of the industry in Greece, a process which has already taken place in most of the other Member States, since they temporarily and artificially keep alive a company which is incapable of showing a profit and is irrevocably required to go out of business in 2000. In addition, artificially keeping PKT and DF running makes it impossible for other national or Community producers to assume their share of the market. The guarantees under consideration therefore constitute aid within the meaning of Article 92(1) of the Treaty.

The Greek authorities have been unable to show in the course of this procedure that DF would have been able to obtain loans for the purpose of covering its operating losses in 1994, 1995 and 1996 without the State guarantee, primarily because of the extremely difficult financial position of the beneficiary company. No evidence has emerged during the examination procedure to overturn the view stated when the procedure was launched, that the guarantees coincide with the amount guaranteed minus 1 % commission on the amount of the loan, paid in order to secure the guarantee.

No private individual would have continued to engage in a loss-making activity without a State guarantee, when, what is more, the activity was for a limited period of time and would

entail further losses owing to an inability to achieve sufficient sales to reach break-even point. It is understandable that in the circumstances the shareholder bank, NBG, preferred to advance loans to DF with a State guarantee rather than restructure the company's capital, since in the first case the bank ran no risk of losing its investment.

Having regard to the company's balance sheets and the decisions relating to the granting of the guarantees, the Commission cannot rule out the possibility that all or a substantial part of the State guarantees for the loans obtained by DF have been activated. The orders granting the guarantees provide that the State undertakes to pay the NBG every instalment of the loan which is not repaid within two months following the due date for payment. In addition, according to the 1996 balance sheet, DF had overdue debts of GRD 3,76 billion (including interest) consisting of loans with State guarantees.

(c) *The increase in NFI's capital and the debt to the National Electricity Board*

(i) In February 1995, the ABG, NFI's principal shareholder, increased the company's equity by GRD 1 billion (GRD 1 000 000 041 according to the 1995 balance sheet), so that the company could carry out a programme of investment in modernising its plant with a view to manufacturing new products.

The Greek authorities represent this operation as a normal commercial operation. The investment programme involved installing mechanical equipment to automate the filling-bagging line and the building of a warehouse to store raw and ancillary materials. The company hoped in this way to improve its financial situation through an increase in production. The Greek authorities admit, however, that the programme failed and that the operation in question was a mistaken choice by the ABG.

If we are to conclude that the capital injection under discussion was not State aid, it would have to be shown that the ABG behaved like a private investor in normal market conditions. The principles applied to determine whether a State-owned undertaking behaves like a private investor in market conditions are contained in the Commission communication to the Member States on the application of Articles 92 and 93 of the EEC Treaty and of Article 5 of Commission Directive 80/723/EEC (on the transparency of financial relations between Member States and public undertakings) to public undertakings in the manufacturing sector (⁷).

Examination of NFI's accounts reveals that the company in question began to show losses at least as early as 1992 and went on doing so until 1996, the year of the last balance sheet of which the Commission has a copy. There is, however, no evidence to suggest that the ABG, as investor, could have expected a satisfactory yield on its investment, since it had for many years let the company's position deteriorate without acting in any way.

(⁷) OJ C 307, 13.11.1993, p. 3.

Neither the Greek authorities nor the ABG have sent the Commission any detailed rationalisation plan such as should have been drawn up by the bank in order to restore NFI to long-term viability and which would have shown that the ABG's investment would produce a return. Furthermore, the Greek authorities have sent a copy of a study drawn up by the Ministry of Industry in 1994 on the productivity of the four fertiliser factories in Greece. The study lists NFI's problems and suggests a number of solutions.

The difficulties enumerated include the fact that part of the production units were shut down and stopped operating in 1991, the fact that following the upturn in fertiliser production in 1992, sales were too low to reach break-even point and, most of all, the GRD 4,5 billion debt which the National Electricity Board has been calling in.

As far as the solutions are concerned, the study recommends maintaining the plant (estimated cost GRD 350 million) and modernising it (estimated cost GRD 3,6 million), solving the ammonia procurement problems, improving sales figures on the domestic market, particularly in areas accessible at low transport cost, reaching an agreement with Synel to ensure a certain volume of sales and, lastly, endeavouring to work out an agreement with the National Electricity Board, as requiring the company to pay off the debt would entail an increase in the price of fertilisers which would inevitably cause the company to go out of business.

Because of these difficulties, at the end of 1993 the company's equity position continued to be just barely positive, i.e. GRD 1,6 million as against capital of GRD 3,37 billion. At the end of 1994, it was negative by approximately -GRD 800 million, and at the end of 1995, despite the increase in capital referred to above, it remained negative by roughly GRD 500 million. At the end of 1996 the equity came to -GRD 1,4 billion. The reason for this trend was the accumulation of losses in the various financial years. The company's position apparently deteriorated until it was placed in the hands of the receiver in 1997 ⁽⁸⁾.

According to the balance sheets of which the Commission has copies, Article 47 of Law No 2190/1920 has been applied to NFI at least since 1992. This article provides that the board of directors must convene a general meeting within six months of the end of the trading year if the total equity of a company is less than half its nominal capital. The general meeting must then decide whether to wind up the company or take other steps. So, since the middle of 1993, the ABG should have wound NFI up or taken steps to restructure it. Not until two years later, however, in

November 1995, did the bank decide to restructure the capital of its subsidiary, NFI.

This capital injection does not seem sufficient to make any major change in the company's financial position, since it is equivalent to at least one quarter of the accumulated losses, it does not make for any improvement in the equity position such as to obviate the application of Article 47 to the company, since the equity position remains highly negative, and, lastly, it only just covers the difference between the company's current assets and liabilities. Furthermore, the contribution is not enough to cover the cost of modernising the plant as estimated by the Greek authorities in the study referred to above. What is more, it should be noted that the ABG's investment programme, as described by the Greek authorities, entails nothing more than increasing fertiliser sales, without, apparently, any account having been taken of the remaining points in the study in question.

It should also be noted that, according to the information in the Commission's possession ⁽⁹⁾, the purpose of the capital injection was to finance the purchase of raw materials, not to modernise the plant. At least partial confirmation of this is to be found in the balance sheet for 1995, where there is a note saying that production costs rose by GRD 800 million as compared with 1994, while reserves rose by GRD 200 million. During the same period, equipment and machinery went up by GRD 34 million and buildings and construction by roughly GRD 100 million. If interpreted correctly, this would be a further argument for the view that the purpose of the capital injection was not to alter the company's structure by rationalising its expenditure but to attempt to keep the factory operating and increase production.

In either case, the capital injection into NFI from the ABG was not enough to make the company viable again, while the Commission was not notified of any other rationalisation measure of the kind which the shareholders should have adopted under Greek law and according to the guidelines in the report from the Ministry of Industry. This failure to take additional measures may very well be the reason why the company went bankrupt.

Since the State bank ABG allowed NFI's financial position to deteriorate without taking any action for at least two years and, even when a decision was taken to act, the action was not sufficient to restore the company to viability, it has to be concluded that the bank did not behave like a private investor in normal market conditions. Consequently, the GRD 1 billion increase in NFI's capital has to be regarded as State aid within the meaning of Article 92(1) of the Treaty.

⁽⁸⁾ According to *Fertiliser Week* of 23 March 1998, NFI was put up for sale by the receiver at the beginning of 1998.

⁽⁹⁾ *Fertiliser Week* of 12 June 1995.

- (ii) As regards the measures taken by the National Electricity Board to secure payment of the money owed by NFI, which it puts at GRD 4,5 billion (including interest), the Greek authorities stated that the creditor has availed itself of all legal recourses provided for in law.

The debt relates to consumption of electricity from 1989 to 1991. In 1990, the National Electricity Board instituted an action against NFI before the single-member Athens Court of First Instance. In the context of the present proceedings, the Greek authorities have stated that that case was heard in December 1995 but that no ruling has yet been given ⁽¹⁰⁾.

In addition, the National Electricity Board went to the Greek courts and lodged an application for interim protection measures against NFI. In 1993 it registered notice of a charge on NFI property to the value of GRD 4 billion.

NFI has actually settled part of its debt, for the period from April to December 1991, involving a sum of approximately GRD 800 million.

In view of the above acts, it is concluded that the National Electricity Board has taken the requisite steps to secure collection of the money owed to it by NFI. The Commission is therefore able to close the procedure in relation to that matter.

(d) *The action taken by Synel*

Before the procedure was initiated, the complainant reported that Synel was under the control of the State bank ABG. In the information which it continued to pass on to the Commission after the procedure had been initiated, the complainant made it clear that the control was partial. In a previous decision, in 1992 ⁽¹¹⁾, relating to aid to Synel, the Commission found that it was 30 % controlled by the ABG and 70 % by agricultural cooperative associations. In the context of this procedure, the Greek authorities have stated that Synel is still a private undertaking and its actions do not, therefore, fall within the scope of Article 92(1) of the EC Treaty.

The fact that Synel allows its suppliers different payment terms depending on the amounts of fertiliser purchased, and on the physical location of the suppliers, does not conflict with the rationale of the market. The distortion of competition to which the complainant refers clearly lies in the fact that certain suppliers, particularly PKT, sell their products at a loss.

This is confirmed by one of the interested third parties who submitted comments in the course of the procedure and who maintains that Synel's selling prices on the national market are directly linked to the prices charged by the suppliers.

The Commission reserves the right to investigate this point under any other provisions of the Treaty.

⁽¹⁰⁾ Letter from the Greek authorities dated 21 November 1997.

⁽¹¹⁾ OJ C 266, 15.10.1992, p. 5.

VI

In so far as it has been shown that the State aid for DF and the capital contribution to NFI constitute State aid within the meaning of Article 92(1) of the EC Treaty, it has now to be considered whether they were lawful and compatible with the common market.

All the above aid was granted to the two undertakings without the Commission being notified in advance, in violation of Article 93(3) of the Treaty. The aid is therefore found to be unlawful.

Compatibility of the aid in favour of DF

There were two aid measures, in the form of two State guarantees for loans of GRD 1.2 billion and GRD 600 million respectively.

(a) *Community rules on State aid for environmental protection*

The Greek authorities consider that the aid measures in question are compatible with these rules ⁽¹²⁾, particularly section 3.4. This section provides that the Commission may make an exception to the general rule that it does not approve operating aid which relieves firms of costs resulting from the pollution or nuisance they cause. Such an exception can be made for example in fields such as waste management and relief from environmental taxes. In such cases, the aid must only compensate for extra production costs by comparison with traditional costs, and should be temporary and in principle degressive, so as to provide an incentive for reducing pollution or introducing more efficient uses of resources more quickly.

In their observations on the initiation of this procedure, the Greek authorities stated (in a letter dated 7 January 1997) that, since the factory is operating only temporarily, the object of the State contribution was to meet certain fixed operating costs, for environmental reasons, since the State itself has ordered a permanent reduction in production.

The Greek authorities consider that these fixed costs come to GRD 1,5 billion per annum and relate to the operating of environmental protection plant (filters, waste water processing unit, solid waste disposal: GRD 300 million), purchase of essential materials and spare parts for short-term maintenance (GRD 300 million) and staff costs (GRD 900 million). These costs hardly reduce at all with the cut in production.

Again according to the Greek authorities, the company also reduced its staff: the 820 employees working for it in 1995 were reduced to 520 at the end of 1996 and 450 in 1997. In other words, the purpose of the aid was not to keep an unproductive company in a state of artificial viability but to restructure it as part of moves to reduce production for environmental reasons, until it finally shut down altogether. The shutdown is scheduled to take place in three to five years' time.

⁽¹²⁾ See footnote 3.

In their letter of 21 November 1997, the Greek authorities said that the final shutdown on 31 July 2000 had been ordered by decision of the Prefecture of Piraeus on 18 June 1997. According to this letter, the purpose of the aid was to cover losses arising from the 50 % production cut ordered by the authorities and to enable the staff to be made redundant gradually. The text of the decisions granting the State aid says that the object of the loans and the guarantees is to cover losses over successive financial years.

The exception invoked by the Greek authorities is inapplicable in this particular case. The fact is that since it was the authorities themselves who required the closure of the polluting production units, there are no extra production costs by comparison with traditional costs, as the Community rules require.

Nor can it be maintained that the aid granted is degressive, so as to provide an incentive for reducing pollution or introducing more efficient uses of resources more quickly. These costs will not reduce in the future in such a way as to bring about a less polluting method of production, since there is no plan to introduce such a method. In any case, the purpose of the aid is to cover the company's fixed operating costs, not the additional costs arising from more polluting types of activity with a view to reducing them gradually. What is more, there is no evidence that the aid is degressive if the purpose of it is to cover the company's fixed costs.

In this case, the factory's difficulties arise from the fact that the production cut ordered by the State on grounds of pollution has not been accompanied by any reorganisation of the company's activity to take account of the new operating conditions. Any such reorganisation would certainly have been pointless, as the plan since the time the PKT was set up in 1993 had obviously been that the factory should cease operating completely within the next few years.

(b) *Community guidelines on State aid for rescuing and restructuring firms in difficulty* ⁽¹³⁾

Although the Greek authorities do not invoke the above guidelines, they mention many failed attempts at restructuring and the difficulties faced by the Drapetsona factory. So the possibility that they are referring at least indirectly to this set of guidelines cannot be ruled out.

DF, the PKT subsidiary set up in November 1995, took over PKT's fertiliser production business while PKT occupied itself with developing real estate. PKT is still the owner of the plant, which it rents to DF. Although it was set up in November 1995, DF published accounts covering the period from 31 January to 31 December 1995. Its turnover is more or less the same as that achieved by PKT between 9 March 1993 and 31 December 1994. Furthermore, it appears that DF took over part of PKT's liabilities, but not of its assets. In these circumstances, the Commission doubts whether DF, which assumed only an undefined portion of PKT's liabilities, can be regarded as a company in difficulty within the meaning of the guidelines referred to above. And even if it were regarded as being in difficulty, the Commission considers, only in the alternative,

that the conditions for assessing the aid as compatible are not met.

DF inherited an unspecified part of PKT's financial burdens and continued to show losses since its operating expenditure did not cover actual turnover. To add to this already difficult situation, DF's debts increased. Thus, in the financial year 1995, DF made losses of GRD 1,3 billion, followed by approximately GRD 2,5 billion in 1996. For the whole duration of its existence the company came under Article 47 of the above-mentioned Law No 2190/1920, since it never showed a positive net position. The company was finally wound up in August 1997.

The aid in the form of State guarantees under consideration here cannot be regarded as rescue aid compatible with the guidelines, since it is not confined to whatever is essential to the running of the undertaking but covers part of the fixed costs and/or the operating losses, even if its purpose is to keep the recipient company viable.

In any case the aid greatly exceeds the time limit (generally speaking, six months) for the drafting of rationalisation measures under the guidelines in question. In this particular case, the guarantees covered loans for a period of two and a half years in the first instance and one and a half in the second, during which times no rationalisation measures whatever were drawn up or, at any rate, the Commission was not notified of anything to that effect.

Lastly, rescue aid must be an exceptional operation. In this case, however, the operation was repeated at least once, so as to cover losses over successive financial years.

As regards the compatibility of the aid as restructuring aid, it should be pointed out that the Commission was not notified of any restructuring plan which would have enabled the factory to be restored to long-term viability.

Furthermore, according to the information given in the Greek authorities' letter of 7 January 1997, it appears that the decision to close the factory's operations down for good had already been taken before the Prefecture of Piraeus issued its decision to that effect on 18 June 1997. Even before that decision was issued the letter referred to above states it as a given fact that the factory was merely operating on a temporary basis until the expected shutdown of operations in three or five years' time.

Both the Greek authorities and the complainant agree on at least one point, which is that the object of PKT was to develop land with a view to building. The purchase of the land on which the factory stands should logically be seen in conjunction with the business objectives of PKT, which wanted to use the land on which the factory had been built. It therefore makes no sense to refer to the long-term viability of the undertaking managing the factory (DF), since the undertaking itself was already in an extremely parlous condition and there were already plans to shut down operations and wind the company up. The fact that DF was placed in the hands of the receiver in 1997 seems the natural consequence of the condition the undertaking was in.

⁽¹³⁾ OJ C 368, 23.12.1994, p. 12.

Since the condition that a restructuring plan to make the company viable again should be submitted to the Commission was not complied with, there is no need to examine the other conditions laid down by the guidelines. The aid measures in the form of guarantees cannot, therefore, be approved as restructuring aid.

(c) *Operating aid*

The aid under consideration cannot be regarded as regional investment aid either, since the purpose of it was not to carry out productive investment. It must therefore be regarded as operating aid.

Operating aid may be granted only in the areas stated in Article 92(3)(a) of the Treaty. This article covers the whole territory of Greece. In its communication on the method for the application of Article 92(3)(a) and (c) to regional aid ⁽¹⁴⁾, the Commission accepts that operating aid may be given on certain conditions, as follows:

- (i) that the aid is limited in time and designed to overcome the structural handicaps of undertakings located in Article 92(3)(a) areas;
- (ii) that the aid is granted to promote the durable and balanced development of economic activity and does not lead to surplus production capacity in particular sectors at the Community level, such that the resulting Community sectoral problem is more serious than the original regional problem;
- (iii) that aid is not granted in violation of the specific rules on aid granted to companies in difficulty;
- (iv) that an annual report on how the aid is applied is sent to the Commission, showing total expenditure by type of aid and the sectors to which the aid relates;
- (v) that aid designed to promote exports to other Member States is excluded.

Having regard to what has been said above as regards the possibility of applying the Community guidelines on State aid for the rescuing and restructuring of companies in difficulty, the third condition has clearly not been met. It is also doubtful whether the aid can possibly promote the durable and balanced development of economic activity when it is borne in mind that, because there was no restructuring, there would obviously be a deterioration in the position of the company, even without considering the announcement that the factory was to shut down.

Since the aid measures in the form of guarantees to DF covering loans of GRD 1,2 billion and 600 million respectively cannot be approved as operating aid, they cannot be covered by the exemption laid down by Article 92(3)(a) of the Treaty. Nor can they be exempted under Article 92(3)(b), since their purpose is not to promote the execution of an important project of common European interest.

Furthermore, the aid under consideration cannot be allowed the exemption laid down in Article 92(3)(c), since it does not meet the conditions for approval as aid for the rescuing or restructuring of companies in difficulty. Lastly, it is not eligible for exemption under Article 92(3)(d), since its purpose is not to promote culture and heritage conservation.

Nor can the exemptions laid down by Article 92(2) of the Treaty be allowed, since the aid was not granted to individual consumers or to make good the damage caused by natural disasters or exceptional occurrences.

The aid in question is therefore not compatible with the common market.

Compatibility of the aid in favour of NFI

As stated above, at the end of financial year 1993, the company's equity position was still positive, by GRD 1,6 million as compared with nominal capital of GRD 3,37 billion. At the end of 1994, the position was negative by approximately -GRD 800 million, and at the end of 1995, despite the increase in capital referred to above, it remained negative by some -GRD 500 million. At the end of 1996, the net position was negative by -GRD 1,4 billion. Consequently, the undertaking in question must be regarded as being in difficulty within the meaning of the Community guidelines on State aid for rescuing and restructuring companies in difficulty and the capital injection of GRD 1 billion has to be regarded as restructuring aid.

The aid was intended for modernising the plant with a view to manufacturing new products (artificial fertilisers). More specifically, the investment programme comprised installing mechanical equipment to automate the loading-bagging line and the construction of a warehouse for raw and ancillary materials.

Furthermore, apart from the simple reference to the fact that the purpose of the investment was to improve the company's financial position by means of an increase in production, no forecast yield was notified to the Commission. The only indication of the favourable results which the ABG expected for its subsidiary NFI which the Greek authorities communicated to the Commission was a copy of the company's annual production record which was clearly put together after the company ceased operating on 18 July 1997.

The Commission was not sent any restructuring plan regarding the restoration of the company to a state of long-term viability within a reasonable period of time, on the basis of realistic assumptions as to future operating conditions. Where DF is concerned, since the condition that a restructuring plan for the restoration of viability should be submitted to the Commission was not met, it is not necessary to examine the other conditions laid down by the Community guidelines on State aid for the rescuing and restructuring of companies in difficulty. As this *sine qua non* under the guidelines was not complied with, the aid cannot be allowed the exemption laid down by the rules, i.e. that provided for in Article 92(3)(c).

⁽¹⁴⁾ OJ C 212, 12.8.1988, p. 2.

On exactly the same grounds as those invoked with respect to DF, the aid cannot be approved as operating aid. Again, on the same grounds, the exemptions provided for in Article 92(3)(b) and (d) cannot be allowed. The same argument applies to the exemptions provided for in Article 92(2). Consequently, this aid is not compatible with the common market either.

VII

The Commission finds that Greece unlawfully applied the aid for DF and NFI in violation of Article 92(3) of the Treaty.

Where aid is incompatible with the common market under Article 93(2) of the EC Treaty, as confirmed by the judgments of the Court of the Justice of the European Communities on 12 July 1973 in Case 70/72 *Commission v Germany* ⁽¹⁵⁾, on 24 February 1987 in Case 310/85 *Deufl v Commission* ⁽¹⁶⁾ and on 20 September 1990 in Case C-5/98 *Commission v Germany* ⁽¹⁷⁾, the Commission is required to ask the Member State to recover from the recipient all aid unduly granted. The aid measures in question must therefore be repealed and, if the aid has already been paid, it must be recovered by the Greek authorities.

As regards the State guarantees in favour of DF, for the reasons stated above, they are guarantees of which the aid element coincides with the amount of the guaranteed loan, as stated when the procedure was initiated.

The Greek authorities must recover the corresponding amounts from DF, after the commission of 1 % of the amount of the loans paid by the company to secure the State guarantee has been deducted.

As regards the capital injection of GRD 1 billion to NFI, the Greek State must recover the amount in question from the company,

HAS ADOPTED THE FOLLOWING DECISION:

Article 1

The State guarantees in favour of Lipasmata Drapetsonas (Drapetsona Fertilisers) AE to cover two loans of GRD 1,2 billion and GRD 600 million respectively, granted pursuant to ministerial decisions of 16 January 1996 and 23 June 1996, constitute State aid within the meaning of Article 92(1) of the Treaty.

The capital injection of GRD 1 billion by the Agrotiki Trapeza Ellados (Agricultural Bank of Greece) into its subsidiary Viomihania Azotouhon Lipasmaton (Nitrogen Fertiliser Industry in

1995) also constitutes State aid within the meaning of Article 92(1) of the Treaty.

The aid measures in question are hereby found to be unlawful in that they were put into effect without prior notification to the Commission, in violation of Article 93(3) of the Treaty.

Article 2

The aid measures in question are, furthermore, incompatible with the common market, in that they do not qualify for any of the exemptions provided for in Article 92(2) and (3) of the Treaty.

Article 3

Greece shall take the measures necessary to recover the aid referred to in Article 1. Recovery from Lipasmata Drapetsonas shall be effected after deduction of the commission, equivalent to 1 % of the sums guaranteed, which the company in question was required to pay in order to secure the State guarantees.

Article 4

Recovery shall be effected in accordance with the substantive and procedural requirements of Greek law. The sums to be recovered shall bear interest from the date on which the aid was disbursed until its actual recovery. The interest shall be calculated on the basis of the reference rate used to determine grant equivalent under the regional aid system in Greece.

Article 5

Within two months of notification of this Decision, Greece shall inform the Commission of the measures it has taken to comply with it.

Article 6

This Decision is addressed to the Hellenic Republic.

Done at Brussels, 21 April 1999.

For the Commission

Karel VAN MIERT

Member of the Commission

⁽¹⁵⁾ [1972/1973] ECR 609.

⁽¹⁶⁾ [1987] ECR 901.

⁽¹⁷⁾ [1990] ECR I-3437.