

COMMISSION DECISION

of 2 July 2008

on the measures C 16/04 (ex NN 29/04, CP 71/02 and CP 133/05) implemented by Greece in favour of Hellenic Shipyards

(notified under document C(2008) 3118)

(Only the Greek text is authentic)

(Text with EEA relevance)

(2009/610/EC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community, and in particular the first subparagraph of Article 88(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 ⁽¹⁾ and having regard to their comments,

Whereas:

1. PROCEDURE

- (1) By letter dated 9 September 2003, the Greek authorities submitted to the Commission an application by Hellenic Shipyards S.A. (hereafter 'HSY') for amendments to the investment plan for its restructuring, in favour of which aid was authorised by Commission decision of 15 July 1997 in case N 401/97 ⁽²⁾ (hereafter 'decision N 401/97'). According to the amended plan, dated November 2002, HSY applied for, and eventually received the approval of the Greek authorities to complete the implementation of the investment plan by 30 June 2004. Moreover, according to the amended plan, the aid approved by the Commission in 1997, has not yet been paid out to HSY.
- (2) By letter dated 31 October 2003, the Greek authorities explained that the amended plan was communicated to the Commission 'for its information', and was not meant to be a notification.
- (3) By letter dated 18 November 2003, the Commission asked the Greek authorities to clarify whether they intended to grant or disburse aid to HSY for the purposes of the amended investment plan. In the same letter, the Commission reminded the Greek authorities that in such a case, and in accordance with Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 93 of the EC Treaty ⁽³⁾ (hereafter 'Regulation (EC) No 659/1999') this aid should be notified to the Commission and should not be implemented before the Commission has taken a formal decision in that respect.
- (4) By letter dated 16 January 2004 the Greek authorities stated that the aid they intend to grant is 'existing aid', covered by the terms of the Commission's approval decision of 1997, and that the Greek authorities have jurisdiction to approve amendments to the restructuring plan, including the prolongation of the timetable for the plan's implementation.
- (5) By letter dated 20 February 2004, the Commission communicated to the Greek authorities its doubts regarding the validity of the above statements.
- (6) By letter dated 27 February 2004, the Greek authorities stated that no aid had been granted to HSY to that date.
- (7) By decision C(2004) 1359 of 20 April 2004 ⁽⁴⁾ (hereafter 'the opening decision'), the Commission initiated the procedure laid down in Article 88(2) of the Treaty with respect to the amendments made to the investment plan which is partly financed by the investment aid authorised by decision N 401/97. The opening decision indicates also that the State-owned bank Hellenic Bank of Industrial Development (hereinafter 'ETVA') granted several loans and guarantees to HSY and that the Greek authorities have not provided yearly reports as they should have done.
- (8) After having requested and received extensions of the deadline to submit comments, Greece submitted comments on the opening decision by letter of 20 October 2004.
- (9) The Commission decision to initiate the procedure was published in the *Official Journal of the European Union* ⁽⁵⁾. The Commission invited interested parties to submit their comments on the measures.
- (10) After having requested and received extensions of the deadline to submit comments, HSY made comments on the opening decision by letter of 18 October 2004. These comments are the same as the ones submitted by Greece on 20 October 2004. Elefsis, a Greek competitor of HSY, submitted comments by letter of 10 September 2004. These comments were sent to Greece by letters of 16 December 2004 and 23 December 2004, which

- replied respectively by letters of 20 January 2005 and 26 January 2005. By letter of 29 March 2005, the Commission sent additional comments of Elefsis to Greece, which replied by letter of 23 May 2005.
- (11) From 2002, the Commission had started to receive letters of complaint from Elefsis, which asserted that HSY has benefited from several unlawful and incompatible aid measures and misused aids authorised by the Commission. These letters were dated 23 May 2002, 28 May 2002, 14 August 2002, 24 April 2003, 3 February 2004, 4 March 2004, 30 June 2004, 8 April 2005, 27 April 2005, 24 May 2005, 10 June 2005, 15 July 2005, 28 July 2005, 13 September 2005, 16 September 2005, 21 October 2005, 12 December 2005, 23 December 2005, 6 January 2006, 10 January 2006, 12 January 2006, 18 January 2006, 23 January 2006, 3 February 2006, 9 February 2006, 23 March 2006, 28 March 2006, 6 April 2006, 20 April 2006, 24 May 2006 and 2 June 2006. The Commission sent letters to the complainant on 27 June 2002, 22 July 2004 and 12 August 2005.
- (12) These complaints were registered under the numbers CP 71/02 and CP 133/05.
- (13) The Commission asked Greece for information by letters dated 30 January 2003, 30 July 2004, 2 May 2005, 24 May 2005, 24 March 2006, 24 May 2006 and 29 May 2006. Greece answered by letters dated 31 March 2003, 21 October 2004, 17 December 2004, 20 June 2005, 25 April 2006, 30 May 2006 and 1 June 2006.
- (14) The Commission met the Greek authorities on 22 March 2006 (on this occasion the Greek authorities were accompanied by representatives of HSY as well as Piraeus Bank and provided the Commission with some additional documents), the complainant on 10 January 2003, 14 January 2005, 10 March 2005, 20 May 2005, 19 October 2005, 8 November 2005 and 23 March 2006, and Thyssen Krupp Marine Systems AG (hereafter 'TKMS') on 21 March 2006.
- (15) By decision C(2006) 2983 of 4 July 2006 ⁽⁶⁾ (hereafter the extension decision), the Commission extended the procedure laid down in Article 88(2) of the Treaty to include several additional measures in favour of HSY. This extension decision also concludes that several non-notified measures either fall within the scope of Article 296 of the Treaty or do not constitute aid in the meaning of Article 87(1) of the Treaty.
- (16) This extension of the procedure in case C 16/04 was made without prejudice to any other existing or forthcoming State aid procedure concerning HSY, notably procedure C 40/02.
- (17) After having requested and received an extension of the deadline to reply, Greece replied to the extension decision by letter of 5 October 2006.
- (18) The Commission decision to extend the procedure was published in the *Official Journal of the European Union* (?). The Commission invited interested parties to submit their comments on the measures.
- (19) The Commission received comments from the following interested parties. HSY submitted comments by letter of 30 October 2006. Greek Naval Shipyard Holding (hereafter 'GNSH') and TKMS made a joint submission by letter of 30 October 2006. Piraeus Bank submitted comments by letter of 27 October 2006 and — following a meeting with the Commission on 15 November 2007 — by letter of 27 December 2006. After having requested and received an extension of the deadline to reply, Elefsis submitted comments by letter of 17 November 2006.
- (20) By letter of 22 February 2007, the Commission forwarded these comments to Greece, which commented them by letter of 7 March 2007 and 19 March 2007. By letter of 27 April 2007, the Commission sent to Greece annexes to the comments of third parties which it had omitted in the letter of 22 February. In the letter dated 27 April 2007, the Commission also raised several questions to Greece, which replied by letter of 29 June 2007. By letter of 23 August 2007, the Commission asked questions to HSY, which replied by letter of 9 October 2007. By letter of 13 November 2007, the Commission requested from Greece further information and forwarded the answers of HSY of 9 October 2007. Greece replied by letters of 4 December 2007 and 14 December 2007. The Commission met the Greek authorities on 16 October 2007 and on 21 January 2008. The Commission sent additional questions to Greece on 12 February 2008, which replied by letter of 3 March 2008.
- (21) A meeting was held on 8 May 2007 between the Commission and TKMS/GNSH as well as HSY's lawyer. TKMS/GNSH submitted additional comments by letter of 21 June 2007. The Commission forwarded this letter on 11 September 2007 to Greece, which submitted comments by letter of 11 October 2007. Following a second meeting held on 9 January 2008 between the Commission and the same persons, TKMS/GNSH made an additional submission by letter of 18 January 2008, which was forwarded to the Greek authorities by letter of 12 February 2008.

- (22) The Commission met Elefsis on 15 March 2007 and on 7 August 2007. Following the latter meeting, Elefsis made additional comments by letter of 8 November 2007, which were submitted to Greece by letter of 17 January 2008. Greece commented by letter of 15 February 2008.
- (23) Piraeus Bank submitted additional comments by letter of 22 October 2007, which were forwarded to Greece by letter of 13 November 2007. On 12 February 2008, Piraeus Bank asked to meet once more the Commission. The meeting took place on 5 March 2008.
- (24) Article 6 of Regulation (EC) No 659/1999 indicates that the Member State and the other interested parties have a one-month period to submit comments and 'In duly justified cases, the Commission may extend the prescribed period'. In the present case, the parties have continued to make submissions (and to request meetings with the Commission) after the expiration of this period. Initially, the Commission has forwarded these submissions to Greece for comments and thereby signalled to Greece that the Commission has accepted these submissions made after the expiration of the one month period. The Commission also accepted initially the meeting requests from the interested parties and, during these meetings, it accepted when the interested party in question asked to be allowed to make a submission to complement the issues discussed during the meeting. However, the Commission has never indicated to the interested parties that their other submissions made after the expiration of the one month period would be accepted. In particular, the Commission has never indicated to the interested parties that they could indefinitely submit comments or that the Commission would inform them when it will stop to accept submissions.
- (25) The Commission considers that a prolongation of the prescribed period beyond one month was justified in the present case because the extension decision covers a large number of measures. In addition, the assessment of several of these measures requires complex legal analysis and the clarification of facts as old as 10 years.
- (26) However, some interested parties have continued to make submissions to the Commission more than one year after the publication of the extension decision. If the Commission had not decided to ignore the comments submitted after a certain date, this continuous submission of comments would have prevented the Commission to arrive at a final decision in a reasonable period⁽⁸⁾. In addition, in some submissions, some parties were commenting again issues which they had already commented in their previous submissions, without bringing new factual elements. This can not be the purpose of extending the period for submitting comments.
- (27) Consequently, the Commission has decided that any submission received from 5 March 2008 (i.e. date at which the Commission received the 4-pages-letter dated 3 March 2008 by which Greece replied to the Commission letter of 12 February 2008) would be considered as submitted after the expiration of the period for submitting comments. This concerns the submission of Elefsis dated 7 March 2008, 24 April 2008, and 2 June 2008⁽⁹⁾, and the submission of GNSH/TKMS of 2 April 2008. This means that these submissions have not been sent to Greece for comments and have not been taken into account in the present decision.

2. PRIOR DECISIONS OF THE COMMISSION AND OF THE COUNCIL

- (28) The facilities of HSY are among the largest of the eastern Mediterranean. The yard is situated in Skaramanga, West of Athens, Attica. HSY was established in 1939 by the Hellenic Navy and purchased in 1957 by Mr Niarchos' group. The extended crisis in the shipping sector, which followed the first oil crisis, had a negative effect on HSY's level of activity. In April 1985, the situation was so critical that the firm ceased operations and entered into liquidation process. In September 1985, the State-owned bank ETVA bought the company. The activities resumed after this sale. However, the activities of the firm were insufficient in view of the large facilities and the large number of employees⁽¹⁰⁾.
- (29) Greece obtained in 1990 from the Council a special provision in Council Directive 90/684/EEC of 21 December 1990 on aid to shipbuilding (hereafter 'Directive 90/684/EEC')⁽¹¹⁾ allowing operating aid for restructuring in the framework of the privatisation of several yards.
- (30) In 1992, due to its financial obligations and accumulated losses, HSY was put into liquidation. In November 1993, following two unsuccessful efforts to sell HSY, the liquidation process was revoked. On the basis of the undertakings given by the Greek Government that its public yards would be privatised by 31 March 1993, the Commission authorised on 23 December 1992⁽¹²⁾ a debt write-off in favour of HSY. The Greek Government having failed to respect the March 1993 deadline, the Commission opened on 10 March 1994 a procedure (C 10/94) for misuse of the authorised aid⁽¹³⁾. On 26 July 1995, the Commission decided⁽¹⁴⁾ to close the procedure with a negative decision concerning the aid in favour of HSY. However, at the request of the Greek Government, claiming that the sale of the yard was imminent, the Commission decided to suspend notification of that decision. Finally, the Greek authorities

informed the Commission that 49 % of HSY's shares had been sold to its employees, Greece using the opportunity to keep a majority holding in one of the yards, justified by defence reasons as provided for in Article 10(3) of Directive 90/684/EEC. On 31 October 1995, the Commission revoked the final negative decision for HSY⁽¹⁵⁾. In the meanwhile, the amount of debts was growing and restructuring had not been carried out. The Commission therefore extended on 8 January 1997 the procedure initiated in case C 10/94⁽¹⁶⁾. Council Regulation (EC) No 1013/97 of 2 June 1997 on aid to certain shipyards under restructuring⁽¹⁷⁾ (hereafter 'Regulation (EC) No 1013/97'), including HSY, was then adopted.

(31) On 15 July 1997, the Commission approved aid for HSY in two separate decisions:

— by the first decision⁽¹⁸⁾ (hereafter 'decision C 10/94'), the Commission closed the procedure C 10/94 launched in 1994 by approving a debt write-off amounting to GRD 54,5 billion (EUR 160 million) under Regulation (EC) No 1013/97,

— by decision N 401/97, the Commission, further to a notification of the Greek authorities of 20 June 1997, approved a grant of GRD 7,8 billion (EUR 22,9 million) for an investment programme of GRD 15,6 billion (EUR 45,9 million) aimed at the restructuring of the shipyard.

(32) In 2001, the government decided to fully privatise HSY. The Greek State initiated an open bidding competition, for which a tender document was established. On 31 May 2002, ETVA and HSY's employees sold their HSY shares to a consortium constituted of HDW and Ferrostaal⁽¹⁹⁾ (hereinafter 'HDW/Ferrostaal'). This consortium founded GNSH in order to harbour the holding in HSY. HDW and Ferrostaal were equal shareholders of GNSH. ThyssenKrupp took over HDW in January 2005⁽²⁰⁾ and acquired Ferrostaal's shares in GNSH in November 2005⁽²¹⁾. Since the end of 2005, ThyssenKrupp has therefore 100 % ownership and control of HSY. GNSH and HSY are harboured in TKMS, ThyssenKrupp's division specialised in systems for naval vessels and specialised commercial ships.

(33) In August 2001, during the bidding process for the sale of HSY, the Greek State has adopted law 2941/2001, which includes several measures aimed at facilitating the sale of HSY. First, the law gives incentives to the workers to voluntarily leave the company. Second, the Greek State will take over some of the one-off pension costs of HSY. Third, the law makes it possible for HSY to benefit from a number of tax-exempt reserves if they are

set off against losses from previous years. Fourth, the law contains a provision for the compensation for the workers that were shareholders in HSY prior to the privatisation. More precisely, the Greek State will reimburse the workers for the amounts they invested in HSY in the framework of the capital increases carried out over the preceding years. On 5 June 2002, the Commission adopted a two-fold decision (hereafter 'decision N 513/01')⁽²²⁾ regarding several measures included in law 2941/2001 and which Greece had notified in 2001 (notification registered under number N 513/01). The Commission decided to approve closure aid of EUR 29,5 million in favour of HSY and to open (under the case number C 40/02) the formal investigation procedure laid down in Article 88(2) of the Treaty as regards: (1) payment by the State of some of the one-off costs of the retirement of HSY employees; (2) transfer of a number of reserves of the balance sheet without paying the statutory 10 % tax. The final Decision taken on 20 October 2004⁽²³⁾ (hereafter 'decision C 40/02') concluded that these two measures constituted incompatible State aid that has to be recovered.

3. ASSESSMENT OF HORIZONTAL ISSUES

(34) The present decision concerns 16 measures. Before assessing them one by one, the Commission needs to clarify some key issues which are relevant for the assessment of several of these measures.

3.1. Horizontal issue 1: Creditworthiness and access to the financial market between 1997 and 2002

(35) For the assessment of most of the measures subject to the current decision, it is necessary to determine what the economic and financial situation of HSY was during the years 1997–2002 and whether one could have reasonably expected that the firm would return to long term viability. In addition, it has to be determined whether in these circumstances a market economy investor would have accepted to grant HSY loans and guarantees similar to the ones that have been granted by the State and the State-owned bank ETVA. The latter were the only institutions that provided financing to HSY during that period.

(36) The Commission will start by analysing the situation in 1997 and afterwards analyse the evolutions until 2002.

3.1.1. Situation in 1997

(37) To start this analysis, it is necessary to verify whether the Commission has already expressed itself on this issue in earlier decisions. First, the Commission recalls that in

decision N 401/97 and decision C 10/94, both adopted by the Commission on 15 July 1997, the Commission did not put into question the validity of the business plan submitted by Greece. Therefore, the Commission implicitly acknowledged that the implementation of this plan was able to restore the viability of HSY. Second, the descriptive part of decision N 401/97 indicates that the yard will finance a part of the restructuring plan by means of bank loans amounting to GRD 4,67 billion borrowed on market terms without State guarantees. By not putting into question the feasibility of this financing, the Commission acknowledged that the firm should be in a position to have access to the loan market, at least for the amount at stake. Indeed, if the Commission had been of the opinion that the yard was unable to obtain loans amounting to at least GRD 4,67 billion, it should have indicated that the restructuring plan was unfeasible and should have prohibited the large amounts of restructuring aid (including the investment aid). In conclusion, the Commission can not contradict these two earlier assessments in the present Decision.

- (38) Without contradicting them, the Commission nevertheless recalls how weak the situation of the yard was in 1996–1997.
- (39) First, as regards the physical infrastructure, decision N 401/97 indicates that equipments of the yard were old and outdated, and that the investment plan was the first investment plan since the construction of the yard⁽²⁴⁾. Decision C 10/94 also indicates that this modernisation of the infrastructures was necessary to restore competitiveness and viability. It can therefore be concluded that the return to viability was conditional on the rapid implementation of the investment plan.
- (40) Second, as regards the commercial activities of HSY and the size of its order book, the Greek authorities them-

selves acknowledge that ‘at the time of the presentation of the investment plan, the firm had not signed shipbuilding contracts, the activity of the yard being characterised by a great uncertainty regarding its future, an absence of clear commercial strategy and a lack of investments. The only serious activity was the termination of the MEKO type frigates for the Greek Navy’⁽²⁵⁾. Since the shipbuilding order book was empty and since the yard needed a sufficient level of shipbuilding activity to be viable in the future years, the Commission considers that the return to viability was depending on the rapid signature (i.e. conclusion) of profitable civil or military shipbuilding contracts.

- (41) Third, as regards the financial situation of HSY, Table 1 provides the key accounting figures. As regards the solvability of the firm in 1997, one observes that the firm had a large amount of equity⁽²⁶⁾. However, this positive situation was entirely the consequence of the massive debt waivers implemented by the State in 1996. In particular, the State wrote off GRD 54,52 billion (EUR 160 million) of debts related to civil activities — this waiver was approved by decision C. 10/94 — and GRD 46,35 billion (EUR 136 million) of debts related to military activities. The seemingly healthy balance sheet observed on 31 December 1996 was somehow ‘artificial’ and in particular it was not at all a proof that the yard had restored its competitiveness and that the causes of the severe difficulties encountered over the last twenty years had been tackled. Without the complete implementation of the restructuring plan, the yard would most probably record losses which would rapidly deplete these own resources (i.e. the net equity). It has to be kept in mind that HSY had been put twice in liquidation during the preceding 12 years. In conclusion, this positive equity would not have sufficed to convince a bank to lend to HSY at a normal interest rate, i.e. at the interest rate charged when lending to healthy firms.

Table 1

Figures for HSY's turnover, profit and net equity from 1997 to 2005

(EUR millions)

	1997	1998	1999	2000	2001	2002	2003 ⁽¹⁾	2004	2005
Share capital	86	91	92	95	65	106	106	121	121
Net Equity	82	88	54	17	-4	-78	-83	-111	-182
Turnover	74	83	30	59	55	89	112	130	198
Profit	7	1	-36	-42	-21	-115	-1	-45	-71

⁽¹⁾ Financial year 2003 ran from 1.1.2003 till 30.9.2003.

(42) In conclusion, the Commission considers that in 1997 the yard was still in difficulty and not competitive yet, but a return to viability could be expected if the investment plan was implemented in full and in time and if the yard succeeded in rapidly concluding profitable shipbuilding contracts. Since the return to viability was conditional upon these two uncertain developments, lending to HSY in 1997 and in the following years presented 'a particular risk'. A private bank would have accepted to grant loans or guarantees to HSY, but at a price reflecting the significant risk. In a situation presenting 'a particular risk' the Commission notice on the method for setting the reference and discount rates⁽²⁷⁾ indicates that the adequate reference point to determine the existence and the amount of State aid is the reference rate for Greece (i.e. ATHIBOR plus 300 basis points until 31 December 2000 and 5 year EUR swap rate plus 75 basis points from 1 January 2001) increased by a risk premium of at least 400 basis points (i.e. this means ATHIBOR plus at least 700 bps until 31 December 2000 and 5 year EUR swap rate plus at least 475 bps from 1 January 2001). As regards guarantees on loans, the Commission will assess the existence of aid on the basis of the same method, i.e. by comparing the total cost of the guaranteed loan (i.e. interest rate paid by HSY to the bank plus guarantee premium paid by HSY to the guarantor) with the cost which HSY would have supported if it had concluded this loan on the market (i.e. reference rate for Greece plus at least 400 basis points).

3.1.2. Evolution from 1997

(43) As will be explained below, the Commission can not exclude that until 30 June 1999 HSY was still able to borrow from the market at the interest rate such as defined in the previous section⁽²⁸⁾.

(44) HSY recorded slight net profits in 1997 and 1998⁽²⁹⁾. However, during these two years it did not succeed in concluding any shipbuilding contract⁽³⁰⁾ — either military or civil — which would have been necessary to ensure a sufficient level of activity in the next years and to avoid making losses. The first shipbuilding contract that the yard succeeded to conclude concerned the construction of two ferries for Strintzis. It was signed only at the beginning of 1999⁽³¹⁾. In addition, from the outset it was known that the sales price was too low to cover the costs and that this contract would therefore cause a loss⁽³²⁾. In July 1999, the Greek navy awarded the construction of three submarines to HSY and HDW. The three submarines were planned to be constructed over nearly 10 years and the total contract was amounting to around GRD 350 billion (EUR 1 billion), of which around three quarters would go to HDW, which was due to supply the machinery, pressure components and sensitive electronics systems. In addition, the first submarine was to be constructed at

HDW's yard in Kiel⁽³³⁾. Therefore this project would not generate a lot of activities and income for HSY during the first years⁽³⁴⁾.

(45) In view of the failure to build a large and profitable order book in 1997, 1998 and in the first months of 1999, the management and any investor having analysed the situation of the yard must have realised at the latest in the first months of 1999 that the yard would not have a sufficient level of activity in 1999 and 2000 to cover its costs and that in these years the yard would record large losses reducing its net equity to a small amount⁽³⁵⁾. In these circumstances a return to viability could not be expected anymore⁽³⁶⁾. As a subsidiary element, the Commission notes that the first report performed by the Greek authorities regarding the implementation of the investment plan showed that on 30 June 1999 only a small part of the plan had been completed. Therefore, besides the commercial setbacks, the modernisation of the facilities was slow⁽³⁷⁾. Finally, the Commission notes that the looming financial difficulties caused a dispute between the independent management team of the yard (i.e. Brown & Root, which was appointed in September 1996) and the employees/shareholders. In particular, the management insisted on the necessity to carry out additional workforce reduction due to the low level of activity. The union leaders opposed to such a reform and succeeded in getting the management team ousted⁽³⁸⁾. Such an event, creating management discontinuity and illustrating the difficulty to implement sufficient reforms in the yard, was an additional element which would have deterred a market economy investor to lend money to HSY.

(46) From the foregoing, the Commission concludes that from 30 June 1999 it was not reasonable anymore to expect a return to viability. Consequently, the Commission considers that from that date no bank would have accepted to lend to the yard anymore, even at high interest rates, and no bank would have accepted to grant a guarantee anymore, even in exchange of a high guarantee fee. Since HSY would not have received a loan or guarantee from the market, any loan or guarantee granted after 30 June 1999 automatically constitutes aid. If found incompatible and still outstanding, any guarantee has to be stopped immediately, and any loan has to be immediately reimbursed. The reimbursement — following the normal time schedule laid down in the loan contract and following from the present decision — of any loan granted after 30 June 1999 is however not sufficient to restore the initial situation since until the reimbursement date HSY has had at its disposal a financing that it normally would not have obtained from the market. In order to restore the initial situation, this advantage, of which the size can only be approximated by using the interest rate of a very risky

loan, should therefore also be recovered. Therefore, for the period running from the pay-out of the loan to HSY until the reimbursement by HSY, the Commission has to order the recovery the difference between the interest rate actually paid by HSY and an interest rate theoretically adequate for a loan presenting a very high risk. In order to determine the latter interest rate, the Commission notes that the Commission notice on the method for setting the reference and discount rates indicates that the risk premium may be higher than 400 basis points above the reference rate 'if no private bank would have agreed to grant the relevant loan', which is the situation in the present case. In several decisions, the Commission has considered that a premium of 600 basis points above the reference rate was adequate minimum to reflect a situation containing a high risk⁽³⁹⁾. The Commission considers that this constitutes the minimum for loans in the present situation. As regards State guarantees granted after 30 June 1999, the Commission will use the same approach: for the period for the pay-out of the guaranteed loan until the termination of the guarantee — whether following the normal calendar laid down in the guarantee contract or following from the present decision — the Commission will order the recovery of the difference between the cost of the guaranteed loan (interest rate paid to the bank plus guarantee premium paid) and the reference rate for Greece increased by 600 basis points.

- (47) In order to underpin its claim that the loans and guarantees granted by the State and ETVA could have been granted at the same terms by a private bank, HSY has submitted the first Deloitte report⁽⁴⁰⁾. In the section 5 of this report, Deloitte analyses the creditworthiness of HSY in 1999 and in the following years. It concludes that 'the Company could have alternatively borrowed or received letters of guarantee from another non-affiliated financial institution (i.e. with no other relationship, apart from the regular commercial collaboration) during the period under examination'⁽⁴¹⁾. The Commission observes that the report does not explain how this conclusion can be reconciled with the fact that HSY's attempts to raise funds from other financial institutions have failed⁽⁴²⁾. In addition, the Commission notes that the analysis contains a series of errors⁽⁴³⁾, which significantly bias the conclusion.

3.1.3. Intra-group analysis

- (48) All the loans and guarantees subject to the current procedure were granted by ETVA or by the State. The Greek authorities claim that since ETVA and the Greek State (through ETVA) were shareholders of HSY, the loans and guarantees could be seen as intra-group transactions. In this context, Greece makes two claims:

- First, that it is normal for a mother company to lend at favourable conditions to its subsidiary. Indeed, the advantage granted to the subsidiary increases the value of the shares held by the mother company. Therefore, even if the Commission would consider that ETVA and the State granted loans and guarantees at a price below the market price, this would have been acceptable to a market economy investor in a similar situation. Consequently, these loans and guarantees would not constitute aid,
- Second, it is normal for a mother company to lend to its subsidiary in difficulty. Indeed, such lending aims at preserving the value of the shareholding held by the mother company. Therefore, even if the Commission should consider that no private bank would have lend to HSY during a certain period because the yard's situation was too bad, loans and guarantees granted by ETVA and by the State should nevertheless be considered as acceptable for a private investor in similar circumstances. These loans and guarantees would therefore not constitute aid.

- (49) The Commission consider that Greece's conclusions are not correct.

- (50) First, the Commission notes the two following elements. In first instance, no market economy investor would have found itself in the situation of ETVA. Indeed, it is recalled for instance that when ETVA purchased HSY in 1985, it was a development bank, acting upon order of the government, in order to avoid the closure of a company of significant importance for the Greek economy⁽⁴⁴⁾. In order to keep HSY alive, ETVA made in 1986 a capital injection, which was found to constitute aid by the Commission⁽⁴⁵⁾. In 1995, ETVA kept 'a 51 % majority holding' in HSY because Greece claimed it was 'justified by defence interest', in accordance with Article 10 of Directive 90/684/EEC. In second instance, the Commission observes, when all the measures implemented by the State (including the measures implemented by ETVA, since, as will be demonstrated later in this Decision, they are imputable

to the State) in favour of HSY are taken into account — and in particular the repeated and large State aids granted to HSY in the period until 2002 —, it appears clearly that, during the period until 2002, the State has not acted as a market economy investor. It has constantly provided the large financial support necessary to keep HSY alive, what has been highly costly. In conclusion, since the State (through ETVA) found itself in the situation of being the shareholder of HSY only because it acted as a public authority willing to preserve the activities of HSY at all costs and since it has never acted like a market economy investor who wants to make money thanks to its shareholding in HSY, the claim that ETVA and the State acted in a way acceptable for a market economy investor because the too low interest rates (or guarantee fee) charged on the financing (loans and guarantees) which they granted to HSY was compensated by an increase of the value of the share of HSY lacks credibility. Since the State (included ETVA) has never acted like an investor trying to make profit but conversely accepted to keep HSY alive at that high price, Greece and HSY should have at least underpinned their claim by a detail analysis showing that, as shareholder of HSY, the State and ETVA could really expect a capital gain (i.e. an increase of the value of the shares) higher than the 'foregone revenues' (i.e. the insufficient interest rate or the insufficient guarantee premium). Since such an analysis has not been provided and since HSY and Greece made that doubtful and hypothetical claim without any supporting evidence, the Commission dismisses without further analysis their claim that the State (including ETVA) acted as a market economy investor since the financing granted at favourable terms triggered an increase of the value of HSY shares which was sufficiently important to compensate the 'foregone revenues'.

(51) Second, even if the foregoing reasoning were dismissed and the intra-group aspects should be analysed (i.e. the potential increase of the value of HSY's shares), there are ample evidence that the transactions carried out by ETVA would have not been acceptable for a market economy investor which would have hold a 51 % shareholding in HSY.

(52) At the end of 1995, 49 % of the ownership of HSY was transferred to the employees of HSY. The price that the employees would pay to purchase this 49 % stake was decided at that moment. Therefore, in the following years, when ETVA and the State were providing financing to HSY at a price below what a (non-affiliated) private bank would have charged, 49 % of the increase of

the value of HSY resulting from this savings (i.e. HSY was paying lower interest rates) was benefiting the other shareholders of HSY. Only 51 % of the advantage (reduction of the interest rates charged and of the guarantee premiums charged) granted by ETVA and the State to HSY was returning to them in the form of an increase of the value of HSY. No market economy investor would have accepted to make such a gift to the other shareholders of HSY. In order to avoid losing money in favour of these other shareholders, a market economy investor would have charged an interest rate similar to the one charged by (non affiliated) private banks. The first claim of the Greek authorities is therefore unfounded.

(53) As regards the period after 30 June 1999, at a time when no private bank would have provided financing to HSY because the risk of bankruptcy was too high, the same reasoning applies. In particular, a rational investor holding only 51 % of a firm would have at least asked the other shareholders to provide financing in proportion to their shareholding in HSY. If these other shareholders did not have the resources to provide this financing, a rational investor would have at least negotiated the provision of financing to HSY against a higher shareholding in HSY. Providing significant financing to HSY without co-financing or without concessions by the other shareholders was similar to put one's own money at high risk to save the value of the shares held by someone else. No market economy investor in similar circumstances would have accepted to make such a gift to the other shareholders⁽⁴⁶⁾. The second claim of the Greece authorities has therefore to be rejected.

3.2. Horizontal issue 2: Imputability of ETVA's behaviour to the State

(54) Several of the 16 measures analysed in the present decision were not granted directly by the State. They were granted by the State-owned bank ETVA. Since Greece, HSY and TKMS/GNSH contest the imputability to the State of these measures while Elefsis and Piraeus Bank confirm it, this issue has to be analysed.

(55) These measures were granted by ETVA between 1996 and 2002. According to case-law, such measures may qualify as State aid pursuant to Article 87(1) of the Treaty only if the State was in a position to control ETVA and if the public authorities have 'been involved, in one way or another, in the adoption of those measures'⁽⁴⁷⁾.

- (56) ETVA, whose initials stand for Industrial Development Bank of Greece, was founded in 1964 following the merger of three organisations (the Industrial Development Organisation, the Economic Development Financing Organisation and the Tourist Credit Organisation). It was converted into a corporation by Law 1369/1973. Since 1973 it has therefore operated as a State-owned bank. According to Greece⁽⁴⁸⁾, 'The main purpose stated in the statute of ETVA as a development bank was promotion of the development of the country through the financing of production activities in the Greek economy (tourism, industrial production, etc.)'. ETVA was the only development bank in Greece. ETVA therefore endeavoured to play a decisive role in the economic and regional development of the country by financing enterprises, developing the regional infrastructure of the country, providing venture capital and participating in undertakings with strategic importance for the Greek economy. In 1995, following financial difficulties resulting from these activities, the recapitalisation, restructuring and modernisation of the bank became a top priority of the Greek government. This was done on the basis of a five-year programme within the framework of Law 2359/95. In addition to the provision of GRD 427 billion of capital by the government, the aim of the restructuring was to implement a new strategic orientation, change the organisational structure and formulate modern business procedures which respond to present-day conditions of competition. Consequently, 'In addition to its development activity, ETVA developed commercial banking services, in particular from 1997 onwards'⁽⁴⁹⁾.
- (57) In 1999, the State, which held 100 % of ETVA's shares, decided to proceed with the bank's listing on the Athens Stock Exchange, offering 24 % of its share capital to the public. The State decided to proceed even further with the bank's privatisation and reduce the State's participation to below 50 %. A call for tender was conducted and Piraeus Bank was chosen. On 20 March 2002, shares representing 57,7 % of ETVA's capital were transferred to Piraeus Bank⁽⁵⁰⁾.
- (58) Regarding the possibility for the State to control ETVA, the Commission observes that until the end of 1999 ETVA was fully owned by the Greek State. The State kept a majority shareholding until the transfer of the majority of the shares to Piraeus Bank on 20 March 2002. The State was therefore in a position to control ETVA at least until 20 March 2002. This also illustrates that State resources were involved in the measures implemented by ETVA.
- (59) Regarding the involvement of the State in the adoption of the different measures, the Commission observes the following points:
- First, the Commission notes that the three most significant decisions regarding ETVA's shareholding in HSY have not been decided independently by ETVA's management: these decisions have been taken by the government and implemented by ETVA. Indeed, when ETVA purchased the bankrupt HSY in 1985, this was a government decision⁽⁵¹⁾. ETVA simply implemented this State decision and rapidly made a large capital injection in HSY, which was considered to be State aid by the Commission⁽⁵²⁾. This illustrates that the relation between ETVA and HSY has from the outset been a relation of State support in favour of a company which was important — in terms of employment and of activities — for the Greek government. The second major decision was the sale by ETVA of 49 % of HSY's capital to the employees, which was decided by Law 2367/1995⁽⁵³⁾. In addition, this Law imposes significant restructuring measures on HSY⁽⁵⁴⁾ (and grants very large aid amounts to the yard). The third major event was the privatisation of HSY in 2001–2002 (i.e. ETVA had to sell its remaining 51 % shareholding in HSY). This privatisation was decided by decision No 14/3-1-2001 of the relevant Inter-ministerial Privatisation Committee and took place within the framework of the Greek Privatisation Law 2000/2091. This was constantly repeated in the tender documents submitted to the interested investors/bidders by Alpha Finance, which was the bank organising the sale of HSY on behalf of the State and of the Sellers (ETVA and the employees). The tender documents dated 2 April 2001 also indicate that the State will select the preferred bidder with the Sellers. In conclusion, the three crucial decisions concerning ETVA's shareholding in HSY were decided by the State.
 - In addition to its direct involvement at these three occasions, the State granted very large amounts of aid during the period 1995 to 2002. The State wrote off GRD 54,52 billion (EUR 160 million) of debts related to civil activities — this waiver was approved by decision C 10/94 — and GRD 46,35 (EUR 136 million) of debts related to military activities. As indicated in decision N 401/97, the State also intended to grant GRD 7,8 billion (EUR 22,9 million) of investment aid. During the bidding process in 2001, the Greek State enacted law 2941/2001, which contained a large amount of financial support aimed at facilitating the privatisation of HSY (see recital 33 of the present decision). As the Commission indicated in decision N 513/01, the

State committed for instance to pay EUR 118 million as incentives to encourage employees to voluntarily leave the company. By granting large and repetitive aids, the government clearly signalled that it considered the survival of HSY as politically very important ⁽⁵⁵⁾.

— Finally, the Commission observes that the State awarded strategic defence contracts to HSY during these years, like for instance the construction of the submarines. Consequently, the State had a direct interest in monitoring the activities of HSY and ensuring the continuation of the operations of the yard.

(60) By deciding the size of the shareholding of ETVA in HSY, by giving constantly large financial support to HSY and because it granted military contracts of high importance for Greece's security, the Greek government signalled very clearly that it attached a great importance to HSY's activities and was monitoring the situation of the yard carefully. In this general context, the Commission considers that, until ETVA's privatisation in March 2002, the imputability of ETVA behaviour to the State can not be questioned. Indeed, in these circumstances, it was impossible for ETVA's management to develop towards HSY a lending policy which would not have been in line with the policy of steady support adopted by the government. In particular, it would have been impossible for ETVA to take a decision creating financial problems for HSY. For instance, ETVA could not have charged a high interest rate (i.e. a high 'spread' above the interbank rate) on the loans granted to HSY, since this would have deteriorated HSY's financial situation, what would have been politically unacceptable for the government. Similarly, ETVA could not have refused to grant a loan demanded by HSY to finance its operations ⁽⁵⁶⁾. In other words, ETVA had no other choice than remaining coherent with the policy of strong and continuous support toward HSY adopted by the State. Consequently, the Commission concludes that all the measures implemented by ETVA towards HSY (loans, guarantees, capital injections, etc.) were automatically imputable to the State, and that it is not necessary to bring forward additional evidence of the State's involvement at the moment when each of these measures were adopted by ETVA. In conclusion, the Commission considers that the different measures carried out by ETVA are imputable to the State.

(61) As subsidiary grounds, the Commission also notes the following elements confirming the imputability of ETVA's behaviour to the State.

(62) First, in 1995 ETVA sold only 49 % — and thus not 100 % — of HSY shares to the employees. 'Greece invoked its military needs in shipbuilding to justify retaining 51 % of the yard as allowed by Article 10 of the Directive' ⁽⁵⁷⁾. Article 10(3) of the Directive 90/684/EEC indeed provides that 'Notwithstanding the obligation to dispose of the yards by sale referred to in paragraph 2, the Greek Government shall be allowed to maintain a 51 % majority holding in one of the yards if justified by defence interests.' This illustrates that ETVA's 51 % stake in HSY was aimed at allowing the State to control HSY with the goal of preserving the defence interests of Greece. It is obvious that in this context ETVA's management could not have developed towards HSY a relation based on commercial terms. Any decision regarding the provision of financing to HSY and the terms of this financing could not go against Greece's defence interests. In particular, the Commission fails to see how ETVA's management could have refused to grant a financing to HSY or could have charged a high interest rate on these financings. Moreover, if Greece's goal was the preservation of defence interests, one can suppose that the government was in fact directly supervising any significant decision of the management of HSY and any decision of ETVA regarding financing provided to HSY.

(63) Second, since ETVA's mandate as 'development bank' was defined by the State, it can be concluded that all the activities of ETVA implemented in the framework of that mandate were imputable to the State. In a similar manner, the case law indicates that, in order to analyse the imputability of measures adopted by a firm 'the nature of its activities and the exercise of the latter on the market in normal conditions of competition with private operators' ⁽⁵⁸⁾ may be relevant. In this context, the Greek authorities acknowledge that 'ETVA from its creation onwards did not function like a usual commercial bank but as a special development credit institution mainly active in the field of long-term credits playing a decisive role in the economic and regional development of the country' ⁽⁵⁹⁾. In this context, the Commission recalls that ETVA purchased HSY in 1985. The involvement of ETVA within HSY was therefore developed within this mandate as 'development bank', and not within the framework of its commercial activities which started not earlier than 1997. Since ETVA had until then to support HSY within its mandate as 'development bank', ETVA could not suddenly from 1997 stop providing the loans and guarantees demanded by HSY and let the yard go bankrupt. In this context, the Commission recalls that, in the second half of the nineties, ETVA has been authorised to develop commercial activities besides its development activities, and not in replacement of its development activities, which had to be continued.

- (64) Third, according to case-law, 'the legal status of the undertaking (in the sense of its being subject to public law or ordinary company law' ⁽⁶⁰⁾ may be relevant to show imputability. In this respect, since ETVA, as a State-owned development bank, has as its principal corporate object to further the country's development by financing the Greek economy, it was not subject to banking directives ⁽⁶¹⁾. It is only when ETVA's shares were listed on the Athens Stock Exchange on 12 January 2000 that ETVA became subject to the standard supervisory rules applicable to commercial banks.
- (65) Fourth, the Commission observes that during the period 1996–2002, the State was particularly attentive to the operations of ETVA. Indeed, the State adopted Law 2359/95 in order to restructure ETVA and injected hundred of billions of drachma within that framework. In 1999, it decided to list a part of the capital on the Athens Stock Exchange. One year later, it decided to privatise the majority of the capital of ETVA. This privatisation was completed in 2002. This illustrates that during the period 1996–2002, the State was deeply interested in the operations of ETVA. The loans and guarantees provided to HSY were of a size ⁽⁶²⁾ sufficiently large such that the granting decisions could not have been taken by ETVA's management without endorsement or direct order of ETVA's sole shareholder.
- (66) In the foregoing paragraphs the Commission has demonstrated that, in the period preceding the sale of the ETVA to Bank Piraeus in March 2002, all the measures implemented by ETVA involved State resources and all the measures implemented by ETVA towards HSY were imputable to the State. When it will assess individually each of the measures implemented by ETVA, the Commission will therefore not demonstrate these two points anymore.
- (67) The Commission will only discuss again these two issues in the assessment of measure E18c, because some parties claim that this measure was granted by ETVA in May 2002, i.e. after the purchase of ETVA by Piraeus Bank.
- (69) The Commission has therefore to assess whether some measures could partially or entirely fall within the scope of Article 296 of the Treaty.
- (70) None of the parties to the present procedure contests that HSY has civil and military activities. Over the last 15 years, the main civil activity was the repair of civil ships. HSY has also built railstock material and hulls of civil ships. HSY's military activities consisted in the construction and repair of military ships and submarines for the Greek Navy.
- (71) The Commission recalls that the extension decision has already identified the measures supporting exclusively the military activities of the yard. The extension decision concludes that these measures entirely fall under Article 296 of the Treaty and are not subject to State aid rules. The extension decision has not been challenged at the Court.
- (72) Some of the State supports covered by the present decision were not assigned to a particular activity, i.e. they were not earmarked to finance a given project. The Commission has therefore to determine to which extent these State supports benefited the military activities and to which extent they benefited the civil activities. This calculation is made complicated by the fact that HSY did not keep separate accounts for the civil activities and for the military activities. In these circumstances, the Commission will base its analysis on the relative size of the two activities. It must therefore assess the relative weight each activity. The Commission observes that any State support (e.g. financing, capital injection, etc) granted to HSY (and not assigned to finance a particular activity) has at the same time covered losses of the past (i.e. losses generated by past contracts) and allowed the yard to finance future activities. In order to determine to which extent a given State support benefited the civil and the military activities, the Commission therefore considers that the analysis must not be limited to the division between civil and military activities (i.e. the relative weight of each activity) in the year when the support was provided, but it is necessary to calculate the average division between these two activities over a sufficiently long period. The fact that the relative weight of the two activities varies strongly from one year to another also justifies using an average over several years. Indeed, a given year may not be representative of the average division between the two activities over the medium and long term.

3.3. Horizontal issue 3: aid measures partially financing the military activities of HSY

- (68) In its answer to the extension decision, Greece claims that several of the measures investigated by the Commission have supported the military activities of the yard. Greece therefore claims that they fall under Article 296 of the Treaty, and can not be assessed — and even less recovered — under State aid rules.

(73) In the framework of the procedure for the recovery of the aid found unlawful and incompatible by decision C 40/02, Greece has claimed that the civil activities accounted for 25 % of the activities of HSY and the military activities accounted for 75 % of the activities. To underpin this claim, Greece provided data regarding the work-hours and the turnover (i.e. sales value) of the two activities for the years 1997 to 2005 ⁽⁶³⁾. In the context of the present procedure, Greece has not contested these figures. In addition, the Commission had already accepted a division 25 % civil/75 % military in the decision N 513/01, which has not been contested in front of the Court. On the basis of the foregoing, the Commission will consider that the civil activities accounted for 25 % of the activities of HSY and the military activities for 75 % of the activities.

(74) With regards to the military activities of HSY, the Commission has consistently accepted in earlier decisions that the support provided to them is outside the scope of the State aid rules ⁽⁶⁴⁾. The Commission repeated that assessment in paragraphs 86 to 90 of the extension decision. Since the measures which are the subject of the present decision were granted to HSY (i.e. HSY as a whole) during the same period as the period analysed in these earlier decisions, it must be concluded that the part of these measures which has supported the military activities of HSY also fall within the scope of Article 296 of the Treaty and is exempted of State aid rules.

(75) When assessing each measure individually, the Commission will establish whether it has exclusively supported the civil activities of HSY or whether it was granted to HSY without being earmarked for a particular use ⁽⁶⁵⁾:

— If only the civil activities were supported, the Commission considers that Article 296 of the Treaty does not apply and the entire measure can be assessed under Article 87 of the Treaty,

— If HSY as a whole was supported, the Commission considers that, since 75 % of the activities of the yard is related to military production, 75 % of the State support benefited the military activities and fall under Article 296 of the Treaty. The remaining 25 % of the State support can be assessed under State aid rules.

4. THE MEASURES: DESCRIPTION, GROUNDS FOR INITIATING THE PROCEDURE, COMMENTS RECEIVED, ASSESSMENT AND CONCLUSION

(76) As regards the comments of Greece and of third parties, the Commission observes that they cover a wide range of arguments. For instance, in its numerous submissions to the Commission, the complainant Elefsis has claimed that there exist numerous grounds on the basis of which the measures should be considered incompatible aid. Similarly, Greece, HSY, and TKMS/GNSH have claimed in their successive submissions to the Commission that there exist numerous grounds on the basis of which the measures could be found compatible with the common market.

(77) Pursuant to Article 253 of the Treaty, a Commission decision has to state the reasons on which it is based. However the Commission is not obliged to answer to each of the arguments raised by the parties. Consequently, the present decision will explicitly deal only with the major points raised by the parties. In particular, the decision will not deal with some grounds raised by the parties which are clearly irreconcilable with the facts, which are in contradiction with points made by the same party in its other submissions or which can be clearly dismissed on the basis of the facts and assessment presented in the present decision.

(78) Since the present investigation covers a significant number of measures, it is important to number them in order to facilitate the reading and avoid confusion. Therefore, the four measures covered by the opening decision will be numbered P1 to P4. The twelve measures covered by the extension decision will keep the number attributed to each of them in that decision, but preceded by an E.

4.1. Misuse of the investment aid endorsed in 1997 (measure P1)

4.1.1. Description of the measure

(79) By Decision N 401/97, the Commission authorised a GRD 7,8 billion (EUR 22,9 million) investment aid, which Greece had notified on 20 June 1997. In that decision, the aid has been assessed on the basis of Article 6 'Investment aid' of Chapter III 'Restructuring aid' of the Directive 90/684/EEC, which indicates that 'Investment aid [...] may not be granted [...] unless it is linked to a restructuring plan which does not involve any increase in the shipbuilding capacity of the yard [...]'. Such aid may not be granted to ship repair yards unless linked to a restructuring plan which results in a reduction in the overall ship repair capacity'. The Decision N 401/97 indicates that a business plan has been set up which aims at restoring the competitiveness of the yard through increased productivity and modernisation. The

first pillar of this plan is an important reorganisation and reduction of the workforce. In particular, the number of workers will be reduced to 2 000 by the end of 1997 and more flexible work methods will be introduced. The Decision N 401/97 indicates that most of the workforce reduction had already been implemented at the time of the decision, what will contribute to increase the productivity. The second pillar of the restructuring plan is an investment programme, which aimed at replacing the old and obsolete equipment with new updated technology. The Decision indicates that the plan foresees that the yard will have its viability restored at the end of the business plan, the year 2000. The total cost of the investment programme was estimated at GRD 15,62 billion (EUR 45,9 million). The descriptive part of the decision indicates that this programme will be financed in the following manner: GRD 7,81 billion (EUR 22,9 million) of State aid, GRD 3,13 billion (EUR 9,2 million) by an increase of the share capital, and GRD 4,67 billion (EUR 13,7 million) by bank loans. The capital increase will be made in the same proportion as the distribution of capital, i.e. 51 % by ETVA and 49 % by the employees of HSY. The decision further indicates that the bank loans will be raised at normal market conditions without State guarantees. In its assessment, the Commission notes that according to the restructuring plan, there is no increase in shipbuilding capacity and a decrease in the shiprepair capacity. The Commission also notes that the intensity of the aid (50 %) stays within the regional aid intensity allowed for Greece. The intensity is also justified by the extent of the restructuring involved.

4.1.2. Grounds for initiating the procedure

- (80) The Exchange of Letters between Greece and the Commission which has preceded the opening of the procedure has been described in the chapter 1 'Procedure' of the present decision.
- (81) In the opening decision, the Commission expressed doubts that the investment aid approved by decision N 401/97 may have been misused. First, the Commission observed that the investment plan was implemented only partially and with important delays. The Greek authorities granted several extensions of the deadline to execute the investment plan after 31 December 1999 without consulting the Commission. Second, whereas decision N 401/97 indicates that the investment programme will be financed by banks loans raised at normal market conditions without State guarantees, the firm seems to have received loans from a State-owned bank with non market-conform interest rates and it seems that one of the loans was covered by a State guarantee. Third, the Greek authorities did not send the yearly reports on the implementation of the plan, as

requested by the decision N 401/97. Due to these three breaches of decision N 401/97, it seems that the investment aid was misused.

4.1.3. Comments from interested parties

- (82) Elefsis underlines that the earthquake invoked to justify the delay occurred only in September 1999. That is four months before the end of the period to implement the investment plan, namely 31 December 1999. At the end of 1999 HSY had carried out only a small part of the investment plan. This shows that HSY had already accumulated significant delays in the implementation of the plan before the earthquake occurred and that HSY could not have finished on time the investment programme even if the earthquake had not occurred. Similarly, the privatisation of HSY invoked to justify a delay took place well after the end of 1999 and therefore could not justify HSY's failure to respect decision N 401/97. Finally, Elefsis claims that, since HSY received a loan guaranteed by the State and loans at non arm's length conditions, it has breached the conditions laid down in decision N 401/97. Therefore, this additional aid as well as the investment aid should be recovered.
- (83) HSY submitted the same comments as Greece, which are summarised in the next section.

4.1.4. Comments from Greece

- (84) In their letter of 20 October 2004, the Greek authorities confirm that they initially set the date of 31 December 1999 for the completion of the investment plan. In December 1999, they carried out the first control on the implementation of the plan, which related to the expenses incurred by HSY until 30 June 1999. It turned out that they amounted to GRD 2,7 billion (EUR 8,1 million), which is 17,7 % of the total expenses of the investment programme. On 27 June 2001, the Greek authorities granted a prolongation until 31 December 2001 for the completion of the investment, because the earthquake of 7 September 1999 had caused damages to the yard's facilities and delayed the execution of the investment plan. By decision of 28 December 2001, the Greek authorities granted a second prolongation until 30 June 2002 because the privatisation process, which started in January 2001 (and was finally completed on 31 May 2002), requested to freeze the investment plan. When the Greek authorities carried out the second control in May 2002, they determined that the expenses incurred by HSY until 31 December 2001 amounted to GRD 9,8 billion (EUR 28,9 million), or 63 % of the total investment costs. By decision of 14 June 2002, a new extension was granted until 30 June 2004. By decision of

23 July 2003, the authorities authorised a modification of the investment plan. On this occasion, the company asked to remove some of the investment expenses certified on the occasion of the second control. These expenses were advance payments concerning investments that the firm had decided to exclude from the investment plan. Therefore, the total amount certified after the second control was reduced to EUR 23,3 million, or 50,75 % of the total. By letter of 30 June 2004, the yard requested a new extension until 31 December 2004. As of today, the investment aid has not been paid out to the yard yet.

(85) The Greek authorities claim that, when granting the extensions, they considered in good faith that they acted within the limits of the approval decision of the Commission and that it concerned an existing aid for which no new notification was necessary. They considered that it was unrealistic not to provide for the possibility of a prolongation of an investment plan of such size and such scope, even more for a yard which had no experience with the implementation of such a plan, as acknowledged by the Commission itself in its approval decision. They also claim that they informed the Commission of the prolongation in November 2002. Concerning the modification of the investment plan which they have authorised in 2003, it did change neither the nature, nor the substance, nor the purpose of the approved aid. It simply aimed to adapt the content of the plan to the new circumstances: the privatisation of the yard, the new contracts of unforeseen nature (submarines), the 1999 earthquake, and the technological progress. The Greek authorities also fail to see how the prolongations could affect the substance of the aid and therefore its compatibility. Finally, they claim that the Commission should assess the compatibility of the prolongation of the investment plan on the basis of the point 52 of the Community guidelines on State aid for rescuing and restructuring firms in difficulty⁽⁶⁶⁾ (hereafter 'the 1999 R & R guidelines'). In this case, the aid should be found compatible since the revised plan foresees a return to viability in a reasonable period, namely before 30 June 2004. The Greek authorities claim in particular that the delay is not caused by the firm but by *force majeure* (earthquake of 1999 and privatisation of the firm). Finally, the 'one time, last time' principle would not be breached since the aid would take place in the adaptation of an existing restructuring plan.

(86) Concerning the non-submission of annual reports on the implementation of the investment plan, Greece considers

that this fact is not of sufficient importance to prevent the modification of the plan.

4.1.5. Assessment

4.1.5.1. Article 296 of the Treaty

(87) Before undertaking an assessment of the compatibility under Article 87 and 88 of the Treaty, the applicability of Article 296 Treaty needs to be considered. In this respect, the Commission observes the following elements. First, the investment aid had been notified by Greece in 1997 in accordance with the procedure laid down in Article 88(3) of the Treaty. By notifying the aid, Greece acknowledged that the investment plan was mainly related to the civil activities of HSY (i.e. ship repair and ship building), because if the plan had been related to military activities and had been important for national security, Greece could have invoked Article 296 of the Treaty at the time and would not have had to notify this investment aid⁽⁶⁷⁾. Moreover, Greece did not contest the approval decision in which the Commission assessed the notified aid under the State aid rules. Finally, Greece has not invoked Article 296 in its reaction to the opening decision. The prior elements are sufficient to conclude that the investment plan did not affect the security interests of Greece and any aid financing the investment plan can be dealt with under State aid rules laid down in Article 87 and 88 of the Treaty.

4.1.5.2. Existence of a misuse of the aid

(88) The three doubts raised in the opening decision will be analysed successively.

(89) As regards the breach of the condition that loans have to be raised at market rates and without State guarantees, the Commission considers that this breach affects the compatibility of the latter measures and not the compatibility of the investment aid. Indeed, the purpose of such a condition is to avoid the granting of additional aid in favour of the investment programme (i.e. to avoid the accumulation of aid above the intensity laid down in the decision N 401/97). Anyway, as will be explained later in the present decision, the Commission finds on the basis

of other legal grounds that the State guarantee granted to HSY constitutes incompatible aid that has to be recovered. As regards the loans, the Commission also finds that the aid element has to be recovered. Since the aid elements will be recovered, the initial situation will be restored and the financing costs of HSY will not be lower than the market rate. In other words, by means of these recoveries, the objective of the condition laid down in decision N 401/97 will be fulfilled, namely to avoid the granting of additional aid by means of financing granted to HSY below market price. The Commission therefore rejects Elefsis' aforementioned claim that both the aid element in the loans and guarantee and the investment aid endorsed by decision N 401/97 have to be recovered.

- (90) As regards the absence of yearly reporting raised in the opening decision, the Commission considers that the non-submission of yearly reports does not as such constitute a misuse of the aid. Indeed, it does not change the characteristics of the aid, its effect or the characteristics of the investment programme. However, since Greece has not provided this information in due time and has therefore not informed the Commission about the delays at the moment when they occurred, it has prevented the Commission from adopting a decision on these issues at the appropriate moment. Consequently, this absence of reporting entails that the burden of proof falls on Greece: it is for Greece to prove that the Commission would have endorsed the successive prolongations of the period to implement the investment programme.
- (91) As regards the delayed implementation of the investment plan, which was the main doubt raised in the opening decision, the Commission has reached the following conclusion. By Decision N 401/97, the Commission authorised aid to support investments which were 'linked to a restructuring plan', as requested by chapter III 'Restructuring aid' of Directive 90/684/EEC. As indicated in the description of the business plan in Decision N 401/97, the investment plan was in fact not simply linked to the restructuring; it was itself one of the two pillars of the restructuring because the yard had made no investments in the previous years and needed to replace 'old and obsolete equipment with new technology' to restore its competitiveness. In section 2.1 of their letter of 20 October 2004, the Greek authorities confirm that the investment programme aimed at restoring the competitiveness of HSY, by means of better productivity and modernisation, in order to become a competitive firm at the national and international level. Greece also confirms that the purpose was to replace outdated and unused equipments by new equipment with modern technology. In conclusion, from decision N 401/97 itself as well as from Greece's letters, it appears that the investment programme had a crucial role in the restructuring plan and in the restoration of viability⁽⁶⁸⁾. Since it was 'linked to a restructuring plan' and crucial for the return to viability, it is obvious that the implementation of the investment programme could not be delayed significantly. In fact, its implementation was urgent in order to allow restoration of viability. In conclusion, the Commission authorised an aid to support an investment programme that had to be implemented in a precise period; it did not authorise an aid to support any investment project carried out in the future.
- (92) As regards the precise timing of the implementation of this investment programme, decision N 401/97 did not include the planned calendar. Decision N 401/97 only indicates that 'the yard will have its viability restored at the end of the business plan, the year 2000'. In their letter of 20 October 2004, the Greek authorities indicate that, according to the Ministerial decision of December 2007 granting the subsidy, the investment programme had to be completed by 31 December 1999⁽⁶⁹⁾. However, this date does not appear in decision N 401/97. The Commission concludes that on the basis of decision N 401/97, the investment programme had to be completed at the latest at the end of 2000.
- (93) From the foregoing, the Commission concludes that respecting the date of 31 December 2000 was important to ensure the success of the restructuring plan. In addition, any investment implemented significantly after 2000 could not be considered as linked to the restructuring plan which is described in decision N 401/97, as requested by Directive 90/684/EEC.
- (94) After this analysis of the decision N 401/97, the Commission has to determine whether it would have granted a prolongation of the period to carry out the investments if Greece had requested it and correctly informed the Commission about the delays. In September 1999, an earthquake partially damaged the following of the yard's facilities: walls, roofs, windows, structure of three buildings, tubes, electrical networks, piers, and cranes' rails. Greece claims that the earthquake forced the yard to stop the investment plan and to focus on the repair of these damages.
- (95) Justifying the delay on the basis of the earthquake, the yard asked in November 2000 a first delay of the date to complete the investment programme until 31 December 2001. The question is whether the Commission would have accepted this request if it had received it. The

Commission observes that, if it had applied paragraph 52 of the 1999 R & R guidelines, it would not have approved the first prolongation since the restructuring plan approved in 1997 had become clearly insufficient to restore viability in view of the situation prevailing in November 2000 and no other restructuring plan allowing a return to viability was available at that time. However, the Commission doubts that it would have applied paragraph 52 of the 1999 R & R guidelines since the aid had not been approved on the basis of these guidelines, since there was no 'amendment' of the content of the plan but only a delay of the date to complete the investments, and since there were not clear provisions regarding the modification of the date for completing the investments in decision N 401/97 and in Directive 90/684/EEC. In addition, since a severe earthquake is an event beyond responsibility of the yard and of the Greek authorities, which is exceptional and not related to the economy and the business, the Commission would have probably considered that it can justify some months of delay. In addition, the implementation of an investment plan is something difficult, which may necessitate some additional months. Consequently, even if one year is a long delay, it is reasonable to consider that the Commission might have accepted the prolongation.

- (96) Regarding the second prolongation granted by the Greek authorities, Greece and HSY justified it by the privatisation of the yard during which the investment plan was frozen⁽⁷⁰⁾. In other words, the delay in the implementation of the investment programme resulted from a conscious decision to suspend the implementation. The Commission can certainly not authorise a prolongation of the period to implement the investment programme when it was consciously decided to stop the implementation during several quarters of a year. As concluded previously, the respect of the calendar set for the implementation of the restructuring plan was crucial. The Commission has authorised aid to support a precise restructuring plan implemented at a precise moment. As a subsidiary argument, the Commission notes that if prolongations after 31 December 2001 were accepted, the restructuring period would be so long that the investments carried out after that date could not be considered as 'linked' — in the meaning of the Directive 90/684/EEC — to the restructuring that began as early as in 1996. The restructuring plan approved in 1997 was inadequate to tackle the difficult financial situation of the yard in the years from 2001. Moreover, significant restructuring measures were implemented in 2001–2002, which were new and not included in the restructuring plan described in decision N 401/97 (for instance, an additional reduction of the

workforce). In view of the foregoing considerations, the Commission considers that it would not have endorsed a prolongation of the investment period after 31 December 2001.

- (97) In conclusion, the Commission considers that any aid supporting investment expenses incurred after 31 December 2001 fall outside the scope of decision N 401/97.
- (98) Greece claims that even if the Commission finds that aid in favour of some investment expenses would not fall within the scope of decision N 401/97, this aid should nevertheless be considered compatible as restructuring aid on the basis of the 1999 R & R guidelines. The Commission must therefore analyse whether aid in favour of the investment expenses incurred by HSY after 31 December 2001 could be found compatible. The Commission notes that there is no doubt that HSY was a firm in difficulty after 31 December 2001. For instance, the losses accumulated over the preceding years were so important that the net equity was negative. Therefore, any aid granted to the firm, and especially aid supporting the modernisation of obsolete equipment, should have been considered as restructuring aid. The Commission considers however that the firm did not comply with the conditions for receiving aid under the 1999 R & R guidelines. For instance, the 'one time, last time' condition laid down in paragraph 48 of these guidelines was breached because Greece had already granted restructuring aid to HSY by Ministerial decision of December 1997. Indeed, the investment aid approved by decision N 401/97 was a restructuring aid according to Directive 90/684/EEC and according to decision N 401/97 itself. Paragraph 48 of the 1999 R & R guidelines allows an exemption from the 'one time, last time' condition in 'exceptional and unforeseeable circumstances'. The Commission fails to identify which exceptional and unforeseeable circumstances could justify restructuring aid to be granted in favour of investment expenses incurred after 31 December 2001. In particular, the earthquake of September 1999 may, as concluded previously, justify a limited delay in the implementation of the investment plan. But it is not the cause of the delay of the implementation of the investment plan after 31 December 2001. As regards the freezing of the plan during the privatisation process, it does not fulfil the definition of 'exceptional and unforeseeable circumstances'. Greece claims that the 'one time, last time' condition would not be breached since the aid would take place in the adaptation of an existing restructuring

plan. As has been extensively explained, the Commission considers that the investment implemented after 31 December 2001 are not part of the investment programme described in decision N 401/97. In addition, paragraph 52 of the 1999 R & R guidelines indicates that 'the revised plan must still show a return to viability within a reasonable timescale'. According to the initial plan the yard should have its viability restored by 2000. The Commission therefore considers that the planned restoration of viability in June 2004 was a too long delay compared to the initial plan and was not within a reasonable timescale anymore. Finally, the Commission observes that accepting such a long prolongation of the restructuring period would be similar to a circumvention of the 'one time, last time' condition.

- (99) In conclusion, the Commission considers that aid in favour of the investment expenses incurred until 31 December 2001 and related to the investment programme described in decision N 401/97 can be considered to be covered by decision N 401/97. Any other aid does not fall within the scope of decision N 401/97. In addition, any other aid in favour of the other investment expenses that have been incurred by HSY is incompatible with the common market. Since Greece has indicated that the investment aid has not been paid out to HSY yet, no aid has to be recovered from HSY.

4.2. GRD 4,67 billion (EUR 13,72 million) loan granted in 1999 and covered by a State guarantee (measure P2)

4.2.1. Description of the measure

- (100) Greece indicates that this 8-year loan amounting to GRD 4,67 billion (EUR 13,72 million) was granted by ETVA to finance the investment programme ⁽⁷¹⁾. By decision of 8 December 1999, the government granted a guarantee and charged an annual guarantee fee of 100 basis points. The loan was concluded on 29 December 1999 and paid to HSY in successive tranches from that date until 26 October 2000, up to a total amount of EUR 12,76 million ⁽⁷²⁾. The interest rate was ATHIBOR (EURIBOR from 1 January 2001) plus 25 basis points. On 31 May 2002, the State guarantee and the loan were prolonged until 30 June 2009 and the interest rate increased by 100 basis points. The reimbursement of the capital started with a first payment in December 2003.

4.2.2. Grounds for initiating the procedure

- (101) The opening decision indicates that the State guarantee could constitute State aid, the compatibility of which is

doubtful. In addition, leaving aside the qualification of aid or not, decision N 401/97 indicated that, in order to finance the investment programme, bank loans would be raised at normal market conditions without State guarantees. It seems therefore that State guarantees were per se prohibited by decision N 401/97.

4.2.3. Comments from interested parties

- (102) Elefsis made the following comments concerning measures P2, P3 and P4. It recalls that decision N 401/97 required that the bank loans financing HSY will be obtained on normal market terms without State guarantees. It can be shown that all three loans were given upon a non-arm's length basis. First, these loans were granted from the end of 1999 onwards, when HSY's financial situation was catastrophic and raised the risk of the revocation of the company's operating licence. Second, the loans were granted at a time when it was clear that HSY had failed to implement its restructuring/investment plan and had failed to respect the terms of decision N 401/97. Third, given its catastrophic financial situation and the lack of arm's length security, HSY would not have been able to raise these loans from the private sector.

4.2.4. Comments from Greece

- (103) The Greek authorities (as well as HSY) claim that the State guarantee does not constitute State aid and was offered at normal market conditions. They base their analysis on the following elements:

- the yard could have concluded a similar loan with any other bank by offering other types of securities than a State guarantee. In particular, the company could have offered as securities some claims related to large contracts or some mortgages on its assets,
- the annual guarantee fee of 1 % is the market rate. In addition, it is not selective since the Greek State granted several guarantees during that period and in some cases the fee charged by the State was much smaller,
- even if the Commission should consider that the guarantee fee was below the market rate, the State nevertheless acted as a market economy investor since it was shareholder of HSY (through ETVA) and would benefit from the return to profitability following from the implementation of the investment plan,

— the fact that the loan aimed at financing an investment plan which had been approved by the Commission should have constituted a sufficiently solid ground for the lending bank and the guarantor to expect that HSY would be able to reimburse the loan,

— the loan is regularly reimbursed and the guarantee fee paid.

4.2.5. Assessment

4.2.5.1. Article 296 of the Treaty

(104) Before undertaking an assessment of the compatibility under Article 87 of the Treaty, the applicability of Article 296 of the Treaty needs to be considered. The Commission notes that on the basis of the granting decision, HSY was obliged to use the guaranteed loan as well as the two others loans covered by the opening decision (i.e. measures P3 and P4) for the financing of the investment programme⁽⁷³⁾. As concluded in the assessment of measure P1, the investment programme does not fall within the scope of Article 296 of the Treaty. The Commission therefore considers that these three loans earmarked for the financing of the investment programme are subject to State aid rules and are not covered by Article 296 of the Treaty.

4.2.5.2. Existence of aid

(105) It first needs to be verified whether the State guarantee fulfils the conditions to be State aid in the meaning of Article 87(1) of the Treaty.

(106) In order to assess the existence of aid in the different guarantees investigated in this decision, the Commission will use the Commission Notice on the application of Article 87 and 88 of the EC Treaty to State aid in the form of guarantees⁽⁷⁴⁾ (hereinafter 'the Notice on guarantees'), which was published in March 2000. However, as indicated in its section 1.4, it did not consist in a change of policy, but rather explains in more details the method that the Commission used until then to assess guarantees. Consequently, the principles laid down in the Notice on guarantees can also be used to assess the guarantees granted before March 2000. In accordance with this conclusion, in the opening decision the Commission used the Notice on guarantees to assess measure P2. Greece did not contest that application. Conversely, Greece also applied it to assess measure P2⁽⁷⁵⁾.

(107) First, in order to fall under Article 87(1), a measure must involve State resources. This is the case for measure P2

since, by granting this guarantee, the State put State resources at risk.

(108) Second, it needs to be established whether the measure is selective. Greece claims that the State has granted several guarantees to other firms and charged also a premium of 1%. Greece provided a list of these firms. The Commission considers that this fact does not show that the measure was a general measure. In order to be a general measure, a measure must be open to all economic agents operating within a Member State. It must be effectively open to all firms on an equal access basis, and they may not de facto be reduced in scope through, for example, the discretionary power of the State to grant them or through other factors that restrict their practical effect. The present measure can therefore not be considered to be a general one. In particular, it is not because certain firms have received a State guarantee that all the firms could receive one. Greece has not shown that the granting of a State guarantee is open to all economic agents on an equal access basis. In addition, all the firms that appear in the list provided by Greece are State-owned firms or firms carrying out some military activities. It seems therefore that private firms could not have received such a guarantee for the financing of their normal activities. In fact, Greece does not indicate the legal basis on the basis of which the Minister of Finance decided on 8 December 1999 to grant the guarantee. It is likely that it is Law 2322/1995, which is a selective measure as it will be explained in the assessment of measure E12b.

(109) Third, the existence of an advantage must be demonstrated. In accordance with point 2.2.2 of the Notice on guarantees, since the guarantee was granted before the granting of the loan and not 'ex post', there is no presumption of aid to the lender. It is therefore the aid to the borrower that needs to be investigated, as defined in point 2.1.1 of the Notice on guarantees. Greece claims that there is no advantage since HSY could have obtained a similar loan by offering a bank other securities instead of a State guarantee. The Commission considers that it does not have to investigate whether, by offering other securities, HSY could have obtained this loan. Indeed, the Commission must assess whether the actual transaction implemented by the State, namely granting a guarantee on a loan without benefiting of any security, would have been acceptable to a market economy investor. A guarantee on a loan secured by a lien on some assets or by the conveyance of claims constitutes a different transaction. As indicated in section 2.1.1 of the Notice on guarantee, one of the potential advantages of the State guarantee is the possibility for the borrower 'to offer less security'. In addition, even if the possibility to obtain a financing by offering more securities had to be assessed,

the Commission has already concluded in section 3.1 of the present decision that after 30 June 1999 HSY would not have received loans or guarantees from private banks, even by offering a security to the bank. The Commission concludes that, since the State guarantee was granted in December 1999, it gave an advantage to HSY by providing financing which HSY could not have received from the market.

- (110) Greece also claims that the guarantee fee of 1 % was the market price and there is therefore no advantage. The Commission notes that Greece did not provide any market data showing that banks were ready to grant a guarantee at that price. Greece only provided a list of guarantees provided by the State during the same period for the same price. The Commission fails to understand how this list of State guarantees could prove that the guarantee fee asked from HSY is market conform and does not constitute aid. In particular, this list can not be considered as 'a State guarantee scheme [which] does not constitute State aid under Article 87(1)' since, as the guarantee in favour of HSY illustrates, it does not fulfil many of the conditions laid down in section 4.3 of the Notice on guarantees. Furthermore, even if a guarantee fee of 1 % might have been market conform for other (healthy) companies, this would not automatically make it market conform for a company in difficulties like HSY.
- (111) As regards the claim that a guarantee fee below the market price could be acceptable for a private investor in similar circumstances because Greece was shareholders of HSY, the Commission has already dismissed this claim in section 3.1 of the present decision.
- (112) Section 3.1 also shows that from 30 June 1999 there was sufficient information available to conclude that HSY had not succeeded to conclude enough shipbuilding contracts to restore its viability and would face heavy losses in 1999 and 2000. Therefore, whereas the fact that the loan was financing an investment plan approved in 1997 by the Commission would have comforted a potential lender in 1997 and 1998, it would not have comforted a bank in December 1999 since it was clear that the business plan had failed. The corresponding point made by Greece must therefore be dismissed.
- (113) Finally, as regards the fact raised by Greece that the loan is reimbursed in accordance with the terms of the contract, the Commission fails to see how it could prove that a private bank would have granted the loan

in question. Indeed, what matters is the situation of the firm and the information available when the guarantee was granted⁽⁷⁶⁾. As a subsidiary element, the Commission observes that, in accordance with the information available at the time of the granting of the guarantee and on the basis of which it could be expected that the yard would book severe losses in the following years, the yard has really recorded heavy losses in the following years and its net equity really became very negative. In addition, HSY only survived (and thus is able to reimburse the loan) because of the continued support by State aid.

- (114) From the foregoing, the Commission considers that the measure gives an advantage to HSY.
- (115) This selective advantage distorts competition because it provides financing at a time when HSY would not have received financing from the market and was in difficulty. The measure therefore contributed to keep HSY alive and to finance its activities. Since some competitors of HSY are located in other Member States⁽⁷⁷⁾, this distortion of competition affects trade between Member States⁽⁷⁸⁾.
- (116) Since it fulfils all the conditions laid down in Article 87(1) of the Treaty, the guarantee constitutes State aid. Since, contrary to the requirement laid down in Article 88(3) of the Treaty, it was granted without prior notification, it constitutes unlawful aid.
- (117) Since the Commission has just demonstrated that a selective advantage granted to HSY distorts competition and trade, the Commission will not repeat the analysis of the existence of a distortion of competition and trade anymore when it will assess the remaining measures.

4.2.5.3. Compatibility of the aid

- (118) As regards the compatibility under Article 87(2) and (3) of the Treaty, the Commission notes that none of the provisions laid down in Article 87(2) and Article 87(3)(b) and (d) apply. As regards the compatibility under Article 87(3)(a), (c) and (e), aid to shipbuilding was regulated from 1 January 1999 by Council Regulation (EC) No 1540/98 of 29 June 1998 establishing new rules on aid to shipbuilding⁽⁷⁹⁾ (hereinafter 'Regulation (EC) No 1540/98'). Since the guaranteed loan aimed at financing an investment plan which was a part of a restructuring plan and since in addition HSY was in

difficulty, the State guarantee should be assessed on the basis of Article 5 of Regulation (EC) No 1540/98. It is clear that the measure does not fulfil the conditions laid down in this article. In particular, Article 5 indicates that restructuring aid 'may exceptionally be considered compatible with the common market provided that it complies with the Community guidelines on State aid for rescuing and restructuring firms in difficulties'. The guidelines applicable at the time of the grant were the 1999 R & R guidelines, which had been published in the Official Journal on 9 October 1999⁽⁸⁰⁾ and which entered into force on the same day. Several of the conditions for authorisation of the aid laid down in section 3.2.2 of these guidelines are not fulfilled. For instance, regarding condition (b) 'Restoration of viability', the Commission notes that the State guarantee financed an investment plan which was part of a restructuring plan which, in December 1999, has become totally insufficient to restore the long term viability of HSY. Regarding the condition (d) 'Aid limited to the minimum', the Commission had already decided in decision N 401/97 that State aid could at the maximum amount to 50 % of the investment costs and the remaining 50 % would be financed by funds raised from the shareholders and by bank loans raised at market conditions. Consequently, no additional aid in favour of the investment plan could be granted otherwise the maximum aid intensity of 50 % would be breached. The State guarantee also breached the 'one time, last time' condition laid down in section 3.2.3 of the 1999 R & R guidelines since by decision N 401/97, the Commission had authorised investment aid, which, under Directive 90/684/EEC, was a kind of restructuring aid. This aid has been granted to HSY by Ministerial Decision of December 1997 (but, as described in recital 84 of the present decision, Greece indicates that it has not been paid out to HSY yet).

- (119) On the basis of the foregoing, the Commission considers that the State guarantee constitutes unlawful and incompatible aid, which must be recovered. If it is still outstanding at the time of this decision, the State guarantee has to be stopped immediately. This is however insufficient to restore the situation that would have prevailed without aid since HSY has during several years benefited from a loan which it would not have received without State intervention. In order to recover this advantage, the Commission considers, in accordance with the conclusion reached in section 3.1 of the present decision, that the difference between the total cost of the guaranteed loan (interest rate and guarantee premium) and the reference rate for Greece increased by 600 basis points needs to be recovered for the years during which the guarantee was running.
- (120) The Commission considers that this will restore the situation that would have existed without a State guarantee. Thereby, the breach of the prohibition of State guarantees and financing below market rate laid down in decision N 401/97 is eliminated.

4.3. GRD 1,56 billion (EUR 4,58 million) loan granted in 1999 (measure P3)

4.3.1. Description of the measure

- (121) In 1999, HSY received a loan amounting to GRD 1,56 billion (EUR 4,58 million) from ETVA, which received as securities a right on the payment of the first tranche of the investment aid authorised by decision N 401/97. The loan was concluded on 28 July 1999 and fully paid out to HSY the next day. The initial duration was until 31 March 2001. After successive prolongations, it was reimbursed on 2 August 2004. The interest rate was ATHIBOR (EURIBOR from 1 January 2001) plus 100 basis points⁽⁸¹⁾.

4.3.2. Grounds for initiating the procedure

- (122) In the opening decision, the Commission indicates that the loan could constitute aid, the compatibility of which is doubtful. In addition, if it turned out that this loan benefited from a State guarantee, it seems to infringe decision N 401/97, which indicated that, in order to finance the investment programme, bank loans would be raised at normal market conditions without State guarantees.

4.3.3. Comments from interested parties

- (123) Elefsis claims, in addition to the comments indicated previously with respect to measure P2, that since the measures P3 and P4 have been granted at a time when it was clear that HSY had failed to implement its restructuring/investment plan and had failed to respect the terms of decision N 401/97, there was a material risk that the security given for these loans, i.e. the payment of the approved investment aid, was unlawful and thus void and unenforceable.

4.3.4. Comments from Greece

- (124) The Greek authorities (and HSY) claim that this loan was granted on market terms. In particular, the interest rate is similar to the one of some loans granted by ETVA to other firms during this period. HSY could have borrowed from any other bank but logically preferred ETVA which was its shareholder. In addition, the security in the form of the conveyance of the claims on the first tranche of the investment aid constituted a collateral acceptable to any bank. Finally, Greece notes that the loan was fully reimbursed to the bank.

4.3.5. Assessment

4.3.5.1. Article 296 of the Treaty

- (125) The Commission has already concluded in the assessment of measure P2 that measure P3 does not fall within the scope of Article 296 of the Treaty. It must therefore be assessed under State aid rule.

4.3.5.2. Existence of aid

- (126) First, the Commission notes that the loan has been granted by ETVA and was not covered by a State guarantee.

- (127) As regards the selectivity of the measure, Greece observes that other firms received loans from ETVA at similar interest rates. However, as already explained in the assessment of measure P2, a measure is a general measure only if it fulfils strict conditions, which are clearly not fulfilled in the present case. For instance the measure is not open to all firms on an equal access basis, since interest rates vary from one borrower to the other and depend on the decision of ETVA to grant the loan or not, and on which conditions. The measure is therefore selective.

- (128) As regards the existence of an advantage, the Commission notes that this loan was granted after 30 June 1999, at a time when the firm had no access to the loan market anymore, as explained in section 3.1 of the present decision. The fact that ETVA charged a similar interest rate for some loans to other firms during that period does not prove that this interest rate would have been acceptable for a private bank in similar circumstances. First, the interest rate demanded by a private bank on a particular loan depends on the credit-worthiness of the borrower. Greece has not shown that the other borrowers in the list had a risk of default similar to the risk of default of HSY. The Commission recalls that the situation of HSY was very bad at the time. It is therefore likely that a market economy investor would have requested a higher interest rate for loans to HSY than for loans to healthy firms. Second, even if the other borrowers had a risk of default as high as HSY, the list provided by Greece would still be insufficient to conclude that this interest rate was the market price. Indeed, the list provided by Greece contains only loans

granted by ETVA, which was a State-owned bank (and in addition a development bank), and it is therefore possible that the other loans also contain an aid element. It therefore does not prove that they would have been acceptable to a private bank.

- (129) The Greek authorities also assert that the security in the form of the conveyance of the claims on the first tranche of the investment aid constituted a collateral, which would have rendered the loan acceptable to any private bank. The Commission notes that, according to the government decision by which the investment aid was approved, the payment of the first tranche of the aid would take place once the competent control body would have observed that the investment expenses amount to GRD 2,73 billion. In addition, the payment had to take place before 31 December 1999. As was revealed by the control made by the Greek authorities in December 1999 (see comments of Greece on measure P1), the amount of GRD 2,73 billion had just been reached by 30 June 1999. Therefore, since the loan was granted in July 1999 and since at the time it could probably be estimated already that the threshold of GRD 2,73 billion had been reached or would be reached soon, the probability of receiving the first tranche of the aid could at first sight be considered as quite high. However, different problems preventing the payment of the aid could still occur. First, in case of bankruptcy of HSY, it was not certain that the Greek authorities would have accepted to pay the investment aid to a firm that would have ceased operations⁽⁸²⁾. The bank would then have had to start costly and lengthy legal actions to recover the money. Second, it is not certain that the competent control bodies would have accepted to validate the investment expenses incurred, such that the threshold would not be reached in due time. Third, other administrative problem could happen. This is exactly what happened in reality⁽⁸³⁾, such that the Greek authorities did not pay the first tranche during several years. As indicated in chapter 1 'Procedure' of the present decision, when the Commission later learnt about the delay in the implementation of the investment plan, it asked the suspension of the payment of the aid which had not yet been paid to HSY. The Commission concludes that the payment of the first tranche of the investment aid by the State was likely but not certain. In view of the difficult situation of HSY, a private bank would have required securities that could be enforced rapidly and with certainty, and would have not been satisfied with security of which the value could be zero in certain circumstances. The Commission thus concludes that a private bank would not have accepted to grant this loan. As indicated previously, this is confirmed by HSY's unsuccessful attempts to raise funds from market economy investors.

(130) Greece also claims that, since ETVA was the shareholder of HSY, it served its interests by providing this loan to HSY. In section 3.1.3 of the present decision, the Commission has already rejected this claim.

(131) Finally, regarding the fact that the loan has been reimbursed, the Commission has already explained in the assessment of measure P2 why such a fact does not show that a private bank would have accepted to provide this financing to HSY at that moment.

(132) From the foregoing considerations, the Commission concludes that the loan gives an advantage to HSY since it could not have received this loan from the market.

(133) The Commission concludes that measure P3 constitutes aid in the meaning of Article 87(1) of the Treaty. Since, contrary to the requirement laid down in Article 88(3) of the Treaty, the aid was granted without prior notification, it constitutes unlawful aid.

4.3.5.3. Compatibility of the aid

(134) As measure P2, the compatibility of the present measure must be assessed under Regulation (EC) No 1540/98. Since, as measure P2, this loan aimed at financing an investment plan which was a part of a restructuring plan and since it was granted to a firm in difficulty, it should also be considered as restructuring aid covered by Article 5 of Regulation (EC) No 1540/98. It is clear that the measure does not fulfil the conditions laid down in this article. In particular, Article 5 indicates that restructuring aid 'may exceptionally be considered compatible with the common market provided that it complies with the Community guidelines on State aid for rescuing and restructuring firms in difficulties'. The guidelines applicable at the time of the grant were the ones published in the Official Journal on 23 December 1994⁽⁸⁴⁾ and which entered into force on the same day (hereinafter the 1994 R & R guidelines). Several of the conditions for authorisation of the aid laid down in section 3.2.2 of these guidelines are not fulfilled. For instance, regarding condition (i) 'Restoration of viability', the Commission notes that the State guarantee financed an investment plan which was part of a restructuring plan which, in July 1999, had become insufficient to restore the long term viability of HSY. Regarding the condition (iii) 'Aid in proportion to the restructuring costs and benefits', the Commission had already decided in decision N 401/97 that State aid could at the maximum amount to 50 % of the investment costs

and the remaining 50 % would be financed by funds raised from the shareholders and by bank loans raised at market conditions. Consequently, no additional aid in favour of the investment plan could be granted otherwise the aforementioned percentages of 50 % would be breached and the Commission could not consider that the aid is proportional to 'the restructuring costs and benefits'.

(135) On the basis of the foregoing, the Commission considers that the loan constitutes unlawful and incompatible aid, which must be recovered. Since after 30 June 1999 HSY could not have received any loan from the market, the entire loan has to be reimbursed. This is however insufficient to restore the situation that would have prevailed without aid since during several years HSY has benefited from a loan which it would not have received without State intervention. In order to recover this advantage, the Commission considers, in accordance with the conclusion reached in section 3.1 of the present decision, that the difference⁽⁸⁵⁾ between the interest rate of the loan and the reference rate of Greece increased by 600 basis points needs to be recovered for each year from the pay-out of the loan to HSY until its reimbursement.

(136) The Commission notes that in March 2002 the State sold the majority of ETVA's shares to Piraeus Bank. ETVA was therefore not owned by the State anymore in the last two years of the loan, which was reimbursed in 2004. The question could then be raised (for this loan and for the other loans and guarantees granted by ETVA before March 2002 and having a duration spreading beyond March 2002) whether the part of the aid relating to the period after March 2002 should be reimbursed to ETVA instead of being reimbursed to the State. In order to answer this question, the Commission recalls that when the State grants a loan with an interest rate below the market rate, the aid is granted at the time of the conclusion of the loan, even if the advantage only materialises at each interest payment date, when the borrower pays a lower interest rate⁽⁸⁶⁾. In the same manner, the market value of a loan which has an interest rate not reflecting adequately the difficulties of the borrower decreases immediately⁽⁸⁷⁾ after the signature of the loan contract (i.e. not at the future dates when the borrower pays an interest rate below the market interest rate). In turn, the value of a bank depends on the value of its assets, and notably its portfolio of existing loans. Therefore, the granting of loans at non market conform conditions decreased the value of ETVA and therefore diminished the price that the State later received when it sold ETVA's shares⁽⁸⁸⁾. This illustrates that it is the State which supported the cost of these aid measures, including for their duration running after March 2002.

4.4. EUR 13,75 million loan granted in 2002 (measure P4)

4.4.1. Description of the measure

- (137) The loan contract between ETVA and HSY was concluded on 31 May 2002. The amount of the loan was EUR 13,75 million, its duration 2 years and its interest EURIBOR plus 125 basis points. The loan would be used as an advance on the second and third tranches of the investment aid. The loan was secured by the conveyance of the payment of the second and third tranches of the investment aid ⁽⁸⁹⁾.

4.4.2. Grounds for initiating the procedure

- (138) In the opening decision, the Commission indicates that the loan could constitute aid, the compatibility of which is doubtful. In addition, if it turned out that this loan benefited from a State guarantee, it seems to infringe decision N 401/97, which indicated that, in order to finance the investment programme, bank loans would be raised at normal market conditions without State guarantees.

4.4.3. Comments from interested parties

- (139) Elefsis's comments on this measure are similar to the comments on measure P3.

4.4.4. Comments from Greece

- (140) The Greek authorities claim that this loan was granted on market terms. In particular, the interest rate is similar to the one of some loans granted by ETVA to other firms during this period. HSY could have borrowed from any other bank but logically preferred ETVA which was its shareholder. In addition, the security in the form of the conveyance of the claims on the second and third tranches of the investment aid constituted a collateral acceptable to any bank. Finally, the loan was never paid out to HSY and it could therefore not constitute aid to HSY. In addition, the fact that ETVA has refused to pay out the loan when it realised that the payment of the investment aid had been 'frozen' for procedural reasons and that the payment of the aid was uncertain illustrates that ETVA acted as any other bank would have done.

4.4.5. Assessment

4.4.5.1. Article 296 of the Treaty

- (141) The Commission has previously concluded in the assessment of measure P2 that measure P4 does not fall in the scope of Article 296 of the Treaty. It must therefore be assessed under State aid rule.

4.4.5.2. Existence of aid

- (142) First, the Commission notes that the loan has been granted by ETVA and was not covered by a State guarantee.
- (143) The Commission observes that, since ETVA refused to pay out the loan to HSY, HSY never received any money under the loan contract. Therefore, there is no advantage to HSY and the Commission can immediately conclude that the measure does not constitute aid.
- (144) The two following elements concerning measure P4, even if they are irrelevant for the assessment of measure P4, may cast doubts on the validity of the assessment of other measures. Therefore the Commission will analyse them.
- (145) First, Greece claims that the fact that ETVA, because there was a risk that the investment aid would not be paid, decided not to disburse the loan to HSY illustrates that ETVA acted as a normal private lender and did not offer to HSY a favourable treatment. The Commission notes that Greece's claim fails to take into account the fact that when ETVA refused to pay out the loan it was already under the control of Piraeus Bank and not under State control anymore. Therefore, the refusal to pay out the loan can not be taken as an illustration of the way ETVA behaved when it was under State control. Conversely, this confirms that a private bank would have avoided to lend to HSY.
- (146) Second, the Commission notes that measure P4 has the same type of collateral as measure P3. Measure P4 was signed when Piraeus Bank had already taken control of ETVA. However, this does not show that measure P3 was in fact acceptable to a private bank. Indeed, the two situations are not comparable for several reasons. The Commission notes for instance that when the loan contract was signed on 31 May 2002, it was already known, and certainly to ETVA who was the shareholder of HSY until that date, that the payment of the investment aid had been 'frozen' for administrative reasons ⁽⁹⁰⁾. Therefore, when ETVA signed the contract on 31 May 2002, it was already in a position to refuse to pay out the loan ⁽⁹¹⁾. It knew that it had the possibility to refuse to pay out the loan. This is different from the situation of ETVA when it signed the loan contract in July 1999. Another difference with measure P3 is that when the loan contract was signed on 31 May 2002, two international firms had completed the acquisition of HSY and would invest in it. The acquisition increased the chances of survival of the firm. Such an acquisition could not be foreseen in July 1999.

4.5. Misuse of the GRD 54 billion (EUR 160 million) aid authorised in 1997 (measure E7)

4.5.1. Description of the measure

- (147) On 15 July 1997, besides decision N 401/97 endorsing the investment aid, the Commission adopted decision C 10/94. That decision closed the procedure pursuant to Article 88(2) by approving under Regulation (EC) No 1013/97 a debt write-off amounting to GRD 54 billion (EUR 160 million), which corresponded to the debts related to civil work of the yard. The write-off of the debts related to military work of the yard, which took place at the same time, has not been assessed under State aid rules.

4.5.2. Grounds for initiating the procedure

- (148) In the extension decision, the Commission raises doubts that two conditions laid down in decision C 10/94 have been breached. First, the authorisation of the debt write-off was conditional on the implementation of the restructuring plan, of which the investment plan was one of the two pillars. As the Commission has explained in the opening decision (see description of measure P1), the Commission doubts that this investment plan has been implemented correctly. Second, decision C 10/94 prohibits the granting of additional operating aid for restructuring purposes. The Commission observes that the different measures included in the extension decision seem to constitute additional restructuring aid. It seems therefore that this condition was breached.

4.5.3. Comments from interested parties

- (149) Elefsis claims that the breach of two conditions brought forward in the opening decision constitute a valid basis to conclude that the aid was misused. In addition, Elefsis claims the privatisation of 1995 never constituted a real privatisation. In particular, the employees never supported any financial risk as shareholders since they only paid a small part of what they should have paid and since the amounts they really paid were entirely reimbursed by the State at the time of the 2001–2002 privatisation. The Commission should consider the absence of any real privatisation, which was a condition for the waiver, as an additional breach of the decision C 10/94.

4.5.4. Comments from Greece

- (150) In their comments on the extension decision, Greece and HSY⁽⁹²⁾ claim that the prohibition of additional restructuring

aid only renders any new aid unlawful. This prohibition, if breached, does not have the effect of rendering the aid authorised by decision C 10/94 incompatible. In addition, Greece stresses that the decision prohibits additional 'operating aid' (as defined in Article 5 of Directive 90/684/EEC) for restructuring. It therefore contests that after 1997 no restructuring aid may be granted to HSY.

- (151) As regards the investment plan, Greece and HSY contend that decision C 10/94 did not contain a condition concerning the implementation of an investment plan. Moreover, it could not have contained such a condition since Directive 90/684/EEC and Regulation (EC) No 1013/97, which formed the legal basis for the decision, did not contain such a condition. The only condition was the partial privatisation of HSY and the submission (i.e. not the implementation) of an investment plan.

4.5.5. Assessment

4.5.5.1. Article 296 of the Treaty

- (152) Article 296 does not apply to the present measure since it concerns the write-off of debts exclusively related to the civil activities of the yard. In addition, decision C 10/94 was based on State aid rules and not on Article 296 of the Treaty

4.5.5.2. Implementation of the investment plan

- (153) As regards the implementation of the investment plan, the Commission considers that it was a condition laid down in decision C 10/94. Indeed, the second before last paragraph indicates 'The investment plan has not yet started [...]. Once it is executed, the ongoing restructuring should be completed and the yard should return to viability' In the one before last paragraph, the Commission recalls the prohibition of further restructuring aid. Finally, the last paragraph indicates 'In the light of the above, the Commission has decided to close the procedure pursuant to Article 93(2) by authorising the aid subject to the conditions described in this letter. Should the Commission consider that any of these conditions have not been complied with, it may require the suppression and/or recovery of the aid'. The fact that the Commission used the word 'conditions' in plural indicates that there was at least a second condition in addition to the prohibition of additional restructuring aid. On the basis of the structure and the content of the decision, it can be concluded that the implementation of the investment plan was a condition. The Commission

has already assessed in detail the implementation of the investment aid when analysing measure P1. The Commission has concluded that HSY has not implemented the investment plan in a reasonable period. On 31 December 2001 — after one prolongation of the date for completing the investment plan — HSY had executed only 63 % of the plan. The Commission concludes therefore that this condition has not been complied with.

- (154) Greece claims that the implementation of the investment plan is not a condition laid down in Regulation (EC) No 1013/97, which is the legal basis of decision C 10/94. The Commission recalls that the aid was authorised by decision C 10/94. Therefore, the conditions laid down in the latter decision have to be respected. If Greece considered that the conditions laid down in decision C 10/94 did not comply with the conditions laid down in Regulation (EC) No 1013/97, it should have contested decision C 10/94. However, it has not done so within the time limit set by article 230 of the Treaty. As a subsidiary element, the Commission recalls that Regulation (EC) No 1013/97 is simply an amendment of the Directive 90/684/EEC and aimed at increasing the aid amount which can be granted to three groups of yards. With regards to HSY, Regulation (EC) No 1013/97 indicates that 'All other provisions of Directive 90/684/EEC shall apply to this yard.' The Commission recalls that the Directive 90/684/EEC authorises aid to Greek yards if 'granted for the financial restructuring of yards in connection with a systematic and specific restructuring programme linked to the disposal by sale of the yards.' This indicates that the Council could not be satisfied with the mere submission of a restructuring plan but really needed the implementation to be carried out. Indeed, how aid could be granted 'in connection with a systematic and specific restructuring programme' if this programme is not implemented.

- (155) Since the condition has not been complied with, the aid has been misused and, in accordance with the last paragraph of decision C 10/94, it has to be recovered.

4.5.5.3. Prohibition of 'further operating aid for restructuring purposes'

- (156) The one before last paragraph of decision C 10/94 indicates that 'the Commission notes that Regulation (EC) No 1013/97 was adopted by the Council with the

condition that no further operating aid for restructuring purpose will be made available for the yards covered by the regulation. Accordingly, no such restructuring aid can be granted to this yard in the future.' The parties to this procedure disagree on the interpretation of this condition. According to Greece and HSY, this entails that any operating aid for restructuring purpose which would be granted after the adoption of the decision would be automatically incompatible and should be recovered. According to Elefsis, this condition entails that the grant of any operating aid for restructuring purposes after the adoption of the decision would be a misuse of the aid authorised by decision C 10/94 and should therefore lead to the recovery of the aid authorised by the decision C 10/94, in addition to the recovery of the additional operation aid for restructuring purposes.

- (157) The Commission observes that the goal of the prohibition of further operating aid for restructuring is to avoid the accumulation of aid above the level set in the decision. The Commission considers that this objective is reached if any additional operating aid granted after the adoption of decision C 10/94 is recovered. Indeed, by the recovery of the additional aid, the initial situation is restored and accumulation of aid above the level set in decision C 10/94 is avoided. The Commission therefore concludes that the grant of additional operating aid for restructuring purpose after the adoption of decision C 10/94 does not trigger the obligation to recover the aid approved by decision C 10/94, as long as the additional aid is actually recovered.

- (158) The Commission observes that, in order to determine whether the aid authorised by decision C 10/94 should be recovered, it is not necessary to determine which of the aid measures unlawfully implemented after the adoption of decision C 10/1994 constitute 'operating aid for restructuring purpose'. Indeed, in the present decision, the Commission will conclude that all the aid measures unlawfully implemented after the adoption of decision C 10/94 should be recovered. Consequently, any measure which could potentially qualify as further operation aid for restructuring purposes will have to be recovered. The recovery will restore the initial situation and therefore any potential accumulation of restructuring aid is avoided. Therefore, the objective of the condition laid down in decision C 10/94 will be complied with.

4.5.5.4. Non payment of the purchase price

- (159) In the course of the deeper analysis of the case that took place during the investigation procedure, the Commission discovered an additional infringement of decision C 10/94: in the whole period during which the employees — as holder of a 49 % stake in HSY — were participating in the management of HSY, they have never paid the purchase price they were supposed to pay under the partial privatisation contract of September 1995.
- (160) In order to understand this breach of decision C 10/94, it is first necessary to analyse the text of this decision and of the legal acts on which it is based.
- (161) The preamble of the Directive 90/684/EEC indicates 'Whereas a short-term financial restructuring of the shipbuilding industry in Greece is necessary in order to enable its public owners to restore its competitiveness by selling it off to new owners'. On that basis, Article 10 of the Directive indicates '2. During 1991, operating aid for shipbuilding, ship conversion and ship repair not related to new contracts may be considered compatible with the common market if granted for the financial restructuring of yards in connection with a systematic and specific restructuring programme linked to the disposal by sale of the yards. 3. Notwithstanding the obligation to dispose of the yards by sale referred to in paragraph 2, the Greek Government shall be allowed to maintain a 51 % majority holding in one of the yards if justified by defence interests'. The Commission observes that the Directive uses the words 'selling [...] to new owners' and not 'giving' to new owners. The new owners were thus supposed to pay a price in exchange for the ownership of the yards. The ownership can not be granted for free. The sentence 'to restore its competitiveness by selling it off to new owners' explains the purpose of this condition. Under State ownership, the yards have not taken the necessary measures to restore their competitiveness. Consequently, they constantly needed State aid. To remedy this situation, unacceptable on the basis of Article 87 of the Treaty, the Council authorises aid for a last time (i.e. aid can be granted in 1991) but impose the sale of the yards to new owners. The logic is therefore that the new owners will take the measures necessary to restore competitiveness, such that the yards will not need operating aid for restructuring⁽⁹³⁾ anymore.
- (162) As indicated in section 2 'Prior decisions of the Commission and of the Council' of the present decision, the Commission took in July 1995 a negative decision in the procedure C 10/94 because HSY had not been sold, as requested by Directive 90/684/EEC. Greece asked the suspension of that decision by claiming that the sale was imminent. Greece itself then presented the contract of September 1995 as a sale of the yard. On that basis the Commission revoked its negative decision.
- (163) The preamble of Regulation (EC) No 1013/97 indicates 'Whereas, in spite of the efforts made by the Greek Government to privatise all its public yards by March 1993, the Hellenic shipyards was only sold in September 1995 to a cooperative of its workers, the State having kept a majority holding of 51 % for defence interests; Whereas the financial viability and the restructuring of the Hellenic shipyard necessitates the provision of aid which allows the company to write-off the debt accumulated before its delayed privatisation'. Article 1(3) of Regulation (EC) No 1013/97 indicates 'Drachma aid in the form of a waiver of debts of "Hellenic shipyards", up to the amount of Dr 54 525 million, corresponding to debts relating to civil work by the yard, as existing on 31 December 1991 and with accrued interest rates and penalties until 31 January 1996 may be regarded as compatible with the common market. All other provisions of Directive 90/684/EEC shall apply to this yard'. Regulation (EC) No 1013/97 was therefore adopted because, in order to become viable, HSY needed more aid than what was authorised under Article 10 of the Directive 90/684/EEC. More precisely, the former regulation authorised the waiver of the interests and penalties related to debts existing on 31 December 1991 and which had accrued since then. Regulation (EC) No 1013/97 was applicable until 31 December 1998. The Commission observes that the Council again used the words 'sold' and 'privatisation' in respect of HSY. The Council authorised the aid because it considered that a valid sale contract had been concluded in September 1995, in compliance with the condition laid down in the Directive 90/684/EEC. In other word, it was not necessary to put the sale of the yard as a condition since a valid sale contract already existed.
- (164) Decision C 10/94 starts by recalling that Article 10 of the Directive 90/684/EEC required the sale of the yard. Decision C 10/94 then indicates that this condition was fulfilled since '49 % of the shares in the yard were sold on 18 September 1995 to a cooperative of the yard's workers'. However, since the aid amount is larger than what the Directive 90/684/EEC authorised, 'The Commission could not give its approval on the basis of the provisions of the 7th Directive' which therefore was amended by Regulation (EC) No 1013/97 to increase the amount of aid that can be granted to HSY. Since the conditions laid down in the latter regulation and the

conditions laid down in Directive 90/684/EEC were met, Decision C 10/94 authorised the aid. The Commission observes that Decision C 10/94 again used the word 'sold' and considered that the contract between ETVA and the employees concerning the sale of 49 % of HSY shares was a valid sale. The Commission underlines that it had received a copy of the sale contract before the adoption of decision C 10/94 and was therefore aware of its content. The Commission concludes that, when adopting decision C 10/94, the Commission had no reason to request the sale of HSY (i.e. to put it as an explicit condition to be respected in the future) since a valid sale contract had already been signed in September 1995.

(165) However, the Commission recalls that the contract of September 1995 contained unusual provisions regarding the payment of the purchase price: the purchase price of GRD 8,1 billion (EUR 24 million) would not be paid immediately by the employees but it would be paid in 13 annual instalments after a grace period of 2 years, therefore from 1998 until 2010. Nevertheless, the ownership of the shares would be immediately transferred to the employees. Until the payment of the purchase price by the employees, ETVA will keep a pledge on the shares. In order to finance the payment of the yearly instalments to ETVA, HSY would retain a part of the monthly salary and of the allowances of the employees. In the months following September 1995, a contract was signed between ETVA, HSY, the association of the employees and each individual employee of HSY (the contract of September 1995 was concluded between ETVA and the association of employees). By this contract, each employee agreed to purchase a given number of shares in accordance with the terms of the September 1995 contract. These contracts also repeat that HSY will retain a part of the monthly wage and of the Easter and Christmas allowance to finance the annual instalments.

(166) The Commission has now established that the employees have never paid the yearly instalments. This means that they have not paid them while they were participating in the management of the yard as owner of 49 % of the shares. The first three instalments defined in the September 1995 contract — the ones that should have been paid in 1998, in 1999 and in 2000 — were not paid. In 2001, in the framework of the privatisation of HSY, the employees and ETVA concluded a contract by which the employees gave up their claim on 49 % of the revenue from the sale of HSY's shares to HDW/Ferrostaal. In exchange, ETVA gave up its claim toward the employees concerning the payment of the purchase price of 49 % of HSY's shares which should have been paid by the employees according to the September 1995 contract. This means that the employees as owners were

never financially exposed to the success or failure of the restructuring.

(167) The Commission indicated to Greece and HSY that the non-payment of the purchase price by the employees seems to constitute a misuse of decision C 10/94 since it entails that the partial privatisation, aiming at restoring the competitiveness of the yard, never took place.

(168) Greece and HSY contest these conclusions. Among others, they raise the following three grounds to dismiss the Commission doubts.

(169) As a first ground, Greece claims that the privatisation is 'real' and 'genuine'. In particular, the Greek Government underlines that: 'The employees acquired the shareholder's capacity according to the provisions of Greek law. They were registered in the company's Shareholders' Book and acquired all relevant rights as shareholders, including the right to participate and vote in the General Meetings and thus exercising control and influence on the day-to-day administration of the shipyards. In addition, the acquisition of shares entailed the risk that the shares might lose their value'. 'The employees exercised their pre-emption rights, provided by the relevant laws, and participated in the share capital increase, pro rata to their stake in the share capital, therefore private capital was invested in the shipyards' ⁽⁹⁴⁾.

(170) As a second ground, Greece claims that the payment of the purchase price was not a condition laid down in decision C 10/94, and even if it was the case, the Commission considered it as already fulfilled. In particular, Greece recalls that 'The Commission mentioned in its Decision of 31 October 1995 that it will continue to examine, within the procedure it had opened, all the actions of the Greek Government regarding the application of the agreement to transfer 49 % of the shares to the employees' union, as well as its content, before taking a final decision on the authorisation of the debt write-off. By acting accordingly, it reached a final positive decision in 1997 which approved the write-off, without imposing the condition of privatisation. In other words, the Commission had already examined in 1997 the content of the agreement and had concluded that it is a matter of privatisation before authorising the debt write-off;' ⁽⁹⁵⁾.

(171) As a third ground, Greece claims that ETVA has correctly applied the sale contract. Indeed, the employees, since they already had to participate in three capital increases aimed at financing the investment plan ⁽⁹⁶⁾, 'found it difficult to honour their commitment to pay the price of the shares. ETVA did not take out injunctions in order to recover the amount owed by each of the 2 000 employees because, realistically, there was no chance of bringing any such action to a successful conclusion [...]. Rather than engaging in complicated, time-consuming, costly and ultimately futile court proceedings in order to satisfy its claims [...], ETVA enforced the pledge on the unpaid shares and recovered its claim from the proceeds of the sale of the shares belonging to the employees, in that the said proceeds covered the debt in question' ⁽⁹⁷⁾. In other words, Greece claims that, since in the framework of HSY's privatisation in 2001–2002 ETVA received from HDW/Ferrostaal 100 % of the sale price — instead of only 51 % — 'it may be seen that the price was received. It is evident that the discharge of the price of the workers' shares by means of the sale satisfied ETVA's requirement to be paid the price [...]. [...] there is no issue of non-payment of the buy-out price' ⁽⁹⁸⁾. In addition, it can not be contested that the sale to HDW/Ferrostaal constitutes a real privatisation.

(172) The Commission has reached the following conclusions. As indicated earlier, decision C 10/94 and Regulation (EC) No 1013/97 concluded that, since the shares of HSY had been sold to the employees by the September 1995 contract, the condition of the sale of the yard laid down in Article 10 of the Directive 90/684/EEC was fulfilled. As indicated earlier, the purpose of this condition was to transfer the ownership to owners who, since they would aim at maximising the value of their investment, would take the measures necessary to restore the competitiveness of the yards. In this context, the Commission accepted the September 1995 contract as a valid sale since it contractually obliged the employees to pay EUR 24 million in exchange of a 49 % stake in HSY. This price to pay entailed that, when participating to the management of the yard, the employees would take care of preserving and increasing the value of their investment ⁽⁹⁹⁾. It appears now that ETVA, which was controlled by the State, has never seriously tried to obtain the payment of the parts of

the purchase price which, according to the September 1995 contract, should have been paid by the employees in 1998, 1999 and 2000. ETVA had several ways to obtain the payment of the purchase price. ETVA controlled HSY, which was legally entitled to collect the amounts from the wages and allowances of the employees ⁽¹⁰⁰⁾. In addition, HSY and the association of the employees were also contractually bound towards ETVA by the individual agreements signed with each employee in the months following September 1995. ETVA could therefore sue HSY and the association for the employees and did not need to sue the individual employees, as claimed by the Greek authorities. The Commission therefore concludes that the Greek authorities consciously did not request the payment of the annual instalments from the employees. By adopting this behaviour, Greece showed that it did not intend to obtain from the employees the payment of the purchase price. This dramatically modified the situation in which the employees found themselves. Instead of having to pay a purchase price, the employees would not have to put at risk this amount of own money. This means that, when participating in the management of the yard, they attached less importance to the preservation and the increase of the value of the shares and the restoration of financial viability (and more to the preservation of the employment and of the working conditions). In addition, since they were not paying the purchase price, it could be expected that over the medium or long term, ETVA would enforce its pledge on the shares and therefore the employees would simply have no shareholding anymore in the yard. In this context, the Commission fails to see how the employees could have been interested in preserving and increasing the value of HSY and taking the necessary measures to restore its competitiveness. The Commission therefore considers that the fact that the State did not seek to obtain the payment of the purchase price from the employees under the terms of the September 1995 contract dramatically changed the situation of employees when they were participating in the management of the yard. Consequently, because ETVA did not seek the payment of the purchase price from the employees, the change of ownership that took place in September 1995 did not constitute a real 'sale', aiming at restoration of competitiveness of the yard, as requested by Directive 90/684/EEC. In conclusion, by not seeking the payment of the purchase price from the employees, Greece has misused decision C 10/94. Indeed, the latter was adopted by the Commission on the basis of the legitimate assumption that the September 1995 contract would be implemented by the State-owned bank ETVA, and in particular that ETVA would collect the payment of the purchase price from HSY employees in accordance with the precise provisions laid down in the contract, hereby ensuring that these new owners have a financial interest in supporting the measures necessary to restore competitiveness and viability. The Commission could not expect that Greece, after having itself presented the September 1995 contract as a sale of HSY, would consciously refrain from obtaining the payment of the sale price from the purchaser, despite the existence of several contractual and legal provisions allowing the collection of the price. The Commission considers that such behaviour is similar to the submission of incorrect information to the Commission and to a misuse of aid.

The aid authorised by Decision C 10/94 should therefore be recovered from HSY.

(173) The Commission has reached the conclusion that the three grounds raised by Greece and HSY which have been summarised earlier should be dismissed.

(174) As regards the first ground — the privatisation was genuine and real because the employees got ownership of the shares and the corresponding control over HSY — the Commission observes that the transfer of the ownership was a necessary but not sufficient condition. Indeed, Decision C 10/94 as well as Regulation (EC) No 1013/97 are based on the fact that the shares have been 'sold' to the employees in September 1995. In other words, they are based on the hypothesis that the employees will pay the purchase price in accordance with the conditions laid down in the September 1995 contract. They are not based on the fact that the shares have been 'transferred' or 'given' to the employees. As explained earlier, it is logic that the Commission and the Council considered the payment of the purchase price as crucial since it forced the employees to attach importance to the value of the shares and manage the yard accordingly. As indicated earlier, since they did not had to pay this price, they were in a different situation from a market economy owner. As regards Greece's claim that 'the acquisition of shares entailed the risk that the shares might lose their value', the Commission notes that, while it is undisputed that the employees become formally the owner of the shares, they were much less concerned by the evolution of the value of the shares since they did not have to pay a high price (i.e. reduction of the wages and allowances during 12 years) to obtain them. In addition, since the employees were not paying the purchase price, they had to expect that ETVA would enforce its pledge on the shares, such that the employees would not remain the owners of these shares. Finally, as regards Greece's claims that 'The employees [...] participated in the share capital increase, pro rata to their stake in the share capital, therefore private capital was invested in the shipyards', the Commission does not contest that the employees participated to the capital increase (this will be described in the description and assessment of measure E10). However, the Commission recalls that, according to the September 1995 contract, the participation to the capital increase did not entitle the employees to any new shares of HSY. The Commission therefore fails to see how this participation alone could incite the

employees to manage the yard in a way that preserves or increases the value of the shares since this participation did not give them any new shares⁽¹⁰¹⁾. The Commission also fails to see how this participation could constitute a 'sale' of HSY since the employees did not receive additional shares in exchange of their investments. As a subsidiary element, the Commission recalls that the total amount invested by the employees on the occasion of the three capital increases was much smaller than what they should have invested if they would have participated to these capital increases and paid the purchase price according to the terms of the September 1995 contract. It is recalled that decision C 10/94 and Regulation (EC) No 1013/97 were based on the hypothesis that the September 1995 contract would be implemented, i.e. that the purchase price and the participation to the capital increases would be paid by the employees. Since the amount of money that the employees had to invest was much smaller than what the Commission legitimately expected when it adopted decision C 10/94 (and what the Council expected when it adopted Regulation (EC) No 1013/97), the Commission considers it insufficient to incite them to attach sufficient importance to the value of the shares and the restoration of the competitiveness of HSY.

(175) As regards the second ground raised by Greece — the payment of the purchase price was not a condition laid down in decision C 10/94, and even if it was the case, the Commission considered it as already fulfilled after having examined the September 1995 contract — the Commission has earlier recalled that the sale of the yard was a condition laid down in the Directive 90/684/EEC and explained what was the reason for this condition. The Commission has also already explained that it took a negative decision in July 1995 because the yard had not been sold. It was therefore evident to Greece that the Commission would not be satisfied by a mere transfer of ownership to the employees and it finally accepted the September 1995 contract only because it was a real sale, i.e. the employees would pay a significant purchase price and would thus have a real financial interest in restoration of competitiveness. The Commission also recalls that Regulation (EC) No 1013/97 amended Directive 90/684/EEC only in respect of the amount of operating aid for restructuring that can be granted to HSY. Since the September 1995 contract had already been submitted to the Commission and the Council at the time of the adoption of Regulation (EC) No 1013/97 and decision C 10/94, these legal acts did not need to repeat the condition of the sale of the yard. They simply recall that the shares of HSY have been 'sold'. On that basis, decision C 10/94 concludes that 'The conditions set in Article 10 of the Directive [...] were met' In other words, the assessment made by the Commission in Decision C 10/1994 (and the one made by the Council in Regulation (EC) No 1013/97) takes into account the existence of the September 1995 contract, which

was presented as a sale by Greece and, above all, which contractually obliges the employees to pay EUR 24 million to ETVA for the purchase of 49 % of HSY and which precisely determines how this purchase price would be collected from the employees and paid to ETVA. Since the obligations and rights of the parties were precisely determined in a contract, since Greece itself presented the contract as a sale of HSY, and since the Greek government itself had adopted a law obliging the employees to pay the purchase price to ETVA (see footnote 100), the Commission had no reason to doubt that the State would correctly implement the contract. In particular the Commission could not expect that the State itself will consciously refrain from collecting the purchase price from the purchaser. The Commission was entitled to consider that HSY had been sold and did not have to repeat that HSY had to be sold.

- (176) As regards the third ground raised by Greece to dismiss Commission's doubts — the September 1995 contract was correctly implemented — the Commission observes that the September 1995 contract indicated clearly how the purchase price would be paid. The annual instalments would be paid from 1998 and they would be financed by retaining a part of the Christmas and Easter allowances as well as a part of the monthly wage. Since the employees had accepted a reduction of their future salaries and allowances, ETVA did not need to collect the purchase price from each individual employee: HSY was able to directly withhold a part of their monthly salary. In these circumstances, the Commission fails to see how the non-payment of the yearly instalments can be justified by the fact that 'the workers found it difficult to honour their commitment to pay the price of the shares'. ETVA had simply to ensure that HSY withheld the respective amounts from the allowances and wages. ETVA, being the majority shareholder, controlled HSY. In addition, HSY was supposed to withhold these amounts under the terms of the agreements concluded between ETVA, HSY, the association of the employees and each individual employee. Therefore, ETVA could have directly sued HSY if it did not act according to the terms of the contract⁽¹⁰²⁾. The Commission therefore concludes that ETVA, which was controlled by the State, has not tried to obtain the payment of the purchase price as it was supposed to do under the provisions of the sale contract of September 1995. As earlier explained, this constitutes a misuse of decision C 10/94, since the latter legitimately supposed a correct implementation of that contract. As a subsidiary ground, the Commission notes that, even if Greece's claim that it was impossible for ETVA to collect the purchase price from the workers is true, this would also require the recovery of the aid authorised by decision C 10/94. Indeed, if this claim is true, it means that Greece has notified to the

Commission a sale agreement which from the outset could not be implemented (i.e. the State can not collect the purchase price from the purchaser)⁽¹⁰³⁾. In that case, the Commission should consider that decision C 10/94 is based on misleading information from Greece and should therefore rescind it.

- (177) In relation to the third ground raised by Greece, the Commission also rejects the claim that the enforcement of the pledge on the unpaid shares and their sale in the framework of the privatisation of 2001–2002 is similar to obtaining from the employees the payment due under the September 1995 contract. First, since ETVA did not seek to obtain the payment of the purchase price from the employees, they did not expect to actually have to invest the corresponding amount of money and consequently did not risk losing this money if the value of the shares would decrease. As explained earlier, this is in contradiction with decision C 10/94, which supposed that HSY had been 'sold', i.e. that a private investor put a precise and large amount of its own money at risk by purchasing shares of HSY and it would therefore be incited to manage the yard with the objective of maximising the value of its holding. Second, the cash received by ETVA — and therefore by the State — is totally different. By enforcing the pledge on the shares, ETVA supported 100 % of the risk related to the value of HSY (thereby it reverted the partial privatisation). In addition, ETVA received only EUR 6,1 million when it sold 100 % of the shares of HSY to HDW/Ferrostaal. This means that ETVA received only EUR 3 million from the sale of the 49 % stake. This is much less than what ETVA should have received from the employees under the terms of the September 1995 contract, namely EUR 24 million paid in yearly instalment from December 1998 to December 2010.
- (178) Finally, as regards the claim that a real privatisation took place when HDW/Ferrostaal acquired 100 % of HSY, the Commission does not contest that point. However, it recalls that Article 10 of the Directive 90/684/EEC authorised aid only in connection with a sale of the yard. Similarly, Regulation (EC) No 1013/97 and decision C 10/94 authorised aid because the yard had just been 'sold'. Therefore, the aid had to be granted in the context of the sale of the yard. It could not be granted

for a sale taking place several years later. Therefore, the fact that HSY was really privatised by the sale to HDW/Ferrostaal does not change the conclusion that decision C 10/94 has been misused. It is also recalled that at the time of the sale to HDW/Ferrostaal, both Directive 90/684/EEC and Regulation (EC) No 1013/97 had expired for several years. Therefore, HSY would not have been able to receive the aid approved by decision C 10/94 in the framework of the 2001-2002 privatisation.

- (179) The Commission concludes that none of the grounds raised by Greece can dismiss the earlier conclusion that, by not seeking to obtain the payment of the purchase price from the employees, the State-controlled ETVA has misused decision C 10/94. This constitutes therefore a second misuse — besides the non implementation of the investment plant — of Decision C 10/94 and a second reason for the recovery of the aid authorised by this Decision.

4.5.5.5. Justification for the procedural choice of the Commission

- (180) In the extension decision, the Commission has raised doubts that the employees have not paid the purchase price for their 49 % stake in HSY. However, these doubts were raised in the framework of the assessment of measure E10 (named measure 10 in the extension decision). These doubts were not raised in the assessment of measure E7 (named measure 7 in the extension decision). Consequently, the extension decision does not indicate that the non-payment of the purchase price could constitute a misuse of decision C 10/94. The question could thus be raised whether according to Article 6 of Regulation (EC) No 659/1999 the Commission should have adopted a new decision extending for the second time the formal investigation procedure in order to raise doubts on this point. Greece claims this to be the case⁽¹⁰⁴⁾.

- (181) The Commission does not consider that it was obliged to extend a second time the investigation procedure in this particular case. First, as indicated, the doubts concerning the precise fact (i.e. the payment or not of the purchase price by the employees) have been raised in the extension decision, thereby offering the possibility for the parties to comment on it. Second, as regards the legal reasoning that this fact could constitute a misuse of measure E7, the Commission only reached this conclusion in the framework of the in-depth analysis of all the facts and laws that took place in the framework of the formal

investigation procedure. In such a large and complex case, which concerns measures as old as 10 years old, the investigation procedure will nearly automatically allow the Commission to refine its analysis since it provides a better knowledge of the facts and legal issues. Third, Greece has for a long time given confusing information regarding the payment of the purchase price by the employees. As late as in its answer to the extension decision, Greece and HSY claimed that the employees had started to pay the purchase price in 1998, as planned in the September 1995 contract⁽¹⁰⁵⁾. However, in the framework of the investigation procedure, the Commission accumulated evidence that it was not the case. It therefore requested Greece and HSY to submit solid evidence for their claims⁽¹⁰⁶⁾. Finally, HSY and Greece acknowledged that the employees did not pay the annual instalments in accordance with the September 1995 contract. The Commission, having eventually clarified the relevant facts of the case, was at that moment able to assess whether there has been misuses of earlier decisions.

- (182) The Commission also stresses that, in order to allow Greece and HSY to participate effectively in the procedure and in order to be sure that the rights of defence had been respected, it offered the opportunity to Greece and HSY (i.e. the only parties that had submitted comments on measure E10, besides Elefsis which had however already indicated in its comments that it considered that, since the purchase price had not been paid, the Commission should order the recovery of the aid endorsed by decision C 10/94) to comment on its assessment that the non payment could be considered as a misuse of decision C 10/94⁽¹⁰⁷⁾. Both Greece and HSY submitted extensive comments⁽¹⁰⁸⁾.

4.6. Misuse of the EUR 29,5 million closure aid authorised in 2002 (measure E8)

4.6.1. Description of the measure

- (183) On 5 June 2002, decision N 513/01 authorised aid amounting to EUR 29,5 million to encourage part of HSY's employees to voluntarily leave the yard. The Commission found that the EUR 29,5 million aid constituted compatible closure aid in the meaning of Article 4 of Regulation (EC) No 1540/98 and accepted as valid capacity reduction the limitation of the annual ship repair capacity of the yard to 420 000 direct man-hours, including subcontractors.

4.6.2. Grounds for initiating the procedure

- (184) In the extension decision, the Commission expressed doubts whether this limitation has been respected. The obligation to submit bi-annual reports was not respected. In addition, the Greek authorities have submitted confusing figures when asked to submit the relevant information.

4.6.3. Comments from interested parties

- (185) According to Elefsis, the turnover of HSY and the number of ships annually repaired in the yard are so high that they are irreconcilable with the compliance with the 420 000 hours limitation.

4.6.4. Comments from Greece

- (186) According to Greece and HSY, the yard resorts intensively to subcontractors, which have to be divided in two categories. First, the 'subcontractors retained by HSY'. They are chosen and paid by HSY. Second, the

'contractors of third parties'. The latter are chosen by the ship-owner. The ship-owner selects them and discusses the price directly with them. The contractors of third parties pay a fee to HSY to use the yard's facilities. According to Greece, only the first category has to comply with the limitation laid down in decision N 513/01. However, HSY does not know how many hours these 'subcontractors retained by HSY' work since they are paid on a fixed price basis. Greece therefore proposes a method to approximate the number of hours during which they worked: first, the sum of the contract prices paid to them is reduced by 15 % — which accounts for the profit margin — and by a further 20 %⁽¹⁰⁹⁾ — which account for the indirectly productive man-hours. The amount obtained is then divided by the 'annual cost rate of a man-hour derived from HSY's official books'⁽¹¹⁰⁾. By using this method, Greece arrives at a total number of hours below 420 000 for the each of year from 2002 until 2006. Greece thus concludes that the limitation has been complied with. The method is summarised in the following table.

	1.1.2002 –31.12.2002	1.1.2003 –30.9.2003	1.10.2003 –30.9.2004	1.10.2004 –30.9.2005	1.10.2005 –31.8.2006
A. Directly productive man-hours performed by HSY's workers	51 995	42 155	[...] (*)	[...]	[...]
B. Price paid to subcontractors retained by HSY (in Euro)	3 798 728	16 471 322	[...]	[...]	[...] (until 30.6.2006)
C. = B after deduction of profit margin (15 %) and indirect work (20 %)	2 469 173	10 179 134	[...]	[...]	[...]
D. Price per hour (in Euro) of HSY direct workers	25,97	27,49	[...]	[...]	[...]
E. Estimation of the directly productive man-hours performed by workers of the subcontractors retained by HSY (= C divided by D)	95 077	370 284	[...]	[...]	[...]
F. Total directly productive man-hours falling under decision N 513/01 (= A + E)	147 073	412 440	[...]	[...]	[...]

(*) Covered by the obligation of professional secrecy.

4.6.5. Assessment

4.6.5.1. Article 296 of the Treaty

- (187) As regards the potential application of Article 296 to the present measure, the Commission recalls that the

separation between the military activity and the civil activity was already done in decision N 513/01, which considered that the part of the State support falling under State aid rules was 25 %. The EUR 29,5 million aid was therefore entirely related to the civil activities of HSY and can be assessed under State aid rules.

4.6.5.2. Existence of a misuse of the aid

- (188) The Commission has reached the conclusion that each of the following elements is individually sufficient to conclude that the limitation laid down in the authorising decision was not respected and therefore the aid was misused.
- (189) First, since it was subject to a limitation of the number of man-hours, HSY had to put in place a mechanism to calculate precisely these hours. By having not put in place a mechanism to calculate precisely the number of man-hours carried out by subcontractors, and therefore by preventing a precise calculation of the number of man-hours carried out by the yard, HSY has misused decision N 513/01. This is especially the case since it is Greece that proposed to use the indicator 'number of man-hours' to prove that HSY was reducing its production capacity.
- (190) Second, the Commission contests Greece's assertion that 'contractors of third parties' are not covered by the limitation of hours. Greece claims it has no contractual relationship with them except renting the facilities. First, the Commission considers that accepting this reasoning would offer an easy way to circumvent the limitation: HSY, instead of signing contracts with subcontractors, would ask the shipowners to sign them, such that there is no contract between HSY and the subcontractors. Second, the aim of the limitation is to reduce the activities within the yard. It is therefore logic that when decision N 513/01 indicates that 'subcontracted labour' is included in the limitation, both the subcontractors of HSY and the subcontractors of the shipowner which are working within the yard are covered. Third, following detailed questions raised by the Commission⁽¹¹¹⁾, Greece acknowledged that HSY manages the payment to some of these 'third party contractors': The latter make an agreement with the shipowner regarding the tasks to be performed and the price, but then the shipowner pays HSY, which in turn transfers the money to the contractors. In such cases, there is a contractual relationship between HSY and the contractors, and the amounts paid by the shipowner for the work of the contractor appears in HSY income statement as a revenue (i.e. they are included in the sales/turnover of HSY). It is therefore beyond doubts that at least these contracts with 'contractors of third parties' fall within the limitation. Greece has neither calculated nor communicated to the Commission the number of man-hours performed by these 'contractors of third parties'. This constitutes an additional breach of decision N 513/01. In addition, the Commission observes that the turnover of the repair activities of HSY has rapidly increased since 2002. However this trend is not reflected at all in the total number of man-hours communicated by Greece. It is therefore likely that the number of man-hours performed by third party contractors paid by HSY has significantly increased. Since according to the figures provided by Greece, HSY was just below the limit of 420 000 hours in 2003, the Commission concludes that, if the contractors of third parties which are paid by HSY are included in the total number of man hours performed by HSY, it is reasonable to suppose that this limit has been breached in the following years.
- (191) Third, even if it were accepted that 'contractors of third parties' do not fall under the limitation of hours laid down in decision N 513/01 (which is not) and that the man-hours performed by the 'subcontractors retained by HSY' can be approximated by dividing the amounts paid to them by the hourly cost of labour, the limitation is not respected. Indeed, the 'annual cost rate of a man-hour derived from HSY's official books', which is used by Greece, is an inappropriate approximation of the hourly cost of a worker working for a subcontractor. Indeed, the high volatility of the series (for instance, it goes from EUR 27 to EUR [...] in the next year) proves that the annual cost rate of a man-hour derived from HSY's official books does not indicate how much a worker costs per hour⁽¹¹²⁾. Indeed, the hourly gross wage in an industry never evolve in such a manner: it increases steadily over time, but never doubles from one year to the other. In addition, yards use subcontractors precisely because it is cheaper than hiring more labour themselves. Consequently, the use of the annual cost rate of a man-hour derived from HSY's official books overestimates the cost per man-hour of the workers employed by the subcontractors. This fact has been confirmed by the consultant retained by the Commission. When more reasonable estimates of the cost per hour are taken into account, this significantly increases the number of man-hours performed by subcontractors⁽¹¹³⁾, such that the limitation of 420 000 hours is breached in 2003 and 2005.
- (192) Fourth, in the method proposed by Greece, the year 2003 has only nine months, i.e. until September 2003. Greece claims that from that moment the accounting year started to run from October to October. It can not be accepted that an annual ceiling is applied on the activity of nine months only. The Commission asked Greece to provide details over the activity during the last three months of 2003 but Greece has not provided the requested data⁽¹¹⁴⁾. If the activity of the last three months of the calendar year 2003 is approximated as a quarter of the activity of the business year 2004, it is clear that there is a breach of the limitation of man-hours.

(193) Since there are several independent grounds from which the misuse can be concluded, the Commission concludes that the aid must be recovered.

4.7. Capital injection of GRD 8,72 billion (EUR 25,6 million) by the Greek State or ETVA in 1996–1997 (measure E9)

4.7.1. Description of the measure

(194) In 1996–1997, ETVA made a GRD 8,72 billion (EUR 25,6 million) capital injection in HSY.

4.7.2. Grounds for initiating the procedure

(195) The extension decision raises doubts that this capital injection corresponds to the behaviour of a market economy investor. First, the Commission notes that Greece made contradicting submissions, indicating first that this amount had been granted by the State to compensate for the cost of a workforce reduction of 1 000 employees, and afterwards contradicted this explanation by claiming that this capital injection had been made by ETVA. Second, the Commission observes that the employees, who owned 49 % of the shares, did not participate in this capital increase. In addition, it is surprising that this capital injection by ETVA did not increase its shareholding in HSY.

(196) The Commission also indicated that, if found to constitute aid, it is doubtful whether this measure could constitute compatible aid.

4.7.3. Comments from interested parties

(197) Elefsis indicates that in 1996 49 % of the shares of HSY were owned by the employees. If ETVA made a capital injection without a pro rata participation of the employees, its shareholding should have increased to above 51 %, what was prohibited by law and what did not take place. This entails that ETVA did not receive any new shares in exchange for this capital injection. Such a scenario would have been unacceptable for a private investor.

4.7.4. Comments from Greece

(198) Greece confirms that ETVA made a GRD 8,72 billion (EUR 25,6 million) capital injection in 1996–1997 and received an equivalent amount from the State. Greece claims that the State acted as market economy investor since the reduction of the workforce financed by the capital injection significantly improved the efficiency of the yard and its future profitability. HSY explains that the amounts injected did not lead to the issuance of new shares and did not formally constitute a capital injection. That explains why the State shareholding did not increase above 51 %. Should the Commission nevertheless consider that this measure constitutes aid, Greece considers that it is compatible closure aid according to Article 7 of Directive 90/684/EEC.

4.7.5. Assessment

4.7.5.1. Article 296 of the Treaty

(199) This measure financed the entire activity of the yard and was not earmarked to support the civil activities only. Since, as concluded in section 3.3 of the present decision, 75 % of the activities of yard are military and Greece invokes Article 296 of the Treaty, only 25 % of the measure, which is GRD 2,18 billion (EUR 6,4 million), may be assessed under State aid rules.

4.7.5.2. Existence of aid

(200) The Commission observes that the State, through ETVA, gave money to HSY without receiving new shares, whereas it held only 51 % of HSY. A market economy investor would not make such a present to the other shareholders. It would have asked new shares or a pro rata capital injection by the other shareholders. Consequently, a private investor in similar circumstances would not have carried out this capital injection.

(201) Since the State provided resources to HSY which it would not have received from the market, this measure gave a selective advantage to HSY. The measure therefore constitutes aid in the meaning of Article 87(1) of the Treaty. Since, contrary to the requirement laid down in Article 88(3) of the Treaty, it was granted without prior notification, it constitutes unlawful aid.

4.7.5.3. Compatibility with the common market

(202) As regards the compatibility of this aid, the Commission observes that it is undisputed that HSY's workforce was reduced from 3 022 persons in 1995 to 1977 persons in 1997. This reduction of the workforce was also reported in the two decisions adopted on 15 July 1997 (Decisions C 10/94 and N 401/97) because it constituted one pillar of the restructuring plan. Decision N 401/97 authorises investment aid, which, according to Directive 90/684/EEC, can be found compatible only if it is 'linked to a restructuring plan which results in a reduction in the overall ship repair capacity' and 'which does not involve any increase in the shipbuilding capacity'. Decision N 401/97 considers there is 'a reduction in the yard's repair capacity equivalent to the reduction in the number of employees, which will not be possible to compensate with the envisaged increase in productivity and a reduction of docking capacity for commercial vessels'. The Decision also indicates that there is a small reduction of the shipbuilding capacity.

Since the Commission itself acknowledged in decision N 401/97 that the workforce reduction in combination with the other measures proposed by Greece would lead to a reduction of the ship building and ship repair capacities, the Commission considers that there was a capacity reduction, as requested by Article 7 of Directive 90/684/EEC. As regards the amount and the intensity of the aid, the Commission observes that the aid amounted to EUR 25,6 million for a reduction of the workforce by 1 000 persons. In 2002, just six years later, the Commission found compatible an amount four times larger for a workforce reduction of a smaller size. The Commission considers therefore that the amount and the intensity of the aid are justified. In conclusion, the Commission considers that the conditions laid down in Article 7 of Directive 90/684/EEC were met and

therefore finds that the aid is compatible with the common market.

4.8. Capital increase in 1998–2000 to finance the investment plan (measure E10)

4.8.1. Description of the measure

- (203) As planned in decision N 401/97, three capital increases took place in 1998, 1999 and 2000, for a total amount of GRD 2,98 billion (EUR 8,7 million), in order to finance a part of HSY's investment plan. They were financed by ETVA and HSY's employees, in proportion to their shareholding in HSY.

(million GRD (million EUR))

	Total	Contribution of ETVA (51 %)	Contribution of the employees (49 %)
20 May 1998	1 569 (4,6)	800 (2,3)	769 (2,3)
24 June 1999	630 (1,8)	321 (0,9)	309 (0,9)
22 May 2000	780 (2,3)	397 (1,2)	382 (1,1)

- (204) In 2001, the Greek State paid to the employees an amount equal to their contribution to the three capital increases (see recital 33 of the present decision, which describes Law 2941/2001).

partial privatisation agreement of September 1995. Second, it is not excluded that the State has secretly committed to reimburse the employees any amount they would inject in HSY's capital. Such a commitment would entail that the employees did not support any risk.

4.8.2. Grounds for initiating the procedure

- (205) In the extension decision, the Commission raised doubts that the participation of ETVA in the capital increases constitutes incompatible aid. Even if decision N 401/97 adopted on 15 July 1997 considers that the future participation of ETVA to the capital increases can in principle be considered free of aid within the implementation of the restructuring plan, this participation may nevertheless have constituted aid when it was implemented in 1998, 1999 and 2000. In particular, the situation of HSY worsened between these dates. The extension decision further indicates that the fact that the employees participated in the capital increase pro rata to their stake in HSY's capital does not exclude aid: first, it is not sure that they paid to ETVA the price for the 49 % stake in HSY in accordance with the

4.8.3. Comments from interested parties

- (206) Elefsis supports the doubts expressed in the opening decision, recalls the Alitalia case-law⁽¹¹⁵⁾ regarding employees' participation in the capital increase of their own firm, and conclude that the participation of ETVA to the capital increases constituted incompatible aid.

4.8.4. Comments from Greece

- (207) Greece recalls that the participation of ETVA and of the employees in the capital increase was contractually settled in the partial privatisation agreement of September 1995. Decision N 401/97 also indicated that these capital increases would take place, with a participation of ETVA and HSY's employees of

respectively 51 % and 49 %, without considering that ETVA's participation would constitute aid. Finally, Greece and HSY contest both the hypothesis that the employees did not pay the purchase price to ETVA and the existence of a secret agreement promising the employees that the State would reimburse them any amount paid to finance the investment plan. HSY claims that if the Commission should consider the measure as aid, it would constitute compatible restructuring aid.

4.8.5. Assessment

4.8.5.1. Article 296 of the Treaty

- (208) As regards the potential application of Article 296 of the Treaty, the Commission observes that the capital increases aimed at financing the investment plan. As already concluded in the framework of the assessment of measures P1, P2, P3 and P4, this investment plan and the State support financing it can be assessed under State aid rules.

4.8.5.2. Existence of aid

- (209) The Commission has reached the following conclusions. On the basis of the partial privatisation agreement of September 1995, ETVA was contractually obliged to participate at a level of 51 % in the future capital increase of HSY, the remaining 49 % being contributed by the employees. The capital increase was necessary to partially finance the investment plan. In decision N 401/97 regarding the investment aid, the Commission implicitly considered that this participation of ETVA in the future capital increase of HSY will not constitute State aid. This was coherent with decision C 10/94 adopted the same day, in which the Commission considered that the sale of 49 % of HSY's shares to the employees was a valid partial privatisation and a return to viability could be expected.
- (210) As regards ETVA's participation in the capital increases of 20 May 1998, the Commission considers that there are no sufficient grounds to deviate from the implicit non-aid assessment made in the decision N 401/97. In particular, the circumstances in May 1998 were not sufficiently different from the ones forecasted at the time of the adoption of the decision. In addition, the Commission found no proof of a (secret) commitment of the State to reimburse the employees any amount they would pay in the framework of the capital increases.

- (211) Conversely, at the time of the capital increase of 24 June 1999 and 22 May 2000, fundamental elements that formed the basis of the no aid assessment of 15 July 1997 were not present anymore:

- First, as explained earlier, both decisions adopted on 15 July 1997 were based on the fact that Greece would implement the partial privatisation agreement of September 1995, and in particular that the employees would pay the purchase price to ETVA, as laid down in the contract, thereby assuming a financial risk which would incentivise them to support the necessary measures for restoring competitiveness. Whereas the employees had to pay the first instalment of the purchase price to ETVA before 31 December 1998, no payment occurred. The State did not seek to obtain the payment. As indicated in the assessment of measure E7, this meant that the employees were not put in the situation of investors having to pay in total GRD 8,17 billion (EUR 24 million) over the next 12 years, contrary to what the Commission expected in July 1997 when the two decisions were adopted. This non payment also meant that the employees were not respecting their obligation under the partial privatisation contract of September 1995. ETVA was not contractually bound by the partial privatisation agreement anymore⁽¹¹⁶⁾ since the employees had breached it. In conclusion, contrary to what could legitimately be expected at the time of the decision N 401/97 on the basis of the existing contracts, no real partial privatisation had taken place and the contract was not binding ETVA anymore. The Commission considers that these are major differences compared to what the Commission expected at the time of adopting decision N 401/97 on the basis of the September 1995 contract. This is therefore sufficient to revise the non-aid assessment made at that time,
- Second, as already analysed in detail in section 3.1 of the present decision, the commercial and financial success planned at the time of decision N 401/97 did not materialise. The company did not succeed in building a large and profitable orderbook in 1997 and 1998. Therefore, from the end of 1998, it progressively became more and more certain that the yard would be loss making in the next years. The Commission established the date of 30 June 1999 as the date from which no return to viability could reasonably be expected. It is certain that at the beginning of June 1999, most of the bad news was already known and a return to viability was highly hypothetical on the basis of the existing restructuring plan.

(212) On the basis of the foregoing, the Commission considers that a market economy investor which would have found itself in the same situation as ETVA would not have invested anymore in HSY⁽¹¹⁷⁾.

(213) Since such a capital injection provides a selective advantage to HSY, the Commission concludes that the participation of ETVA to the second and third capital increase constitutes State aid in favour of HSY. Regarding the compliance with Article 88(3) of the Treaty, the Commission observes that it has never adopted any decision explicitly assessing and authorising ETVA's participation to the capital increases of HSY. The Commission therefore considers that the aid has been put into effect in contravention of Article 88(3) of the Treaty.

(214) The Commission observes that, even if it were considered that this measure has been authorised by Decision N 401/97 (the decision N 401/97 describes that ETVA will participate in the capital increases of HSY and, by not raising doubts on the compliance with State aid rules, implicitly considers that this participation would not be an aid), it would not change the forthcoming conclusion that the aid has to be recovered. Indeed, in such a case, it should be considered that this Decision has been misused by the State-owned bank ETVA which has not collected the purchase price from the employees in accordance with the September 1995 contract. Indeed, the conclusion that ETVA's participation to the future capital increases was not an aid was based on the expectation of the employees would pay the purchase price in accordance with the September 1995 contract. It should therefore be concluded that the part of Decision N 401/97 authorising ETVA's participation has been misused and therefore that ETVA's participation should be recovered from HSY.

4.8.5.3. Compatibility with the common market

(215) Greece claims that this measure could constitute compatible restructuring aid. The Commission recalls that the aim of the capital increases was to finance the investment plan. In the framework of the assessment of measure P2 and measure P3, the Commission has already explained why additional restructuring aid in favour of the investment plan can not be considered compatible with the common market.

(216) Since the two capital increases constitute incompatible aid, they have to be recovered from HSY.

4.9. State counter guarantee in relation to HSY's contracts with OSE and ISAP (measure E12b)

4.9.1. Description of the measure

(217) In the framework of contracts that HSY concluded with Hellenic Railway Organization (OSE) and Athens-Piraeus Electric Railways (ISAP) concerning the supply of rolling stock, ETVA granted guarantees for advance payments and good performance (hereinafter down payment guarantees or advance payment guarantees). ETVA issued the advance payment guarantees in relation to the ISAP contract in February 1998 and January 1999 and the guarantees in relation to the OSE contract in August 1999. ETVA in turn received corresponding counter-guarantees from the State. The guarantees in the framework of the contracts with OSE and ISAP amounted respectively to EUR 29,4 million and EUR 9,4 million.

4.9.2. Grounds for initiating the procedure

(218) In the extension decision, the Commission raised doubts whether a private bank would have provided these counter-guarantees at the same conditions. In view of the difficulties of HSY, it could even be questioned whether a bank would have granted them at all.

4.9.3. Comments from interested parties

(219) Elefsis supports the doubts expressed by the Commission. In particular, the State did not act as a market investor because it assumed a multiple risk, being not only HSY's majority shareholder but also its sole creditor and guarantor, who bore nearly all the risk associated with its operations.

4.9.4. Comments from Greece

(220) Greece and HSY claim that, even if the State counter-guarantees were formally issued in December 1999, they were already promised to ETVA when it issued the advance payment guarantees in relation to the ISAP contract in February 1998 and January 1999 and the guarantees in relation to the OSE contract in August 1999. Greece claims that these counter-guarantees did not constitute selective measures. Indeed, they were granted pursuant to Law 2322/1995⁽¹¹⁸⁾ and several firms received State guarantees on the basis of that law. In addition, Greece claims that the annual fee of

0,05 % was adequate to remunerate the risk. As regards ETVA's behaviour, it was acceptable to a private bank since it received a counter-guarantee from the State and charged a premium of 0,4 %⁽¹¹⁹⁾. HSY has submitted a report of a consultant — the first Deloitte report — which supports this assertion. This report also asserts that, without a State counter-guarantee, HSY could nevertheless have received from a private bank a guarantee similar to the one granted by ETVA by offering lien on certain assets as a security. Finally, Greece claims that the beneficiary of the State counter-guarantees is OSE and ISAP and not HSY.

4.9.5. Assessment

4.9.5.1. Article 296 of the Treaty

- (221) The present measure does not fall within the scope of Article 296 of the Treaty since it directly supports a civil activity.

4.9.5.2. Existence of aid

- (222) It needs first to be clarified which of the two types of measures — the down payments guarantees granted by ETVA and the counter-guarantees granted by the State to ETVA — could constitute an aid measure. Since Greece claims that the State counter-guarantees were already firmly promised to ETVA when the latter granted the advance payment guarantees, it has to be concluded that when ETVA granted the guarantees, it was fully protected by the State counter-guarantees. Therefore, since ETVA run no risks (thanks to the State counter-guarantees) while receiving a fee of 0,4 % per quarter, this measure would have been acceptable to a market economy investor in similar circumstances. Conversely, the State granted counter-guarantees, which were not secured by any collateral, and for which it received a guarantee premium of only 0,05 %. This second measure would clearly not be acceptable to a market economy investor. It is therefore this second measure which constitutes State aid. The Commission however observes that since the State owned 100 % of ETVA and all the measures implemented by the latter bank are imputable to the State, the separation between the two measures (i.e. guarantee and counter-guarantee) is somehow artificial.

- (223) Since Greece claims that the beneficiary were OSE and ISAP, it needs to be clarified who is the beneficiary of this measure. The Commission observes that in the

framework of contracts for the supply of rolling stock material, the seller has usually to provide bank guarantees to the purchaser for the advance payments the latter makes. Indeed, the purchaser wants to be sure to recover these amounts if the seller does not deliver the material, for instance because it went bankrupt. Therefore, it is the seller that has to obtain these guarantees from a bank and to support their costs. In other words, it is a normal cost that a seller of rolling stock material has to support. In the present case, the State counter-guarantee allowed HSY to obtain from ETVA guarantees at a price of only 0,4 % per quarter. As will be shown afterwards, without State counter-guarantee, a private bank would have at least charged 480 bps per year for guarantees granted before 30 June 1999. After that date, no private bank would have provided such guarantees. It is therefore clear that in the period before 30 June 1999 the State counter-guarantees allowed HSY to obtain guarantees at a lower price. In the period after 30 June 1999, the State counter-guarantees allowed HSY to obtain guarantees, which HSY could not have received from the market at all. In conclusion, the beneficiary of the aid is HSY.

- (224) As regards Greece's claim that the measure is not selective, the Commission recalls that, in order to be general, a measure must be effectively open to all economic agents operating within a Member State on equal access basis, and they must not de facto be reduced in scope through, for example, the discretionary power of the State to grant them or through other factors that restrict their practical effect. The Commission considers that Law 2322/1995 is far from fulfilling this definition. First, Article 1 of the law states that the guarantee is granted by the Minister of Economy in agreement with three other ministers. Therefore the granting of the guarantee depends on the discretionary power of the authorities. Second, a State guarantee can be granted to a private firm only if it is located in a remote area and with the aim of improving the economic development of the area and not the specific firm (Article 1bb) or if it has suffered damages as a result of nature (Article 1cc). Conversely, companies that are 100 % State-owned or where the State holds the majority of shares can be granted State aid for general reasons such as covering some of their liabilities (Article 1B). It is therefore clear that State-owned firms have a much wider access to the State guarantees than private firms. This conclusion is confirmed by the analysis of the list of guaranteed loans provided in the first Deloitte

report⁽¹²⁰⁾. Third, the guarantees are not accessible on an equal access basis. Indeed, Article 1(4) of the Law indicates that when granting a guarantee the State may ask for some security (i.e. lien on fixed assets of the company). The decision to request a security or not is left at the discretion of the Minister of Economy. In the present case, the State did not ask a security when granting measure E12b. As regards the absence of access on an equal basis, the Commission observes that the guarantee fee is not the same for all loans. For instance, the guarantee premium amounted to only 0,05 % in the present case. In the case of measure E14, also granted on the basis of Law 2322/1995, the premium was 1 %. In the list of guaranteed loans provided in the first Deloitte report, some loans had also a premium of 0,1 % and 0,5 %. In conclusion, the Commission dismisses Greece's claim that Law 2322/1995 is a general measure.

(225) As regards the claim of the first Deloitte report that HSY could have received these down payment guarantees from a private bank by giving to the bank a lien on certain assets as collateral instead of giving to the bank a State counter-guarantee, the Commission considers that this claim is irrelevant in the analysis of the measure. Indeed, the Commission has to analyse whether the terms of the measures which were actually granted by the State constituted aid to the yard. The Commission does not have to verify whether by providing more security, the yard could have received the same guarantee from the market. As indicated in section 2.1.1 of the Notice on guarantee, one of the potential advantages of the State guarantee is the possibility for the borrower 'to offer less security'. In the present case, none of the State counter-guarantees was secured by a lien on some assets of the yard. Therefore, a counter-guarantee with an asset as security constitutes a different transaction, which does not have to be assessed. As a subsidiary ground, the Commission notes that, even if the claim of the first Deloitte report had to be assessed, HSY would not have been able to convince a private bank to provide such down payment guarantees by providing securities. Indeed, the assets of yards were already encumbered and they had a low liquidation value (see the second and third items discussed in footnote 43 of the present decision). Therefore, even a security in the form of a lien on certain assets of HSY would not have been sufficient to convince a market economy investor to lend to HSY.

(226) The Commission has earlier in this decision established the interest rate which a private bank would have charged for giving a loan to HSY. For the period until 30 June 1999, it was concluded that, since HSY presented a particular risk, it was necessary to add a risk premium of at least 400 basis points above the

interest rate charged for loans to healthy firms. In order to apply the same approach to guarantees on down payments, it is necessary to determine which premium a market economy investor would charge for granting an advance payment guarantee to a healthy firm. No party to the current procedure has provided a reliable market price for such guarantees. In several State guarantees schemes targeted at the shipbuilding sector and approved by the Commission as free of aid⁽¹²¹⁾, the annual guarantee premium for the borrower with the lowest credit risk was set at 0,8 %, or 80 basis points. In the absence of other reliable indicators, the Commission will use this rate as an estimation of the minimum annual guarantee premium paid by healthy shipbuilding firms in Greece at the time. Even if the contracts with OSE and ISAP do not concern shipbuilding but the construction of rolling stock, the Commission will use 0,8 % as benchmark since the construction of rolling stock remained a marginal activity for HSY and most of the activities of HSY, and therefore most of the risk of HSY, concerned ship building and ship repair. Consequently, for advance payments guarantees granted to HSY before 30 June 1999, the existence and amount of aid will be assessed by comparing the annual premium actually paid by HSY (including the counter guarantee fee paid to the State) with a premium of 480 basis points (i.e. 80 basis points increased by 400 basis points). As regards the period after 30 June 1999, the Commission earlier in the present decision concluded that the yard had no access to the financial market anymore, and that the aid element to recover in any loan would be the difference between the interest rate actually paid by HSY and the reference rate increased by 600 basis points. In case of down payments guarantees, the aid to recover will therefore be calculated by comparing the actual premium paid by HSY (including the counter guarantee fee paid to the State) with a premium of 680 basis points (i.e. 80 basis points increased by 600 basis points).

(227) The Commission notes that Greece claims that the counter-guarantees were already promised when ETVA granted the advance payment guarantees. Accordingly, the counter-guarantees related to ISAP's advance payments were granted before end of June 1999. The total annual cost of these guarantees (guarantee fee paid to ETVA plus counter guarantee fee paid to the State) was much less than 480 basis points. They therefore contain State aid, which amount to the difference between the latter premium and the total cost of the guarantees for HSY (premium paid to ETVA⁽¹²²⁾ and the premium paid to the State). Since,

contrary to the requirement laid down in Article 88(3) of the Treaty, it was granted without prior notification, it constitutes unlawful aid.

- (228) The counter guarantees related to the advance payments of OSE were granted after June 1999, at a time where no bank would have provided any guarantee anymore. Therefore, these entire counter-guarantees constitute aid. Since, contrary to the requirement laid down in Article 88(3) of the Treaty, the aid was granted without prior notification, it constitutes unlawful aid. If these aid measures are found to constitute incompatible aid and if they are still outstanding, they will have to be stopped immediately. This would however be insufficient to restore the initial situation since HSY would have during several years benefited from a guarantee which it would have not received from the market. For the period until the expiration of the guarantee, aid amounting to the difference between 680 basis points and the premiums actually paid by HSY would also have to be recovered.

4.9.5.3. Compatibility with the common market

- (229) The Commission observes that the aid constitutes operating aid since it reduces the costs that HSY should normally have supported in the framework of commercial contracts. Since operating aid was not allowed in the sector of the production of rolling stock material, the aid can not be considered compatible with the common market and has therefore to be recovered.

4.10. Deferment/rescheduling of obligations and waiver of penalties owed to OSE and ISAP (measure E12c)

4.10.1. Description of the measure

- (230) HSY was unable to meet its obligations stemming from the rolling stock contracts concluded with OSE and ISAP. In particular, HSY did not succeed in producing the rolling stock according to the agreed timetable. Consequently, in 2002–2003 some of the contracts were renegotiated and a new timetable for delivery agreed upon. In addition, it seems that application of penalty clauses and default interests as laid down in the initial contracts was waived or postponed.

4.10.2. Grounds for initiating the procedure

- (231) In the extension decision, the Commission raises doubts that during the negotiations that took place in

2002–2003 OSE and ISAP, which are State-owned companies, behaved in a way acceptable for a private undertaking in similar circumstances. They may have applied and/or renegotiated the contracts in a way favourable to HSY, thereby granting State aid to the latter.

4.10.3. Comments from interested parties

- (232) Elefsis claims that OSE and ISAP have not sought to obtain full payment of penalties and default interest which have arisen as a result of the delays, nor have they called upon the guarantees given on behalf of HSY for the good performance of its contractual obligations.

4.10.4. Comments from Greece

- (233) The Greek authorities claim that HSY paid all the penalties and relevant interest amounts in accordance with its contractual obligations, and any renegotiation was effected in accordance with accepted commercial practice. OSE and ISAP never waived penalties and default interests.

- (234) As regards the contracts between OSE and HSY, the following six programme agreements (PA) were concluded at the end of 1997: PA 33 SD 33, PA 33 SD 33^a, PA 35 SD 35, PA 37 SD 37^a, PA 39 SD 39 and PA 41 SD 41a. The programme agreements were activated in August and September 1999 through payment by OSE of the advance payments agreed in the contracts of 1997. OSE demanded timely implementation of the agreements from 2000 onwards after the first delays in the delivery of the material in that year. The consortia of which HSY was part of proposed amendments to the six contracts with the following terms:

- payment by the consortia of the established penalties and default interest in cash or in kind, according to OSE's preference,
- evolution of the price escalation formula on the basis of the agreed delivery timetables of the enduring contracts, and not on the basis of the new delivery timelines proposed by the consortia, in order to make this delivery dates acceptable,

- supply to OSE, for its use without a consideration, of equivalent rolling stock, in order, on the one hand, to make the new delivery timelines proposed acceptable, and, on the other hand, to stop further evolution of the penalty and default interest amounts. PA 39 (electric locomotives) was exempted from the provision of equivalent rolling stock because OSE had not completed the electrification of the Patras-Athens-Thessaloniki line, and PA 35 was exempted because the consortium wished for the evolution of the penalty and default interest amounts to continue in accordance with the contract,
- if the equivalent rolling stock was not supplied or if delivery (of the material provided for in the contract) was late, the penalty and default interest arrangements would continue to evolve, with recommencement from the point at which they were stopped on 31.12.2002.
- (235) On 7.1.2003 the board of OSE approved the proposed amendments. Three PAs (33^a, 35 and 39) were amended in the first four months of 2003, and the corresponding amending contracts were signed on 28.2.2003, 17.4.2003 and 28.2.2003, respectively (123).
- (236) Faced with the dilemma of choosing between denunciation or amendment of the PAs, and in view of its requirements for the 2004 Olympic Games, OSE judged that its business interest was best served by acceptance of the proposal of the consortia for amendment of the agreements, rather than by denunciation. Denunciation would have deprived OSE of the acceptance of additional new rolling stock, given that it would have taken at least 3 or 4 years for any new procedures for procurement of the rolling stock to reach fruition. The amended contracts were lawful and in accordance with the original ones.
- (237) The above information shows in the opinion of Greece that the consortia, and thus HSY, were never given a treatment more favourable than that afforded to other suppliers of OSE, and that the penalty and interest amounts were claimed and collected in every case (124). The contract made no provision for default interest on penalty amounts, but OSE claimed the interest and invoiced the consortia accordingly.
- (238) The same things apply with regard to the ISAP amounts, which are actual payments made by HSY, not provisions. It is emphasised, further, that there was no renegotiation or amendment in the case of programme agreement 1/97 (125). That agreement provided for the design, construction, delivery and placing in operation of 40 multiple units, each consisting of three vehicles. The delivery of the units was late, and therefore the penalties and interest envisaged in the programme agreement were imposed and withheld (126).
- 4.10.5. *Assessment*
- 4.10.5.1. *Article 296 of the Treaty*
- (239) The present measure does not fall within the scope of Article 296 of the Treaty since it concerns exclusively civil activities.
- 4.10.5.2. *Existence of aid*
- (240) The Commission observes that the Greek authorities have provided detailed information on the contracts concerned, as requested in the extension decision. On the basis of this information, the doubts raised by the Commission have been allayed. Indeed, HSY paid the penalty and relevant interest amounts in accordance with its contractual obligations, and, when renegotiations of contracts took place, the Commission did not find evidence that the renegotiations were not affected in accordance with accepted commercial practice. As acknowledged by Elefsis itself, the delays in the execution of the contracts have cost tens of millions of euro to HSY precisely because OSE and ISAP requested the payment of the penalties and default interest, or, alternatively, the supply of equivalent rolling stock. As regards Elefsis' claim that OSE and ISAP, if they had been private firms, would have turned down all the amendments proposed by the consortia, would have therefore requested the entire payment of the penalties and default interest and would have requested a rapid payment in cash rather than spreading the payments over a longer period, it can be said that this seems highly unlikely. Indeed, if OSE and ISAP had adopted such an inflexible approach before the closure of the sale of HSY, this would have probably deterred the new owner to purchase the yard. Without such a purchase, the yard, as will be explained in the analysis of measure E18c, would most probably have gone bankrupt. Even after the purchase by HDW/Ferrostaal, the financial situation of the yard did not improve. Consequently, if OSE and ISAP would have adopted a totally inflexible approach, there was a real risk that HSY would go bankrupt. This means that the execution of the existing contracts would have been stopped. This means that OSE and ISAP would have had to organise a new call for tender, the contract would have been awarded to a new supplier, and the delivery would have been delayed by several years. In such circumstances, the Commission considers that a market economy purchaser may accept a partial renegotiation which allows the completion of the existing contract within a reasonable timeframe, such that the purchaser finally receives the ordered railstock material with a limited delay. In this respect, the Commission observes that the probability that the contracts would be completed in a reasonable timeframe increased when HSY was privatised since the new private owner had experience with the management of complex projects and was a private firm motivated by profit and therefore willing to limit the delay to limit the negative financial consequences.

(241) In conclusion, the Commission considers that there is not convincing evidence that the behaviour of OSE and ISAP would not have been acceptable to a private company in similar circumstances. The Commission therefore concludes that the way in which the contracts with OSE and ISAP were implemented and the limited amendments of the contracts accepted by OSE in 2002–2003 do not involve aid elements.

4.11. Loan of ETVA to finance the Strintzis contract (measure E13a)

4.11.1. Description of the measure

(242) On 29 October 1999, ETVA granted a GRD 16,9 billion (EUR 49,7 million) loan to HSY to finance the construction of the two ferries ordered by the company Strintzis. The interest rate was LIBOR ⁽¹²⁷⁾ plus 100 basis points. In June 2001, a preferential mortgage on the two ships under construction was created. The loan was repaid in full to the lending bank on 8 October 2004.

4.11.2. Grounds for initiating the procedure

(243) The extension decision raised doubts whether the conveyance of a mortgage on the ships and of insurance premiums constituted a sufficient security. In addition, it seemed that the loan was immediately paid out to HSY, whereas it should have been paid in parallel with the construction costs. Moreover, the interest rate seemed insufficient in view of the difficulties of the yard. Finally, the combination of this loan and the next measure (measure E13b) indicates that a substantial part of the financing of the two ships ordered by Strintzis was supported by ETVA.

4.11.3. Comments from interested parties

(244) Elefsis claims that no private banks would have granted this loan. First ETVA had no security when the loan was concluded since the mortgage on the ships was created much later. In addition, Elefsis agrees that the market value of hulls in construction is low.

4.11.4. Comments from Greece

(245) Greece and HSY stress that the conditions of the loan were usual for that time. The Deloitte report confirms that both the specific bank (ETVA) and in general the Greek banks were granting loans to firms at a similar interest rate. HSY gives details on the securities which were granted to ETVA at the time of loan contract (assignment of the price of the two vessels, of the insurance indemnities, and of all claims against third party arising from the charter or generally the exploitation of the ships) and at a later date (the mortgage

on the ships), and conclude that they were adequate. Greece also gives the calendar according to which the loan was paid out by ETVA to HSY and which shows that it was paid in parallel with the evolution of the construction costs.

4.11.5. Assessment

4.11.5.1. Article 296 of the Treaty

(246) The present measure does not fall within the scope of Article 296 of the Treaty since it directly supports a civil activity.

4.11.5.2. Existence of aid

(247) The Commission has reached the following conclusions. This loan was concluded after June 1999, at a time when no bank would have lent to HSY anymore. Greece claims that the security attached to the loan were reducing the risk so much that the granting of the loan would have been acceptable to a private investor. This claim can not be accepted. The assignment of the price of the ships represents a solid security only if the yard brings the construction of the ship to a good end, what is uncertain. If the yard goes bankrupt during the construction of the ship, this security has no value since the purchase price can not be claimed from Strintzis because the latter has not received the ordered vessels ⁽¹²⁸⁾. This means that the security would be worthless exactly in the scenario where it would be needed. As regards the constitution of a mortgage upon each one of the ships under construction, it was granted to ETVA only in June 2001, well after the loan had been paid out to HSY. In addition, the Commission observes that the value of ships under construction is relatively low and they are difficult to sell. This is illustrated by the present case. Indeed, HSY did not succeed in completing the construction of the two ships and, consequently, the contract with Strintzis was revoked in July 2002. HSY needed not less than two years to sell the hulls in construction and HSY received only EUR 14 million, which corresponds to only a third of the amount borrowed from ETVA to finance the construction.

(248) As regards the assertion of Greece, HSY and Deloitte that the interest rate of the loan granted to HSY was similar to the interest rate of many other loans granted during the same period by ETVA and by Greek banks, it does not show that the loan granted to HSY is not an aid. Indeed, Greece, HSY and Deloitte have neither analysed nor shown that the financial situation of the other

borrowers used as comparison point was similar to the one of HSY, i.e. that their financial situation was as bad as the situation of HSY. They have therefore not shown that private banks were ready to lend to firms in difficulty at an interest rate similar to the one of the present loan. Comparing the interest rate of loans granted to different firms without verifying that the risk supported by the lending banks is similar is a pointless exercise. The Commission therefore concludes that no market economy investor in similar circumstances would have granted this loan to HSY, which therefore constitutes aid. Since, contrary to the requirement laid down in Article 88(3) of the Treaty, the aid was granted without prior notification, it constitutes unlawful aid.

4.11.5.3. Compatibility with the common market

(249) The Commission observes that the aid constitutes operating aid since it reduces the costs that HSY should normally have supported in the framework of commercial contracts. As concluded here above, the loan in fact allowed HSY to undertake this commercial contract, which HSY could not have financed by raising funds from the market. The Commission observes that, on the basis of Article 3 of Regulation (EC) No 1540/98, contract-related operating aid was authorised for shipbuilding contracts signed until 31 December 2000. However, HSY was not entitled to receive aid for the contract with Strintzis since HSY never finished the ships, they were never delivered, and the contract with Strintzis was cancelled⁽¹²⁹⁾. In addition, the hulls were sold to a new purchaser only in 2004, i.e. several years after 31 December 2000.

(250) Since the aid is unlawful and incompatible, it has to be recovered. Since the loan has been reimbursed, part of the advantage received by HSY has already been withdrawn. However, thanks to this loan of ETVA, HSY had at its disposal the amount of the loan during several years, an amount which HSY could otherwise not have had at its disposal during that period. This advantage needs also to be recovered. The Commission thus considers that aid has to be recovered which amounts to the difference between the interest rate paid to ETVA and reference rate for Greece⁽¹³⁰⁾ plus 600 bps for the period from the payment of the loan to HSY until the date when the loan was secured by a mortgage on the hulls. For the period thereafter until the reimbursement of the loan, the aid to recover is the difference between the interest rate paid to ETVA and the reference rate for Greece plus 400 bps. The reduction by one third of this risk premium reflects the fact that the mortgage on the

hulls would have partially reduced the loss of the lender in case of default of HSY, and therefore reduced the risk of the loan for ETVA. In particular, as just indicated, HSY succeeded to sell the hulls at a price roughly equivalent to one third of the money lent by ETVA.

4.12. Guarantee of ETVA in relation to the Strintzis contract (measure E13b)

4.12.1. Description of the measure

(251) In 1999, HSY used two guarantees from ETVA to secure Strintzis's advance payments amounting to EUR 6,6 million. The guarantees have been cancelled in July 2002 when the shipbuilding contract with Strintzis was cancelled.

4.12.2. Grounds for initiating the procedure

(252) The extension decision considers that the two guarantees, the terms of which were not known at the time of the decision, could constitute aid.

4.12.3. Comments from interested parties

(253) Elefsis emphasizes the fact that the State/ETVA has at the same time assumed the role of guarantor, creditor, shareholder and largest customer of HSY. By doing so, the State was putting itself in a situation of serious financial risk. In assuming this multiple role, the State was in effect providing finance with no security since in the event of the company's default and/or insolvency, the State would have no recourse and would sustain a definite loss since the value of the yard's assets would be considered to be insufficient to cover all the liabilities.

4.12.4. Comments from Greece

(254) Greece indicates that a first guarantee was granted on 4 March 1999 and a second on 17 June 1999. According to the first Deloitte report submitted by HSY, they respectively amounted to EUR 3,26 million and EUR 3,38 million. Greece recalls that ETVA did not pay out any amounts under the guarantees after the cancellation of the Strintzis contract in 2002. This proves that HSY was not a borrower whose default risk was high. In addition, Greece and HSY indicate that ETVA received as security for this EUR 6,6 million guarantee the assignment of proceeds of HSY resulting from Agreement 39 with OSE, of which the contractual price for HSY amounted to EUR 8,5 million. The consultant confirms that HSY could have received the two guarantees from a private bank.

4.12.5. *Assessment*4.12.5.1. *Article 296 of the Treaty*

- (255) The present measure does not fall within the scope of Article 296 of the Treaty since it directly supports a civil activity.

4.12.5.2. *Existence of aid*

- (256) The Commission observes that both guarantees were granted before 30 June 1999. As explained previously, the Commission considers that HSY had still access to the financial market at that time, but at a price which reflected the very fragile economic situation of HSY.

- (257) Greece and HSY claim that the assignment of proceeds resulting from Agreement 39 with OSE was an adequate security which would render the grant of the guarantee acceptable for a private investor. The Commission observes that, in case of bankruptcy of HSY, this security would not have allowed a bank to recover money. Indeed, if HSY had gone bankrupt, the construction of the rolling stock would have stopped, no delivery would have been made to OSE and no payment could be requested from OSE under that Agreement⁽¹³¹⁾. The Commission therefore fails to understand how this security would have significantly decreased the risk of a loan to HSY.

- (258) HSY has been able to indicate neither to the Commission nor to its own consultant (see first Deloitte report, page 4–9) whether HSY was contractually obliged to pay a guarantee premium to ETVA and what was the level of this premium. As explained in the assessment of measure E12b, HSY should normally have paid an annual premium of at least 480 basis points for such a guarantee. Knowing the level of the other guarantee premiums paid by HSY to ETVA, it is highly unlikely that the guarantee premium actually paid by HSY was as high as 480 basis points. The Commission therefore concludes that the guarantee granted by ETVA constitutes State aid, which amounts to the difference between the annual guarantee premium actually paid to ETVA and a guarantee premium of 480 basis points. Since, contrary to the requirement laid down in Article 88(3) of the Treaty, the aid was granted without prior notification, it constitutes unlawful aid.

4.12.5.3. *Compatibility with the common market*

- (259) As indicated in the assessment of measure E13a, the Commission considers that aid like the present one constitutes operating aid, which can not be found

compatible on the basis of Regulation (EC) No 1540/98. It is therefore unlawful and incompatible and must be recovered.

4.13. **State guarantee securing a GRD 10 billion (EUR 29,3 million) loan (measure E14)**

4.13.1. *Description of the measure*

- (260) After the earthquake of September 1999, ETVA granted on 13 January 2000 a GRD 10 billion (EUR 29,3 million) loan to HSY, which was secured by a State guarantee granted by decision of the Minister of Finance dated 8 December 1999. ETVA charged an interest rate of EURIBOR plus 125 basis points⁽¹³²⁾ and the State charged a guarantee premium of 100 basis points.

4.13.2. *Grounds for initiating the procedure*

- (261) Given the financial situation of HSY at the time, it is doubtful that the terms of the guarantee would have been acceptable to a market economy investor. As regards the compatibility on the basis of Article 87(2)(b), Greece has not shown that the size of the measure was commensurate to the damage suffered by HSY.

4.13.3. *Comments from interested parties*

- (262) Elefsis considers that no bank would have lent money to HSY at that time in view of its financial situation. The guarantee should be considered compatible aid only if it is limited to amounts strictly necessary to make good damage resulting from a specific natural disaster.

4.13.4. *Comments from Greece*

- (263) Greece and HSY contest that the measure is selective since the guarantee was granted according to the provisions of Law 2322/1995, which stipulates the terms and conditions for the granting of a guarantee on behalf of the Greek State to any applying company. In addition, they claim that the guarantee premium of 1 % would have been acceptable for a private investor. In addition, HSY could have borrowed from the market without a State guarantee by using other forms of security, as for example the cession of claims from major contracts and the mortgage of its assets. Even if the measure should constitute aid, it is partially compatible on the basis of Article 87(2) b) insofar as the said capital was granted as compensation for the damage that HSY suffered by the earthquake and partially falls within Article 296 of the Treaty insofar as it relates directly to the military activities of HSY.

4.13.5. *Assessment*4.13.5.1. *Article 296 of the Treaty*

(264) As regards the applicability of Article 296, the text of the decision by which ETVA decided to grant the guaranteed loan shows that ETVA was among others concerned by the continuation of the military activities of HSY. However, there is no contractual provision that forces HSY to use the guaranteed loan for the financing of the military activities. In other words, ETVA wanted to keep HSY alive in order to ensure the continuation of the military activities, but it did not assign the guaranteed loan to the financing of a particular activity. HSY was free to use the money as it wished to. As already explained, for such measures which are granted to the yard as a whole, the Commission considers that 25 % of the guaranteed loan was used for civil activities and 75 % for military activities. Therefore, only 25 % of the State guarantee (this means initially an amount of GRD 2,5 billion (EUR 7,34 million) has to be assessed under State aid rules, and could be recovered if constituting incompatible aid. 75 % of the State guarantee falls within the scope of Article 296 of the Treaty and is not covered by State aid rules.

4.13.5.2. *Existence of aid*

(265) As regards the selectivity of the measure, the Commission has already shown in the assessment of measure E12b that Law 2322/1995 is not a general measure.

(266) As regards the existence of an advantage, the Commission recalls that the guaranteed loan was granted in January 2000, at a time when no market economy investor would have provided a loan or a guarantee to HSY anymore, as previously concluded. Without a State guarantee, no bank would have therefore provided a loan to HSY. The State guarantee therefore gave a clear advantage to HSY.

(267) In conclusion, the part of the State guarantee which is not covered by Article 296 of the Treaty constitutes aid. Since, contrary to the requirement laid down in Article 88(3) of the Treaty, the aid was granted without prior notification, it constitutes unlawful aid.

4.13.5.3. *Compatibility with the common market*

(268) As regards the compatibility of this aid on the basis of Article 87(2)(b) of the Treaty, no party contests that the earthquake of September 1999 was a 'natural disaster'. Whereas the loan contract was signed only on 13 January 2000, HSY demanded this financing to ETVA already in the weeks following the earthquake. According to the Greek authorities, the damage to the yard amounted first to the cost of repairing the physical installations and, second, to the costs generated by the delay in the execution of the contracts. However, Greece has not submitted any estimation of the second type of damage. If Greece wished to compensate HSY for the latter type of costs, it should have at least tried to quantify them and this calculation should have been done on the basis of a verifiable method. Since this was not done and since aid can be found compatible on the basis of Article 87(2)(b) only if it is strictly limited to the compensation for the damage suffered, the Commission considers that these hypothetical costs do not constitute a valid ground for the compatibility of the aid⁽¹³³⁾. As regards the first type of costs — the repair of physical damages — the Commission observes that no mechanism was set up to ensure that the size of the State guarantee would be reduced once the size of the damages suffered would be precisely established and once the indemnities would be paid out to HSY by the insurance companies. In its letter of 20 October 2004⁽¹³⁴⁾, Greece estimated that the physical damages amounted to around GRD 3 billion (EUR 8,8 million). Consequently, the Commission considers that the amount exceeding that figures, namely EUR 20,5 million, was not related to damages caused by the earthquake. Conversely, EUR 8,8 million can be assumed to be commensurate with the damages suffered, but only until the first quarter of 2002, when the insurance companies paid an indemnification of EUR 3,52 million⁽¹³⁵⁾. From that date onwards, the State guarantee should have been reduced by an equivalent amount. Therefore, from that date, only the balance (EUR 8,8 million – EUR 3,5 million = EUR 5,3 million) could be considered to be commensurate with the net damages suffered (i.e. damages suffered minus the indemnifications paid to HSY by the insurance companies).

(269) As indicated previously, since 75 % of the guaranteed loan is considered to finance military activities, only 25 % of the guarantee is falling under State aid control and was found to constitute State aid. However, it is also reasonable to suppose that only 25 % of the damage suffered by HSY related to its civil activities because the earthquake has damaged HSY's facilities without distinction between military facilities, civil facilities and facilities used for both types of activities. In other words, there is no reason to consider that 100 % of the damage suffered by HSY should be financed by the 25 % of the State guarantee which constitutes State aid. Consequently, only 25 % of the damages can be taken into account

when assessing whether the State aid is commensurate with the damages suffered. In conclusion, out of the State aid, an amount equivalent to 25 % of the part of the State guarantee considered commensurate with the damage suffered (such as defined in the previous paragraph) constitutes compatible aid on the basis of Article 87(2) b). In other words, out of part of the State guarantee constituting aid, GRD 750 million (EUR 2,20 million) — i.e. 25 % of GRD 3 billion (EUR 8,8 million) — is compatible until the payment of the indemnification by the insurers in the first quarter of 2002. After that date, only EUR 1,32 million — i.e. 25 % of GRD 3 billion (EUR 8,8 million) minus EUR 3,52 million — is compatible. The rest of the aid is incompatible with the common market.

- (270) If the State guarantee is still outstanding, the part of this guarantee which constitutes incompatible aid (i.e. 25 % of the guarantee still outstanding, minus EUR 1,32 million which is compatible) should be immediately rescinded. The cancellation of the incompatible guarantee is not sufficient to restore the initial situation. Indeed, thanks to the incompatible State guarantee, HSY has had at its disposal during several years a loan which it would otherwise not have received. In order to recover this additional incompatible aid, the Commission considers that, from the granting of the guaranteed loan until the end of the incompatible State guarantee, an aid equal to the difference between the total cost of the guaranteed loan (interest rate plus guarantee premium paid by HSY) and reference rate for Greece increased by 600 bps must be recovered. This amount has to be calculated in respect of the part of the State guarantee which constituted incompatible aid.

4.14. Loans granted by ETVA in 1997 and 1998 (measure E16)

4.14.1. Description of the measure

- (271) This measure consists of three loans granted by ETVA to HSY in 1997 and 1998.
- (272) First, on 25 July 1997, ETVA granted a credit line of GRD 1,99 billion (EUR 5,9 million), with an expiration date set at 31 October 1997. It had an interest rate of ATHIBOR plus 200 basis points and was granted to cover HSY's needs for working capital. It was secured by accounts receivable from the Hellenic Navy.
- (273) Second, on 15 October 1997, ETVA granted a credit line of USD 10 million, also to cover HSY's needs for working capital⁽¹³⁶⁾. The loan had an interest rate of

LIBOR plus 130 basis points and was secured against accounts receivable from the contract with the Greek Navy. On 19 May 1999, ETVA received additional security for the loan through the conveyance of every claim in respect of Programme Agreement 1/97 which HSY had concluded with ISAP for the construction and supply of 125 rail cars. The loan was repaid in January 2000.

- (274) Third, on 27 January 1998, ETVA granted a credit line of USD 5 million, also with an interest rate of LIBOR plus 130 basis points. The purpose was also to cover HSY's needs for working capital. No security was provided for this third credit line.

4.14.2. Grounds for initiating the procedure

- (275) The extension decision indicates that these loans seem to constitute aid, the compatibility of which is doubtful. In addition, the fact that the first two loans were secured by receivables from the Hellenic Navy does not automatically entail that these loans are covered by Article 296 of the Treaty.

4.14.3. Comments from interested parties

- (276) Elefsis submits that given the financial situation of the yard at that moment, no private bank would have provided these loans to HSY.

4.14.4. Comments from Greece

- (277) Greece and HSY claim that ETVA obtained adequate security with the conveyance of claims on accounts receivable from the Hellenic Navy. Greece indicates that the three loans were repaid in full to the lending bank and claims therefore that any unlawful State aid, *quod non*, was recovered through the repayment. Finally, the Greek authorities assert that, in view of the type of securities provided to the lending bank and the fact that HSY was mainly active in the defence sector, the Commission is not allowed to analyse these measures on the basis of Article 88 of the Treaty but has to use the procedure laid down in Article 298 of the Treaty.

4.14.5. Assessment

4.14.5.1. Article 296 of the Treaty

- (278) As regards the application of Articles 296 and 298 of the Treaty, the Commission observes that the two credit facilities granted in 1997 were secured by receivables from a military contract. However, this fact alone does not show that the facilities were granted to finance the

execution of these military contracts. Greece has not brought forward evidence that there existed a contractual obligation limiting the use of these funds to financing the execution of military contracts. Conversely, Greece indicates that the two loans were granted to cover HSY's needs for working capital. The first Deloitte report confirms that they were granted for working capital purposes and does not indicate that they were assigned to the financing of a particular activity. This is supported by the fact that an additional security related to a civil contract (i.e. contract with ISAP) was granted in respect of the USD 10 million credit facility. The Commission therefore considers that these three loans have financed the yard in its entirety and not only the military activities. As indicated in section 3.3 of the present Decision, the Commission considers in such a case that 25 % of the loans have financed the civil activities of HSY, are not covered by Article 296 of the Treaty and can therefore be assessed under State aid rules.

4.14.5.2. Existence of aid

(279) As regards the securities provided — the assignment of accounts receivable from the contract with the Hellenic Navy and with ISAP — the Commission considers that they did not offer a solid protection against losses in case of bankruptcy of HSY. Indeed, if HSY would have stopped its operations, the execution of the ongoing contracts with the Navy and with ISAP would have stopped. Since no product would be delivered to the Navy and to ISAP, they would not be liable to pay the purchase price⁽¹³⁷⁾. As regards the existence of receivables for products already delivered to the Navy and to ISAP, Greece has not shown, first, that such claims existed, second, that they were collectible and, third, that they represented — on a continuous basis during the life of the loan — an amount sufficiently large to mitigate the risk of losses in case of bankruptcy of HSY.

(280) As concluded in section 3.1 of the present decision, in 1997 and 1998 private banks would have charged an interest rate amounting to reference rate plus 400 basis points, namely ATHIBOR plus 700 basis points. There exists no reference rate in dollars. However, since the reference rate in strong currencies was established by adding a premium of 75 basis points to the interbank

rate⁽¹³⁸⁾ and since the two loans in dollars had a variable interest rate indexed on LIBOR, the Commission considers coherent with the former approach to calculate the aid amount on the basis of US LIBOR plus 475 basis points (i.e. US LIBOR plus 75 basis points to build the reference rate, plus a risk premium of 400 basis points to reflect the special risk of lending to HSY). On the basis of the foregoing, it appears that the premium charged for these three loans is below the rate which would have been charged by a market economy investor.

(281) The Commission concludes that the part of these three loans which does not fall under Article 296, namely 25 % of these loans, contains State aid. The aid amounts to the difference between the interest rate charged by ETVA and the interest rate which would have been charged by a market economy investor, as defined above. Since, contrary to the requirement laid down in Article 88(3) of the Treaty, the aid was granted without prior notification, it constitutes unlawful aid.

4.14.5.3. Compatibility with the common market

(282) These three loans were granted to cover HSY's needs for working capital. They therefore constitute operating aid, that is to say, aid granted to finance the operation of the yard in general and not a particular project. They were granted at a time where aid to the shipbuilding sector was still regulated by Directive 90/684/EEC. Articles 4 and 5 of this Directive provides that operating aid may be granted to shipbuilding and ship conversion activities, which are both defined in Article 1 of the Directive. However, in the years during which the loans were granted, namely 1997 and 1998, HSY did not have such activities. Directive 90/684/EEC prohibits aid to ship repair, which was the main civil activity of HSY in 1997 and 1998. The aid can therefore not be found compatible with the common market and, since it has been granted unlawfully, it has to be recovered.

(283) As underlined by Greece, the loans have been reimbursed. The aid as defined previously has therefore to be recovered for the period from the paying out of the loans to HSY until their reimbursement.

4.15. Cross-subsidisation between military and civil activities until 2001 (measure E17)

4.15.1. Description of the measure

- (284) The extension decision indicates that there seems to have existed cross-subsidisation between military and civil activities. In particular, it describes two cases where, in the framework of military contracts, HSY received large advance payments exceeding its short term needs stemming from the execution of the corresponding contract, such that HSY was able to use this cash to finance other activities. First, HSY's 2001 Management Report mentions that 'amounts up to EUR 81,3 million have been received as advance payments for defence activities, but were mostly used on other activities and operation costs of the company'. Second, in its submission in the framework of a legal action before a Greek Court, the consortium HDW/Ferrostaal indicates that at least part of the funds (estimated by Elefsis to be in excess of EUR 40 million) given to HSY for the construction of the gunboats (contract signed on 21 December 1999) were used for other purposes.

4.15.2. Grounds for initiating the procedure

- (285) The extension decision asserts that when documents explicitly refer to the use of funds received for military contracts for 'other activities', the Commission is entitled to doubt that these funds are covered by Article 296 and do not constitute State aid in the meaning of Article 87(1). The extension decision also recommends the introduction of separate accounts for civil and military activities, in order to avoid that civil activities are financed by State support provided for the military activities.

4.15.3. Comments from interested parties

- (286) Elefsis asserts that cross-subsidisation is difficult to detect since there is no accounting separation of HSY's civil and military activities. Nevertheless, when the activities undertaken by the yard in 2001 are analysed, it turns out that the military activities were limited. It is therefore clear that the 'other activities' which, according to the Management report, were financed would mainly be civil activities.
- (287) TKMS/GNSH, which has submitted comments only on this measure and on the following one (measure E18c), considers that Article 296(1)(a) of the Treaty acknowledges that certain restrictions on the disclosure of information can be justified. Consequently, the

Commission cannot require Greece to disclose information which relates, for example, to the exact sums spent on different military projects. Second, TKMS/GNSH asserts that there is no legal basis for asking the separation of accounts between civil and military activities.

4.15.4. Comments from Greece

- (288) Greece claims that to the extent that the amounts referred to in the complaint were linked to the defence activities of the yard, the procedure initiated by the Commission on the basis of Article 88(2) of the Treaty is erroneous and *ultra vires*. If the Commission thinks that the measures distorted competition, it should follow the procedure described in Article 298 of the Treaty. HSY adds that there is no legal obligation for HSY to keep separate accounts. No legal basis exists for the Commission request.

4.15.5. Assessment

4.15.5.1. Article 296 of the Treaty

- (289) In order to establish whether Articles 296 and 298 of the Treaty are applicable, it is necessary to establish the facts. According to the documents quoted in the opening decision, during at least several quarters these advance payments were not used for the purpose of executing the military contract concerned. Neither Greece nor HSY has denied the quotes made in the opening decision. In addition, HSY's accounts confirm that HSY has received in 2000 and 2001 advance payments from the Navy far in excess of the funds needed in the short term to finance the execution of the corresponding military contracts. For instance, the balance sheet as of 31 December 2000⁽¹³⁹⁾ shows that the advance payments received by HSY for the gunboats contract and the submarines contract amounted respectively to EUR 49,1 million and EUR 33,1 million. At the same date, the sum of the inventories, work in progress, advances for inventories and trade debtors (in accounting terms, these items are referred to as current assets) related to the contracts for the Navy amounted to EUR 14,8 million. In other words, the advance payments exceeded by an amount of EUR 67,4 millions the current assets which had to be financed. Since the amounts quoted in the extension decision have not been contested and since a different source shows that they seem to be a reasonable approximation of the reality, the Commission concludes that, during at least one year, these advance payments were not used for the purpose of executing the military contracts concerned.

(290) As regards the application of Articles 296 and 298 of the Treaty, the Commission rejects Greece's argument that any advance payment paid in the framework of a military contract would automatically fall under Article 296. In particular, in the present case the management of HSY itself acknowledged that some advance payments exceeded by far the amounts needed for the execution of the contracts in the short term and therefore were temporarily used for other purposes. A measure falls in the scope of Article 296 only if Greece considers it to be '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'. The Commission observes that Greece has not explained why the part of the advance-payments that exceeded the funds necessary to execute the military projects concerned would have contributed to 'the protection of the essential interests of its security'. The Commission itself fails to understand why it would be the case since the yard did not need them to produce the war material concerned and did not use them for that purpose. In such a case, where the facts indicate that Article 296 does not apply, Greece should have explained why it nevertheless considers that these excess advance payments have contributed to its security. Since it was not done, the Commission concludes that these advance payments, in the period during which they were not necessary for the execution of the military contracts concerned, do not fall within the scope of Article 296 of the Treaty.

(291) Since the advance payments have initially been used for financing all the activities of the yards, the Commission considers that 75 % of these advance payments has financed military activities and 25 % has financed civil activities. In other words, during at least one year 25 % of EUR 81,3 million and 25 % of EUR 40 million fell under State aid rules.

4.15.5.2. Existence of aid

(292) These excessive advance payments constitute interest-free loans granted by the State. They therefore convey a selective advantage to HSY. One could argue that if the State purchases products in a way which would be acceptable for a private firm, the purchase contract — including its terms like the advance payments — can not convey a selective advantage to the producer. However, in the framework of the military contracts awarded to

HSY, the State has never behaved in a way acceptable for a private firm wanting to purchase goods. In particular, a private firm would have sought to pay the lowest price possible by considering all potential suppliers in the world. Conversely, Greece has always limited its choices to suppliers active in Greece (or to consortia having a member active in Greece), in order to support employment in Greece and in order to maintain capacity of production of military products in Greece⁽¹⁴⁰⁾. A private firm would therefore not have concluded these purchase contracts. In addition, a private firm would not have accepted to make advance payments exceeding what was needed to execute its orders, but would have tried to limit advance payments as much as possible.

(293) In these circumstances, the Commission considers these excessive advance payments as an interest-free loan. The aforementioned documents shows that at least during one year these funds have been used for other activities than the execution of the contracts concerned⁽¹⁴¹⁾. The Commission therefore considers them equivalent to a one-year loan free of any interest. In accordance with the analysis of the creditworthiness of HSY laid down in section 3.1 of the present decision, the amount of aid included in these loans granted after 30 June 1999 is equal to the reference rate for Greece plus 600 basis points. Since, contrary to the requirement laid down in Article 88(3) of the Treaty, the aid was granted without prior notification, it constitutes unlawful aid.

4.15.5.3. Compatibility with the common market

(294) The Commission has not found a basis on which this aid could be found compatible. Since this aid supports the general operation of the yard, it seems to be operating aid, but, as already explained in the assessment of prior measures, this yard was not entitled to receive operating aid in 1999, 2000 or 2001.

(295) Since the aid is unlawful and incompatible, it must be recovered.

(296) As regards the separation of accounts, the Commission will deal with this issue at the end of the present decision.

4.16. Indemnifying clause in favour of HDW/Ferrostaal in the case where aid would be recovered from HSY (measure E18c)

4.16.1. Description of the measure

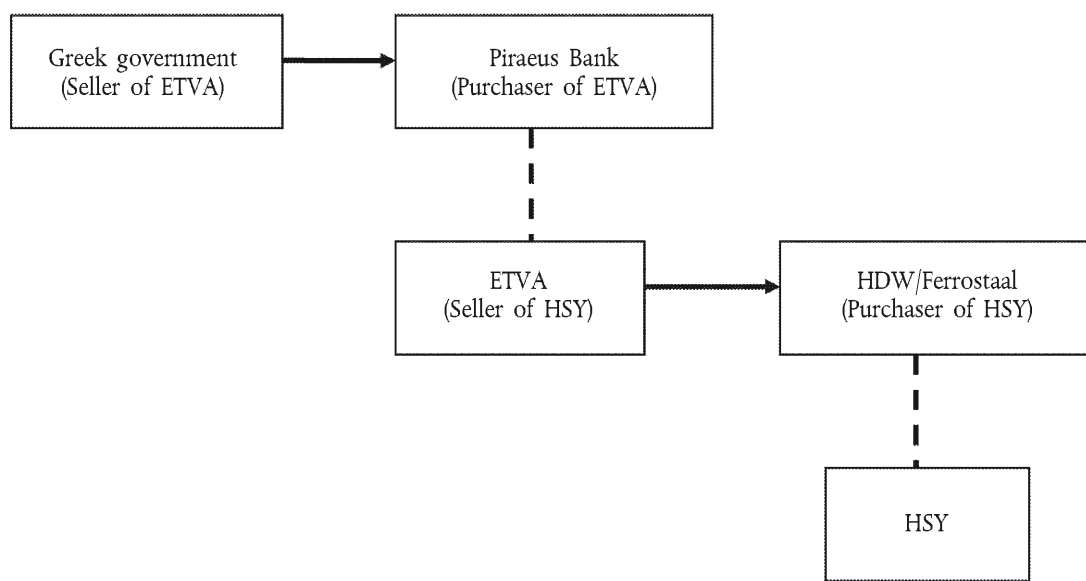
(297) The extension decision indicates that the Greek State promised to indemnify the purchaser of HSY (i.e. HDW/Ferrostaal) in case incompatible aid granted before and at the time of the privatisation was recovered from HSY. From a legal point of view, this guarantee was granted through a two steps mechanism:

— On the one hand, ETVA granted a guarantee to the purchaser of HSY (i.e. HDW/Ferrostaal). According to this indemnification guarantee, ETVA would indemnify HDW/Ferrostaal for any aid recovered from HSY. The extension decision underlines that in the Agreement for the sale of the share of HSY (hereinafter 'HSY SPA') concluded between ETVA and HDW/Ferrostaal on 11 October 2001, ETVA, which

was at that moment still under the control of the State, already promised to provide this guarantee to HDW/Ferrostaal. The guarantee granted by ETVA seems therefore imputable to the State,

— On the other hand, the State provided a guarantee to the purchaser of 57,7 % of the shares of ETVA (i.e. Piraeus Bank). According to this indemnification guarantee, the State would pay to Piraeus Bank 100 % of any amount paid by ETVA to the purchaser of HSY as a consequence of an indemnification guarantee granted by ETVA to the purchaser of HSY.

(298) The following graph illustrates the structure of the two steps guarantee, such as described in the extension decision (the continuous lines indicate the indemnification flows under each of the two steps of the guarantee, while the dotted line indicates the ownership after the closing of the sale of HSY and of 57,7 % of the shares of ETVA).



4.16.2. Grounds for initiating the procedure

(299) The extension decision indicates that a private seller would not have given such a guarantee because it is not limited in time or amount. In addition, a market economy shareholder would have preferred to let HSY go bankrupt and be liquidated rather than selling it in these circumstances. Indeed, the sale price received by the State was only EUR 6 million and the indemnity payments that the State should have expected to make under the guarantee were much larger.

(300) Whereas the legal beneficiary of the two steps guarantee is HDW/Ferrostaal, the extension decision indicates that

HSY is the real beneficiary of the whole mechanism. Without such State indemnifying provision, no investor would have been ready to purchase HSY. The Greek State explicitly recognised this fact. Therefore, it is likely that without such a guarantee HSY would have remained unsold and unable to face its financial difficulties, and would have gone bankrupt.

(301) The extension decision also indicates that such a guarantee seems incompatible per se as it impairs the 'effet utile' of any recovery decision.

4.16.3. *Comments from interested parties*

- (302) Elefsis claims, in accordance with the Commission's initial assessment, that no private seller would have granted such an unlimited guarantee. As regards the Commission's claim that no investor would have been ready to purchase the yard without such a provision, Elefsis contests it since Elefsis, who participated in the tender procedure and wanted to buy HSY, did not put that condition in its bid for HSY and was ready to purchase HSY without such a guarantee. According to Elefsis, the guarantee was exclusively granted to HDW/Ferrostaal. The latter and HSY are therefore the beneficiaries of the guarantee.
- (303) Piraeus Bank, which commented only on that measure because it is the only one in which it is directly involved, provides several documents showing that ETVA already agreed to grant the indemnifying clause in favour of HDW/Ferrostaal at the time of conclusion of HSY's SPA in October 2001, at a time when ETVA was still controlled by the State. Piraeus Bank produces contracts, documents and press articles illustrating that the privatisation procedure of HSY was managed by the State. The agreement between the Greek government and Piraeus Bank, dated 20 March 2002, provides that, even though Piraeus Bank became the majority shareholder of ETVA, the privatisation process of HSY would continue to be managed by the State. Finally, Piraeus Bank shows that in the invitation to tender sent to potential bidders in July 2001, it was already explicitly stipulated that in the event that a recovery is imposed on HSY pursuant to a potential breach of the EU regulations regarding State aid, the highest bidder will not be responsible for the payment of such a recovery.
- (304) TKMS/GNSH indicates that during the negotiations with ETVA for the purchase of HSY, it became clear that HSY had received some financial support from the Greek State. However, neither the extent of these measures nor the precise circumstances under which they had been taken was known to the potential buyers. During the bidding process the buyers received very little information on the various measures which are now subject of the present procedure. In other words, for the buyers the possible State aid implications of HSY were not quantifiable. In order to avoid being exposed to any risks from past or present aid, HDW/Ferrostaal insisted that approval or a comfort letter/negative clearance should be obtained from the Commission for past aid measures. Should this not be possible, the buyer would suggest an acceptable form of guarantee to the seller. Following contacts with the Commission, it became clear that it would not be ready to issue such a comfort letter/negative clearance. In the merger decision approving the acquisition of HSY by HDW/Ferrostaal, the Commission itself acknowledges that the extent of the subsidies was not known. In these circumstances, the indemnifying clause was agreed upon on 31 May 2002 as an Addendum to the HSY SPA, whereby ETVA as vendor of HSY guaranteed to make up for any financial loss the buyer would suffer in case of recovery of aid from HSY. TKMS/GNSH concludes that no investor would have agreed to buy HSY without such a guarantee. This claim was also confirmed by the second Deloitte report, which was submitted by TKMS/GNSH in June 2007.
- (305) TKMS/GNSH considers that the measure is not imputable to the State since it was granted by ETVA at a time when it was not under the control of the State anymore. Indeed, on the basis of HSY's SPA concluded in October 2001, there was no contractual obligation for ETVA to indemnify GNSH. ETVA decided to grant this guarantee not earlier than in May 2002. TKMS/GNSH also claims that ETVA and the State acted as a private vendor. The probability that the guarantee would have to be paid out was relatively low. Conversely, if the yard was liquidated, the losses on the loans and guarantees granted to HSY would represent much larger amounts (The calculation justifying this claim was provided in the second Deloitte report submitted by TKMS/GNSH). In addition, TKMS/GNSH considers that the guarantee granted by the State to Piraeus Bank on 20 March 2002 provides that the State would pay indemnification to Piraeus Bank amounting to only 57,7% of any amount paid by ETVA to the purchaser of HSY (i.e. HDW/Ferrostaal). Conversely, the guarantee granted by ETVA to HDW/Ferrostaal on 31 May 2002 provides that ETVA would pay indemnification to HDW/Ferrostaal amounting to 100% of any aid recovered from HSY. TKMS/GNSH concludes that the guarantee granted by ETVA on 31 May 2002 is wider than the one received by Piraeus Bank on 20 March 2002. Therefore, this can not form one single guarantee mechanism and the fact that ETVA granted a wider guarantee proves that it acted as any private vendor.
- (306) TKMS/GNSH fails to see why such an indemnifying provision could constitute a circumvention of the recovery of aid. Indeed, if aid would be recovered from HSY, the State would not indemnify HSY, but the purchaser of HSY (i.e. TKMS/GNSH, which is the successor of HDW/Ferrostaal).
- (307) TKMS/GNSH⁽¹⁴²⁾ also considers that the guarantee granted by the State to Piraeus Bank could constitute aid to Piraeus Bank and ETVA.

4.16.4. *Comments from Greece*

(308) According to Greece and HSY, the indemnifying clause is not an aid. First, it is not imputable to the State since it was granted by ETVA Bank, at a time when it was not under State control anymore. Second, Greece and HSY claim that the Greek State acted as a market investor when it sold its stake in HSY as the main shareholder of ETVA. The guarantee granted to the purchaser by the vendors of HSY is a standard and normal condition in commercial agreements. Indeed, Greece recalls that it did not provide a guarantee to HSY with regard to the liability to repay unlawful State aid, but to the buyer of HSY. Such indemnification burdens the vendor regardless of whether it is included as a clause in the commercial agreement or not. The Commission's statement that the Greek State knew or should have known about the considerable number of further potentially unlawful and incompatible State aid measures and that the amounts would have to be recovered and thus trigger the indemnifying clause is without basis. In the period in which the indemnifying clause was provided, there was no Commission decision ruling that HSY had received unlawful State aid. In addition, the closure and liquidation of HSY would have been more costly to the State, taking account the social cost.

(309) In addition, HSY fails to see how it could have benefited financially from a guarantee, which was agreed upon between ETVA Bank and HDW/Ferrostaal, or from a guarantee agreed upon between the Greek State and Piraeus Bank. Even if HDW/Ferrostaal was to receive compensation, there is no obligation for the consortium to inject this amount in HSY. Therefore the Commission also fails to show why the indemnifying clause would neutralise a recovery decision. According to the Courts' case law, by repaying the aid, the recipient forfeits the advantage, and the situation prior to the granting of the aid can be restored.

(310) Finally, if the Commission considered the indemnifying clause to be State aid, Greece claims that Articles 296 to 298 of the Treaty would be applicable. In this context, HSY indicates that, given that the Hellenic Navy was always the most important client of the yard, the procedure and the terms of the privatisation, including the entry into force of Law 2941/2001, should be examined under the light of the State-client, which for national defence reasons is interested in maintaining the operation and the viability of the yard. In the present case, the Greek State has adopted such measures, which any private company, whose interests are related to the viability of another undertaking, would have adopted. Moreover, this assessment is even more important

when the State has the obligation to bear the burden and the losses of the company's dissolution and liquidation, which would be more costly and thus non-profitable.

4.16.5. *Assessment*

4.16.5.1. *Article 296 of the Treaty*

(311) The Commission considers that the measure does not fall within the scope of Article 296 of the Treaty. Indeed, the indemnification mechanism applies in case of recovery of State aid from HSY. As has been claimed by Greece and accepted consistently by the Commission⁽¹⁴³⁾, the military activities of HSY are essential for Greece's security, are falling under Article 296 and therefore the State aid rules do not apply to them. Since all State support provided to the military activities of HSY is exempted from State aid rules, any recovery of State aid can only be the recovery of State support provided to the civil activities of HSY. Consequently, the present guarantee is directly and exclusively related to the civil activities of HSY.

(312) Some parties claim that, without this guarantee, no investor would have purchased HSY and the yard would probably have gone bankrupt. Therefore, even if it relates exclusively to the civil activities of HSY, this measure was nevertheless indispensable to ensure the survival of the military activities of HSY and therefore falls under Article 296. The Commission cannot accept this argument. On the basis of Article 296, Greece could have granted to the military activities the financial support they needed to ensure their continuation. Greece would have thereby avoided the demise of the military activities. Alternatively, Greece could have granted the financial support necessary to render the military activities attractive for a potential investor, such that these military activities would have been purchased and thereby their continuation would have been ensured. An investor purchasing the military activities would not have needed a guarantee like the present one since, as just explained, no aid could be recovered from the military activities of HSY. Consequently, the present measure was solely necessary in order to find a purchaser for the entire HSY, i.e. including the civil activities. The effect of the present measure was thus to permit to find a purchaser for the civil activities of HSY, and thereby to ensure the continuation of these activities. It was not necessary to ensure the continuation of the military activities. It does therefore not fall within the scope of Article 296 of the Treaty.

4.16.5.2. Existence of aid

(313) Since some parties contest that the two guarantees — the one granted by the State to Piraeus Bank and the one granted by ETVA to HDW/Ferrostaal — constitute one single guarantee mechanism and that HSY is the beneficiary of the two guarantees, the Commission will first assess separately the guarantee granted by ETVA to HDW/Ferrostaal and demonstrates that it constitutes State aid in the meaning of Article 87(1) of the Treaty.

(314) In order to constitute a State aid in the meaning of Article 87(1) of the Treaty, a measure must be imputable to the State. Some parties contest that the guarantee granted by ETVA to HDW/Ferrostaal is imputable to the State. They claim that the decision to grant this guarantee was taken independently and freely by ETVA. They claim in particular that the guarantee was granted on 31 May 2002 by means of the Addendum to HSY SPA, at a date when ETVA was not under State control anymore but under the control of Piraeus Bank. The Commission dismisses this claim and considers that there is ample evidence that the measure is imputable to the State:

— First, during the privatisation process of HSY, this guarantee was appearing in the documents submitted to the potential bidders⁽¹⁴⁴⁾. In other words, already during the privatisation process, there was a promise that the purchaser of HSY would be indemnified for any State aid recovered from HSY. In addition, on 14 September 2001, ETVA explicitly and unambiguously committed to provide this guarantee to HDW/Ferrostaal if the European Union would not give clearance regarding past and present State aid granted to HSY⁽¹⁴⁵⁾. Clause 1.2.3 of HSY SPA signed on 11 October 2001 explicitly refers to the document signed on 14 September 2001. The discussion regarding the precise wording of the guarantee continued in the following months⁽¹⁴⁶⁾. Since the Commission did not give a letter of comfort/negative clearance regarding past and present aids to HSY, ETVA had on 31 May 2002 to issue the guarantee in favour of HDW/Ferrostaal, as had been agreed by the parties on 14 September 2001 and in Clause 1.2.3 of HSY SPA. All the foregoing illustrates that, even though the Addendum containing the guarantee to HDW/Ferrostaal was signed on 31 May 2002, ETVA already committed to grant this guarantee (if the EU did not clear past and present aids) at a time when ETVA was still under the control of the State. In other words, the Addendum of 31 May 2002 is

the execution of a contract entered into by ETVA when it was still under State control. As shown in section 3.2 of the present decision, when ETVA was under State control, all the actions it took towards HSY can be considered imputable to the State⁽¹⁴⁷⁾. All these elements were confirmed by Greece in its letter of 23 May 2005⁽¹⁴⁸⁾,

— Second, even if it were considered that, on the basis of the aforementioned documents concluded by ETVA when it was under the control of the State (i.e. until end March 2002), there existed no contractual obligation of ETVA to grant this guarantee to HDW/Ferrostaal, the measure would still be imputable to the State. Indeed, the Commission observes that Greece continued to manage the sale of HSY even after the sale of ETVA to Piraeus Bank. Article 8.2.2 of the Agreement of 20 March 2002 between the State and Piraeus Bank provides that ETVA will not be responsible for the sale process of HSY, which the State will continue to manage. Article 8.2.2.(b) for instance provides that the State 'shall assume the control, care and responsibility of the acts and negotiations with the third purchaser of the Holding in Hellenic Shipyards'. In accordance with Article 8.2.2 of the Agreement of 20 March 2002, Piraeus Bank asked by letter of 28 May 2002 the agreement of the State regarding the guarantee that ETVA intended to grant to HDW/Ferrostaal. The State gave its authorisation by letter of 31 May 2002. All this shows that the grant of the guarantee is imputable to the State,

— Third, even if the two foregoing points were dismissed, the guarantee would still be imputable to the State. The Commission indeed observes that the State decided to privatise HSY⁽¹⁴⁹⁾. When Piraeus Bank took control of ETVA, it was therefore obliged by law to privatise HSY. As acknowledged by TKMS/GNSH itself, HDW/Ferrostaal would not have purchased HSY if they would not have received such a guarantee. Since the State decided that HSY had to be sold, and since the grant of the guarantee was indispensable to sell HSY, it can be concluded that the State put ETVA in a situation where it was forced to issue the guarantee. Therefore, even if it would be concluded that ETVA decided to grant the guarantee in May 2002 without any direct involvement of the State, the measure would remain imputable to the State,

- Fourth, even if all the previous points were dismissed, it should be concluded that ETVA accepted to grant the guarantee on 31 May 2002 only because its controlling shareholder (i.e. Piraeus Bank) had received a guarantee from the State protecting him against any financial damage stemming from this guarantee. Indeed, as will be shown, a market economy investor would never have granted such a guarantee without having received a counter guarantee from the State. The granting of the guarantee occurred only because the State had protected the economic unit (i.e. the group) granting the guarantee from any negative consequence (by granting a counter guarantee). In such a case, where a firm simply transfer an aid to a second firm, the granting of the measure is imputable to the State.
- (315) In order to constitute a State aid in the meaning of Article 87(1) of the Treaty, a measure must be financed by State resources. The Notice on guarantees indicates that ‘The aid is granted at the moment when the guarantee is given, not the moment at which the guarantee is invoked or the moment at which payments are made under the terms of the guarantee. Whether or not a guarantee constitutes State aid [...] must be assessed at the moment the guarantee is given’. As indicated above, the Commission considers that ETVA contractually committed to grant this guarantee to HDW/Ferrostaal at a time when the State still owned the large majority of the shares of ETVA. Since the Notice on guarantees indicates that the existence of aid has to be analysed at the time of the grant of the guarantee and not later when the guarantee is invoked, it can be concluded that by committing to grant the guarantee, the State put State resources at risk and the guarantee therefore involves State resources. The fact that ETVA was sold to Piraeus bank shortly after does not affect this conclusion. Indeed, if the State has correctly informed the bidders about the contractual obligations of ETVA — including this commitment of ETVA to provide the guarantee to HDW/Ferrostaal if the Commission does not issue a comfort letter — the bidders must have taken into account this commitment of ETVA. They must therefore have revised downwards the price they were ready to pay to purchase ETVA. This means that the State sold ETVA at a lower price and therefore lost resources. As indicated above, even if it were concluded that, at the time when ETVA was still under State ownership, ETVA did not contractually commit to issue the guarantee, the Commission considers that by deciding to privatise HSY in January 2001 — at a time when ETVA was still under State ownership — the State put ETVA in a situation where it was forced to issue such a guarantee since the latter was indispensable to find a purchaser for HSY. This entails that when the bidders made their bid for ETVA, they must have taken into account the fact that ETVA would have to issue this guarantee. According, they proposed a lower price for purchasing ETVA and this therefore also leads to the conclusion that State resources have been lost.
- (316) Even if it were concluded that when the State sold ETVA there was no obligation (neither contractually nor de facto) to issue this guarantee, it can still be demonstrated that the guarantee granted by ETVA involves State resources. Indeed, the State granted to the purchaser of ETVA (i.e. Piraeus Bank) a guarantee by which the State promised to refund Piraeus Bank 100 % of any amount which ETVA would have to pay under the guarantee ETVA will issue in favour of HDW/Ferrostaal. This counter guarantee was granted in successive contracts. In the Agreement of 18 December 2001 between the State and Piraeus Bank for the sale of 57,7 % of ETVA, the State committed to pay to Piraeus Bank 57,7 % of any amount which ETVA would pay to the purchaser of HSY. In the Agreement of 20 March 2002 between the same parties and which amended the agreement of 18 December 2001, the State committed to pay to Piraeus Bank 100 % of any amount ETVA would have to pay to the purchaser of HSY⁽¹⁵⁰⁾. By letter dated 31 May 2002 sent to Piraeus Bank, the State confirmed to the latter that it would refund 100 % of any amount paid by ETVA to HSY’s purchaser⁽¹⁵¹⁾. In other words, when ETVA signed the Addendum to HSY SPA on 31 May 2002, Piraeus Bank had received a guarantee from the State providing that it would be 100 % indemnified for any amount ETVA would have to pay as a consequence of the guarantee planned to be granted to HDW/Ferrostaal⁽¹⁵²⁾. This shows that any amount paid by ETVA would ultimately be financed by the State budget and that the guarantee involves State resources.
- (317) In order to prove the existence of a State aid in the meaning of Article 87(1) of the Treaty, it is necessary to show that the State did not behave as a market economy investor would have behaved in similar circumstances. In this respect, Greece, HSY and TKMS/GNSH claim that in similar circumstances a market economy investor would have accepted to issue this guarantee in favour of HDW/Ferrostaal. They argue that the test of the market economy investor should be applied at the level of ETVA, which was the legal entity which sold HSY, and at the level of the Greek government, which was the seller of ETVA.
- (318) The Commission recalls that, as has been indicated in section 3.2 of the present decision, when ETVA purchased HSY and directly thereafter injected capital to keep it alive, it did not acted as a market economy investor but as a public authority granting aid to keep alive a firm deemed important for the Greek economy.

Therefore, no market economy investor would have found itself in the situation of ETVA. No market economy investor would have found itself in the situation of selling these shares of HSY. Therefore, the Commission considers that the market economy investor test can not be used in the present case to justify the fact that the State is putting additional State resources at risk (by granting the guarantee).

- (319) Even if nevertheless one considers that the market economy investor test should be applied, the Commission considers that if the State had been a private firm acting under normal market conditions, it would not have accepted to grant the guarantee. Each of the three following points is alone sufficient to prove this.
- (320) First, the Commission observes that ETVA (and the State through ETVA), whereas it had only a 51 % shareholding in HSY (the remaining 49 % were owned by the employees⁽¹⁵³⁾), promised to pay to the purchaser of HSY (i.e. HDW/Ferrostaal) 100 % of any aid that would be recovered from HSY. A market economy investor would not have accepted to give an indemnification amounting to 100 % of the damage suffered by the company sold. In certain circumstances, a market economy investor may accept to take responsibility for certain future liabilities of the firm sold, but only in a proportion equal to its shareholding, which was 51 % in the present case. A market economy investor would have asked the other shareholders to assume responsibility for the remaining 49 % of the liabilities concerned. By accepting to support 100 % of potentially huge liabilities (it is recalled that the contract does not define a ceiling for the indemnification payments) of the firm sold, ETVA made a gift to the other shareholders of HSY (i.e. the employees). A market economy investor would not have accepted to make such a gift by assuming potentially huge liabilities of the sold firm in a proportion exceeding by far its shareholding. Therefore, from the mere fact that the indemnification guarantee granted by ETVA to HDW/Ferrostaal amounts to 100 % (i.e. instead of 51 %) of the aid that could be recovered from HSY, it can be concluded that no market economy investor would have provided such a guarantee.
- (321) Second, Greece, HSY and TKMS/GNSH claim that the net proceeds (i.e. revenues minus costs) were higher in case of sale of HSY — including the expected payments due under of the guarantee — than if HSY would have been liquidated. TKMS/GNSH supports its claim by means of

the second Deloitte report. This report compares the net costs in the two scenarios. This analysis is done at the level of ETVA and then at the level of the State. The Commission considers that applying the test at the level of ETVA is a misuse of this test. Indeed, as discussed in section 3.2 of the present decision, the privatisation was decided and financially supported — see for instance the State aid included in Law 2941/2001⁽¹⁵⁴⁾ — by the government and ETVA has never been in the position of an independent economic unit free to design the sale of HSY in a way maximising its revenues and minimising its losses. It is therefore the intervention of the State as a whole that must be scrutinised and not the behaviour of one of its parts.

- (322) If the test is nevertheless applied at the level of ETVA, one has to compare the net proceeds (i.e. revenues minus costs) for ETVA in case of liquidation of HSY and in case of sale of HSY. In the case of liquidation of HSY, it has to be established what would be the costs incurred by ETVA. TKMS/GNSH claims that the loss would amount at least to the loans and guarantees granted by ETVA to HSY and which were not counter-guaranteed by the State. The Commission observes however that none of these loans and guarantees constitutes a normal cost of winding up a firm⁽¹⁵⁵⁾. Indeed, all these loans and guarantees have been granted by ETVA as public authority because either they constituted State aid to the civil activities or they were measures to protect the security of Greece in accordance with Article 296 of the Treaty⁽¹⁵⁶⁾. These loans and guarantees can therefore not be taken into account when applying the market economy vendor test. Consequently, it turns out that ETVA as a market economy operator would have had no significant cost to support in case of liquidation of HSY. In case of sale of HSY, ETVA received the sale price of EUR 6 million. As regards the costs incurred in case of sale of HSY, ETVA had to issue the guarantee currently analysed, which was unlimited in size and therefore entailed potential payments of tens or even hundreds of millions of Euro. Comparing the two scenarios, it turns out that a market economy investor would have preferred to liquidate the yard⁽¹⁵⁷⁾. ETVA therefore did not behave as a market economy investor. If the comparison between the sale of HSY and the liquidation of HSY is performed at the level of the State, it leads exactly to the same conclusions. There were no large costs for the State in its capacity as entrepreneur/owner in case of liquidation of HSY since all the loans and guarantees granted by the State (directly or via ETVA) to HSY have been granted by the State as public authority, because either they constituted State aid to the civil activities or measures to protect the security of Greece in accordance with Article 296 of the Treaty. In case of sale of HSY, the State would just receive a few million Euro while, because it granted the guarantee, it ran the risk of having to pay tens or hundreds of millions of Euro. In conclusion, the State did not act in a way acceptable to a private firm in similar circumstances.

- (323) Greece, HSY and TKMS/GNSH claim that the risks of HSY having to reimburse State aid were very limited, since at that time there were no ongoing investigations by the Commission. They therefore claim that the risk for ETVA and the State of having to pay indemnification under the guarantee was small. The Commission can not accept this claim. It is akin to claim that, since Greece over the prior years had succeeded to hide the grant of unlawful and incompatible State aids to HSY and the misuses of aid previously approved by the Commission, it was allowed to grant this guarantee. As a subsidiary ground, the Commission observes that HDW/Ferrostaal insisted to receive this guarantee and was not ready to sign the closing of the sale of HSY before receiving the guarantee. The importance attached to the guarantee by HDW/Ferrostaal proves that this private investor considered that the probability that HSY would have to reimburse State aid was not small. The fact that, from the beginning of the privatisation procedure, Greece committed to grant such a guarantee to the highest bidder proves also that Greece considered that a private investor would find such a guarantee very important (a condition *sine qua non*, according to Greece's letter of 23 May 2005 quoted in footnote 148 of the present decision and according to the second Deloitte report), which can only be the case if a private investor considers that the probability of recovery is not very limited.
- (324) The Commission also observes that in this context where the amount of aid which could be recovered from HSY was difficult to estimate, a market economy vendor selling HSY would have at least introduced in the sale contract a ceiling limiting the potential payment to the purchaser. A market economy vendor would not have accepted to run the risk of having to pay hundreds of millions of Euros, even if it were accepted that the probability of such a high payment could be very low. Therefore, the fact that no ceiling was introduced in the guarantee constitutes an additional proof that ETVA and the State did not behave in a way acceptable to a market economy operator.
- (325) Third, when assessing whether the State acted as a market economy investor, it is necessary to take into account the entire intervention of the State. In the present case, the State has granted several large aids to facilitate the privatisation of HSY (i.e. the State aid included in Law 2941/2001⁽¹⁵⁸⁾). It notably repaid to the workers of HSY the amount of EUR 4,3 million they had invested in the framework of the three capital increases of HSY. This measure, which aimed at ensuring that the employees would not hinder the sale of HSY, would have been unacceptable to a market economy investor, among others since there was no contractual obligation to do it and since in addition the employees still owed EUR 24 million to ETVA as purchase price for the shares. Finally, the State asked the bidders to pay a part of the purchase price of HSY in the form of a capital increase⁽¹⁵⁹⁾. All these elements illustrate that during the sale of HSY, the State did not behave with the objective of maximising its revenues and minimising its costs, but with the goal of facilitating the sale of HSY and the continuation of the yard's operations. Therefore, during the sale of HSY, the Greek State did not act as a market economy investor.
- (326) On the basis of each of the three foregoing considerations, the Commission concludes that a market economy investor would not have granted the guarantee.
- (327) As regards the existence of an advantage and the identification of the beneficiary, the Commission considers that no investor would have purchased the entire HSY (i.e. including the civil activities) without the guarantee. The second Deloitte report confirms this conclusion: 'Based on our experience and the above analysis, we tend to believe that no rational investor would have been prepared to acquire HS and in parallel assume any additional risk related to State aid (which at that time was neither certain nor quantified by the EC), for the company that a) was under the ownership and management of a State-owned company (ETVA Bank) for a number of years, and at the same time b) had a significant negative shareholders' equity position, amongst other operational problems (i.e. low productivity, high operational costs, excess staff, etc.)'. This conclusion is also confirmed by the fact that Greece, anticipating that such a guarantee would be necessary to attract private investors, promised in the tender documents that the highest bidder would receive such a guarantee⁽¹⁶⁰⁾. This conclusion that such a guarantee was necessary to find a purchaser for HSY is logic since an investor performing a due diligence of HSY would have found that HSY had benefited of several measures which could constitute aid of which the recovery could be asked by the Commission⁽¹⁶¹⁾. Contrary to this conclusion, Elefsis claims that this guarantee was not necessary and claims in particular that it would have been ready to purchase HSY without such a guarantee, what is illustrated by the fact that, in its bid for the purchase of HSY, it did not put this guarantee as a condition for purchasing HSY. The Commission considers that Elefsis' claim lacks credibility. The Commission first recalls that, even if this it was true that Elefsis did not request such a guarantee in its bid, it does not prove that, if Elefsis had been selected as the preferred bidder, it would not have requested this guarantee at a later stage of the negotiation with the seller⁽¹⁶²⁾. This is very likely that Elefsis would have done

so. Indeed, as soon as HSY was sold to HDW/Ferrostaal, Elefsis started to file complaints with the Commission, claiming that HSY had benefited from several and large aid measures that the Commission should recover. An investor convinced that a firm has received tens of millions of Euro of incompatible aid will not himself take the risk of purchasing this firm, except if he receives a guarantee. The Commission therefore dismisses Elefsis' claim and considers that without this guarantee no market economy investor would have purchased the entire HSY, i.e. HSY including the civil activities. As indicated earlier, if HSY had not been sold, Greece could have continued to support the military activities on the basis of Article 296 of the Treaty. Conversely, because of Article 87 of the Treaty, Greece would not have been allowed to provide financial support to the civil activities. The Commission observes that the financial situation of HSY deteriorated dramatically between 1998 and 2002. Even if HSY does not publish separate accounts for civil activities, it is reasonable to suppose that these activities were deeply loss-making during these years. Besides the ship repair activity, the three main civil contracts performed during these years were the contracts with ISAP, OSE and Strintzis. As has been explained in the present decision (see description and assessment of measure E12c), the contracts with ISAP and OSE were executed with significant delays, forcing HSY to pay high penalties and to provide rolling stock for free, what also represented a high cost for HSY. It is therefore clear that these contracts were highly loss-making. As has also been explained in the present decision, the contract concluded with Strintzis at the beginning of 1999 was a big failure for HSY. The contract was cancelled in 2002, HSY had to pay the contractual indemnities to Strintzis and sold the hulls in 2004 at a price which was only a small fraction of the tens of millions of Euro of costs which HSY had incurred to build these hulls. This contract was therefore also highly loss-making. Finally, the last civil activity was the ship repair. It is a low margin business since there is fierce competition between yards. The Commission therefore doubts that this activity has been profitable, and, in any event, it was certainly unable to compensate the big losses stemming from the ISAP, OSE and Strintzis contracts. It is therefore reasonable to suppose that the civil activities were strongly loss making until 2002. As has been shown in the present decision, these activities have been constantly supported by aid, a part of which has now to be recovered. Above all, the failure to carry out correctly the ISAP, OSE and Strintzis contracts proves that, without being purchased by a large firm and without benefiting from the technical and project management skills of the latter, the civil activities would have remained loss-making. The second Deloitte report confirms that HSY had 'operational problems (i.e. low productivity, high operational costs, excess staff, etc.)'. Consequently, if the civil activities had not been sold, they should have ceased rapidly (except if Greece would have continued to provide unlawful and incompatible aid to these activities). In summary, the Commission has shown in this paragraph that without the guarantee, no investor would have purchased the civil activities of HSY and, if these activities had not been purchased, they would have stopped rapidly. The Commission concludes that the beneficiary of the

guarantee is HSY and that the advantage is to allow the continuation of the civil activities.

- (328) Elefsis disagree with the prior conclusion regarding the identification of the beneficiary. Elefsis claims that, in addition to HSY, HDW/Ferrostaal was also a beneficiary of the guarantee granted by ETVA. The Commission disagrees with this assessment. As has been shown, in the tender document submitted to the bidders, it was already indicated that they would be indemnified in case of recovery of State aid from HSY. This means that when HDW/Ferrostaal made its bid for the purchase of HSY, it made the assumptions that, if any aid would be recovered from HSY, it would receive a corresponding indemnification from ETVA⁽¹⁶³⁾. In other words, the purchase price proposed by HDW/Ferrostaal was already taking into account the indemnification guarantee. The guarantee has therefore not favoured HDW/Ferrostaal.
- (329) The Commission concludes that the guarantee granted by ETVA to HDW/Ferrostaal constitutes State aid in the meaning of Article 87(1) of the Treaty and the beneficiary of this aid is HSY. Since, contrary to the requirement laid down in Article 88(3) of the Treaty, the aid was granted without prior notification, it constitutes unlawful aid.
- (330) As regards the guarantee granted by the Greek State to Piraeus Bank, it also constitutes aid. It is a selective measure financed by State resources. A market economy investor selling ETVA would not have granted such a guarantee. Indeed, the only justification for granting this guarantee was the guarantee granted by ETVA to HDW/Ferrostaal. If the latter guarantee had not been granted, it would not have been necessary to provide the guarantee to Piraeus Bank. Since, as has been explained, no market economy investor would have granted the guarantee granted by ETVA, which constitutes State aid, no market economy investor would have granted the guarantee to Piraeus Bank (since the latter guarantee would not have been

necessary, i.e. it would have been irrelevant). As regards the identification of the beneficiary of the guarantee granted by the State to Piraeus Bank, the Commission recalls that the present procedure concerns potential State aid to HSY. No other potential beneficiary is mentioned in the extension decision. Therefore, only aid to HSY can be investigated in the framework of the present procedure. If the guarantee granted by the State to Piraeus Bank were to constitute aid to HSY, it would not constitute additional State aid on top of the State aid included in the guarantee granted by ETVA to HDW/Ferrostaal. Indeed, it is thanks to the latter guarantee that a private investor accepted to purchase HSY and that the civil activities of HSY were thereby saved. In other words, the guarantee granted by the State to Piraeus Bank does not provide an additional advantage to HSY and can therefore not constitute additional aid to HSY: all the advantage to HSY is granted by the guarantee granted by ETVA to HDW/Ferrostaal. In the present procedure which concerns potential State aid to HSY, the Commission therefore does not have to take a final view on the identity of the beneficiary of the guarantee granted by the Greek State to Piraeus Bank and the Commission does not have to further investigate the latter guarantee. It is sufficient to investigate the former guarantee — the guarantee of ETVA to HDW/Ferrostaal — and to cancel it if it constitutes incompatible aid to HSY.

4.16.5.3. Compatibility with the common market

(331) As regards the guarantee granted by ETVA to HDW/Ferrostaal, the Commission fails to see how this aid could be found compatible on the basis of Article 87(2) and (3) of the Treaty. As regards Article 87(3)(c) of the Treaty, the Commission observes that HSY was in difficulty. The Commission has already indicated that aid to shipbuilding was regulated from 1 January 1999 by Regulation (EC) No 1540/98. Article 5 indicates that restructuring aid 'may exceptionally be considered compatible with the common market provided that it complies with the Community guidelines on State aid for rescuing and restructuring firms in difficulties'. The guidelines applicable at the time of the granting of the guarantee were the 1999 R & R guidelines. The guarantee clearly did not fulfil all the conditions for authorisation of the aid laid down in section 3.2.2 of the guidelines. For instance, under condition (b) 'Restoration of viability', the granting of the aid must be 'conditional on implementation of the restructuring plan which must be endorsed by the Commission in the case of all individual aid measure'. The Commission observes that the grant of the guarantee was not conditional on implementation of a restructuring plan. In addition, this plan, since it was not submitted to the Commission, has not been endorsed by it. The guidelines also indicate 'the plan must be submitted in all relevant detail to the Commission'. This pre-consultation of the Commission was especially necessary in the present case since the Commission had already approved a restructuring plan in 1997, which had failed to restore the viability of HSY. The guarantee also breached the 'one time, last time' condition laid down in section 3.2.3 of

the 1999 R & R guidelines. Indeed, by decision N 401/97, the Commission had authorised investment aid under the Directive 90/684/EEC, which was a kind of restructuring aid⁽¹⁶⁴⁾. As noted in the analysis of measure P1, the State granted this aid in December 1997 (but did not pay it out). As has been shown in this decision, the firm also received several non-notified and incompatible aids in the years before the 2001–2002 privatisation. The restructuring aid authorised by decision C 10/94 was granted to the yard but the conditions attached to its approval were not respected.

(332) Since the guarantee granted by ETVA to HDW/Ferrostaal constitutes incompatible aid in favour of HSY, the Commission considers that it has to be stopped immediately.

4.16.5.4. Per se prohibition of the guarantee

(333) As indicated in the extension decision, the guarantee granted to HDW/Ferrostaal is incompatible with the common market for a second reason. The Commission considers that it is per se incompatible since, by preventing any recovery of aid from HSY to have an 'effect utile', it prevents the application of the State aid rules.

(334) TKMS/GNSH and HSY contest this position. In particular, they recall that HSY is not the recipient of any indemnity payment. Indeed, the guarantee issued by ETVA insures HDW/Ferrostaal and not HSY. Therefore, if the Commission would order the reimbursement of aid, HSY would have to make the reimbursement and this would restore the initial situation. TKMS/GNSH fails to understand why the indemnification of TKMS/GNSH (as successor of HDW/Ferrostaal) would invalidate this conclusion. Indeed, there is no obligation for TKMS/GNSH to re-invest in HSY the indemnification received.

(335) The Commission observes that 100 % of the shares of HSY were purchased by HDW/Ferrostaal and are now held by TKMS/GNSH. This means that, even if HSY and its shareholder are two different legal entities, they form one single economic unit. Thanks to the guarantee, this economic unit would be 100 % indemnified for any aid it would have to reimburse to the State. The Commission therefore considers that this constitutes an elimination of the 'effet utile' of any recovery decision.

- (336) As regards the absence of a legal provision forcing TKMS/GNSH to re-inject into HSY any indemnification received, the Commission fails to understand how it would invalidate the prior conclusion. In addition, the Commission observes that, if there is no obligation, there is also no prohibition to do it. Therefore, TKMS/GNSH could inject in HSY the indemnification received. Moreover, one can reasonably assume that, since TKMS is a successful private group, its financial resources are optimally allocated among the different legal entities of the group. Therefore, it is reasonable to suppose that, if one legal entity of the group has to pay a fine and another legal entity receives an indemnification for that fine, the management of the group will decide to transfer the latter amount to the former entity, thereby re-establishing the optimal allocation of resources among the different legal entities of the group. In other words, even if there is no obligation for TKMS/GNSH to re-inject the funds in HSY, it seems likely that the management will decide to do it.
- (337) The Commission concludes that the guarantee granted by ETVA to HDW/Ferrostaal is per se incompatible with State aid rules.

5. CONCLUSION

- (338) The Commission has found that, out of the 16 measures covered by the formal investigation procedure, some do not constitute State aid in the meaning of Article 87(1), some constitute compatible aid, several constitute incompatible aids and several aids approved by the Commission in the past have been misused. For the cases of incompatible aid granted in breach of the provisions of Article 88(3) of the Treaty and for the cases of misused aid, the Commission concluded that the aid has to be recovered.
- (339) The Commission considers that the following problem could hinder an effective recovery of this aid and that it is necessary to impose additional conditions to avoid this happening. This will be explained in the next section.

5.1. Necessity to ensure that the reimbursement of the aid, which has benefited the civil activities of HSY, is not partially financed by the military activities

- (340) As explained in section 3.3 of the present decision and applied to the measures concerned, the Commission has accepted that if a State support was provided to the yard

without being earmarked to finance a precise activity, it can be considered that 75 % of the support benefited the military activities and 25 % benefited the civil activities. This conclusion follows from the fact that HSY has no separate accounts and therefore the use of the funds can not be traced.

- (341) However, if the Commission accepts that 75 % of any inflow of State money will finance the military activities of the yard, it must also conclude that 75 % of any outflow of money from the yard will be supported by the military part of HSY. In other word, 75 eurocent of any Euro recovered from HSY is paid by the military part of HSY. Asking HSY to reimburse the aid received by the civil activities will restore the initial situation of the civil activities of the yard only if Greece submits solid evidence to the Commission that this reimbursement has been financed exclusively by the civil part of the yard.

- (342) In other words, since the majority of the HSY's activities are military and since HSY does not hold separate accounts for the civil activities, there is a clear risk that the reimbursement of aid received by the civil activities will be mainly financed by funds which otherwise would have financed the military activities. The recovery which should have been entirely supported by the civil part of the yard would mainly be supported by the military part. Since the State has provided large and repeated financial support and financing to the military activities of HSY⁽¹⁶⁵⁾, using funds — which otherwise would have financed the military activities — in favour of the civil activities of HSY is akin to a transfer of State aid to the civil activities of the yard. In other words, a part of the financial support granted by the State to the military activities would in fact support the civil activities of HSY (and therefore does not fall within the field of application of Article 296 of the Treaty. Indeed, these funds can not be deemed to be necessary for the financing of military production because they are not used for that purpose). The initial situation in the civil markets will therefore not be restored and, in addition, additional incompatible aid would be automatically granted to the civil activities of HSY.

- (343) Consequently, in order to re-establish the situation that would have prevailed without State aid and to prevent the granting of additional aid to the civil activities, Greece will have to ensure that the aid is recovered exclusively from the civil part of the yard⁽¹⁶⁶⁾,

HAS ADOPTED THIS DECISION:

Article 1

The aid in favour of the investment expenses which were incurred by HSY before 31 December 2001 and which were related to the investment programme described in Commission decision of 15 July 1997 concerning the case N 401/97 (this measure was named 'measure P1' in the preamble of the present decision) falls within the scope of the Commission decision of 15 July 1997.

Any aid in favour of the other investment expenses incurred by HSY — and in particular the investment expenses incurred after 31 December 2001 — does not fall within the scope of the decision of 15 July 1997 and is incompatible with the common market.

Article 2

The guarantee which Greece granted to ETVA by decision of 8 December 1999 and which covers a loan of GRD 4,67 billion (EUR 13,72 million) granted by ETVA to HSY (this measure was named 'measure P2' in the preamble of the present decision) constitutes aid, which has been put into effect in contravention of Article 88(3) of the Treaty and which is incompatible with the common market.

If the guarantee is still outstanding at the date of the present decision, the State guarantee has to be stopped immediately. In addition, aid has to be recovered for the period running from the pay-out of the guaranteed loan to HSY until the expiration of the guarantee.

The aid to recover amounts to the difference between the reference rate of Greece increased by 600 basis points and the total cost of the guaranteed loan (interest rate plus guarantee premium paid by HSY).

Article 3

The loan amounting to GRD 1,56 billion (EUR 4,58 million) which was granted in July 1999 by ETVA to HSY and was reimbursed in 2004 (this measure was named 'measure P3' in the preamble of the present decision) constitutes aid, which has been put into effect in contravention of Article 88(3) of the EC Treaty and which is incompatible with the common market.

For the period from the pay-out of the loan to HSY until its reimbursement, the aid to recover amounts to the difference between the reference rate of Greece increased by 600 basis points and the interest rate of the loan.

Article 4

The 2-year loan amounting to EUR 13,75 million which was concluded on 31 May 2002 between ETVA and HSY and was never paid out to HSY (this measure was named 'measure P4' in the preamble of the present decision) does not constitute aid.

Article 5

The aid amounting to GRD 54 billion (EUR 160 million) which was authorised by Commission decision of 15 July 1997 regarding the State aid case C 10/94 (this measure was named 'measure E7' in the preamble of the present decision) has been misused and must be recovered.

Article 6

The aid amounting to EUR 29,5 million which was authorised by Commission decision of 5 June 2002 concerning the case N 513/01 (this measure was named 'measure E8' in the preamble of the present decision) has been misused and must be recovered.

Article 7

75 % of the injection of capital amounting to GRD 8,72 billion (EUR 25,6 million) made by ETVA into HSY during the years 1996 and 1997 (this measure was named 'measure E9' in the preamble of the present decision) is covered by Article 296 of the Treaty. The remaining 25 % constitutes aid, which has been put into effect in contravention of Article 88(3) of the Treaty and which is compatible with the common market.

Article 8

The injection of capital amounting to GRD 800 million (EUR 2,3 million) made by ETVA into HSY on 20 May 1998 (this capital increase, as well as the two following ones, were named 'measure E10' in the preamble of the present decision) does not constitute aid.

The injections of capital amounting to GRD 321 million (EUR 0,9 million) and to GRD 397 million (EUR 1,2 million) made by ETVA into HSY respectively on 24 June 1999 and on 22 May 2000 constitute aid, which has been put into effect in contravention of Article 88(3) of the Treaty and which is incompatible with the common market. This aid must be recovered.

Article 9

The counter guarantees granted by the State to ETVA to guarantee the guarantees that ETVA had issued in the framework of contracts that HSY concluded with Hellenic Railway Organization (OSE) and with Athens-Piraeus Electric Railways (ISAP) (these measures were named 'measure E12b' in the preamble of the present decision) constitute aid, which has been put into effect in contravention of Article 88(3) of the EC Treaty and which is incompatible with the common market.

In the case of the counter guarantees related to the ISAP contracts, the aid amounts to the difference between an annual fee of 480 basis points (i.e. 4,8 %) and the premiums actually paid by HSY (i.e. the guarantee premium paid to ETVA plus the guarantee premium paid to the State). This aid has to be recovered for the period until the State counter guarantees expired.

In the case of the counter guarantees related to the OSE contracts, if they are still outstanding, they have to be stopped immediately. In addition, aid has to be recovered for the period running from the counter guarantees were in force. The aid to recover amounts to the difference between an annual fee of 680 basis points (i.e. 6,8 %) and the premiums actually paid by HSY (i.e. guarantee premium paid to ETVA plus guarantee premium paid to the State).

Article 10

The implementation of the contracts existing between HSY on the one hand and OSE and ISAP on the other, as well as the amendments of the contracts accepted by OSE in 2002–2003 (these measures were named 'measure E12c' in the preamble of the present decision), do not constitute aid.

Article 11

The loan amounting to GRD 16,9 billion (EUR 49,7 million) granted on 29 October 1999 by ETVA to HSY and reimbursed in 2004 (this measure was named 'measure E13a' in the preamble of the present decision) constitutes aid, which has been put into effect in contravention of Article 88(3) of the Treaty and which is incompatible with the common market.

The aid to recover for the period until June 2001 is the difference between the reference rate for Greece increased by 600 basis points and the interest rate actually paid to ETVA by HSY.

For the period thereafter until the reimbursement of the loan, the aid to recover is the difference between the reference rate for Greece increased by 400 basis points and the interest rate actually paid by HSY to ETVA.

Article 12

The guarantees of EUR 3,26 million and of EUR 3,38 million granted by ETVA respectively on 4 March 1999 and on 17 June 1999 and which were cancelled in 2002 (these measures were named 'measure E13b' in the preamble of the present decision) constitute aid, which has been put into effect in contravention of Article 88(3) of the Treaty and which is incompatible with the common market.

The aid to recover for the period until the cancellation of the guarantees amounts to the difference between an annual guarantee premium of 480 basis points (i.e. 4,8 %) and the guarantee premium actually paid by HSY.

Article 13

75 % of the State guarantee granted on 8 December 1999 to guarantee a loan amounting to GRD 10 billion (EUR 29,3 million) granted by ETVA to HSY (this measure was named 'measure E14' in the preamble of the present decision) is covered by Article 296 of the Treaty.

The remaining 25 % of the State guarantee is not covered by Article 296 of the Treaty and constitutes aid, which has been put into effect in contravention of Article 88(3) of the Treaty. GRD 750 million (EUR 2,20 million) of this aid was compatible

with the common market until 31 March 2002. After that date, only EUR 1,32 million was compatible with the common market.

The rest of the aid is incompatible. If the State guarantee is still outstanding, the part of this guarantee which constitutes incompatible aid (i.e. 25 % of the guarantee still outstanding, minus EUR 1,32 million which is compatible) has to be stopped immediately.

In addition, for the period running from the paying out of the guaranteed loan to HSY until the termination of the incompatible State guarantee, aid amounting to the difference between the reference rate for Greece increased by 600 basis points and the total cost of the guaranteed loan (interest rate plus guarantee premium paid by HSY) has to be recovered.

This aid has to be calculated in respect of the part of the State guarantee which constituted incompatible aid.

Article 14

75 % of the loans amounting to GRD 1,99 billion (EUR 5,9 million), USD 10 million and USD 5 million granted by ETVA to HSY respectively on 25 July 1997, 15 October 1997 and on 27 January 1998 (these measures were named 'measure E16' in the preamble of the present decision) are covered by Article 296 of the Treaty.

The remaining 25 % of the loans constitute aid.

The aid included in the first loan, which was denominated in drachma, amounts to the difference between the reference rate for Greece increased by 400 basis points and the interest rate paid by HSY. The aid included in the second and the third loan, which were denominated in US dollar, amounts to the difference between US LIBOR increased by 475 basis points and the interest rate paid by HSY.

In the three cases, the aid has been put into effect in contravention of Article 88(3) of the Treaty and is incompatible with the common market.

This aid has therefore to be recovered.

Article 15

25 % of EUR 81,3 million and of EUR 40 million, which represent approximations of the advance payments made by the Greek Navy in 2000 and 2001 in excess of the costs incurred by HSY in the execution of the corresponding contracts during that period (these measures were named 'measure E17' in the preamble of the present decision), constitute aid during one year.

This aid has been put into effect in contravention of Article 88(3) of the Treaty and is incompatible with the common market. The aid to recover amounts to the reference rate for Greece increased by 600 basis points, which has to be counted during one year.

Article 16

The indemnification guarantee granted by ETVA to HDW/Ferrostaal providing that ETVA would indemnify HDW/Ferrostaal for any State aid recovered from HSY (this measure was part of the measure named 'measure E18c' in the preamble of the present decision) constitutes aid, which has been put into effect in contravention of Article 88(3) of the Treaty and which is incompatible with the common market. In addition, the guarantee is per se incompatible with the common market. The guarantee has therefore to be stopped immediately.

Article 17

Since the aid to recover, such as defined in Articles 2, 3, 5, 6, 8, 9 and 11 to 15, has exclusively benefited the civil activities of HSY, it has to be recovered from the civil activities of HSY. In this respect, Greece shall provide detailed evidence — including a confirmation of the independent firm auditing its accounts — that the reimbursement has been financed exclusively by the civil part of HSY.

Article 18

1. Greece shall recover from HSY the aid to recover such as defined in Articles 2, 3, 5, 6, 8, 9 and 11 to 15.
2. The sums to be recovered shall bear interest from the date on which they were put at the disposal of HSY 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 ⁽¹⁶⁷⁾.
4. Recovery of the aid shall be immediate and effective.
5. Greece shall ensure that this decision is implemented within four months following the date of notification of this Decision.

Article 19

1. Within two months following notification of this Decision, Greece shall submit the following information to the Commission:

- (a) the 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 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 20

This Decision is addressed to the Hellenic Republic.

Done at Brussels, 2 July 2008.

For the Commission
Neelie KROES
Member of the Commission

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- (¹) The initiation of proceedings was announced in OJ C 202, 10.8.2004, p. 3. The extension of proceeding was announced in OJ C 236, 30.9.2006, p. 40.
- (²) OJ C 47, 12.2.1998, p. 3. The decision has been sent to Greece on 1 August 1997 (letter SG(97)D 6556).
- (³) OJ L 83, 27.3.1999, p. 1.
- (⁴) OJ C 202, 10.8.2004, p. 3.
- (⁵) See footnote 1.
- (⁶) See footnote 1.
- (⁷) See footnote 1.
- (⁸) Indeed, it is recalled that any submission of an interested party has to be sent to Greece for comments. Greece has one month to reply. Some submissions having a large size, Greece could have requested to be given more time to reply. If some assertions are not underpinned in a solid manner, the Commission services may have to ask more documents to underpin these claims. The Commission services may also have to ask precise questions to Greece on new issues raised in the submission of the interested party.
- (⁹) This letter has 65 pages, plus 290 pages of annexes. The letter dated 24 April 2008 has 35 pages, plus 900 pages of annexes and the letter dated 2 June 2008 has 63 pages, plus 1 750 pages of annexes.
- (¹⁰) The information provided in this section comes to a large extent from the document: 'Hellenic Shipyards S.A. — Confidential Information Memorandum — Alpha Finance/Commercial Bank of Greece/KPMG/Elias SP. Paraskevas' dated March 2001 and which was distributed to the interested bidders. A copy of this report was provided by TKMS/GNSH in its letter of 21 June 2007.
- (¹¹) OJ L 380, 31.12.1990, p. 27; special provisions referring to Greece are in Article 10.
- (¹²) OJ C 88, 30.3.1993, p. 6.
- (¹³) OJ C 138, 20.5.1994, p. 2.
- (¹⁴) PV(95) 1258, 26.7.1995, SEC(95) 1322/2, 24.7.1995.
- (¹⁵) OJ C 68, 6.3.1996, p. 4.
- (¹⁶) OJ C 80, 13.3.1997, p. 8.
- (¹⁷) OJ L 148, 6.6.1997, p. 1.
- (¹⁸) OJ C 306, 8.10.1997, p. 5.
- (¹⁹) The merger was authorised by the Commission by Decision M.2772 of 25.4.2002 (OJ C 143, 15.6.2002, p. 7).
- (²⁰) The merger was authorised by the Commission by Decision M.3596 of 10.12.2004 (OJ C 103, 29.4.2006, p. 30).
- (²¹) The merger was authorised by the Commission by Decision M.3932 of 10.11.2005 (OJ C 287, 18.11.2005, p. 5).
- (²²) OJ C 186, 6.8.2002, p. 5.
- (²³) OJ L 75, 22.3.2005, p. 44.
- (²⁴) The Greek authorities have confirmed this assessment in their letter of 20 October 2004.
- (²⁵) Section 2.1 of the letter of 20 October 2004.
- (²⁶) In order to assess the own resources of the firm, the net equity is much more relevant than the share capital. Indeed, the net equity takes into account the retained profits and the losses of the previous years, which respectively increase and decrease the own resources of the firm.
- (²⁷) OJ C 273, 9.9.1997, p. 3.

- (²⁸) The Commission observes that HSY tried to borrow from the market at a lower rate, but without success. This fact appears from the HSY's Board of Directors minutes dated 1 December 1998 and 27 January 1999, copies of which were provided by TKMS/GNSH in its letter of 21 June 2007. The attempt to borrow from the market was also reported in the press ('Hellenic Shipyards set first euromarket loan', *Reuters News*, 19 March 1999).
- (²⁹) Thanks to the debt write-off implemented by the State, HSY was nearly debt-free, such that the interest expenses (i.e. interest rate paid to the lending banks) were extremely low in 1997 and 1998 (they dramatically increased the following years). If in 1997 and 1998 the interest expenses had been at a more normal level, the financial results would have been less favourable and most probably no profit would have been recorded in 1998.
- (³⁰) The restructuring plan also planned a dramatic increase of the ship conversion activities after 1998. HSY did not succeed in achieving this goal.
- (³¹) This was in fact the first shipbuilding contract concluded with a private firm in nearly two decades.
- (³²) From the first year, the accounts of HSY contained a provision for the anticipated losses resulting from the execution of this contract. This provision has increased each of the following years. In addition, it seems that these provisions were insufficient since TKMS/GNSH has initiated proceeding against the seller of HSY on that issue. Regarding the reasons for concluding a contract which, when taken separately, is not profitable, the Commission notes that, by concluding this contract, the management probably expected to cover a part of the fixed costs of the yard (the shipbuilding orderbook was empty at that time) and therefore to reduce the expected loss of the yard.
- (³³) This contract was reported by the press. See for instance 'Hellenic lands crucial submarine contract', *Lloyd's List International*, 30 July 1999.
- (³⁴) According to page 5-12 of the report of Deloitte Financial Advisory Services (hereafter 'the first Deloitte report') submitted by HSY in support of its comments on the extension decision, the construction of the submarines would start only in 2003.
- (³⁵) According to press articles, the management of HSY warned the shareholders already in October 1998 regarding the expected difficulties (see the press article quoted in footnote 38). According to HSY's Board of Directors Minutes dated 1 December 1998, losses were expected for 1999. HSY's management publicly acknowledged at the beginning of December 1999 that the yard was planned to register losses of GRD 10 billion (EUR 29 million) for the year 1999 and for the year 2000 ('Hellenic boss expects profit in 2001', *Lloyd's List*, 6 December 1999). The possibility of such a large loss for 1999 was already reported by the press in November 1999 ('Brown & Root team ousted from Hellenic', *Lloyd's List*, 19 November 1999).
- (³⁶) Except if the State would provide additional (incompatible) aid to support the civil activities of the yard and would provide large support to the military activities.
- (³⁷) Therefore, the yard ran the risks of not receiving the investment aid promised by the Greek authorities, which set the date of 31 December 1999 to complete the programme. According to the Greek law, in order to obtain a prolongation of this period, at least 50 % of the expenses had to be incurred.
- (³⁸) In the document 'Hellenic Shipyards S.A. — Confidential Information Memorandum — Alpha Finance/Commercial Bank of Greece/KPMG/Elias SP. Paraskevas' dated March 2001 and which was provided to interested bidders (a copy of this document was provided by TKMS/GNSH in its letter of 21 June 2007), the following description appears: 'In 1999 though, the financial results of the Company became negative again. Brown & Root insisted to proceed with structural personnel changes. Such changes were not accepted by the Shareholders (ETBAbank and Employees), and Brown & Root's contract was revoked.' (page 15). Press articles are more explicit: 'It is thought management informed Hellenic's owners as early as last October that the current year would be a bad one unless steps were taken to rationalise the workforce, which co-owns the yard with a State bank. With money being spent on modernising Hellenic for the first time in years, new equipment has made the reported overmanning problem starker, but shareholders have so far dismissed proposals for shedding a minimum of 250 mainly white-collar jobs. At the same time, management has sought to introduce greater flexibility in the yard's working practices. But the main result appears to have been to alienate union leaders who have sought the removal of the eight-man management team, headed by Mr Groves, which is on secondment from the UK's Brown & Root'.

(³⁹) Recital 68 of Commission Decision of 16 June 2004 on the measures implemented by Spain for Siderùrgica Anón SA (OJ L 311, 26.11.2005, p. 22); Recital 42 of Commission Decision of 11 December 2002 on the State aid implemented by Spain for Sniace SA (OJ L 108, 30.4.2003, p. 35).

(⁴⁰) See footnote 34.

(⁴¹) Page 5-19 of the report.

(⁴²) See footnote 28.

(⁴³) The Commission describes here some of the errors that appear in Chapter 5.0, 'Credit Worthiness of Hellenic Shipyards S.A.', of the first Deloitte report.

Firstly, regarding the 'Implementation of the Investment Plan (Status and Evolution)' the first Deloitte report claims on page 5-4 that on 30 June 1999 'The amount certified exceeded the 50 % of the total investment'. However in reality the amount certified on 30 June 1999 accounted for 18 % of the total investment programme. This shows that the implementation of the investment plan was slow. The 'Status and Evolution' of the plan was therefore rather a 'negative' factor in the table at page 5-2 of the report.

Secondly, regarding the criteria 'Availability of property that could be encumbered' (page 5-5 and 5-6), the Commission considers that this element is irrelevant to assess whether a private bank would have granted the loans and guarantees granted by ETVA and the State. Indeed, the latter loans and guarantees were not secured by any lien on property. When assessing whether a loan or guarantee granted by the State constitutes aid, one must assess whether this precise transaction would have been acceptable for a private investor. The Commission does not have to assess whether HSY, by concluding another type of contract granting more right to the lender, would have been able to obtain the loans and the guarantees. Even if the existence of property that could be encumbered would be relevant, the Commission observes that the existing property were already encumbered for an amount of EUR 199 million until 1998 and for an amount of EUR 51 million until 2003. Therefore, a potential lender would have been able to get a first lien only on a limited part of the property. Moreover, the tangible assets of HSY had a low liquidation value. This is confirmed by Deloitte Financial Advisory Services itself in page 8-8 and 8-9 of its second report written on 18 June 2007 (hereinafter the second Deloitte report) and submitted by TKMS/GNSH in support of its letter to the Commission dated 21 June 2007. In conclusion, the Commission considers the 'Availability of Property that could be encumbered' is irrelevant in the assessment of the measures, and, even if it would be relevant, a potential lender would not have considered this element as positively as Deloitte indicates in the first Deloitte report.

Thirdly, the 'Availability of construction relating to work in progress that could be encumbered' (page 5-7) is not offering a solid protection to a creditor if HSY defaults and ceases activity. Indeed, the market value of a work-in-progress is usually low compared to the funds borrowed to build it and compared to the contract value. This was illustrated by the two hulls of the ferries ordered by Strintzis lines, which were sold at a low price and only (i.e. not earlier than) two years after the revocation of the shipbuilding contract. Regarding the conveyance of HSY's receivables to a lending bank, it is not a solid protection either since if the yard ceases its activities, the purchaser would not receive the ordered product and would therefore not have to pay the purchase price. This means that the security would be worthless exactly in the scenario where it would be needed. The assignment of contracts related claims therefore does not allow the lending bank to recover much money in case of bankruptcy of HSY (see for instance footnotes 128 and 131 of the present decision). Consequently, a potential lender would not have considered this element as positively as Deloitte indicates in the first Deloitte report.

Fourthly, as regards 'Total bank loans to shareholder's Equity ratio & debt obligations outstanding at the time', 'Signed Client Contracts (HS's orderbook)', 'Evolution of revenue generation' and 'Evolution of profitability', the Commission refers to its comments developed earlier in the present decision. Among others, the Commission recalls that as soon as in the last quarter of 1998 it could be foreseen that HSY would show a loss in 1999. In the following months, it became clear that the size of this loss would be large, and that a large loss should be expected also for the year 2000, such that the net equity of the HSY would nearly vanish. In summary, the Commission considers that the first Deloitte report does not take into account that the negative financial results of the years 1999 and 2000 were already foreseeable before the start of the respective year.

Fifthly and lastly, as already explained, any potential lender would have seen the circumstances and reasons why HSY's existing management was ousted as a negative factor. Therefore, the classification as 'Indefinable' in page 5-2 can not be accepted by the Commission.

- (⁴⁴) This point is developed in the next section (section 3.2) where the Commission analyses the imputability of ETVA's behaviour to the State. Being a development bank was the only mandate of ETVA at that moment. The Greek authorities indicate in footnote 63 of their reaction to the extension decision: 'ETVA was the only development bank in Greece, and thus there is no way of comparing its development activity against that of other credit institutions'.
- (⁴⁵) See footnote 52.
- (⁴⁶) As regards the period after 30 June 1999, the Commission also fails to see what 'value' the share of HSY had and therefore what 'value' ETVA was trying to preserve. Indeed, the financial situation was so bad that one fails to see how the shares could have had any significant value.
- (⁴⁷) ECJ, case C-482/99, *France v Commission* ('Stardust') ECR [2002] I-4397, paragraph 52.
- (⁴⁸) Letter of 5 October 2006, paragraph 156.
- (⁴⁹) Letter of 5 October 2006, paragraph 156.
- (⁵⁰) The Share Purchase Agreement was signed on 18 December 2001 and amended on 20 March 2002, at which date the closing of the sale took place.
- (⁵¹) There are many press articles showing the government involvement in that decision. See for instance 'Deadline for Greek shipyard — Government to decide on purchase of Hellenic Shipyards', *Financial Times*, 19 April 1985, 'According to the Greek minister of national economy and shipping, Mr G. Arsenis, the government is under pressure to buy the Hellenic Shipyards because of the structure of Greek industry', *Lloyd's List International*, 29 June 1985, 'Government to buy ailing Greek shipyard', *Financial Times*, 17 July 1985; 'Mr A. Drossoyannis, the Greek Minister for National Defence, has announced that all future naval newbuilding orders will be placed with Hellenic Shipyards', *Lloyd's List International*, 26 July 1985; 'Jobless shipyard workers march in Athens', *The Wall Street Journal*, 12 July 1985.
- (⁵²) By letter of 25 November 1986, Greece notified to the Commission a capital injection of USD 58,3 millions by ETVA into HSY. The case was registered under number N 230/86. By letter of 20 March 1987 (reference SG (87) D/3738), the Commission informed Greece that it has decided that the capital injection by ETVA constitutes State aid, which is however compatible with the common market.
- (⁵³) Chapter E (article 12-15) of Law 2367/1995.
- (⁵⁴) For instance Article 13 of Law 2367/1995 provided for the reduction of 600 in the company's workforce and specified the redundancy incentives. Also, according to article 14 of this law, 99 % of the then existing debts of HSY will be written off.
- (⁵⁵) As indicated previously, the State in fact started to provide large aids to HSY as soon as it purchased it.
- (⁵⁶) As established previously, HSY had no access to the banks from 30 June 1999. Since HSY could not borrow from the market and since it was in a precarious financial situation, if ETVA had refused to grant the loan or had required higher interest rates, this would have aggravated the difficulties of HSY (or even triggered the bankruptcy), what would have been unacceptable for the State. ETVA had therefore, given the state influence, no choice but to grant a loan demanded by HSY.
- (⁵⁷) Commission notice pursuant to Article 93(2) of the EC Treaty to other Member States and interested parties concerning aid which Greece has decided to grant to Hellenic Shipyards plc (OJ C 80, 13.3.1997, p. 8).
- (⁵⁸) ECJ, case C-482/99, *France v Commission* ('Stardust') ECR [2002] I-4397, paragraph 56.
- (⁵⁹) Letter of the Greek authorities dated 18 September 2002 (registered by the Commission on 23 September 2002 with number A/36895), sent in the framework of the case CP 101/02.
- (⁶⁰) ECJ, case C-482/99, *France v Commission* ('Stardust') ECR [2002] I-4397, paragraph 56.

- (⁶¹) Letter of the Greek authorities dated 20 November 2003, sent in the framework of the case CP 101/02.
- (⁶²) Moreover, they were granted in addition to the already existing involvement of ETVA in HSY, such that the total exposure of ETVA towards HSY was significant. The proof of the significance of this exposure is that ETVA's Annual Report of the year 2000 acknowledges the damages brought to the bank by the involvement in Hellenic Shipyards (p. 42-43).
- (⁶³) Greece's letter dated 15 June 2006 (the recovery procedure has number CR 40/02).
- (⁶⁴) In decision C 10/94, the Commission does not assess the waiver of debts stemming from 'the building of military vessels' because it is an 'activity which is outside the scope of the EC Treaty'. Similarly in decision N 513/01, the Commission does not assess 75 % of the State support amounting to EUR 118 million because it is related to military shipbuilding.
- (⁶⁵) It is recalled that HSY did not keep separate accounts between military and civil activities during the years concerned. Therefore, a measure can be considered to finance a particular activity only if the granting decision indicates precisely which activity is financed.
- (⁶⁶) OJ C 288, 9.10.1999, p. 2.
- (⁶⁷) During the same year, the waiver of debts related to the military activities of the yard was not assessed under State aid rules by the Commission.
- (⁶⁸) This is also clear from the wording of decision C 10/94.
- (⁶⁹) This was also the information provided to the interested bidders during the privatisation process in 2001, as can be concluded from the 'Due Dilligence' report of 19 June 2001 performed by Arthur Andersen for HDW and Ferrostaal, p. 23 (provided as Appendix C of the report submitted by TKMS and GNSH in their letter of 21 June 2007).
- (⁷⁰) The Commission recalls that the 2001–2002 privatisation — and even less the freezing of the investment programme during that process — was not something requested by the Commission.
- (⁷¹) Section 1.3.b of the letter dated 20 October 2004.
- (⁷²) Amount provided in EUR by the Greek authorities.
- (⁷³) This information appears in section 1.3 and in Annex 4, 5 and 6 of Greece's letter dated 20 October 2004.
- (⁷⁴) OJ C 71, 11.3.2000, p. 14.
- (⁷⁵) See footnote 14 in Greece's letter of 20 October 2004.
- (⁷⁶) Point 2.1.2 of the Notice on guarantees indicates 'even if no payments are ever made by the State under the guarantee, there may nevertheless be a State aid under Article 87(1). The aid is granted at the moment when the guarantee is given, not the moment at which the guarantee is invoked or the moment at which payments are made under the terms of the guarantee. Whether or not a guarantee constitutes State aid, and, if so, what the amount of that State aid may be, must be assessed at the moment the guarantee is given'.
- (⁷⁷) For instance, 'Portugal shipyards' were mentioned as competitors of HSY on page 10 of the document 'Hellenic Shipyards S.A. — Confidential Information Memorandum — Alpha Finance/Commercial Bank of Greece/KPMG/Elias SP. Paraskevas' dated March 2001 and which was distributed to the interested bidders. A copy of this report was provided by TKMS/GNSH in its letter of 21 June 2007.
The Commission also observes that the Commission Decision in Merger case No COMP/M.2772 — HDW/FERROSTAAL/HELLENIC SHIPYARD indicates under the heading 'Geographical market definition' that 'The parties argue, that the market for construction, repair and conversion of all kinds of commercial vessels are world wide in geographical scope, as the transportation costs for ships are comparatively low and there is no significant trade barriers'.
- (⁷⁸) The Commission also observes that prior decisions of the Commission and of the Council concerning State aid provided to HSY hinged on the existence of a distortion of competition and an effect of trade. These decisions have never been contested. Therefore, when assessing measures implemented during the same period, an extensive verification of the fulfilment of these two criteria is not necessary.

- (⁷⁹) OJ L 202, 18.7.1998, p. 1.
- (⁸⁰) OJ C 288, 9.10.1999, p. 2.
- (⁸¹) This information was provided by Greece in section 1.3.a and Annex 4 of its letter of 20 October 2004.
- (⁸²) If the yard had ceased operations, the competent control bodies could have decided not to make any control regarding the implementation of the plan and therefore the condition to pay the first tranche would not have been met.
- (⁸³) In section 1.2.2 'First control made by competent organs' (English translation) of their letter of 20 October 2004, the Greek authorities explain that the Ministry of national economy has been late in writing the control form, such that the deadline of 31 December 1999 set in the Greek government approval decision has been missed. In order to pay the aid after that date, a prolongation of the period to implement the investment plan needed to be authorised by the Greek authorities. The decision authorising the prolongation supposed itself the prolongation of the commission taking such a decision, which was made complicated by legislative changes.
- (⁸⁴) OJ C 368, 23.12.1994, p. 12.
- (⁸⁵) The difference between the two interest rates has to be multiplied by the principal of the loan outstanding (i.e. not yet reimbursed) during the year concerned.
- (⁸⁶) In a similar manner, the Notice on guarantees indicates that the aid is given when the guarantee is granted and not at a future date (see footnote 76).
- (⁸⁷) Indeed, the market value of a loan depends on the present value of the future cash flows, which are discounted using an interest rate reflecting the risk of the loan. If the interest rate set in the loan contract is below the latter interest rate, the market value immediately decreases below the nominal value of the loan.
- (⁸⁸) If the new owner of ETVA decided after the privatisation to prolong a non-state guaranteed loan beyond its initial maturity, there is no aid in the period beyond the initial maturity since there are no State resources according to the reasoning just explained.
- (⁸⁹) This information was provided by Greece in section 1.3 and Annex 6 of its letter of 20 October 2004.
- (⁹⁰) See footnote 83.
- (⁹¹) One could ask why ETVA signed the loan contract on 31 May 2002 if the intention was not to pay out the corresponding amount to HSY. The Commission observes that the contract date is exactly the date of the signature of the closing of the sale of HSY. It is therefore likely that the purchasers of HSY put ETVA under pressure to grant more financing to HSY by threatening not to accept the closing of the sale. In these circumstances, ETVA probably accepted to conclude this loan contract, but put in the contract provisions allowing her to refuse to pay out the loan when HSY would ask such a payment. As will be explained in the assessment of measure E18c, under section 8.2.2 of the contract of 20 March 2002, Piraeus Bank was supposed to help the State to complete the sale of HSY. On that basis, the State has probably also put pressure on ETVA to sign this loan contract in order to facilitate the closing of the sale of HSY.
- (⁹²) HSY submitted comments on the extension decision by letter of 30 October 2006. Paragraph 4 of this letter indicates 'Given the fact that HSY has closely cooperated with the Greek State within the context of its reply to the European Commission, the Company does not believe it is necessary neither to resubmit information that has already been submitted by the Greek State, nor to set out the same arguments, the content of which it fully supports, but for the purpose of completion of the reply and in order to assist the Commission with its task, it will summarise the arguments already put forward and will submit any new evidence that was gathered during the time that has lapsed between the Greek State's reply and the present reply and will present any new or supplementary arguments'. In the present decision, the comments of HSY and Greece on the extension decision will therefore be merged, instead of repeating twice the arguments.
- (⁹³) Under Directive 90/684/EEC, the restructuring aid (Chapter III) is divided between investment aid (Article 6), closure aid (Article 7), R & D aid (Article 8) and operating aid for restructuring (Articles 9 and 10).
- (⁹⁴) Letter of the Greek authorities dated 15 February 2008, paragraph 26.

- (⁹⁵) Letter of the Greek authorities dated 19 March 2007. This was repeated in the letter of 29 June 2007, paragraphs 62 and 63.
- (⁹⁶) The details of this participation will be provided in the analysis of measure E10.
- (⁹⁷) Letter of the Greek authorities dated 31 March 2003, extract of answer to question 5.
- (⁹⁸) Letter of the Greek authorities dated 29 June 2007, extract of paragraphs 49, 50 and 51.
- (⁹⁹) The Commission could not and did not ignore that employees have objectives like the preservation of the employment and therefore try to defend these objectives when managing their own firm. However, the high purchase price meant that the preservation and the increase of the value of the shares would also have become an important objective for the employees.
- (¹⁰⁰) It is recalled that the payment of the purchase price by the employees by means of a withholding on their wages and allowances, in addition to being laid down in the September 1995 contract, was also laid down in Article 12 of Law 2367/1995.
- (¹⁰¹) It is recalled that ETVA could enforce its pledge on the shares if the employees did not pay the purchase price as provided with in the September 1995 contract.
- (¹⁰²) It is recalled that the payment of the purchase price by the employees by means of a withholding on their wages and allowances, in addition to being laid down in the September 1995 contract, was also laid down in Article 12 of Law 2367/1995.
- (¹⁰³) It was clearly indicated in the September 1995 contract that the employees would have to pay in parallel the purchase price and the contribution to the capital increase. This double payment is therefore not something unexpected. It is an essential part of the September 1995 contract. Greece should have verified whether the basic provisions of the contract were feasible before presenting it to the Commission as a privatisation. If essential provisions of a contract which Greece submitted itself to the Commission turn out to be unenforceable, it must be concluded that the Decision C 10/94 was based on misleading information from Greece and the decision should be repealed.
- (¹⁰⁴) Paragraphs 59 and 60 of the letter of the Greek authorities dated 29 June 2007.
- (¹⁰⁵) Paragraph 191 of Greece letter of 5 October 2006 indicates: 'From 31.12.1998 to the time of the sale of the shares of HSY to HDW/FS consortium (11.10.2001) a portion of the salaries of the employee shareholders was withheld, as explained above, as payment to ETVA of the price for the purchase of 49 % of the shares.' A similar statement was made by HSY in paragraphs 35 and 36 of its letter of 31 October 2006. Before the extension decision, the Greek authorities had made similar statements in the 8th chapter of its letter of 26 May 2005. In addition, in several letters Greece indicated that the employees were the owners of 49 % of the shares. Thereby, Greece gave the impression that the September 1995 contract had been implemented. The Commission only discovered after the opening that Greece had not implemented its own law (i.e. Law 2367/1995), since it had transferred the ownership of 49 % of HSY to the employees but had not implemented the rest of the contract, namely requesting the payment of the purchase price from them. Conversely, in their letter of 31 March 2003, the Greek authorities had implicitly suggested that (part of) the employees had not paid (part of) the annual instalments as planned.
- (¹⁰⁶) Commission's letter of 27 April 2007 sent to Greece (question 3) and Commission's letter of 23 August 2007 sent to HSY.
- (¹⁰⁷) Commission's letter of 27 April 2007 sent to Greece (question 4) and Commission's letter of 23 August 2007 sent to HSY. The latter letter was sent to Greece for comments on 13 November 2007, what offered the opportunity to Greece to comment a second time.
- (¹⁰⁸) Points 2.3.c and 2.4 of Greece's letter of 29 June 2007, HSY's letter of 9 October 2007, and Greece's letters of 14 December 2007 and 15 February 2008.
- (¹⁰⁹) In respect of the repair of the KEYMAR in the first months of 2003, Greece claims that, since the reparation were much more sophisticated than in other cases, it is reasonable to suppose that the percentage of indirect hours was 25 % instead of 20 %.
- (¹¹⁰) Paragraph 144 of Greece's letter of 5 October 2006.
- (¹¹¹) Commission's letter of 27 April 2004 (question 2.2) to which Greece replied by letter of 29 June 2007.

(¹¹²) Most probably, this figure indicates how much a productive hour of HSY's employees costs per hour for HSY in a given year. The number of productive hours performed by a worker is only a fraction of the number of hours paid by HSY to this worker. This number depends on many factors, notably the structure and efficiency of the yard. Conversely, the subcontractors are in competition with each others. Therefore, they have to be competitive and flexible. They have limited fixed costs (i.e. permanent workers) and their costs have to be low. Yards use subcontractors precisely because it is cheaper than hiring more labour themselves.

(¹¹³) The consultant observes:

The number of man-hours of subcontractors can be derived from the costs, by using a mean man-hour cost which is comparable between subcontractors of the same trade and country.

Based on the "Pay development 2006" report published by the European Foundation for the Improvement of Living and Working Conditions, the minimum monthly gross salary is equal to EUR 625,97 in Greece and to EUR 1 254,28 in France.

The average man-hour market price in shiprepair in France ranges between EUR 40 and EUR 50, by applying the ratio of 2 which exists between France and Greece for minimum salaries a price of EUR 20 to 25 could be expected for shiprepair man-hour price in Greece.

As a result of enquiries we made, it appears that this rate was ranging between EUR 30 early 2007 and EUR 36 in early 2007. This price is the price invoiced for each direct man-hour and it includes all related costs: indirect hours, management hours, general expenses and overheads.

As we did not identify where the mean wages of the shiprepair sector stand versus the minimum wages in both countries, we prefer to use a conservative figure, hence our estimations will be calculated with man-hour prices ranging between EUR 30 and EUR 36 per hour.

The man-hour rates of subcontractors mentioned in the annex 6 of the submission of Greece to the Commission are as follows:

(EUR)

Year	Direct	Including profit (15 %) and indirect costs (20 %), following the methodology included in annex 6 of Greece's submission
2002	25,97	40
2003	27,49	42,3
2004	[...]	[...]
2005	[...]	[...]
2006	[...]	[...]

If we calculate the subcontracted man-hours quantity based on man-hour costs ranging between EUR 30 and EUR 36 for 2006 and derived from these figures for the previous years by using the escalation index published by Eurostat, we obtain the following figures:

INDEX: Invlci-tot	2002	2003 (9 m)	2004	2005	2006
EU 27 index	108,9	112,8	116,5	119,7	121,6
Greece index	113,5	116,6	127,0	127,7	133,9
Balance of contracted labour	3 804 891	16 471 323	[...]	[...]	[...]
Consultant estimate					
Manhour cost (min value)	25,4	26,1	28,5	28,6	30
Subcontractor's direct Manhours (max estimate)	149 598	630 388	[...]	[...]	[...]
Consultant estimate					
Manhour cost (max value)	30,5	31,4	34,2	34,3	36
Subcontractor's direct Manhours (min estimate)	124 665	525 324	[...]	[...]	[...]
Hellenic shipyard figures					
Manhour cost	25,97	27,49	[...]	[...]	[...]
Manhour cost + indirect + profit	40,0	44,5	[...]	[...]	[...]
Subcontractor's direct Manhours	95 232	370 142	[...]	[...]	[...]

- (¹¹⁴) Commission's letter of 27 April 2004 (question 2.2.d) to which Greece replied by letter of 29 June 2007.
- (¹¹⁵) Case T-296/97 *Alitalia v Commission* [2000] ECR II-3871, paragraphs 82 and 84.
- (¹¹⁶) In particular, ETVA can not, on the one hand, not implement the part of the September 1995 contract concerning the payment of the purchase price (i.e. not seeking to receive the corresponding annual payments) and, on the other hand, claim that on the basis of the same contract it was obliged to participate to the capital increases. In other words, since ETVA and Greece had decided not to implement correctly major provisions of the contract, they can not at the same time selectively invoke other provisions of this contract to pretend that ETVA was contractually obliged to do certain things (i.e. participate in the capital increases).
- (¹¹⁷) HSY's employees participated in the capital increase. However, they did not find themselves in the same situation as ETVA. Indeed, they had already breached the September 1995 contract as they were not paying the purchase price to ETVA. Moreover, they were in a different situation than ETVA and than a market economy investor. Indeed, they were concerned by the preservation of their jobs, what incites them to invest in HSY, even if the expected financial return is insufficient to convince a market economy investor to invest.
- (¹¹⁸) Greece provided a copy of this law as Annex 10 of its letter of 5 October 2006.
- (¹¹⁹) It is not totally clear from Greece's and HSY's submissions (including the first Deloitte report) whether the premium amounted to 0,4 % annually, but paid on a quarterly basis, or amounted to 0,4 % per quarter. While this is important in the framework of the recovery procedure, this does not change the conclusion in the present decision.
- (¹²⁰) This list was provided on pages 3–11 and 3–12 of the report, in the framework of the analysis of the GRD 10 billion loan that benefited from a State guaranteed granted on the basis of Law 2322/1995 (measure E14 of the present decision).
- (¹²¹) The Commission has authorised aid free guarantee schemes for shipbuilding in Germany (OJ C 62, 11.3.2004, p. 3), the Netherlands (OJ C 228, 17.9.2005, p. 10), France (OJ C 259, 27.10.2006, p. 14) and Finland (OJ C 152, 6.7.2007, p. 6). The two latter schemes explicitly include guarantees on advance payments.
- (¹²²) Since the State owned 100 % of ETVA when the latter granted the down payments guarantees, the guarantee premium paid by HSY to ETVA was already a remuneration for the State.
- (¹²³) The amendments were as follows:
Programme Agreement 33a – SD 33a (Supply of 20 HA/A): the penalties were calculated up to 31.12.2002 and recorded in the amendments as established amounts. It was agreed that those amounts should be paid in 10 instalments, with the first instalment being payable when the first vehicle was delivered and the other nine instalments being payable when each of the last nine electric trains was delivered. It was agreed that the evolution of the penalties would stop from 1.10.2003, provided that the consortia (Siemens AG, Siemens SA and HSY) supplied OSE with equivalent rolling stock. The consortia met that condition only partially, and thus OSE calculated and claimed the penalty amounts for the entire period.
Programme Agreement 39 – SD 39 (Supply of 24 electric locomotives): the penalties were calculated up to 31.12.2002 and recorded in the amendments as established amounts. It was agreed that those amounts should be paid in 10 instalments, the first instalment being payable when the first vehicle was delivered and the other nine instalments being payable when of each of the last nine deliveries was made. A penalty-free period was granted as an extension of the delivery time. No provision was made with regard to equivalent rolling stock in the case of PA 39 SD 39, but the delivery timetable was amended. OSE claimed the penalty clause amounts that had been established by 31.12.2002 and collected them from the consortia (Siemens AG, Siemens SA and HSY).
Programme Agreement 35 – SD 35 (Supply of 29 rail buses): a penalty-free period was not granted, and therefore OSE claimed and collected the penalty clause amounts. Default interest on the penalty amounts was charged and claimed for the period for which the amounts were not paid.
- (¹²⁴) Up to the time of Greece's letter of 5 October 2006, the sum of EUR 9 932 511,99 has been withheld and the sum of EUR 826 556 remained to be withheld.
- (¹²⁵) The consortium for the programme agreement consisted of HSY, Siemens AG and ABB Daimler-Benz Transportation (Bombardier Transportation from 1.5.2001). The implementation percentages for the agreement were 22,06 % of the total final price paid for HSY and 77,94 % for the other companies.

- (¹²⁶) That agreement also provided for the configuration and installation of an automatic train protection and identification system in 50 multiple units. The timetable provided for completion of the work in January 2004. The board decided unanimously in decision No 578/4/4-9-2002 to extend the delivery time to 19.5.2004, in view of the fact that the consortium was not to blame for the delay. The work was finally completed on 4.6.2004. Under paragraph 14 of the programme agreement, the penalties for non-compliance with an agreed delivery time were to commence 40 days after the contractual delivery date and only if the supplier was to blame for the non-compliance. Consequently, there was no ground to impose penalties and interest on account of this delay.
- (¹²⁷) It is not totally clear from the submission of Greece and HSY (including the first Deloitte report) whether the loan was initially denominated in drachma or in euro. Greece's answer to the opening decision only gives amounts in Euro and indicates an interest rate based on 3 months Euribor. Conversely, the first Deloitte report indicates that the loan amounted to GRD 16,92 billion and the interest rate was based on Libor. This issue can be clarified in the framework of the recovery procedure.
- (¹²⁸) In their letter of 21 June 2007, TKMS and GNSH submitted the second Deloitte report. Appendix C of this report is 'The Due Diligence Report on Hellenic Shipyards S.A. titled "Copy for Presentation Purposes" and its Executive Summary prepared by Arthur Andersen, dated 19 June 2001'. Page 7 of this due diligence report analyses the receivables of HSY and indicates that trade debt due by Strintzis Lines 'is only collectible upon delivery of the vessels in 2002'. This confirms that, except for the limited advance payments which anyway had already been paid at the time and were therefore not collectible anymore, the rest of the purchase price was not collectible before the delivery of the vessels.
- (¹²⁹) In the letters dated 21 October 2004 and 17 December 2004 in the case CP 71/02, the Greek authorities confirmed that HSY applied to receive operating aid of 9 % for the two ships, which was accepted by the competent Ministry. The Greek authorities however confirmed that finally no aid was paid out since HSY did not complete the construction of the ships. The granting decisions were finally revoked. Measure 13(c) of the extension decision deals with this topic.
- (¹³⁰) See footnote 127.
- (¹³¹) As regards the possibility to collect proceeds during the execution of the contract (i.e. before delivery), the Commission again refers to the document quoted in footnote 128 of the present decision, which indicates that on 31 December 2000 the trade debt related to the contracts with OSE amounted to only EUR 0,5 million. In addition, the document indicates that 'These receivables will be set off against the respective advances received'. This illustrates that at that moment no money was collectible from OSE.
- (¹³²) The initial margin is 25 bps, which increased to 125 bps from 1 April 2000. The Commission bases itself on the first Deloitte report.
- (¹³³) The following press article suggests that the ship repair activity was not significantly disturbed: 'Contracts — Hellenic declares business as usual after Athens earthquake', *Lloyd's List International*, 14 September 1999.
- (¹³⁴) The letter by which Greece made comments on the opening decision.
- (¹³⁵) Figure from the letter of Greece dated 29 June 2007.
- (¹³⁶) On 19 May 1999, this credit line was converted from USD into EUR.
- (¹³⁷) As regards the possibility to collect money before the delivery of the products, the Commission refers to the document quoted in footnote 128, which is also referred to in footnote 123. This due diligence report refers to a period after the reimbursement of the loans currently assessed. However, it is useful to illustrate that before the delivery of a product, nearly no money is collectible. This due diligence report shows in particular that on 31 December 2000, nearly no money was collectible from Strintzis, the Greek Navy, OSE and ISAP.
- (¹³⁸) See Commission notice on the method for setting the reference and discount rates (OJ C 273, 9.9.1997, p. 3).
- (¹³⁹) This balance sheet appears in the documents submitted by TKMS and GNSH, described in footnote 128 of the present decision.
- (¹⁴⁰) In the case of the submarines, the conditions put by the Greek State lead to the result that the first submarine will be entirely built in Kiel (Germany) while the two following ones will be assembled in HSY (see recital 44 of the present decision). It would most likely have been cheaper and more efficient to produce all three submarines in Germany. It would also have been more rationale not to include HSY, which was a firm in difficulty and in addition had no experience with submarines, within the consortium.

- (¹⁴¹) At a point in time, these funds must have been necessary to cover the costs generated by the execution of the military contracts concerned. At that point in time, the funds were not available anymore to finance other activities of HSY. In other words, at that point in time, a part of the advantage granted by the State was withdrawn. The remaining advantage was that during the preceding quarters, the yard has had at its disposal the funds for free, whereas it could not have borrowed that money from banks.
- (¹⁴²) Page 30 of the letter of 30 October 2006.
- (¹⁴³) E.g. the very large debt waiver related to military activities was mentioned in decision C 10/94 but not assessed under State aid rules, the closure expenses related to military activities were mentioned in decision N 513/01 but not assessed under State aid rules, and the same was done with several measures in the extension decision.
- (¹⁴⁴) For instance, the invitation to submit binding offers for the acquisition of shares of Hellenic Shipyards S.A. dated 2 July 2001 indicates that 'It is stipulated that in the event that a fine is imposed pursuant to a potential breach of EC regulations regarding State aid, the highest bidder will not be responsible for the payment of such fine. This assurance will take precedence over the transfer of the Shares'.
- (¹⁴⁵) The minutes of the meeting held on 14 September 2001, which were signed by the parties, indicates that 'It is agreed that EU-clearance will be a condition precedent to the closing of the contract subsequent to its signature. Alternatively, in the event that such a decision is delayed by the EU [...] or it is not satisfactory, the parties agreed that ETBAbank will undertake the obligation to provide a guarantee to HDW-Ferrostaal in relation to any outstanding issues related to EU, regarding past and present state subsidies, if any, related to HSY'.
- (¹⁴⁶) For instance, in a letter dated 6 December 2001 and addressed to HDW and copied to Ferrostaal, Alpha Finance, which was the adviser of the State and of ETVA, indicates: 'we have been instructed by the Ministry of Development and ETVAbank to provide you with the attached language, proposed by ETVAbank, for [...] the letter of guarantee to be provided by ETVAbank to HDW-Ferrostaal in the case that Clause 1.2.3 of the Agreement is not fulfilled'. In fax messages dated 23 January 2002, 31 January 2002 and 8 March 2002, HDW sent to Alpha Finance comments regarding the exact wording of the guarantee.
- (¹⁴⁷) Bank Pireaus submitted several press articles relating to the period October 2001 to May 2002 illustrating that the government was directly involved in the privatisation process of HSY.

(¹⁴⁸) The letter of 23 May 2005 indicates:

The sale of HSY was conducted with the procedure of denationalisation (Law 2001/1990). The procedure of declaration, which preceded the conclusion of, initially, the promissory contract of 11.10.2001, and, subsequently, of the executing contract (31.5.2002), contained all the essential conditions of the transfer, and also the delivery of the analytical memorandum of the financial advisor (dated April 2001) and the submission of offers. During all these stages, in which all the interested parties (including the complainant) had access to the information, the condition of the guarantee was stipulated. Consequently, as it is also underlined in the letter of 17.12.2004, it concerns not only a legal and financially common condition, but also a condition which is included in the negotiations for the privatisation of the Shipyard from the outset and, in particular, in the form of a critical (*sine qua non*) condition, without which the completion of the sale of HSY's shares would not have been possible. It is characteristic that, as it has been mentioned above, this condition, with different stipulations but always with the same objective, i.e. the reasonable facilitation of the transaction in the framework of the market rules, appears from the beginning of the privatisation procedure in the following texts:

The Declaration of the Advisor

The Invitation for the Submission of Binding Offers

The Offer of the Purchasing Joint Venture (particularly without being included in the Declaration of Quitting from its condition)

In the texts of the Negotiations and, lastly,

In the Share Purchasing Agreement of 11 October 2001.

Consequently, the declaration of guarantee that is included to the addition of the guarantee contract of 31.5.2002 was addressed to the candidate bidder from the outset and therefore does not constitute state aid to the final purchaser. The same condition would have been valid for every bidder, since, as it has already been mentioned, it has been included in the procedure of denationalisation. It is also self-evident that, since the procedure of denationalisation began in February 2001 (at a time when the main shareholder of the then selling Bank ETVA was the Greek State), the State, as a seller of ETVA to Bank Piraeus, ought to also provide and did actually provide its own guarantee to the purchaser of its shares in ETVA (Bank of Piraeus), regarding the asset that was for sale, i.e. the Shipyards, because the seller had to provide such a guarantee. These guarantees, which, as it has already been stressed, are included with absolute transparency and clarity in all the contractual texts of the denationalisation and mainly in the promissory contract of 11.10.2001, pertain to the character of the transaction (sale of a definite asset), are valid for all candidate bidders and do not confer any additional benefit to anyone. On the basis of the abovementioned, the true nature of this guarantee is proven (as a condition necessary to the transaction and common under market rules), as well as its binding character, on the basis of all the procedures preceding privatisation but also of the Sale-Purchase Agreement of the shares of HSY of 11.10.2001 itself, which was subsequently followed by the Sale-Purchase Agreement of the shares of ETVA of 18.10.2001 and the First Amending Act of 18.3.2002 between ETVA and the Greek State. The fundamental point, however, is — and this is emphatically stressed — that the condition on the guarantee is included in the entire procedure of denationalisation and is not stipulated for the first time after the conclusion of the contract. It does not, therefore, constitute a last-minute “invention”, as the complainant desires to show, whose aim is circumventing the Community Rules on the legality of State aid.

The Greek State as a seller of the shares of ETVA ought to, not only at the time of the contract of 18.10.2001, but also according to law, to transfer to Bank Piraeus its shares in ETVA free from any obligation. Given that Bank of Piraeus had no involvement in the procedure of the denationalisation of HSY, it should be, according to law and transaction customs, secured against any obligation emanating from the contract of transferring HSY to which it was not participating. And it is this securing that the guarantee of the Greek State of 18.3.2002 provides to it. This guarantee was self-explanatory and legal. The Greek State gave it since it had a contractual obligation, acting towards Bank Piraeus as a party to a contract, i.e. as a *fiscus*, and not as an agent of public power.'

The Commission recalls that at the time of that letter, Greece, commenting on Elefsis' allegation that the guarantee constituted aid to HDW/Ferrostaal, wished to show that this guarantee did not constitute an advantage selectively granted to HDW/Ferrostaal but was offered to all the bidders (including Elefsis) that participated in the privatisation process of HSY. In its following submissions to the Commission, Greece, realising that the Commission could consider this guarantee as aid to HSY, tried to put in doubt the imputability of the measure to the State by claiming that the guarantee has been concluded not earlier than in May 2002, which is a total contradiction of the claims made in the letter of 23 May 2005.

(¹⁴⁹) As indicated in recital 59 of the present decision, the privatisation was decided by decision No 14/3-1-2001 of the relevant Inter-ministerial Privatisation Committee.

- (¹⁵⁰) The Commission acknowledges that the wording and the structure of the agreement of 20 March 2002 is confusing. Article 8.2.4 of the Agreement of 20 March 2002 provides that, in respect of the aid included in Article 3 to 6 of Law 2941/2001 (see recital 33 of the present decision for a description of that law), the State would pay to Piraeus Bank 100 % of the amount which would be paid by ETVA to HDW/Ferrostaal. However, in case of recovery of aid not included in Article 3 to 6 of Law 2941/2001, Article 8.2.4 of the agreement of 20 March 2002 does not apply. Therefore, Article 8.2.1 would be applicable. This article provides that the State will pay to Piraeus Bank only 57,7 % of the amount which would be paid by ETVA to HDW/Ferrostaal. However, the Commission observes that Article 8.2.2 of the Agreement indicates that, despite the sale of the majority of the shares of ETVA to Piraeus Bank, it is the State — and not Piraeus Bank/ETVA — that is going to manage the ongoing sale of HSY. This article, and in particular point 8.2.2(d), indicates that the State undertakes that the Purchaser (i.e. Piraeus Bank) will suffer no damage in relation to the privatisation of Hellenic Shipyards. Since, as shown by Article 8.2.4 (and by Article 7.4 of the Agreement of 18 December 2001), the agreement was based on the assumption that Piraeus Bank and ETVA would soon merge, the commitment made by the State in Article 8.2.2 would not be respected if it would pay to Piraeus Bank only 57,7 % of the sum paid by ETVA to HDW/Ferrostaal. In other words, in order to implement the commitment made in paragraph 8.2.2 — namely to ensure that Piraeus Bank will not suffer from the sale of HSY — the mechanism laid down in Article 8.2.4 must apply to all cases of recovery of aid, and not only to cases of recovery of aid stemming from Law 2941/2001.
- (¹⁵¹) By letter dated 28 May 2002, Piraeus Bank consulted the government on the wording of the guarantee that ETVA intended to provide to HDW/Ferrostaal and asked confirmation that, in case of calling of this guarantee, what is envisaged in Article 8.2.4 of the Agreement of 20 March 2002 would apply. By letter of 31 May 2002, the government gave its agreement that ETVA issues this guarantee and confirmed that, in case it would be invoked, what is envisaged in Article 8.2.4 would apply. This means that even if, contrary to the foregoing conclusion, the agreement of 20 March 2002 had obliged the State to pay to Piraeus Bank only 57,7 % of the amount paid by ETVA to HDW/Ferrostaal, this has been modified by the letter of the government of 31 May 2002, which states unambiguously that the mechanism provided in Article 8.2.4 of the Agreement of 20 March 2002 (i.e. 100 % indemnification) applies.
- (¹⁵²) In answer to a precise question by the Commission sent by letter of 12 February 2008, Greece confirmed in its letter of 3 March 2008 that it would be obliged to pay to Piraeus Bank the full (i.e. 100 % and not 57,7 %) amount paid by ETVA to HDW/Ferrostaal.
- (¹⁵³) As indicated in the assessment of measure E7, the employees were the owner of these shares but had not paid the purchase price they should have paid to ETVA.
- (¹⁵⁴) See recital 33 of the present decision for a description of that law.
- (¹⁵⁵) Case C-334/99, *Federal Republic of Germany v Commission*, paragraphs 133 to 141.
- (¹⁵⁶) In addition, the Commission observes that, to its knowledge, none of the loans and guarantees covered by Article 296 comply with the conditions laid down in section 3.1 of the present decision. They would therefore not have been acceptable to a market economy investor.
- (¹⁵⁷) Taking into account the risk aversion of the economic agents, the sale of HSY would be preferred over the liquidation of HSY only if the statistical expectancy of payments following from the guarantee would be significantly smaller than EUR 6 million.
- (¹⁵⁸) See recital 33 of the present decision for a description of that law.
- (¹⁵⁹) This has already been analysed by the Commission in the extension decision, in particular in the description and the assessment of measure 18(a). The Commission also notes that the second Deloitte report indicates: 'The clause d) above, regarding the allocation of the consideration between an amount destined for a share capital increase and price offered for the acquisition of existing shares, at a set ratio of 2:1, from our experience in similar transactions, is not a very common term. However, taking into consideration the significant operational problems and deteriorating financial position of the Company, we believe that the decision taken by the Sellers (and their Advisors) to set such terms was both rational and reasonable' (page 9–2). The Commission interprets this quotation as confirming that this allocation of the purchase price was a rational and reasonable request of the State if one considers that its objective was to ensure the continuation of the activities of HSY over the long term (goal as public authority), not if one considers that its objective was to maximise the revenues from the sale (goal as market economy investor).
- (¹⁶⁰) See footnote 148.
- (¹⁶¹) The Commission does not claim that a due diligence would have allowed to identify all the measures which have to be recovered according to the present decision, but some of them. In its letter of 21 June 2007, TKMS/GNSH has submitted some due diligence reports performed in 2001 by Arthur Andersen on behalf of HDW/Ferrostaal. Arthur Andersen indicates in these reports that it is not excluded that HSY has received State aid which should be recovered in the future.

- (¹⁶²) In particular, since ETVA and Greece had promised to grant this guarantee in the tender document submitted to the bidders, the fact that this guarantee was not mentioned as a condition in the bid documents submitted by Elefsis would not have prevented it from requesting it later in the negotiation process.
- (¹⁶³) This point is underpinned in the second Deloitte report which claims that, if HDW/Ferrostaal had had to support the risk of having to reimburse State aid received by HSY in the previous years, it would not have purchased HSY.
- (¹⁶⁴) This is clear from the text of the Seventh Shipbuilding Directive and from its structure, in which 'Investment aid' is a part of 'Chapter III Restructuring aid'.
- (¹⁶⁵) See the very large debt waiver mentioned in decision C 10/94, the payment of the closure costs mentioned in decision N 513/01, and all the financial supports provided by the State and falling under Article 296 which were mentioned in the extension decision.
- (¹⁶⁶) For instance, as regards State financial support which was provided to HSY without being earmarked to the financing of a precise activity, the Commission has considered that only 25 % of the State support benefited to the civil activities. However, if only 25 % of the State support is recovered, only 6,25 % (i.e. 25 % of 25 %) of the State support would in fact be recovered from the civil activities. This will not restore the initial situation of the civil activities of HSY, because they received 25 % of the State support and will only reimburse 6,25 %.
- (¹⁶⁷) OJ L 140, 30.4.2004, p. 1.
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