# JUDGMENT OF THE COURT OF FIRST INSTANCE (Fifth Chamber)
11 December 2003 *

In Case T-61/99,

**Adriatica di Navigazione SpA**, established in Venice (Italy), represented by U. Feraro, M. Siragusa and F. M. Moretti, lawyers, with an address for service in Luxembourg,

applicant,

v

**Commission of the European Communities**, represented by R. Lyal and L. Pignataro, acting as Agents, with an address for service in Luxembourg,

defendant,

APPLICATION for annulment of Commission Decision 1999/271/EC of 9 December 1998 relating to a proceeding pursuant to Article 85 of the EC Treaty (IV/34.466 — Greek Ferries) (OJ 1999 L 109, p. 24),

* Language of the case: Italian.

THE COURT OF FIRST INSTANCE
OF THE EUROPEAN COMMUNITIES (Fifth Chamber),

composed of: J. D. Cooke, President, R. García-Valdecasas and P. Lindh, Judges,

Registrar: J. Plingers, Administrator,

having regard to the written procedure and further to the hearing on 3 July 2002,

gives the following

## Judgment

### Facts

1 The applicant, Adriatica di Navigazione SpA, is a publicly-owned shipping company which provides transport services for passengers, private vehicles and goods vehicles on the route between Brindisi, Corfu, Igoumenitsa and Patras. It is the only Italian company which provides a roll-on roll-off ferry service of this kind between Greece and Italy.

2 Following a complaint from a customer to the effect that ferry tariffs were very similar on routes between Greece and Italy, the Commission, acting pursuant to Article 18(3) of Council Regulation (EEC) No 4056/86 of 22 December 1986 laying down detailed rules for the application of Articles 85 and 86 of the Treaty to maritime transport (OJ 1986 L 378, p. 4), carried out inspections at the offices of six ferry operators, five in Greece and one in Italy.

3 On 21 February 1997 the Commission initiated formal proceedings, sending a statement of objections to nine companies including the applicant.

4 On 9 December 1998 the Commission adopted Decision 1999/271/EC relating to a proceeding pursuant to Article 85 of the EC Treaty (IV/34.466 — Greek Ferries) (OJ 1999 L 109, p. 24, 'the Decision').

5 The Decision contains the following provisions:

'*Article 1*

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

The duration of these infringements is as follows:

(a) in the case of Minoan Lines and Strintzis Lines, from 18 July 1987 until July 1994;

(b) in the case of Karageorgis Lines, from 18 July 1987 until 27 December 1992;

(c) in the case of Marlines SA, from 18 July 1987 until 8 December 1989;

(d) in the case of Anek Lines, from 6 July 1989 until July 1994.

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

The duration of these infringements is as follows:

(a) in the case of Minoan Lines, Ventouris Group Enterprises SA and Strintzis Lines, from 8 December 1989 until July 1994;

(b) in the case of Karageorgis Lines, from 8 December 1989 until 27 December 1992;

(c) in the case of Anek Lines, from 8 December 1989 until July 1994;

(d) in the case of Adriatica di Navigazione SpA, from 30 October 1990 until July 1994.

*Article 2*

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

— Minoan Lines, a fine of ECU 3.26 million,

— Strintzis Lines, a fine of ECU 1.5 million,

— Anek Lines, a fine of ECU 1.11 million,

— Marlines SA, a fine of ECU 0.26 million,

— Karageorgis Lines, a fine of ECU 1 million,

— Ventouris Group Enterprises SA, a fine of ECU 1.01 million,

— Adriatica di Navigazione SpA, a fine of ECU 0.98 million.

...'

6 The Decision was addressed to seven undertakings: Minoan Lines, established in Heraklion, Crete (Greece) (hereinafter 'Minoan'), Strintzis Lines, established in Piraeus (Greece) (hereinafter 'Strintzis'), Anek Lines, established in Hania, Crete (hereinafter 'Anek'), Marlines SA, established in Piraeus (hereinafter 'Marlines'), Karageorgis Lines, established in Piraeus (hereinafter 'Karageorgis'), Ventouris Group Enterprises SA, established in Piraeus (hereinafter 'Ventouris Ferries') and Adriatica di Navigazione SpA, established in Venice (Italy) (hereinafter 'the applicant').

**Procedure and forms of order sought by the parties**

7 By application lodged at the Registry of the Court of First Instance on 1 March 1999 the applicant brought the present action for annulment of the Decision.

8 On hearing the report of the Judge-Rapporteur the Court decided to initiate the oral procedure and, by way of measures of organisation of procedure, called upon the Commission to answer, in writing, certain questions and to produce certain documents. The Commission complied with that request within the time allowed.

9 The parties presented oral argument and answered the questions put to them by the Court at the hearing on 3 July 2002.

10 The applicant claims that the Court should:

— annul the Decision in whole or in part in so far as it concerns the applicant;

— in the alternative, annul the fine imposed on it or reduce the same;

— order the Commission to pay the costs.

11 The Commission contends that the Court should:

— dismiss the application as unfounded;

— order the applicant to pay the costs.

## Law

12 In its principal heads of claim, for annulment of the Decision, the applicant maintains that the Commission made a series of mistakes in forming the conclusion that it had infringed Article 85(1) of the EC Treaty (now Article 81(1) EC). By its first plea it argues that the Decision is vitiated by an insufficient statement of reasons in relation to the definition of the relevant market and by contradiction between the statement of reasons and the operative part. By its second plea it maintains that the Commission failed to establish to the requisite legal standard the applicant's participation in the cartel complained of in the Decision. In the first part of its second plea, the applicant pleads an error of assessment of the documentary evidence which the Commission relied upon as evidence against the applicant and incorrect imputation of the infringement. In the second part of its second plea, the applicant pleads an error in the classification of the infringement committed. By its third plea the applicant alleges infringement of the principles of equity and equal treatment in that the Commission imputed the infringement to undertakings operating on the same route as the applicant. By its fourth plea the applicant alleges incorrect application of Article 85 of the Treaty, there having been no serious harm caused to trade between Member States.

13 In support of its application in the alternative, for annulment of its fine or a reduction in its amount, the applicant puts forward a fifth plea in law alleging that the Commission infringed Article 19 of Regulation No 4056/86, in that the institution imposed a disproportionate fine and erred in its assessment of both the duration and gravity of the infringement.

I — *The application to annul the Decision*

*The first plea: infringement of Article 85 of the EC Treaty and Article 190 of the EC Treaty (now Article 253 EC) in that the Decision is vitiated by an insufficient statement of reasons in relation to the definition of the relevant market and by contradiction between the statement of reasons and the operative part*

Arguments of the parties

14 The applicant complains that the Commission adopted the Decision on the basis of an incorrect and incomplete definition of the relevant market in that, without justification, it omitted to take into account the fundamental differences between the routes operated, between the operators present on those routes and between the various types of service offered. It argues that that incorrect definition had a serious adverse effect on its position in the present case, as an undertaking operating on only one of the routes referred to in the Decision and drawing 90% of its turnover from the transportation of passengers, a service with which the Decision is not concerned. According to the applicant, those particularities ought to have been taken into account and any liability on its part consequently reduced with regard to the route on which it operates.

15 More specifically, the applicant observes that the transportation of freight and goods vehicles is a very different matter from the transportation of passengers and private vehicles. As far as freight transport is concerned the frequency of the service is of prime importance, even in low season. Also, for customers of this type of service, the proximity of ports of embarkation and disembarkation and the place where goods are delivered is a more important factor than tariff rates. Private customers, on the other hand, are more sensitive to the quality of the service and/or its cost than they are to the frequency of service (and the distance

travelled). According to the applicant, treating the three routes in question as constituting a single geographical market is too approximate. The three routes ought to be regarded as partially separate geographical markets serving distinct 'client bases'.

16 The applicant adds that the hasty and superficial treatment in the Decision of the issue of the relevant market amounts to an infringement of Article 190 of the Treaty. It observes that there is a discrepancy between the statement of reasons and the operative part of the Decision concerning the definition of the relevant market and the nature of the infringement. It points out that, by contrast with certain passages in the statement of reasons in which the conduct complained of is presented as constituting one and the same general infringement, the operative part clearly distinguishes both the types of services covered by the agreements in question and the routes to which the conduct complained of relates. The applicant maintains that this approach affected the amount of the fine imposed on it.

17 More specifically, the applicant criticises the Commission for having attributed liability to it for an overall cartel relating not only to the transportation of freight and goods vehicles but also to passenger transport, not only on the single route on which it operates but on all the routes operated in various ways by the other companies to which the Decision is addressed.

18 In this connection, the applicant emphasises the practical consequences ensuing from the imputation of infringements in this way. A customer who had had recourse to the applicant's services during the period in question and who, relying on the Decision, which established the existence of a cartel to fix tariffs for maritime transport at a given level — higher than it would have been but for the alleged cartel —, might decide to bring an action for damages against the applicant. If the Decision were upheld (*rebus sic stantibus*), it would legitimise the actions of persons having had recourse to the applicant's passenger transport services, not only customers of goods vehicle transportation services. That being

so, the applicant maintains that, because incorrect definition of the relevant market has an effect on the attribution of liability, it amounts to a serious error necessarily vitiating the Decision. The applicant adds that, had the Commission recognised that the three routes with which the Decision is concerned constituted separate markets, at least as regards freight and goods vehicle transport, it would not have been able to hold the applicant liable in connection with the services provided by other companies on other routes. Moreover, the gravity of any infringement attributed to it would inevitably have been lesser and that would have had significant consequences for the amount of the fine imposed on it.

19 The Commission disputes the merits of this plea, arguing that, since there is sufficient evidence to prove an infringement on the three routes under consideration (between Ancona and Patras, Bari and Patras, and Brindisi and Patras) taken together, there was no need for it to give a different definition of the relevant market. It adds, in this connection, that the applicant does not indicate in what way any error in the definition of the relevant market could render the Decision invalid.

20 The Commission submits that, from the point of view of the supply by the shipping lines in question, the three routes form one and the same market. For that reason it was unnecessary to analyse from the point of view of demand any substitutability between passenger and freight transport services. Indeed, it found in the Decision that the ports of Ancona, Bari and Brindisi are substitutable in so far as concerns roll-on roll-off ferry services between Greece and Italy, in that they are, to some degree, interchangeable (see paragraph 5 of the Decision). Moreover, in paragraphs 3, 20, 29, 31, 34, 36, 97 and 144 of the Decision, it stated that, from the point of view of supply, the relevant market is that for roll-on roll-off ferry transportation services between Greece and Italy. Lastly, the Commission states that the agreement concluded by the shipping companies related to all roll-on roll-off services between Greece and Italy, with no account being taken of the particular route on which any given company operated.

21 In so far as concerns the definition of the relevant market, from a geographical point of view, the Commission refers to the judgment in Joined Cases T-305/94 to T-307/94, T-313/94 to T-316/94, T-318/94, T-325/94, T-328/94, T-329/94 and T-335/94 *Limburgse Vinyl Maatschappij and Others* v *Commission* [1999] ECR II-931 ('*PVC II*'), paragraph 773), in which the Court of First Instance held that an undertaking may be held responsible for an overall cartel even though it participated directly only in one or some of its constituent elements if it knew that the collusion was part of an overall plan intended to distort competition. Consequently, the Commission maintains, the fact that the applicant's participation in the cartel was limited to the route on which it operated does not relieve it of liability in relation to the whole of the infringement because it was aware of the overall plan of the shipping companies to fix prices (paragraph 117 of the Decision). The fact that the applicant participated in just one aspect of the cartel, relating only to transport services between Brindisi and Patras, has implications only for the degree of its participation in the agreement and for its liability in relation to this aspect of the agreement. It has no bearing on the definition of the relevant market. In this connection, the Commission refers to paragraphs 111 and 144 of the Decision, which state that the agreements which were to be applied on the routes between Patras and Bari and between Patras and Brindisi were part of a broader system of collusion whereby the tariffs for roll-on roll-off ferry services between Greece and Italy were fixed and that, consequently, those agreements should not be regarded as distinct infringements but as different aspects of a single, continuous infringement.

22 The Commission concludes from this that the argument which the applicant makes in order to show a supposed contradiction between the statement of reasons and the operative part of the Decision should be regarded as irrelevant and already answered by the case-law of the Court of First Instance (Case T-308/94 *Cascades* v *Commission* [1998] ECR II-925, paragraph 156), according to which the paragraphs of a decision must be interpreted in the light of the general scheme of the decision and of the statement of objections.

23 The Commission also refers to the case-law relating to the scope of the obligation to state reasons for decisions adopted under Article 85 of the Treaty in so far as concerns the definition of the relevant market. It cites, in particular, the judgment of the Court of First Instance in Case T-29/92 *SPO and Others* v *Commission*

[1995] ECR II-289 (paragraph 74), according to whether Article 85 or Article 86 of the Treaty (now Article 82 EC) is to be applied.

24 The Commission submits that this precedent is applicable to the present case and observes that it just gave enough reasons in the Decision in support of its definition of the market as would enable the Community judicature to exercise its power of review of the legal validity of the Decision because the applicant raised no objection on the point during the administrative procedure. In this connection, it refers to the consistent case-law of the Community Courts, according to which the statement of the reasons on which a decision having an adverse effect on an individual is based must enable effective review of its legal validity to be carried out and must provide the person concerned with information sufficient to allow him to ascertain whether or not the decision is well founded. The adequacy of such a statement of reasons must be assessed according to the circumstances of the case, and in particular the content of the measure in question, the nature of the reasons relied on and the interest which addressees may have in receiving explanations (Case C-56/93 *Belgium* v *Commission* [1996] ECR I-723; Case T-334/94 *Sarrió* v *Commission* [1998] ECR II-1439, paragraph 34, and Case T-354/94 *Stora Kopparbergs Bergslags* v *Commission* [1998] ECR II-2111, paragraph 56). As may be seen from its reply to the statement of objections, the applicant took issue neither with the Commission's definition of the relevant market in paragraphs 3 to 6 of that document, nor with its assessment of the effect of the agreement on trade between Member States in paragraph 55 thereof.

Findings of the Court

25 By its first plea the applicant complains that the Commission's definition of the relevant market is incorrect and incomplete. There are two parts to this plea: first, the applicant takes issue with the way in which the Commission defined the relevant market, and alleges incorrect application of Article 85(1) of the Treaty to

the facts of the case; secondly, the applicant maintains that the Commission infringed Article 190 of the Treaty in that there is a contradiction between the statement of reasons given for the Decision and the operative part thereof.

. . . . . .

A — Incorrect application of Article 85(1) of the Treaty in the absence of a proper definition of the relevant market

26 The applicant complains that the Commission adopted the Decision without having first considered the relevant market in this case. It takes the view that, if it had done so, it would have been able to take proper note of the differences between the various types of services offered by the undertakings operating on the various sea routes linking Greece and Italy. This first limb of the plea therefore raises a question as to the approach to defining the relevant market where the Commission applies Article 85(1) of the Treaty in order to penalise a cartel between undertakings such as that in the present case.

27 It is clear from the case-law of the Court of First Instance that the approach to defining the relevant market differs according to whether Article 85 or Article 86 of the Treaty is to be applied. For the purposes of Article 86, the appropriate definition of the relevant market is a necessary precondition for any judgment concerning allegedly anti-competitive behaviour (Joined Cases T-68/69, T-77/89 and T-78/89 *SIV and Others* v *Commission*, cited above, paragraph 159), since, before an abuse of a dominant position is ascertained, it is necessary to establish the existence of a dominant position in a given market, which presupposes that such a market has already been defined. For the purposes of applying Article 85, the reason for defining the relevant market is to determine whether the agreement, the decision by an association of undertakings or the concerted practice at issue is liable to affect trade between Member States and has as its object or effect the prevention, restriction or distortion of competition within the

common market. That is why, for the purposes of Article 85, the objections to the definition of the market adopted by the Commission cannot be seen in isolation from those concerning the impact on trade between Member States and the impairing of competition (*SPO and Others* v *Commission*, cited above, paragraph 75, and Case T-348/94 *Enso Española* v *Commission* [1998] ECR II-1875, paragraph 232). It has also been held that an objection to the definition of the relevant market is of no consequence provided that the Commission has rightly concluded, on the basis of the documents referred to in the contested decision, that the agreement in question distorted competition and was liable to have an appreciable effect on trade between Member States (Joined Cases T-25/95, T-26/95, T-30/95 to T-32/95, T-34/95 to T-39/95, T-42/95 to T-46/95, T-48/95, T-50/95 to T-65/95, T-68/95 to T-71/95, T-87/95, T-88/95, T-103/95 and T-104/95 *Cimenteries CBR and Others* v *Commission* [2000] ECR II-491, paragraph 1094).

28 In paragraphs 142 and 143 of the Decision the Commission set out the reasons for which the agreement in issue in the present case distorted competition and was liable to have an appreciable effect on trade between Member States. Paragraph 142 of the Decision states that the fact that the agreement affected competition is established because its purpose was to bring about the imposition of common prices, thereby restricting the parties' ability to act independently in the market. As regards the effect of the agreement on trade between Member States, the Commission stated, in paragraph 143 of the Decision, that the agreement related to roll-on roll-off ferry services between Greece and Italy and thus to sea routes which became even more important in 1992 when the beginning of the war in the former Yugoslavia effectively closed the overland routes for imports and exports between Greece and the other Member States of the European Union. The Commission states that, in 1993, 1 316 003 passengers and 213 839 goods vehicles were transported on the routes between Greece and Italy and that, of these, 49% and 38% were transported on the Patras-Ancona route, 35% and 38% on the Patras-Brindisi route, and 10% and 19% on the Patras-Bari route. The Commission added that 'any agreement which affects demand for services between two Member States (such as an agreement fixing price levels between the major providers of that service) is likely to deflect demand both within the group of undertakings involved in the agreement, and those outside this group, and thus alter the pattern of trade in that service between Member States'.

29 Those assertions have not been disputed and the Commission was right to conclude, on the basis of the documents referred to in the Decision, that the agreement in question distorted competition and was liable to have an appreciable effect on trade between Member States. Thus, in light of the case-law just mentioned, the applicant's objection regarding the definition of the relevant market is irrelevant in this case, in so far as it cannot lead to the conclusion that the conditions for applying Article 85(1) of the Treaty have not been satisfied.

30 Nevertheless, as the applicant demonstrates, objections to the Commission's definition of the relevant market may impinge upon other factors which have a bearing upon the application of Article 85(1) of the Treaty, such as the scope of the cartel in question, the question whether it is a specific or general cartel, or the extent of the individual participation of each of the undertakings concerned. Admittedly, these factors do not amount to 'conditions' for the application of Article 85(1) of the Treaty, expressly provided for in that provision, such as the existence of 'agreements' between undertakings, of an effect upon 'trade between Member States', or the 'prevention, restriction or distortion of competition'. However, the factors are closely connected with the principle of personal responsibility for collective infringements, which the Court of Justice expressly recognised in Case C-49/92 P *Commission* v *Anic Partecipazioni* [1999] ECR I-4125, paragraph 78) and with the general principles of law, such as legal certainty and proportionality.

31 As the applicant has stated, the risks inherent in the Commission's holding an undertaking responsible for participating in complex infringements without precisely defining the relevant market are not negligible. Such a lack of precision could in fact have significant consequences for relations between third parties and the undertakings to which a decision penalising a cartel is addressed. Indeed it is quite possible that, relying on the fact that the Decision finds that the existence of a general price cartel has been proved, customers of undertakings sanctioned may seek to obtain compensation for damages sustained as a result of having had to pay, during the period in question, higher than market prices for transport services.

32 Therefore, it is desirable that, where it adopts a decision in which it finds that an undertaking has participated in a complex, collective and continuous infringement (which cartels often are), the Commission should, in addition to ensuring that the specific conditions for applying Article 85(1) of the Treaty are satisfied, take into consideration the fact that, whilst the decision will entail the personal liability of each of its addressees, that liability is limited to their particular involvement in the collective conduct sanctioned, as properly defined. Since a decision of this kind is capable of creating significant consequences not only for relations between the undertakings concerned and the administrative authorities but also for their relations with third parties, the Commission ought to examine the relevant market or markets and identify them in the statement of reasons which it gives for any decision sanctioning an infringement of Article 85(1) of the Treaty, and it should do so with sufficient precision so as to be able to identify the operating conditions in the market in which competition has been distorted and to satisfy the essential requirements of legal certainty.

33 The Court points out, in this connection, that, in its judgment in *SIV and Others* v *Commission*, (paragraph 159), the Court of First Instance rejected the Commission's argument that, where the documentary evidence of the cartels in issue are clear and explicit, they render quite superfluous any inquiry into the structure of the market. The Court found that, on the contrary, 'the proper definition of the relevant market is a necessary precondition for any judgment as to allegedly anti-competitive behaviour'. The importance of examining the relevant market has already been pointed out by Advocate-General Darmon in paragraph 10 of his Opinion in Case 45/85 *Verband der Sachversicherer* v *Commission* [1987] ECR 405:

'The fulfilment of [the three conditions for application of the prohibition laid down in Article 85(1) of the Treaty in any given case] must be verified "by reference to the actual circumstances" of the agreement between undertakings, a decision by associations of undertakings or a concerted practice (Case 5/69 *Völk* v *Vervaeche* [1969] ECR 295, paragraph 7). In view of its special features, the relevant market for the purposes of the application of Article 85(1) in this case must first be analysed.'

34 Lastly, the Commission itself emphasised the importance of such an analysis in its Notice on the definition of relevant market for the purposes of Community competition law (OJ 1997 C 372, p. 5), which states:

'The purpose of this notice is to provide guidance as to how the Commission applies the concept of relevant product and geographic market in its ongoing enforcement of Community competition law.... Market definition is a tool to identify and define the boundaries of competition between firms. It serves to establish the framework within which competition policy is applied by the Commission. The main purpose of market definition is to identify in a systematic way the competitive constraints that the undertakings involved face. The objective of defining a market in both its product and geographic dimension is to identify those actual competitors of the undertakings involved that are capable of constraining those undertakings' behaviour and of preventing them from behaving independently of effective competitive pressure. It is from this perspective that the market definition makes it possible inter alia to calculate market shares that would convey meaningful information regarding market power for the purposes of assessing dominance or for the purposes of applying Article 85.'

35 The applicant maintains that, because incorrect definition of the relevant market has an effect on the attribution of liability of the undertakings concerned, it amounts to a serious error necessarily vitiating the Decision.

36 Admittedly, as the applicant says, an error in the attribution of liability may have its origin in an inadequate and confused definition of the relevant market, that is to say, from inadequate consideration of this question. The principal risk associated with inadequate definition of the relevant market is that the

Commission might err in its understanding of the nature and exact extent of the infringement or of the cartel in question and, consequently, in the attribution of individual liability to the undertakings concerned. Nevertheless, the Court finds that the effect of any such error upon the legal validity of a decision and upon its possible annulment must be considered on a case-by-case basis.

37 In the present case, the applicant maintains that a contradiction between the statement of reasons and the operative part of the Decision has led the Commission to err in its attribution of liability to the applicant, in that it has held it liable for an overall cartel relating both to freight and goods vehicle transportation services and to passenger transport not only on the single route on which it operates but on all the routes on which the other companies to which the Decision is addressed operate.

38 However, the Decision does not hold the applicant liable in relation to an overall cartel relating to the three routes between Greece and Italy.

39 It is clear from the wording of the Decision that the Commission sanctioned two infringements in this case. Article 1(1) refers to an agreement on the prices for various roll-on roll-off ferry services (goods vehicles, passengers, passenger vehicles etc.) between Patras and Ancona. Article 1(2) refers to an agreement on the levels of fares for trucks to be applied on the Patras to Bari and Brindisi routes.

40 In so far as concerns the first infringement, which allegedly went on from July 1987 to July 1994, only the companies operating on the route between Patras and Ancona are implicated. They are Minoan, Anek, Karageorgis, Marlines and Strintzis. In the case of the second infringement, which allegedly went on from

December 1989 to July 1994 and concerns the routes between Patras and Bari and Patras and Brindisi, three undertakings operating on those routes (Adriatica, Ventouris Ferries and Strintzis) and three undertakings not operating on those routes (Minoan, Anek and Karageorgis) are said to have been involved. The Court observes in this connection that the Commission has not taken the view that the companies operating on the southerly routes (from Patras to Bari and from Patras to Brindisi) took part in a cartel relating to prices on the northerly route with the undertakings operating on that route (from Patras to Ancona), on which the former are not active.

41 The Commission submits that the Decision does not relate to two separate infringements, but to a single continuous infringement. It maintains that Article 1 of the Decision should be read in light of the statement of reasons given for the Decision and maintains that the reasons always refer to a single agreement on three routes (from Ancona or Bari or Brindisi to Patras), which it treats as forming a single market. It cites in particular paragraph 144 of the Decision in which it stated:

'On the basis of the above, the Commission considers that Minoan, Anek, Karageorgis, Marlines and Strintzis participated in an agreement contrary to Article 85 by agreeing prices which would be applied to roll-on roll-off ferry services between Patras and Ancona. The Commission also considers that Minoan, Anek, Karageorgis, Strintzis, Ventouris and Adriatica agreed on the levels of fares for trucks to be applied on the Patras to Bari and Brindisi routes. These agreements formed part of a broader scheme of collusion in the setting of fares for the ferry services between Italy and Greece. These should therefore not be regarded as separate infringements but as aspects of a single continuous infringement.'

42 Undeniably, paragraph 144, which speaks of a single infringement, does not reflect the same thinking as the operative part.

43 It should be borne in mind that it is in the operative part of a decision that the Commission must indicate the nature and extent of the infringements which it sanctions. It should be noted that, in principle, as regards in particular the scope and nature of the infringements sanctioned, it is the operative part, rather than the statement of reasons, that is important. Only where there is a lack of clarity in the terms used in the operative part should reference be made, for the purposes of interpretation, to the statement of reasons contained in a decision. As the Court of Justice has already held, for the purpose of determining the persons to whom a decision, which finds that there has been an infringement, applies, only the operative part of the decision must be considered, provided that it is not open to more than one interpretation (Joined Cases 40/73 to 48/73, 50/73, 54/73 to 56/73, 111/73, 113/73 and 114/73 *Suiker Unie and Others* v *Commission* [1975] ECR II-1663, paragraph 315).

44 In the present case, the wording of the operative part of the Decision presents no ambiguity. On the contrary, it is clear and precise, stating plainly that the Commission regards as established a cartel between the companies operating on the northern route (between Patras and Ancona) on the prices applicable to that route and a cartel between all the undertakings concerned by the Decision (with the exception of Marlines) on prices for the transportation of goods vehicles on the southerly routes (between Patras and Bari and Patras and Brindisi). Moreover, not only does the operative part make no mention of the fact of there being only one infringement, but it is particularly precise in its description of the infringements sanctioned. Article 1 is subdivided into two paragraphs concerning two distinct groups of companies. As far as concerns the group referred to in paragraph 2 of Article 1, the operative part states that the infringement of Article 85(1) of the Treaty resides in the fact that they agreed on the level of prices to be applied for goods vehicles — and thus not for passengers — solely on the routes between Patras and Bari and between Patras and Brindisi. It follows that the two paragraphs of Article 1 of the Decision relate to infringements which are distinct for two reasons: they concern different undertakings and they have different scope or intensity.

45 Given that the operative part of the Decision is not ambiguous, in its examination of the various pleas put forward in this case, this Court must begin from the position that the Commission has established and sanctioned not one single infringement relating to all routes but two distinct infringements, one relating to

the northerly route (Article 1(1)) and the other relating to the southerly routes (Article 1(2)). In so far as concerns the applicant, it is clear from the Decision that it is not charged with any liability other than that arising from the infringement described in Article 1(2) of the Decision.

46 In view of the foregoing, the Court rejects the first limb of the first plea. The question whether or not the contradiction between the statement of reasons and the operative part of the Decision affected the Commission's assessment of the applicant's liability must be analysed as part of the Court's examination of the pleas whereby the applicant disputes the evidence and legal classification of the cartel referred to in Article 1(2) of the Decision. The effect of such contradiction on the way in which the Commission imposed a pecuniary penalty on the applicant will be examined as part of the Court's consideration of the fifth plea, relating to the fine.

B — Infringement of the duty to state reasons in relation to the definition of the relevant market

47 It is settled law that the statement of the reasons on which a decision having an adverse effect on an individual is based must enable effective review of its legal validity to be carried out and must provide the person concerned with information sufficient to allow him to ascertain whether or not the decision is well founded. The adequacy of such a statement of reasons must be assessed according to the circumstances of the case, and in particular the content of the measure in question, the nature of the reasons relied on and the interest which addressees may have in receiving explanations (see, in particular, Case T-38/92 *AWS Benelux* v *Commission* [1994] ECR II-211, paragraph 26, and Case T-310/94 *Gruber + Weber* v *Commission* [1998] ECR II-1043, paragraph 209).

48 In the present case, paragraphs 3, 5 and 144 of the Decision explain the way in which the Commission sought to define the relevant markets. In paragraph 3, it stated: 'the relevant market is that for the provision of roll-on roll-off ferry

services between Greece and Italy'. In paragraph 5, it explained that, for the purposes of the present procedure, it '[did] not consider it necessary to examine in depth the degree of substitutability between these routes, since the practices at issue here covered all three main routes for at least part of the period in question'. In paragraph 144 it stated that the agreements relating to the three routes 'formed part of a broader scheme of collusion in the setting of fares for the ferry services between Italy and Greece', a conclusion which led the Commission to regard the agreements as a 'single continuous infringement'. Clearly, the applicant could ascertain from those passages that the Commission indeed regarded all the routes linking Greece and Italy as belonging to the same market.

49 It is established that the Decision, taken as a whole, is such that the applicant was able to identify and plead a lack of consistency between the passages of the statement of reasons just mentioned and the operative part. This Court has held that the operative part of the Decision is clear and precise, and that that enabled the applicant to ascertain the exact scope of the Decision, which sanctions two distinct infringements and, consequently, to seek to show that the Commission had penalised it by calculating the fines on the premiss that what was in issue in this case was a single infringement.

50 It follows that the applicant was able to challenge the legal validity of the Decision and that this Court has been able effectively to review its legal validity.

51 Lastly, the evidence upon which the Commission relied to demonstrate the applicant's involvement in the infringement for which it was sanctioned, that is to say the cartel relating to the tariffs applicable to goods vehicles on the route between Patras and Brindisi, is clearly identified and analysed in paragraphs 122 to 126 of the Decision. The applicant's arguments are also identified and examined in paragraphs 56, 57, 75, 80, 87, 92 and 96 of the Decision.

52 In the circumstances, the applicant cannot maintain that the inadequacy of the statement of reasons given for the Decision prevented it from challenging the Decision before the Court with full knowledge of the facts and issues.

53 The Court therefore rejects the second limb of the first plea in its entirety and thus also the first plea in its entirety.

*The second plea: insufficient evidence of the applicant's involvement in the cartel relating to the tariffs to be applied for goods vehicles on the Brindisi-Patras route*

The first part: error in the assessment of the evidence accepted as inculpatory and error in the finding of an infringement

— Arguments of the parties

54 The applicant admits that its representative in Greece was present at the two meetings of the undertakings operating on the sea routes between Greece and Italy of 25 October 1990 and 24 November 1993. However, it maintains that it did not participate in the collusion with which it is charged because, neither at those meetings nor on any other occasion did it join in price cartels with competitor undertakings. It argues that it has always maintained commercial independence, as is clear from the fact that the conditions under which it provided the services in issue were different from those applied by its Greek competitors which implemented an 'irrational' policy of discounts, rebates and payment terms, which enabled them to garner a large customer base.

55 The applicant disputes the probative value of the documentary evidence used against it in the Decision (see paragraph 117), namely Strintzis's faxes of 8 December 1989, 5 September 1990 and 30 October 1990, Minoan's letter of 2 November 1990, the fax sent to Anek on 22 October 1991, Minoan's document of 25 February 1992, Minoan's telex of 7 January 1993 and the telex sent by the European Trust Agency ('ETA') on 24 November 1993.

56 The applicant submits that it is evident from the result of the Commission's investigation that, from 1987 onwards, Minoan, Anek, Strintzis, Karageorgis and Marlines coordinated their tariffs for passenger and goods vehicle transportation on the Patras-Ancona route and that, from 1989 to 1990 onwards, those same companies began taking an interest also in the Patras-Bari and Patras-Brindisi routes so as to have 'a more or less reliable basis for calculating the different tariffs for each category of goods vehicle to be applied according to the distance of the journey in nautical miles'.

57 The applicant observes that the Commission's first piece of evidence of the desire of the companies on the Patras-Ancona route to contact the operators on the Bari-Patras and Brindisi-Patras routes, namely the fax which Strintzis sent on 8 December 1989 to Anek, Minoan, Karageorgis and Hellenic Mediterranean Lines, does not mention it, not even indirectly.

58 Next, the applicant refers to the meeting between the various companies on 25 October 1990. It states that it had decided to increase its fares and to alter certain commercial terms from November 1990 onwards, well before the meeting was held. It submits that, since increases in tariffs had already been adopted in the past, as the Commission recognised in paragraph 18 of the Decision, it is wrong to claim that the parties agreed on the increase in tariffs at that meeting.

59 The applicant maintains that the fact that its local representative attended that meeting cannot be interpreted as evidence that it concluded or subscribed to any price-fixing agreement with its competitors. It emphasises that its representative had no decision-making authority and was not in a position to engage in it. Next, it argues that, whereas it is not bound by any formal arrangement, the idea of a cartel requires that criteria be satisfied which are lacking in the present case, such as a concurrence of wills between the participants, crystallising around the same unlawful objective, which, in the present case, the Commission takes to be the fixing of common tariff rates. That being so, whilst the applicant did inform its competitors of the pricing policy which it proposed to implement, informing them of the tariffs and of the various alterations of a secondary nature, which it had decided upon independently (such as the withdrawal of reductions on return tickets and of free catering for heavy goods vehicle drivers), it nevertheless did not join a cartel contrary to Article 85(1) of the Treaty, because there is nothing in its conduct which could indicate a desire to coordinate commercial politics by way of the fixing of common tariffs.

60 The applicant observes that, in the correspondence exchanged between the undertakings in question, its name appears on only two of the numerous documents which the Commission gathered during the course of its investigation.

61 As regards the first of these documents, a fax dated 30 October 1990, in which Strintzis asked the applicant, amongst other things, to confirm its agreement to the tariffs decided upon — following a meeting which the applicant has, from the start, acknowledged attending — and which also contained the tariffs which were to enter into effect on 5 November 1990, the applicant states that there is no subsequent document to that fax evidencing its approval of that agreement. Therefore, it cannot be accused of having subscribed to any agreement of any kind, simply because it attended a meeting. Consequently, there was nothing for it to confirm, or otherwise. The fact that the tariffs which came into effect are the same as those set out in the fax just mentioned in no way evidences any subscription to any agreement, for the applicant had decided upon those tariffs

independently before the meeting was held. Similarly, the fact that the dates on which the tariffs came into effect are the same (5 November 1990) is not surprising because, as a general rule, tariffs for the following year always came into effect at the end of the autumn.

62 As regards the second document, a telex sent on 24 November 1993 by ETA to Minoan, the applicant states that this was a purely internal communication in which a parent company, Minoan, was informed by its agent ETA, that, during a meeting held on 24 November 1993 which the applicant acknowledges attending, several companies reached an agreement on tariffs to be applied from 16 December 1993 onwards. That document mentions the applicant, stating that it — together with other companies mentioned by name — had announced that it wished to keep its increases (at between 5% and 10%) more modest than those of Minoan, which were of the order of 15%. The applicant argues that its name was mentioned in error, because it had not planned to introduce any price increase for 1994; it wished to off-set the effects of the introduction of value added tax (VAT), as may be seen from the fact that it then kept its tariffs at the same level (paragraph 125 of the Decision).

63 The applicant also emphasises that this document records a prior agreement replaced by the new arrangement, without however specifying the period for which, nor the companies by which, it was supposed to have been applied. The applicant maintains that the reference to 'fourteen companies' is not such as to throw that into doubt because, given the large number of ferry companies operating between Greece and Italy, the number of participants at the meeting could have been significantly higher than that. Lastly, the document was drafted by a third party and was sent to other third parties and only mentioned the applicant to record its difference of opinion from that adopted by the company for which the document's author worked; it is not, therefore, irrefutable evidence of the applicant's participation in an agreement on tariffs that was to be applied for 1994.

64 Next, the applicant mentions two facts which, it says, confirm these considerations: first, the telex of 1 December 1993 (attached as annex 24 to the application), in which its commercial manager, in response to the minutes of the meeting which the company's local representative drew up, expressly refused to subscribe to the cartel proposed by the Greek shipowners. As far as the applicant is concerned, that document is clear, indisputable evidence of the fact that it distanced itself from any form of collusion and of its commercial independance; it calls into question the probative value, if any, of the fax sent by ETA. Second, the decision not to increase tariffs for 1994 had already been confirmed in a telephone call from the applicant to ETA's director, Mr Sfinias, who had organised the meeting, and it was applied in practice, as the Commission acknowledges in paragraph 125 of the Decision.

65 The applicant also raises the issue of the probative value ascribed to its participation in the meeting of 24 November 1993, arguing that it attended that meeting with the purpose of finding out the positions of the Greek companies with regard to Community VAT, recently introduced. The applicant considered it imperative to know what were the intentions of the Greek shipowners, and whether they intended to apply the regulation or not, because, if the latter were true, that would have caused it commercial damage.

66 The applicant acknowledges that during that second meeting, there was discussion, amongst other things, about the tariffs applicable to goods vehicles, including those on the Brindisi-Patras route. However, it points out that it refused to apply the tariffs agreed by the other operators. On the contrary, it decided to maintain its tariffs at their existing level, as is clear from the telex dated 1 December 1993, just mentioned.

67 The applicant points to the absence of any evidence to establish that it had had any other contacts with its competitors before the meeting of 25 October 1990, during the period intervening between the two meetings in issue, or after the second meeting.

68 It also states that neither the fax of 8 December 1989 nor the telex of 5 September 1990 from Strintzis were addressed to it; nor did they mention the applicant specifically, whether expressly or impliedly.

69 In so far as concerns Minoan's letter of 2 November 1990, Karageorgis's telex of 22 October 1991, Minoan's document of 25 February 1992 and its telex of 7 January 1993, the applicant submits that it is perfectly clear from the statement of objections that, contrary to what the Commission alleges, those documents were not relevant to the facts alleged against the applicant.

70 As regards Minoan's letter of 2 November 1990, which followed the meeting of 25 October 1990, the applicant submits that the statement made in that document, and reproduced in paragraph 20 of the Decision, to the effect that 'prices were agreed by the companies on all the Greece-Italy routes', must be understood in context. The applicant argues that that letter does not concern it, in that it merely communicated decisions which it had already taken irrevocably and that it neither approved or authorised approval of anything.

71 As regards Minoan's document of 25 February 1992, to which paragraph 28 of the Decision refers, the applicant emphasises that the only company which it names is Ventouris Ferries and that it refers expressly and specifically only to the Ortona, Bari and Ancona routes. It makes not the slightest allusion, not even implicitly, to the applicant or to the Brindisi route. Thus, the document has no weight as evidence against it.

72 As regards the telex dated 7 January 1993, sent by Minoan to Strintzis, Anek and Karageorgis, mentioning a proposal to adjust the 'vehicle' tariffs on the routes between Greece and Italy, the applicant asserts that there is clearly no connection between that and its own activities since the Brindisi-Patras route is not once mentioned.

73 Lastly, as regards the telex which Karageorgis, Minoan and Strintzis sent to Anek on 22 October 1991 (see paragraph 22 of the Decision), the applicant states that it was sent to Anek in order to complain of the fact that the latter had not increased its tariffs on the route between Patras and Trieste. If, subsidiarily, there was also a question of an agreement between 11 companies, neither the period during which it was to be in effect, nor the names of the companies concerned by that agreement are specified, whereas more than 11 companies were, at that time, operating crossings between Greece and Italy. The applicant maintains that the Commission's conclusion that the telex in question related to the agreement concluded by the Greek companies at the meeting on 25 October 1990 is uncorroborated by any evidence.

74 Furthermore, the applicant disputes the fact that the Commission should reproach it with having participated in any agreement to fix common tariffs when it has failed to show that its tariffs were the same as those of its competitors who were supposedly in a cartel. Suffice it to observe that the annex to the fax of 30 October 1990, which, according to the Commission, establishes the existence of the cartel and its unlawfulness, gives prices for the applicant which are in no way similar to those of its competitors Hellenic Mediterranean Lines and Medline, which are set out in the same document. Those differences in tariffs are also acknowledged in the Decision, in paragraph 124 of which the Commission stated

'... differences between Adriatica's and the Greek operators' fares on the same route are evidenced in Strintzis' fax, too'.

75 Having regard to the foregoing, the applicant concludes that the Commission has not established that it joined a cartel to fix common tariffs. It argues that, since, in the circumstances, the concordance between tariffs — or the adjustment to them, as the case may be — is not an 'effect' but the 'object' of the cartel, the Decision has no proper foundation that can justify finding against the applicant and imposing a fine upon it in the absence of proof of this necessary requirement for application of Article 85(1) of the Treaty.

76 The applicant states that its attendance at two meetings, with no objective contrary to competition law, taken together with the lack of any implementing conduct, and contradicted by the commercial decisions adopted by the company, is not a sufficient basis for liability.

77 It adds that its position is the same as that of the undertaking Part Carton in the matter leading to judgment in *Sarrió* v *Commission*, cited above, in which the Court of First Instance, for the first time, rightly recognised that mere participation in a meeting might not, even where the undertaking concerned does not expressly distance itself, constitute sufficient evidence of its participation in an infringement of Article 85(1) of the Treaty.

78 The applicant concludes from this that it cannot be alleged against it that it participated in a cartel with the Greek shipowners relating to common tariffs for the transportation of goods vehicles between Greece and Italy and that the Decision must be annulled in full in so far as it relates to the applicant.

79 The Commission observes, as a preliminary point, that it appears from the submissions just outlined that the applicant is seeking to dispute the facts found in the Decision and contends, if that is the case, the Court ought necessarily to revise upwards the fine imposed on the applicant because, as is stated in paragraph 169 of the Decision, a reduction of 20% was granted to the applicant on the ground that it did not dispute the facts set out in the statement of objections.

80 The Commission disputes the applicant's principal argument that it is not legitimate to speak of a concurrence of wills between the undertakings in question because the increases in tariffs were decided upon prior to the meeting of 25 October 1990.

81 The Commission submits, first, that the applicant cannot deny that the implementation, during meetings of the shipping companies, of price initiatives and exchanges of information on the various tariffs over a period of several years amounts to evidence of a joint intention towards particular conduct on the market, which, according to case-law, constitutes an agreement within the meaning of Article 85(1) of the Treaty (Case 41/69 *Chemiefarma* v *Commission* [1970] ECR 661, paragraph 112, and Joined Cases 209/78 to 215/78 *Van Landewyck and Others* v *Commission* [1980] ECR 3125, paragraph 86).

82 As regards the existence of a concurrence of wills, the Commission asserts that it is unequivocally clear that the undertakings operating on the Ancona route asked the undertakings operating on the Bari to Brindisi route to fix their tariffs by common agreement (see the telex of 5 September 1990).

83 Next, the Commission refers to the evidence on which it relied in the Decision and, in particular, the express references to the applicant in certain of the documents. It maintains that the fax which Strintzis sent on 30 October 1990 is unequivocal evidence that an agreement had already been concluded on a date prior to the meeting and that the applicant had made clear its wish to fix its tariffs by common agreement with its competitors. It asserts that it is not important that the fax of 24 November 1993 which ETA sent to Minoan was not addressed to the applicant, because, having been drafted by the organiser of the meeting, ETA, it constitutes clear evidence of the outcome of the meeting of 24 November 1993. The Commission submits that it was right to have ascribed limited probative weight to Adriatica's internal note of 1 December 1993 because, had it done otherwise, it would be simple for an undertaking which has participated in a cartel to escape liability by producing internal documents supposedly proving that it had dissociated itself from the terms of an agreement.

84 As far as concerns the argument that the Commission wrongly imputed to the applicant the conduct with which the Decision is concerned, in that the applicant did no more than attend two meetings, the Commission submits that it was

entitled to take the applicant's attendance at the two meetings in issue as unequivocal evidence of its involvement in the cartel because 'the frequency of an undertaking's presence at producer meetings does not affect the fact of its participation in the infringement, but the extent of that participation' (*PVC II*, paragraph 939).

85 Lastly, in so far as concerns the alleged lack of evidence of contacts between the companies operating the Patras to Ancona route on the one hand and the Patras to Bari and Brindisi routes on the other, the Commission asserts that there is ample evidence in the Decision of such contacts having taken place after the meeting of 25 October 1990 and up to 24 November 1993, in particular in paragraph 117 of the Decision, which mentions the various documents showing that there were constant negotiations and understandings taking place between the companies.

86 As regards the applicant's involvement in the cartel during the period from 1992 to the beginning of 1993, the Commission submits that that should be taken as proved by what is set out in paragraphs 28 and 29 of the Decision, from which it is apparent that the tariffs fixed for 1991 were also applied in 1992. As regards the period prior to that, the simple fact of attending the meeting of 25 November 1990 is confirmation that the applicant participated in the cartel with the aim of fixing prices by common agreement. Finally, as regards the period following the meeting of 24 November 1993, the Commission states that it infers the applicant's participation in the cartel *a contrario*, as stated in paragraph 126 of the Decision, which states that there is no evidence that, having joined the cartel, the applicant left it after 24 November 1993.

87 Lastly, the Commission disputes that there is no evidence of the applicant readjusting its tariffs in relation to those of its competitors.

— Findings of the Court

A — Preliminary remarks

88 It is settled case-law that for there to be an agreement within the meaning of Article 85(1) of the Treaty it is sufficient for the undertakings to have expressed their joint intention to behave on the market in a certain way (see, *inter alia*, *Chemiefarma* v *Commission*, cited above, paragraph 112; *Van Landewyck and Others* v *Commission*, cited above, paragraph 86, and *PVC II*, paragraphs 715, 719 and 720).

89 The criteria of coordination and cooperation laid down by the case-law, far from requiring the elaboration of an actual 'plan', must be understood in the light of the concept inherent in the Treaty provisions relating to competition, according to which each economic operator must determine independently the policy which he intends to adopt on the common market. Although that requirement of independence does not deprive economic operators of the right to adapt themselves intelligently to the existing and anticipated conduct of their competitors, it strictly precludes any direct or indirect contact between such operators with the object or effect either of influencing the conduct on the market of an actual or potential competitor or of disclosing to such a competitor the course of conduct which they themselves have decided to adopt or contemplate adopting on the market (*Suiker Unie and Others* v *Commission*, cited above, paragraphs 173 and 174, and *PVC II*, cited above, paragraph 720).

90 It must be pointed out that, where there is a dispute as to the existence of an infringement of the competition rules, it is incumbent on the Commission to prove the infringements found by it and to adduce evidence capable of demonstrating to the requisite legal standard the existence of the circumstances constituting an infringement (Case C-185/95 P *Baustahlgewebe* v *Commission* [1998] ECR I-8417, paragraph 58).

91 However, once it has been established that an undertaking has participated in meetings of a manifestly anti-competitive nature between undertakings, it is incumbent on that undertaking to put forward evidence to establish that its participation in those meetings was without any anti-competitive intention by demonstrating that it had indicated to its competitors that it was participating in those meetings in a spirit that was different from theirs (Case C-199/92 P *Hüls* v *Commission* [1999] ECR I-4287, paragraph 155, and Case C-235/92 P *Montecatini* v *Commission* [1999] ECR I-4539, paragraph 181). In the absence of proof of such distancing, the fact that an undertaking does not abide by the outcome of those meetings is not such as to relieve it from full responsibility for the fact that it participated in the cartel (Case T-347/94 *Mayr-Melnhof* v *Commission* [1998] II-1751, paragraph 135, and *Cimenteries CBR and Others* v *Commission*, cited above, paragraph 1389).

B — The evidence relied on in the Decision to prove the applicant's infringement

92 The operative part of the Decision makes it clear that Minoan, Anek, Karageorgis, Ventouris Ferries, Strintzis and the applicant had infringed Article 85(1) of the Treaty by agreeing on the levels of fares for trucks to be applied on the Patras to Bari and Brindisi routes. In paragraph 126 of the Decision, the Commission explains its position as regards the applicant's involvement in that infringement. It states that strong evidence indicated an ongoing agreement between those companies. The applicant joined the cartel from 30 October 1990 at the latest, by agreeing to readjust its truck fares for 1991. The Commission also stated that there was direct evidence of the applicant's involvement in the cartel in 1993 and that, during a meeting held on 24 November 1993, Adriatica negotiated and agreed with its competitors the readjustment of its truck fares as from December 1993. Lastly, since there was no evidence that Adriatica, having joined the cartel, left it during this period, the Commission concluded that Adriatica participated in the infringement until July 1994.

93 It is necessary for the Court to consider the evidence which led the Commission to that conclusion concerning the cartel on the Patras to Bari and Patras to Brindisi routes, the applicant's participation in it and the duration of that participation.

1. The existence of a cartel on truck tariffs applicable on the Patras to Bari and Patras to Brindisi routes

94 The Commission asserts that it is unequivocally clear that the Ancona operators asked the Bari and Brindisi operators to collude to fix the tariffs by common agreement. It points to a series of documents which it considers prove the existence of conduct prohibited by Article 85(1) of the Treaty and the involvement in it of lines operating on the Patras to Ancona route and also of those on the Patras to Bari and Patras to Brindisi routes. In particular, there is the table of tariffs to be applied on the three routes from 10 December 1989 onwards (the fax of 8 December 1989) and the telex dated 24 november 1993, which refers to a meeting held that same day attended by the undertakings operating on the two routes.

95 The first of these documents is a fax sent on 8 December 1989 by Strintzis to Minoan, Anek, Karageorgis and Hellenic Mediterranean Lines, setting out, in an annex, a table of tariffs by route and by category of goods vehicle to be applied from 10 December 1989 onwards on the three routes in question, namely from Patras to Ancona, from Patras to Bari and from Patras to Brindisi. The author of the fax wrote:

'... please find attached a photocopy of the list of tariffs for goods vehicles on the routes between Greece and Italy, also accepted by Ventouris Ferries'.

96 That fax, exchanged between the companies operating the various routes between Greece and Italy, is therefore clear evidence of the existence of an agreement between the companies in question to fix prices applicable to goods vehicles on the three routes. Nevertheless, it must be noted that the applicant does not figure among the undertakings to which this first fax was sent and that, consequently, the Commission does not regard the document as evidence of the applicant's participation in the cartel. The applicant's involvement in the cartel, according to the Commission, dates from 30 October 1990.

97 The existence of the cartel is corroborated by other documents which refer to subsequent events, namely a telex dated 5 September 1990, a fax of 30 October 1990, a telex of 22 October 1991, a document dated 25 February 1992, sent by ETA to Minoan, a telex of 7 January 1993 and a telex dated 24 November 1993.

2. The applicant's participation in the cartel on the Patras to Bari and Patras to Brindisi routes

98 The applicant admits that its representative in Greece was present at the two meetings of the undertakings operating on the sea routes between Greece and Italy of 25 October 1990 and 24 November 1993. However, it maintains that it did not participate in the collusion with which it is charged because, neither at those meetings or on any other occasion, did it join in price cartels with competitor undertakings.

(a) The meeting of 25 October 1990 and the fax of 30 October 1990

99 The first document which the Commission treats as direct evidence that the applicant colluded with its competitors and agreed to fix tariffs is the fax sent by Strintzis on 30 October 1990 to eight companies, namely the applicant, Anek,

Hellenic Mediterranean Lines, Karageorgis, Minoan, Mediterranean Lines, Strintzis and Ventouris Ferries. The author of that fax wrote in the following terms:

'We communicate the final agreement for truck fares. Please acknowledge your agreement as to the contents; we suggest announcing the prices on 1 November and putting them into effect, as has been agreed, from 5 November 1990.'

100 The applicant acknowledges that its local representative was invited by the Ancona companies to attend a meeting on 25 October 1990, which was held in the presence of all the operators in the market, and thus also the companies operating on the Ancona, Bari and Brindisi routes. It claims that its representative did no more than take note of the information given by the companies present and communicate to them the new tariffs which it had already decided to apply and to publish from 5 November 1990 onwards.

101 As the Commission submits, that conduct, which the applicant does not deny, is sufficient to found the conclusion that the applicant infringed Article 85(1) of the Treaty, because undertakings must refrain from all direct or indirect contact which has the object or effect either of influencing the conduct on the market of an actual or potential competitor or of disclosing to such a competitor the course of conduct which they themselves have decided to adopt or contemplate adopting on the market (*Suiker Unie and Others* v *Commission*, cited above, paragraphs 173 and 174). It follows that such conduct, which the applicant acknowledges, falls squarely within the scope of the prohibition laid down in Article 85(1) of the Treaty, even though it has not been possible to establish that the applicant responded positively to the request for confirmation of its agreement to the table of tariffs communicated in the fax of 30 October 1990.

102 Thus, even if the applicant had decided in advance and independently to fix new tariffs and to decide the date on which they would come into effect, it cannot claim that that circumstance demonstrates that it was not involved in a cartel contrary to Article 85(1) of the Treaty. On the contrary, given that it attended the meeting of 25 October 1990, to which the fax of 30 October 1990 refers, that it was an addressee of that fax, that the prices which it would apply from 5 November 1990 were correctly set out in the fax and, lastly, that the prices which it charged are the same as those charged by the other companies, the Commission was entitled to conclude that the applicant had played an important part in the agreement in issue.

103 The arguments which the applicant puts forward to contradict that conclusion cannot be upheld.

104 The applicant insists on the fact that it had decided to apply the prices in question before the meeting, and that it had done so autonomously. However, it has furnished no evidence in support of that assertion. The applicant also claims that it had contacted agencies in advance in order to inform them by telex of the prices which it had decided to charge from 5 November 1990 onwards, but it does not submit that it did so before the date of the meeting. It is appropriate to note that, from the copy of the telex furnished, it is not possible to determine its date. In fact, the only fact that the telex (appended as annex 18 to the application) confirms is that the tables of tariffs communicated to the agencies are the same as those set out in the fax of 30 October 1990.

105 The applicant cannot, in an endeavour to deny its subscription to the agreement in question, rely on the letter of 24 October 1990, which the Greek Union of Passenger and Cabotage Shipowners sent to the journal *Kerdos*. That letter merely concerns new tariffs for heavy goods vehicles applicable on the Ancona to Patras route from 20 October 1990 onwards. Whilst that document might prove that the agreement on the Patras to Ancona route predated the meeting, it cannot serve to prove that the new tariffs for the Patras to Brindisi route had been fixed by common agreement between the Greek companies prior to the meeting of 25 October 1990, nor that the applicant had informed the operators in the market of its new tariffs before the meeting took place.

106 It follows from the foregoing that the argument that there was nothing in the applicant's conduct to indicate a wish to coordinate commercial policies by means of price-fixing must be rejected.

107 The Court must also reject the argument based upon the alleged lack of evidence that the agreement had any anti-competitive object. The existence of an agreement between the principal operators on the routes between Greece and Italy with the restriction of competition as its object has been amply proved in this case (see the fax of 30 October 1990 and the earlier documents to which reference has been made above).

108 In the circumstances, the Court sees no need to accede to the applicant's request and order the Commission to produce the second tariff for goods vehicles for 1991 — which was supposed to come into effect in November 1990 — which it says it filed and which has not come to the attention of the Commission.

(b) The meeting of 24 November 1993

109 Paragraph 37 of the Decision states that on 24 November 1993 a meeting was held which was attended by 14 companies, the purpose of which was to readjust the fares on the routes between Patras and Ancona, and between Patras and Brindisi and Bari for 1994. A telex on the same date from ETA to the head office of Minoan states:

'We are pleased to inform you that at today's meeting we achieved agreement on a readjustment of the vehicle tariff by approximately 15%... to be given immediate effect from 16 December 1993.

We are very pleased because we began with the problem of the collapse of the previous agreement on account of the opposition of the companies of Kosma-Giannatou and Ventouris A., we repaired the situation bit by bit, overcoming the 5% to 10% (positions of Strintzis, Ventouris G and Adriatica), and finally got to the percentage stated above.

...'

110 This telex shows that efforts were made to reach a concurrence of wills among certain companies regarding the manner in which they would conduct themselves on the market and that a precise agreement on the rates of readjustment of the tariffs and on the date of their application was finally reached. The most plausible interpretation of the final sentence is that there was a prior agreement relating to the differences in tariffs for goods vehicles on routes between Ancona, Bari and Brindisi.

111 The applicant acknowledges having attended the meeting of 24 November 1993 and admits that, during the meeting, there was discussion of the goods vehicles tariffs, including those on the Brindisi to Patras route. However, it disputes the truth of the assertion made by the author of the telex, that it had announced that it wished to keep its tariff increases (at between 5% and 10%) more modest than those proposed by Minoan, which were of the order of 15%. It argues that its name was mentioned in error, because it had not planned to introduce any price increase for 1994 since it wished to off-set the effects of the introduction of VAT, as may be seen from the fact that it then kept its tariffs at the same level (see paragraph 125 of the Decision).

112 The Court does not accept that argument. As has already been pointed out, the case-law shows that, once it has been established that an undertaking has participated in meetings of a manifestly anti-competitive nature between

undertakings, it is incumbent on that undertaking to put forward evidence to establish that its participation in those meetings was without any anti-competitive intention by demonstrating that it had indicated to its competitors that it was participating in those meetings in a spirit that was different from theirs (*Hüls* v *Commission*, cited above, paragraph 155, and *Montecatini* v *Commission*, cited above, paragraph 181). Since the applicant itself acknowledges the anti-competitive purpose of the meeting of 24 November 1993, is not possible for it to put forward such evidence.

113 Nor can the applicant rely on any lack of precision in the telex of 24 November 1993 concerning the prior agreement which the new arrangement replaced, the undertakings which were party to it and the period for which it was in force, because it is in fact one of the companies mentioned by name and because its attendance at an earlier meeting having an anti-competitive purpose has been established.

114 Those findings are not contradicted by the fact that the document was drafted by a third party and sent to third parties and mentions the applicant only to signal its disagreement with the view held by the company which employed the author of the document.

115 The applicant's submission that it at all times maintained commercial independence (a point which the Commission does not appear to dispute) cannot be accepted.

116 First of all, as the Commission emphasises, the Decision does not hold the applicant liable for having applied tariffs agreed with its competitors, but merely with having participated in an agreement the object of which was to fix selling prices and other trading conditions between the parties thereto (paragraph 141 of the Decision).

117 Secondly, it is clear from a comparison of the tariffs set out in the table (in the column for Adriatica) annexed to the fax of 30 October 1990, from the telex which the applicant sent to its agencies and also from the table produced in response to the statement of objections, informing the agencies of the new heavy goods vehicle tariffs effective from 5 November 1990, that the prices suggested and communicated are identical for each category of vehicle, whether expressed in Greek drachmas or in Italian lire.

118 Thirdly, and in any event, it should be borne in mind that it is settled law that the fact that an undertaking does not abide by the outcome of meetings which have a manifestly anti-competitive purpose is not such as to relieve it of full responsibility for the fact that it participated in the cartel, if it has not publicly distanced itself from what was agreed in the meetings (*Mayr-Melnhof* v *Commission*, cited above, paragraph 135).

119 For the same reasons the applicant's submission that the conditions under which it provided the services in question were different from those of its Greek competitors, in so far as concerns their policy of discounts and payment terms, is of no effect, as is its argument that the tariffs which it established at the end of the 1990s were 10% lower than those offered by the other companies on the same route (namely HML and Medline). So too are its submissions that it continued to use the United States dollar as a tariff unit of account, that neither freight payment terms nor the terms under which customers might be granted discounts nor the question of the commission payable for securing freight were discussed by the cartel. Equally invalid is the applicant's argument that there were no mechanisms or devices for monitoring the conduct of the members of the supposed cartel and that there was no discussion at the meeting of any agreement to maintain market shares or of the calculation and application of supplementary charges (for the provision of an electricity supply or for the transport of dangerous freight, for example).

120 The Court also rejects the applicant's argument that the Commission's position is essentially founded on the premiss that the tariffs were readjusted every two years so that there would be no need for it to prove the applicant's involvement in the

infringement between October 1990 and November 1993. It is clear from paragraphs 124 and 126 of the Decision that, far from proving the applicant's participation in the cartel during the period 1991 to 1993 by means of the mere assertion that there was a readjustment of the tariffs every two years, the Commission indicated that, given the continuance of the cartel, the fact that the applicant did not distance itself from the agreement during the period in question, enabled it to reach the conclusion that it had participated in it.

121 Lastly, it does not assist the applicant to say that it was its local representative that attended the meeting, and that he had no decision-making authority and was not in a position to bind the applicant. Suffice it to observe in this connection, that there is no dispute that the applicant's representative in Greece was perceived by the other companies as such and, therefore, that his actions and observations were interpreted on the market as being those of the applicant.

(c) The continuance of the infringement during the period between the meeting on 25 October 1990 and the meeting on 24 November 1993

122 The applicant states that there is no evidence to show that it had further contact with its competitors during the period between the two meetings in issue. It mentions paragraph 126 of the Decision and, with reference to the telex sent to Anek on 22 October 1991, in which the author refers to the collusion between 'the 11 companies and the 36 vessels on the Greece-Italy crossing', criticises the Commission for concluding from the mere reference to 11 companies that it was necessarily one of them.

123 Moreover, the applicant maintains that the conclusions drawn by the Commission are clearly at odds with the finding of the Court of First Instance in its judgment in Case T-43/92 *Dunlop Slazenger* v *Commission* [1994] ECR II-441

(see paragraph 79) that the Commission must adduce evidence which will establish, to the requisite legal standard, the duration of the infringement, at the same time complying with the principle of legal certainty, which requires evidence of facts sufficiently proximate in time. The applicant wonders how the Commission can rely upon the telex sent on 22 October 1991 to Anek to support its presumption that the applicant participated in a price cartel during the period between 30 October 1990 and 24 November 1993, given that it is not possible to determine from the telex the exact period during which the alleged cartel between the 11 companies was in place or whether its authors were definitely referring to the applicant.

124 The Commission asserts that it is established that there were contacts between the meeting of 25 October 1990 and the meeting of 24 November 1993 and cites the various documents mentioned in paragraph 117 of the Decision, which show that the companies were constantly negotiating and reaching arrangements (Strintzis's faxes of 8 December 1989, 5 September 1990 and 30 October 1990, Minoan's letter of 2 November 1990, the fax sent to Anek on 22 October 1991, Minoan's document of 25 February 1992, Minoan's telex of 7 January 1993 and the telex sent by ETA on 24 November 1993.

125 It is clear from the case-law that, with regard to establishing the alleged duration of an infringement, the principle of legal certainty requires that, if there is no evidence directly establishing the duration of an infringement, the Commission should adduce at least evidence of facts sufficiently proximate in time for it to be reasonable to accept that that infringement continued uninterruptedly between two specific dates (*Dunlop Slazenger* v *Commission*, cited above, paragraph 79).

126 The Court must consider whether the Commission is entitled to conclude that the document of 2 November 1990 and the telexes of 22 October 1991 and 7 January 1993, read together with the other documents considered above, suffice to confirm that the infringement (which the Court has found to be established in the preceding paragraphs) in fact continued without interruption between the dates of the two meetings which the applicant admits attending.

127 First of all, it is apparent from the document of 2 November 1990 (see paragraph 20 of the Decision) that, after the meeting of 25 October 1990, Minoan informed its agents of the new prices, valid from 5 November 1990, stating that these prices had been agreed by the companies on all the routes between Greece and Italy.

128 Secondly (see paragraph 22 of the Decision), on 22 October 1991, Karageorgis, Minoan and Strintzis sent Anek a telex calling upon it to keep to the 'agreement between the 11 companies and the 36 vessels on the Greece-Italy crossing'. There is no dispute that the applicant operated on the Patras to Brindisi route at the relevant time and it has been established that in October 1990 it was party to a cartel relating to goods vehicle tariffs. That being so, and given that this evidence must be interpreted in the context of the facts to which it refers and taken together with the other available evidence, even in the absence of any mention of the undertakings concerned by name, the Commission was entitled to conclude, on the basis of the body of information at its disposal, that the applicant was probably one of the '11 companies' in the cartel to which the authors of the telex referred.

129 Thirdly, in a telex which it sent on 7 January 1993 to Strintzis, Anek and Karageorgis to propose a change in the tariffs for vehicles on routes between Greece and Italy, Minoan wrote: 'We point out that two years have passed since the vehicle tariff was last adjusted'. It may be deduced from this that, throughout the period between the meeting of 25 October 1990 and 7 January 1993, the cartel members did not adjust the tariffs which came into effect on 5 November 1990 and that the tariffs fixed for 1991 remained applicable in 1992. The document shows that the cartel relating to the Patras to Brindisi route continued since, as the Commission points out, the word 'vehicle' is sufficiently general to include goods vehicles.

130 In light of the foregoing, and given that the applicant did not distance itself from the cartel (see below), it was legitimate to treat it as having participated in the cartel during the period intervening between the two meetings. The applicant's allegation that it increased its tariffs every year during the period in question, whilst the cartel members had provided for no alteration of the tariffs, cannot relieve it of liability for infringing Article 85(1) of the Treaty. It is appropriate to observe, first, that the applicant did not opt for a price reduction, but a price increase and, secondly, that a change of that nature might have been in response to a need to harmonise the tariffs to take account of currency fluctuations at the time. Lastly, it should be noted that an appraisal of the applicant's actual conduct can only be of relative value when establishing whether there was an infringement, where it has been established that, both before and after the period in question, the applicant attended meetings during which the representatives of the companies concerned acted in a manner clearly prohibited by Article 85(1) of the Treaty.

131 It is clear from those documents taken as a whole that the Commission was entitled to conclude that, during the period intervening between the two meetings, the cartel relating to the tariff rates to be applied to goods vehicles on the Patras to Bari and Patras to Brindisi routes continued, and that the applicant participated in it.

(d) The applicant's failure to distance itself

132 The applicant argues that on 1 December 1993, after its representative in Greece had attended the meeting in question, it sent it, as a formal communication, an internal document in which its commercial management absolutely rejected involvement in any form of collusion with other undertakings. That written communication was followed up by (i) an oral communication to Mr Sfinias, who had organised the meeting, so that he should take formal note of the applicant's

refusal to support the policy of price increases discussed at the meeting and communicate that refusal to the other companies and (ii) its decision not to increase prices, which totally contradicts the assertions made in Minoan's fax of 24 November 1993. The applicant submits that those factors prove that it distanced itself from the matters discussed during the meeting.

133 The applicant submits that to demand evidence that it publicly distanced itself from the aims of the cartel is to ask the impossible and it therefore seeks to clarify what is meant by 'publicly to distance oneself'. It submits that, in a context in which minutes are generally not taken and participants generally take no notes of the meeting from which to report on the content of discussions held, it is not necessary for a party to address a written declaration to its competitors in order to distance itself. Should the Court find such a clear statement of position still to be insufficient, that would mean that, rather than a criterion for assessing the reliability of a defendant's pleas in law, the requirement that it distance itself would in itself amount to a part of the charge because it would leave the defendant with no possibility of proving its good faith.

134 The Commission, for its part, maintains that the internal note of 1 December 1993 is of limited probative weight because, were it otherwise, it would be simple for an undertaking which has participated in a cartel to escape liability merely by producing internal documents. Moreover, any intention on the applicant's part to disregard the cartel was not externalised: a simple telephone call (the one made by the applicant to ETA) cannot support the conclusion that the applicant in fact dissociated itself from the agreement.

135 The Court observes that the requirement that an undertaking publically distance itself, is part of a legal principle according to which, where an undertaking attends meetings involving illegality, it may be exonerated where the evidence shows that it formally distanced itself from the content of those meetings (Case T-141/89 *Tréfileurope* v *Commission* [1995] ECR II-791, *Sarrió* v *Commission*, cited above, and *PVC II*, cited above). It is for the undertaking in question to adduce evidence to show that it participated in the meetings without anti-

competitive intention by showing that it indicated to it competitors that it was participating in them in a spirit which was different from theirs (Case T-15/89 *Chemie Linz* v *Commission* [1992] ECR II-1275, paragraph 135). It follows that the concept of an undertaking's 'publically distancing itself', it being a means of avoiding liability, must be interpreted narrowly.

136 Admittedly, the fact that an undertaking gives instructions within its own organisation that clarify its wish not to align itself with competitors participating in a cartel, as the applicant did in the present case, constitutes a measure of internal organisation which must be viewed positively. However, in deciding whether or not to impute to the applicant an infringement of Article 85(1) of the Treaty, the Commission could not, in the absence of any evidence that such internal instructions had been externalised, conclude that the applicant had distanced itself from the cartel.

137 Contrary to the applicant's submission, there is no question of requiring evidence that is impossible to furnish. In order to avoid liability by distancing itself, an undertaking which has attended meetings with an anti-competitive purpose need do no more than inform the other companies represented, with sufficient clarity, that, despite appearances, it disagrees with the unlawful steps which they have taken. The fact, to which the applicant points, that the meetings in question were held in circumstances where minutes were generally not taken and where the participants generally took no notes has no effect on the extent to which an undertaking must distance itself publically if liability is to be avoided. Indeed, the contrary is true: in such a context only an undertaking which proves that it firmly and clearly expressed its disagreement can satisfy the test of having publically distanced itself, as required by case-law. Contrary to the applicant's suggestion, that case-law does not indicate that mere assertions by its competitors can provide sufficient evidence that an undertaking has distanced itself. What must be proved is that the means chosen by the undertaking in order publicly to distance itself did in fact have the effect of conveying its disagreement to the other undertakings that attended the meeting.

138 In those circumstances, the internal document of 1 December 1993 sent by the applicant's commercial manager cannot suffice as evidence. In the absence of any documentary evidence, the allegation that that internal communication was followed up by a telephone call to Mr Sfinias, who had organised the meeting, so that he should acknowledge the applicant's refusal to support the policy of price increases discussed at the meeting and communicate that refusal to the other companies has no more probative value. Had the applicant truly wished to dissociate itself from the purpose of the agreement, it could have clearly informed its competitors, at the meeting on 24 November 1993, or afterwards in writing, that it no longer wished to be regarded as a party to the agreement. Lastly, given that the applicant's desire not to adhere to the cartel was expressed in an internal document, but not externalised, it is legitimate to conclude that that was an attempt to mislead the other members of the cartel, in the hope that it would nevertheless remain in force, which, as the Commission states, confirms the undertaking's (albeit disloyal) participation in the cartel.

139 It follows that the applicant has not demonstrated that it distanced itself in the manner required by the case-law for it to be held that if its attendance at the meeting did not prove its participation in the cartel.

140 That being so, the applicant's argument that its decision not to increase prices for 1994 was taken independently and before the meeting need not be regarded as contrary to the foregoing conclusions concerning the evidence of the applicant's participation in the cartel. Such a decision does not, without more, constitute evidence that it distanced itself. The same applies to the applicant's submissions regarding the reasons why it attended the meeting. It is appropriate to point out in this connection that the document makes no mention of the participants at the meeting having discussed the matter of the introduction and application of Community VAT.

(e) The argument based on the applicant's attendance at only two meetings

141 The applicant maintains that its case is such a special one that its attendance at two meetings having an anti-competitive purpose does not suffice to establish its participation in the cartel. It claims that its position is similar to that of Part Carton in the matter leading to judgment in *Sarrió* v *Commission*, cited above, in which the Court of First Instance held that mere participation in a meeting might not, even where the undertaking concerned does not expressly distantiate itself, constitute sufficient evidence of its participation in an infringement of Article 85(1) of the Treaty.

142 Nevertheless, it must be remembered that, in the present case, the applicant's attendance at two meetings having an anti-competitive object is not disputed and that it has been established that those meetings took place against the background of a continuing cartel on the Patras to Bari and Patras to Brindisi routes. The considerations which led the Court of First Instance to exclude Part Carton from the cartel in *Sarrió* v *Commission* cannot therefore be transposed to the applicant's case. In the latter case, the undertaking in question had attended only one meeting and in no way acted upon the decisions taken at the meeting. Consequently, the discussion at the meeting was exceptional in nature for that undertaking. It was in those particular circumstances that the Court held that the 'undertaking [could not] be criticised for not having publicly distanced itself from the outcome of the discussions at that meeting' (*Sarrió* v *Commission*, paragraph 211).

143 Lastly, it is appropriate to recall that the Court of First Instance has held that the frequency of an undertaking's presence at meetings of operators does not affect the fact of its participation in the infringement, but the extent of that participation (*PVC II*, paragraph 939). Thus, it is necessary to distinguish between the evidence of participation in a cartel and the assessment of the degree of that participation, which is relevant to the fixing of the fine. In the present case, that is precisely what the Commission did inasmuch as it took account of the applicant's limited involvement in the cartel when fixing the amount of the fine and allowing it a reduction on the basis that it merely adopted a follow-my-leader role (paragraph 164 of the Decision).

144 It follows from all the foregoing considerations that the Commission was entitled to treat the applicant's attendance at the two meetings in question as unequivocal evidence of its involvement in the cartel.

(f) Conclusion

145 Since the applicant's participation in the cartel referred to in Article 1(2) of the Decision has been established to the requisite legal standard, the first part of the present plea must be rejected.

The second part of the plea, put forward in the alternative: error of classification of the infringement committed by the applicant

146 In the alternative, the applicant submits that the Commission's appraisal of the type of any infringement it might have committed was inadequate. Because the applicant did no more than provide commercial information, at most it participated in an exchange of information relating to the tariffs applicable to goods vehicles, not in a cartel, since at no time did it reach understandings with its competitors about the commercial policy to follow. The applicant argues that that exchange of information is indisputably a lesser infringement than a cartel.

147 It is appropriate to observe that, in this case, the Commission's Decision is not based on the mere exchange of commercial information between competitors in an anti-competitive fashion. The Decision is based upon a finding of a long-term cartel relating to the tariffs for the transportation of motor vehicles on the Patras to Bari and Patras to Brindisi routes. The Decision established that, over a

number of years, the undertakings named in Article 1(2), including the applicant, had implemented, during the course of meetings, price initiatives and information exchanges relating to the tariffs for goods vehicles and that those initiatives constituted the expression of a common will to adopt specific conduct on the market and, thus, that the Commission could regard those facts as an infringement of Article 85(1) of the Treaty. That finding was based upon a body of documents and statements from some of the undertakings concerned, which establish, to the requisite legal standard, the existence of the cartel.

148 Lastly, the Court observes that, during the meetings which the applicant attended, the undertakings represented did not merely exchange information. Suffice it to recall, by way of illustration, the terms of Strintzis's fax of 30 October 1990 and, in particular, the reference to the final agreement, which must be interpreted as proof that that agreement constituted the final act of a series of earlier discussions between all the shipping companies concerned, including the applicant, the purpose of which was to fix tariffs. It follows that the argument which the applicant raises in this part of the plea cannot be accepted.

149 The Court therefore rejects the second part of this plea.

150 The second plea must therefore be rejected in its entirety.

*The third plea: infringement of the principles of equity and non-discrimination*

Arguments of the parties

151 The applicant submits that the evidence on which the Commission based the case against it is similar to the evidence of the participation in the infringement of

other companies such as AK Ventouris and HML. In that the Commission took the view that it did not have sufficient evidence to punish those companies, it is, according to the applicant, guilty of treating almost identical situations differently and therefore of clearly infringing Article 190 of the EC Treaty. The applicant maintains that the reasons for which the Commission did not charge the companies just mentioned with infringement applied equally well to the applicant's situation.

152 The applicant complains that AK Ventouris's attendance at the meeting of 23 November 1993 was not regarded as being sufficient evidence to enable the Commission to charge that company with participating in a cartel, whereas its attendance at two meetings was treated as anti-competitive.

153 The same applies to HML, a company named in two documents (Strintzis's faxes of 30 October 1990 and of 8 December 1989) and from which, according to the applicant, the Commission obtained a table of tariffs signed by the company's representative to confirm his acceptance of the tariffs proposed. The applicant takes issue with the Commission for having refrained, in HML's case, from sanctioning, apparently on the principle (inapplicable in this case) that attendance at a single meeting cannot be regarded as sufficient evidence of an infringement, the conduct of a company which had manifestly subscribed to an anti-competitive agreement, whereas it clear that the applicant was sanctioned even in the absence of any document expressing its agreement to the conclusion of a cartel. Lastly, as confirmation of the breach of Article 190 of the Treaty, the Commission provides no justification for the difference in treatment.

154 Lastly, in so far as concerns the company Med Link, the applicant submits that that company succeeded to Med Lines in 1993, as may be ascertained from Lloyd's Register of Ships or from the Skolarikos Greek Merchant Marine Directory. The applicant submits that the Commission could easily have refuted

the explanations given by Med Link and maintains that, by not charging it with infringement, the institution has infringed not only Article 85 of the Treaty but also the principles of non-discrimination and equal treatment.

155 The applicant submits that, having regard to the foregoing, the Decision ought to be annulled for infringing the general principles of equality and non-discrimination, which are fundamental principles of Community law, and also for the fact that the statement of reasons given for the Decision is inadequate and contradictory.

156 The Commission, for its part, disputes the applicant's plea. It states that, according to settled case-law, it is necessary to reconcile respect for the principle of equal treatment with the principle of legality, according to which a person may not rely, in support of his claim, on an unlawful act committed in favour of a third party (*Mayr-Melnhof* v *Commission*, cited above, paragraph 334, and *Cascades* v *Commission*, cited above, paragraph 259). Any unlawful act in this case would be the failure to address the Decision to AK Ventouris, not the fact of having addressed it to the applicant.

Findings of the Court

157 It is well-established case-law that it is necessary that respect for the principle of equal treatment be reconciled with the principle of legality, according to which a person may not rely, in support of his claim, on an unlawful act committed in favour of a third party (*Mayr-Melnhof* v *Commission*, cited above, paragraph 334, and *Cascades* v *Commission*, cited above, paragraph 259).

158 The applicant's arguments cannot therefore be upheld, it having already been established that the Commission was entitled to charge the applicant with having participated in the cartel with which the Decision is concerned. In fact, even if the Commission had made an error in not including other companies such as HML, Med Link and AK Ventouris among the addressees of the Decision, because of a poor appraisal of the available evidence, the applicant cannot derive an advantage from such an error, which does not relate to its involvement in the cartel.

159 Finally, and in any event, it must be observed that the positions of those companies were not the same as that of the applicant, as the latter claims. The applicant's position is different from that of AK Ventouris in that the applicant attended two meetings and took part in the cartel for a period of three years, whereas AK Ventouris attended one meeting only. As regards HML, that company was mentioned in only one document, Strintzis's fax of 30 October 1990 (see paragraph 117 of the Decision), the Commission having pointed out that the mention of the company in paragraph 16 of the Decision is the result of a printing error and that the reference should be to the company ML (Mediterranean Lines or Med Lines). Lastly, in the case of Med Link, the Commission met with difficulty in establishing whether it had succeeded to Med Lines, and that situation is quite different from the applicant's.

160 It follows from the foregoing that the third plea must be rejected.

*The fourth plea: incorrect application of Article 85 of the Treaty in the absence of any appreciable effect on trade between Member States*

Arguments of the parties

161 The applicant submits that the condition of there being an effect on trade between Member States is not satisfied in the present case. It states that information on the

volume of transport during the period in question and the number of operators active on the Brindisi to Patras route shows not only a constant increase in crossings and the number of goods vehicles transported, but also that several new operators entered the market. The market therefore continued to develop at a constant pace and therefore suffered not the slightest effect from the cartel.

162 The Commission disputes the merits of this plea and contends that, in the circumstances of the case, in order to prove that the condition of an effect on trade between Member States has been satisfied, it is sufficient to show that there is traffic between Greece and Italy. The fact that the cartel also had the added effect of increasing trade is of no importance.

Findings of the Court

163 The condition, for application of Article 85(1) of the Treaty, that there be an effect on trade between Member States is satisfied where it is shown that the agreement alters the normal pattern of trade flows and thus harms intracommunity trade by causing trade to develop differently than it would in the absence of the agreement (Cases 56/64 and 58/64 *Consten and Grundig* v *Commission* [1966] ECR 299, Case 71/74 *Frubo* v *Commission* [1975] ECR 563, paragraph 38, and Case 42/84 *Remia* v *Commission* [1985] ECR 2545, paragraph 22).

164 Given that the cartel in the present case related to the tariffs for the transportation of goods vehicles on sea routes linking Greece and Italy, the possibility of it having affected trade cannot be called into question.

165 The applicant's argument that, during the period in question, the volume of transport and the number of operators increased constantly on the Patras to Brindisi route cannot be upheld. First, it is plausible that but for the cartel the number of goods vehicles transported would have been even higher. Secondly, the condition for applying Article 85(1) of the Treaty, with regard to an effect upon trade, cannot require the production of proof of an actual effect, because Article 85(1) of the Treaty is directed at agreements and practices which have as their 'object' or 'effect' the restriction of competition and an effect on trade.

166 It follows that this plea must be rejected.

II — *The pleas raised in the alternative for annulment of the fine imposed by the Decision or a reduction in its amount*

167 In support of its claim for annulment of the fine imposed on it in the Decision or a reduction in its amount, the applicant puts forward a plea alleging an infringement of Regulation No 4056/86 in that the Commission imposed a fine on it and incorrectly assessed both the gravity and the duration of the infringement.

168 In the alternative, the applicant asks the Court to annul Article 2 of the Decision in so far as it imposes a fine of ECU 0.98 million on it. The applicant maintains that, in the event that the Court should find that its mere passive attendance at two meetings which may have had some anti-competitive content constitutes an infringement of Article 85(1) of the Treaty, its actions did not have the necessary gravity to warrant a fine. It emphasises, in particular, its passive conduct, the fact that it distanced itself from the decisions taken during the meetings which it attended, the paucity of evidence against it and the very limited commercial impact of the alleged cartel.

169 Article 19(2) of Regulation No 4056/86 provides that '[t]he Commission may by decision impose on undertakings or associations of undertakings fines of from [EUR] 1 000 to [EUR] one million, or a sum in excess thereof but not exceeding 10% of the turnover in the preceding business year of each of the undertakings participating in the infringement, where either intentionally or negligently... they infringe Article 85(1)... of the Treaty'. Article 19(2) also provides that '[i]n fixing the amount of the fine, regard shall be had both to the gravity and to the duration of the infringement'.

170 It should be borne in mind that, under Regulation No 4056/86, the Commission has a margin of discretion when fixing fines, in order that it may direct the conduct of undertakings towards compliance with the competition rules (see, to that effect, by analogy, Case T-150/89 *Martinelli* v *Commission* [1995] ECR II-1165, paragraph 59, Case T-49/95 *Van Megen Sports* v *Commission* [1996] ECR II-1799, paragraph 53, and Case T-229/94 *Deutsche Bahn* v *Commission* [1997] ECR II-1689, paragraph 127).

171 Since the Court has found that the infringement alleged against the applicant has been established to the requisite legal standard, it follows that the applicant cannot criticise the Commission for having imposed a fine on it pursuant to Article 19(2) of Regulation No 4056/86.

172 As regards the amount of the fine and its proportionality to the infringement found, the applicant raises a series of objections with regard to the Commission's assessment of the gravity and duration of the infringement alleged against it, which it is appropriate to consider separately.

A — *The first part: infringement of Article 19 of Regulation No 4056/86 in assessing the gravity of the infringement*

Arguments of the parties

173 The applicant states that the Decision erred in classifying it as a medium-sized undertaking, that the Commission's assessment of turnover for the reference period was incorrect and that the Commission infringed Article 19(2) of Regulation No 4056/86 by imposing a fine on it of more than 10% of its turnover.

174 The applicant observes that, for the purpose of calculating the amount of the fine, the Commission treated it as a medium-sized carrier, on the basis of its total turnover in 1993, the last full year of the infringement in the case of almost all the companies. The applicant submits that, in order correctly to determine the actual effect of its conduct on competition, within the meaning of the Guidelines on the method of setting fines imposed pursuant to Article 15(2) of Regulation No 17 and Article 65(5) of the ECSC Treaty (OJ 1998 C 9, p. 3, 'the Guidelines'), the Commission must refer to the turnover achieved on the sea route to which the alleged infringement relates. In the present case, therefore, it should have referred to the turnover achieved from the transportation of goods vehicles on the Brindisi to Patras route. The Commission's decision to rely on total turnover achieved in 1993 in the case of all the companies unfairly penalises the applicant in that the infringement with which it is charged related to only one ferry crossing (Brindisi to Patras) and only one type of service on that route (the transportation of goods vehicles). The majority of the impugned companies were held liable for an infringement relating to several routes (in the case of Minoan, Anek, Strintzis and Karageorgis all of the routes are involved) and to several types of service (relating, in the case of Minoan, Anek, Strintzis and Karageorgis, to both passenger and goods vehicle transportation). Indeed, the applicant finds it incomprehensible that a company charged with a much less serious infringement, having regard to its effect on competition and its duration, and a much more limited one, given its subject-matter, should be penalised by reference to a total turnover figure, 95% of which has no connection with the alleged infringement.

175 The applicant also submits that, whilst the Commission asserted that it had taken into consideration the turnover achieved in 1993 from roll-on roll-off ferry transport, as far as the applicant is concerned, it relied on total turnover, which is greater than that derived from the provision of roll-on roll-off ferry services (ITL 81.2 billion as opposed to ITL 68.7 billion in 1993). According to the applicant, the Commission was never aware of its turnover from roll-on roll-off ferry transportation, because it never asked for that information.

176 In the applicant's view, since in 1993 it achieved approximately 5% of its total turnover from the transportation of goods vehicles on the Brindisi to Patras route (ITL 4.3 billion out of a total of ITL 81.2 billion), the reference turnover used to determine its size should be reduced proportionately. If it were, the relationship between its turnover and that of Minoan would be well below the figure of 0.4 given in table 1 in paragraph 151 of the Decision and consequently it would be more appropriate to treat it as a small carrier.

177 Next, the applicant maintains that the fine of ECU 980 000 imposed on it equates to approximately 54% of its turnover from the provision of the services to which the infringement relates. The applicant argues that, whilst the Commission enjoys a broad discretion in choosing the reference turnover, the lack of proportion between total turnover and the turnover relevant to the present case is such that, in its case, the Commission ought, of its own initiative and for basic reasons of equity, to have calculated the fine on the basis of the latter figure rather than the former.

178 Similarly, the applicant reproaches the Commission for having imposed on medium-sized carriers — of which it is one — fines amounting to 65% of the fines imposed on the large carriers. That percentage is too high, in the applicant's view, and disproportionate in that the relationship between the turnover achieved by Minoan, the principal carrier, and the medium-sized carriers is between 0.26 and 0.45 (specifically, 0.4 in the applicant's case) and that, at the lower end, it is

closer to that of the 'small carrier' Marlines, whose fine was only 20% of the amount of the fines imposed on the large carriers. The applicant adds that fines imposed on the majority of the medium-sized carriers were calculated using a basic amount that was higher, in terms of percentages of turnover, than the fine imposed on the two principal carriers (3.3% in its case).

179 Lastly, the applicant maintains that, in setting the level of fines in practice, the Commission contradicted the statement which it made in paragraph 151 of the Decision that: 'this [1993 turnover] is the appropriate basis for the comparison of the relative size of the undertakings because it enables the Commission to assess the specific weight and importance of the undertakings in the relevant market and, therefore, to evaluate the real impact of the offending conduct of each undertaking on competition'. In support of this argument, the applicant has submitted a table which shows that the fine imposed on it equates to 2.45% of its total turnover, whereas the fine imposed on the principal instigator of the cartel, Minoan, equates to only 3.26% of its total turnover even though, unlike the applicant, Minoan participated in all of the conduct sanctioned for the whole of the duration of the infringement found in the Decision. The Commission thus penalised the companies, such as the applicant, which, in absolute figures, were punished more severely than the large operators which nevertheless participated in all the infringements during a decidedly longer period.

180 The Commission takes issue with the applicant's criticisms. It points out first that, in the Decision, it employed a new method for the calculation of fines, which is set out in the Guidelines. It emphasises that those Guidelines were published in response to observations made by the Court of First Instance in three judgments delivered on 6 April 1995 in which the Court clearly voiced the need for the Commission to set out all the factors which it takes into account in setting fines (Case T-147/89 *Société métallurgique de Normandie* v *Commission* [1995] ECR II-1057, Case T-148/89 *Tréfilunion* v *Commission* [1995] ECR II-1063, paragraph 142, and Case T-151/89 *Société des treillis et panneaux soudés* v *Commission* [1995] ECR II-1191). The Commission adds that, under the new method, fines are not assessed as a percentage of the total turnover of the undertakings concerned because the Commission wished to take as a basis a

turnover figure expressed in absolute terms (in ecu) selected by reference to the gravity of the infringement taken as a whole. That approach accords with the case-law which acknowledges the Commission's right to take account of a large number of parameters, rather than attributing excessive importance to turnover, in calculating fines (Joined Cases 100/80 to 103/80 *Musique diffusion française* v *Commission* [1983] ECR 1825, paragraphs 120 and 121, and *PVC II*, cited above, paragraph 1230). This approach reflects the notion that, from an economic point of view, turnover does not give a very precise indication of the harm caused by the infringement or of any benefit obtained from it by the undertakings in question and, consequently, of the size of fine needed to provide sufficient deterrent effect. The Commission contends that, when assessing the fines to be imposed on undertakings which have all participated in a single infringement, it should have regard to the role played by each of them (whether ringleader or follower) and to the degree to which they may have cooperated with the Commission. It observes that it is a fact that the harm that may be caused by an infringement, taken as a whole, and the benefit derived by each of the participants in it are not necessarily proportional to their respective turnovers.

181 The Commission submits that it applied the Guidelines fully to the present case. As a starting point, it took the view that a price-fixing agreement is a very serious infringement (paragraph 147 of the Decision). However, on considering the actual effect of the infringement on the market and the fact that the geographical market concerned represented only a very small part of the common market, it decided that the infringement should be classified as a serious one (paragraph 150 of the Decision). It also took account of the effective capacity of the authors of the infringement to cause significant harm and consequently fixed the fines at such a level as would ensure that they had a sufficiently deterrent effect. Lastly, it took account of the sizes of the undertakings, so that it could impose heavier fines on the larger ones, taking as a reference their turnover figures for 1993.

182 The Commission submits that that method is consistent with case-law, as the Community judicature has at no point expressed a preference for the fixing of fines on the basis of a percentage of turnover, whether it be the total turnover of

the undertaking concerned or its turnover in the market in which the infringement was committed. In fact, the Community judicature has always expected the Commission to vary the amount of fines 'according to the circumstances and the gravity of the infringement' (judgment of the Court of Justice in Case 183/83 *Krupp* v *Commission* [1985] ECR 3609, paragraph 97) and that the gravity of the infringement is to be appraised by taking into account 'in particular the nature of the restrictions on competition' (*Chemiefarma* v *Commission*, cited above, paragraph 176, Case 45/69 *Boehringer* v *Commission* [1970] ECR 769, paragraph 53, and Joined Cases T-39/92 and T-40/92 *CB and Europay* v *Commission* [1994] ECR II-49, paragraph 143). For its part, the Court has confirmed the notion that the proper level of a fine must be set by reference to 'the nature and intrinsic gravity of the infringement' (*CB and Europay* v *Commission*, cited above, paragraph 147), and it has constantly emphasised the essential factors for the assessment of the gravity of the infringement and the obligation upon the Commission to ensure that its action has a deterrent effect, especially as regards those infringements which are particularly harmful to the attainment of the objectives of the Community (Case T-13/89 *ICI* v *Commission* [1992] ECR 1021, paragraphs 352 and 385, and Joined Cases T-213/95 and T-18/96 *SCK and FNK* v *Commission* [1997] ECR II-1739, paragraph 246).

183 The Community judicature confines its review to assessing that, in fixing the fine, the Commission satisfied three conditions, namely whether the fine is appropriate having regard to the nature and intrinsic gravity of the infringement and whether it has a deterrent effect. Then, as the second stage of its assessment, it considers the importance, relevance and appropriateness of the particular factors taken into account by the Commission in each individual case and, as the last stage of its reasoning, it assesses whether the factors chosen were correctly applied. Therefore the Commission is entitled to take into account a whole series of factors, subject to review by the Court, the turnover on the market in which the infringement was committed being one factor of which it could take account, but it is by no means obliged to do so (see, to that effect, Case C-279/87 *Tipp-Ex* v *Commission* [1990] ECR I-261 and Case T-327/94 *SCA Holding* v *Commission* [1998] ECR II-1373, paragraph 184).

184 Lastly, the Commission points out that the applicant does not deny that after having established the seriousness of the infringement, on the basis of the nature and type of restriction on competition imposed by the agreement in question, the Commission adjusted the amount of the fine according to the size of the undertakings, on the basis of each undertaking's turnover for 1993 on the market on which the infringement was committed (namely the three routes between Greece and Italy taken together). It considers that, by its arguments, the applicant once again challenges the definition of the relevant market which, in its view, should be confined to the single route on which the applicant operates, namely that between Patras and Bari and Brindisi.

185 As for the argument concerning the imposition of a fine on the applicant of 65% of that imposed on the large carriers, the Commission refers to the case-law of the Court of First Instance (*Martinelli* v *Commission*), which states that the Commission enjoys a certain discretion in fixing fines and is not obliged to apply a precise mathematical formula (*Stora Kopparbergs Bergslags* v *Commission*, paragraph 119) nor to ensure absolute proportionality between the fines imposed on the large carriers and medium-sized carriers.

Findings of the Court

186 The applicant criticises the Commission for having calculated the fine in disregard of the scope of the infringement it was found to have committed, which solely concerns an infringement on the Patras-Bari-Brindisi route and refers only to the fares charged for the transport of goods vehicle, unlike the cartel on the Patras-Ancona route which referred to the fares charged for the transport of passengers and their vehicles. Accordingly, the applicant considers that it was unfairly treated in the calculation of the fine by comparison with the other addresses of the Decision which played a more active role in the conduct sanctioned by the Commission. In so doing, the Commission imposed a fine on the applicant which was disproportionate to the size of the infringement it was

found to have committed. Moreover, in setting the amount of the fines in the applicant's case, the Commission misapplied its own method of calculation which, as stated at paragraph 151 of the Decision, involved a comparison of the relative size of the companies so as to be able to evaluate the 'weight and importance of the undertakings in the relevant market and, therefore, to evaluate the real impact of the offending conduct of each undertaking on competition'.

187 It is appropriate to recall the manner in which the Commission fixed the basic amount of the fine in this case.

188 The parties are agreed that the Commission calculated the fine in this case on the basis of the reasoning, set out in paragraph 144 of the Decision, that the two cartels which it regards as having been proved in the Decision were, in its view, 'a single continuous infringement'. The Commission observes that it was because the infringement was committed in relation to the three routes, which it regarded as forming one and the same market, that the basic amount of the fine was set by reference to the turnover achieved by the undertakings in the whole of the market for roll-on roll-off ferry services between Greece and Italy.

189 Indeed, it is clear from paragraphs 157 and 158 of the Decision that the Commission calculated the fines starting from a single basic amount for all the companies, adapted according to their relative size but with no distinction being made according to whether the company concerned had participated in one of the cartels or both.

190 It is appropriate to recall that this Court has held that the operative part of the Decision clearly shows that the Commission sanctioned two distinct infringements and that the applicant is charged only with having participated in the cartel sanctioned in Article 1(2), namely that concerning the tariffs to be applied for

goods vehicles on the routes between Patras and Bari and between Patras and Brindisi. It follows that the fine imposed on the applicant was calculated on the false premiss that the Decision sanctioned a single infringement concerning three routes.

191 The Commission therefore punished in like manner the undertakings which participated in both infringements and those which participated in only one of them, in disregard of the principle of proportionality. However, for reasons of equity and proportionality, the companies whose involvement is limited to a single cartel should be punished less severely than the companies which participated in all the agreements in issue. The Commission cannot punish with the same degree of severity the companies which the Decision charges with two infringements and those which, like the applicant, are charged with only one of them.

192 It follows that, as the applicant has been held liable only for its participation in the cartel sanctioned in Article 1(2) of the Decision, the fine imposed on it is disproportionate to the size of the infringement committed.

193 Similarly, it should be stated that in so doing the Commission erred in the application of its own method of calculating the basic amount in respect of the gravity of the infringement. It is apparent from paragraph 151 of the Decision that in the present case, the Commission considered it 'appropriate that larger fines be imposed on the larger undertakings than on the smaller because of the considerable disparity between their sizes'. The table set out in that paragraph indicates the relative size of each of the undertakings concerned as compared to Minoan, the largest operator in the market. It is stated in the final sentence of that paragraph, and was confirmed by the Commission in its written pleadings, that the comparison of relative size is made on the basis of 1993 turnover in respect of all roll-on roll-off ferry services provided by the undertakings concerned operating on the Adriatic routes, that is on the market on which, according to

the Commission, the infringement was found to have occurred (the three routes between Greece and Italy, taken together). According to the Commission, 1993 'is the appropriate basis for the comparison of the relative size of the undertakings because it enables the Commission to assess the specific weight and importance of the undertakings in the relevant market and, therefore, to evaluate the real impact of the offending conduct of each undertaking on competition' (paragraph 151, final sentence).

194 Moreover, in that table the undertakings to which the Decision is addressed are divided into three categories (large, medium and small carriers). It shows that the applicant was a medium carrier and that it was 40% of the size of Minoan but does not in any way distinguish between the undertakings which took part in only one of the agreements in question (like the applicant) those which took part in both of the agreements at issue. Moreover, it is clear from paragraph 152 of the Decision that the Commission considered that the basic amount of the fine imposed on the medium carriers, including the applicant, should be 65% of that imposed on Minoan. In accordance with that approach, the table set out in paragraph 158 of the Decision shows that, in the case of the medium carriers, including the applicant, the basic amount in respect of gravity was ECU 1.3 million whilst for the large carriers it was ECU 2 million.

195 It is clear from the file that in 1993, the reference year adopted by the Commission to compare the size of the undertakings, the activity which was the subject of the impugned agreement, namely the transport of goods vehicles on the Brindisi-Patras route, constituted only a small part of the applicant's total turnover.

196 To the extent that the Commission assessed the relative size of the applicant by reference to its total turnover and did not merely refer to the turnover in respect of the service covered by the cartel sanctioned, it erred in its application to the applicant of the 'relative size' factor adopted in paragraph 151 of the Decision as

the relevant factor in the present case for imposing fines on the undertakings. It therefore erred in assessing the 'weight and importance of the undertakings in the relevant market and, therefore, the real impact of the offending conduct of each undertaking on competition'.

197 In so far as the Commission erred in the application of its own method of calculating the basic amount in respect of gravity in the applicant's case, it is unnecessary to examine the merits of the other complaints raised by the applicant alleging other errors on the part of the Commission in the assessment of that basic amount.

198 That part must therefore be upheld in part, thereby justifying a reduction in the amount of the fine.

B — *The second part: infringement of Article 19 of Regulation No 4056/86 in assessing the duration of the infringement*

1. The reduction of the duration of the infringement on the basis of the lawfulness of the applicant's attendance at the meeting on 24 November 1993 and the lack of direct evidence of the continuation of the infringement

Arguments of the parties

199 If the Court were to consider that the fact of having attended the first meeting in itself constitutes the infringement, the applicant claims that the Court should

annul Article 1(2) of the Decision in so far as it declares that the infringement continued after 25 October 1991, the date when, in any event, the agreement of 30 October 1990 came to an end. It considers that, in those circumstances, the duration of the infringement found should be reduced.

200 The Commission refers the Court to the observations it put forward to demonstrate the existence of documents showing that the applicant took part in the infringement.

Findings of the Court

201 Since the applicant's participation in the agreement between 30 October 1990 and 24 November 1993 has been demonstrated to the requisite legal standard, this part of the second part must be rejected.

2. The reduction in the fine on account of the alleged discrimination against the applicant in the calculation of the increase in the fine by comparison with Anek and Ventouris Ferries

Arguments of the parties

202 The applicant submits that it was treated differently from Anek and Ventouris Ferries when the increase in the fine was calculated on the basis of the duration. The applicant states that that increase was calculated at the rate of 5% for each

six-month period for which the infringement lasted, for all lines apart from Anek and Ventouris Ferries, which received an unjustified reduction in breach of the principle of equal treatment. In the applicant's case, the Commission rounded up the overall percentages which it arrived at by adopting the rate of 10% per year and 0.83% per month, whilst for Anek and Ventouris Ferries the Commission rounded down.

203 The Commission submits that the applicant cannot rely upon an alleged irregularity in the calculation of the fine for Anek and Ventouris Ferries since it is necessary to reconcile the principle of equality with the principle of legality and points out that it is not required to apply a mathematical formula in setting the amount of the fine (*Stora Kopparbergs Bergslags* v *Commission*).

Findings of the Court

204 It is clear from paragraphs 155 and 156 of the Decision that the Commission concluded that the infringement was of long duration for Minoan, Strintzis and Karageorgis, and of medium duration for the rest of the undertakings, including the applicant, Anek and Ventouris Ferries. Then it considered that those considerations justified 'an increase of the fines by 10% for every year of the infringement for Minoan and Strintzis, by 20% for Marlines and by 35% to 55% for the other undertakings'. Table 2 indicates the relevant percentage increases applicable to the various undertakings.

205 It is clear from that Table 2 that, in order to reflect the duration, the reference amount calculated on the basis of gravity was increased by 45% in the case of Anek, 40% in the case of Ventouris Ferries and 35% in the applicant's case.

206 It should be noted, first of all, that the application of that method corresponds exactly to method in the Guidelines for taking account of the duration of the infringement in calculating the fine. They provide, at Point 1.B, that for 'infringements of medium duration (in general, one to five years) [the amount may increase by] up to 50 % [of] the amount determined for gravity'.

207 In the applicant's case, the Commission found that it had participated in the cartel from 30 October 1990 until July 1994 (Decision, paragraph 154), that is, for three years and nine months. It follows that, in the applicant's case, the Commission followed its own Guidelines since the amount of the fine in the case of infringements of medium duration may be up to 50% of the amount determined for the gravity of the infringement. Furthermore, by taking the applicant's case in isolation, it could even be said that the Commission treated it more favourably than could have been the case, given that, for infringements of medium duration (from one to five years according to the Guidelines), a logical approach would have been to adopt an increase of 10% for each year of infringement. In that case, the basic amount of the fine on account of duration in the applicant's case could have been increased by 39% instead of 35%, which was the rate in fact applied to it.

III — *The Commission's application to increase the fine imposed on the applicant*

208 The Commission considers that the applicant disputed the facts found in the Decision and contends, in the context of the second plea in law, that therefore the Court ought to increase the fine imposed on the applicant because, as is stated in paragraph 169 of the Decision, a reduction of 20% was granted to the applicant on the ground that it did not dispute the facts on which the statement of objections is based.

209 The Court cannot uphold that request. The Court held in Case T-354/94 *Stora Kopparbergs Bergslags* v *Commission* [2002] ECR II-843, ruling on a referral back from the Court of Justice on an appeal, that 'the risk that an undertaking which has been granted a reduction in its fine in recognition of its cooperation will subsequently seek annulment of the decision finding the infringement of the competition rules and imposing a penalty on the undertaking responsible for the infringement, and will succeed before the Court of First Instance or before the Court of Justice on appeal, is a normal consequence of the exercise of the remedies provided for in the Treaty and the Statute [of the Court of Justice]. Accordingly, the mere fact that an undertaking which has cooperated with the Commission and which for that reason has been given a reduction in the amount of its fine has successfully challenged the Decision before the Community judicature cannot justify a fresh review of the size of the reduction granted to it' (paragraph 85).

## IV — *Conclusion*

210 It has been held that, as the applicant was held liable only for its participation in the cartel sanctioned in Article 1(2) of the Decision, the fine imposed on it is disproportionate to the size of the infringement committed. Consequently, the fine imposed on the applicant must be reduced.

211 In light of the reasoning contained in the Decision and of the fact that the Commission chose to apply in this case a method which takes account of the specific weight of the undertakings and of the actual effect on competition of the infringements committed, the fine imposed on the applicant must take account of the volume of traffic on the routes mentioned in Article 1(2) of the Decision (between Patras and Bari and between Patras and Brindisi) by comparison with the volume of traffic on the route mentioned in Article 1(1) of the Decision (between Patras and Ancona). It is clear from the Commission's answer to a question put to it by the Court, in the context of measures of organisation of

procedure, that the total turnover of the undertakings sanctioned by the Decision amounts to EUR 114.3 million. It is clear from the documents before the Court that the turnover from the provision of transport services subject to the cartel sanctioned in Article 1(2) of the Decision (on the routes from Patras to Bari and from Patras to Brindisi) amounts to approximately one quarter of the total turnover taken into account.

212 In view of the foregoing, the Court considers, in the exercise of its unlimited jurisdiction, that the fine of ECU 980 000, imposed on the applicant must be reduced to EUR 245 000.

213 The remainder of the application must be dismissed.

## Costs

214 Under Article 87(3) of its Rules of Procedure, the Court of First Instance may, where each party succeeds on some heads and fails on others, order that the costs be shared. In this case, it is appropriate to order the applicant to bear its own costs and three quarters of those incurred by the Commission.

On those grounds,

THE COURT OF FIRST INSTANCE (Fifth Chamber),

hereby:

1. **Sets the amount of the fine imposed on Adriatica di Navigazione SpA at EUR 245 000;**

2. **Dismisses the remainder of the application;**

3. **Orders Adriatica di Navigazione SpA to bear its own costs and to pay three quarters of the Commission's costs, and orders the Commission to bear one quarter of its own costs.**

Cooke García-Valdecasas Lindh

Delivered in open court in Luxembourg on 11 December 2003.

H. Jung

Registrar

P. Lindh

President

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