JUDGMENT OF THE COURT OF FIRST INSTANCE (Fifth Chamber)

11 December 2003 *

In Case T-66/99,

Minoan Lines SA, established in Heraklion (Greece), represented by I. Soufleros, lawyer, with an address for service in Luxembourg,

applicant,

v

Commission of the European Communities, represented by R. Lyal and D. Triantafyllou, acting as Agents, assisted by A. Oikonomou, lawyer, 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: Greek.

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 1 July 2002,

gives the following

Judgment

Facts

1 The applicant, Minoan Lines SA, is a Greek ferry operator which provides passenger and vehicle transport services on the route between Patras (Greece) and Ancona (Italy).

2 Following a complaint from a customer in 1992 that ferry prices were very similar on routes between Greece and Italy, the Commission, acting pursuant to Article 16 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), sent a request for information to certain ferry operators. Then, in accordance with Article 18(3) of Regulation No 4056/86, it carried out investigations at the offices of six ferry operators, five in Greece and one in Italy.

3 On 4 July 1994 the Commission adopted decision C(94) 1790/5 requiring Minoan Lines SA to submit to an investigation (hereinafter 'the investigation decision'). On 5 and 6 July 1994 Commission officials carried out inspections at premises situated at 64 B Kifissias Avenue, 15125 Maroussi, Athens. It later transpired that those premises belonged to the company European Trust Agency ('ETA'), a different legal entity from that mentioned in the investigation decision. During the inspection the Commission obtained copies of a large number of documents which it subsequently treated as evidence in relation to the various companies into which it was inquiring.

4 The Commission later sent further requests for information, pursuant to Article 16 of Regulation No 4056/86, to Minoan Lines SA and to other ferry companies asking them to provide further details concerning the documents found during the inspection.

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

6 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, hereinafter 'the Decision').

7 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.

...'

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

Procedure and forms of order sought by the parties

9 By application lodged at the Registry of the Court of First Instance on 4 March 1999 the applicant brought the present action for annulment of the Decision.

10 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, a question and to produce certain documents. The Commission complied with that request within the time allowed.

11 The parties presented oral argument and answered the questions put to them by the Court at the hearing on 1 July 2002.

12 The applicant claims that the Court should:

— declare the action admissible,

— annul the Decision in so far as it concerns the applicant,

— in the alternative, annul the fine imposed on the applicant or, in any event, reduce it to an appropriate amount,

— order the Commission to pay the costs.

13 The Commission contends that the Court should:

— dismiss the action in its entirety;

— order the applicant to pay the costs.

Law

14 Minoan puts forward three pleas in law in support of its application for annulment of the Decision. By the first, it alleges that the inspection carried out at ETA's offices was unlawful. By the second it pleads incorrect application of Article 85(1) of the EC Treaty (now Article 81(1) EC) in that the Decision imputes to it actions and initiatives taken by ETA. By its third plea the applicant alleges that the facts of the case were wrongly construed as showing the existence of agreements prohibited by Article 85(1) of the Treaty. This plea falls into two limbs: incorrect application of Article 85(1) of the Treaty, in that the undertakings concerned did not have the requisite autonomy, their conduct being dictated by legislation and directions from the Greek authorities, and incorrect classification of the contracts between the undertakings in the sector in question as agreements prohibited by Article 85(1) of the Treaty.

15 In support of the application which it makes in the alternative, for annulment or reduction of the fine imposed on it, Minoan puts forward a fourth plea which may conveniently be divided into four limbs: incorrect assessment of the gravity of the infringement, of its duration, of the aggravating circumstances and of the mitigating circumstances.

I — *The application for annulment of the Decision*

The first plea: unlawfulness of the investigation carried out at ETA's offices

Arguments of the parties

16 Minoan argues that the Decision is based essentially on documents which the Commission obtained unlawfully in that it seised them during an investigation carried out at the offices of ETA, a company that acted as the applicant's agent for routes between Greece and Italy but was not the company to which the investigation decision was addressed, namely Minoan itself.

17 The applicant regards it as important to recall, at the outset, the circumstances in which this investigation took place.

18 When, on 5 July 1994, officials of the Commission went to ETA's premises at 64 B Kifissias Avenue, 15125 Maroussi, Athens, and asked certain employees of ETA to agree to an investigation being carried out, the employees immediately drew the officials' attention to the fact that ETA was a separate legal entity that had no parent/subsidiary relationship with Minoan and that it was merely Minoan's agent. The applicant adds that, in spite of that warning, the Commission officials, after telephoning their superiors in Brussels, insisted on carrying out the investigation and threatened ETA, should they refuse, with the penalties laid down in Article 19(1) and Article 20(1) of Regulation No 4056/86. Moreover, according to the applicant, the Commission officials at the same time asked the department for investigation of the market and for competition of the Greek Ministry of Commerce, as the competent national authority in competition matters, to send one of its officials to ETA's offices to initiate the procedure under

Article 26 of the Greek Law No 703/77 on the control of monopolies and oligopolies and protection of free competition, paragraph 6 of which provides that, in the event that an investigation is prevented or hindered, application may be made to the competent prosecuting authority in order to obtain the assistance of the police authorities with local jurisdiction.

19 According to the applicant, it was in those circumstances and in view of the insistence of the Commission officials, the threat of a notice being drawn up recording ETA's opposition to the investigation, together with the sanctions that could ensue, and the threat of having the police force entry into ETA's offices, that the ETA employees decided to submit to the investigation.

20 Minoan states that, after the investigation, ETA asked the Commission, by letter of 18 August 1994, for the return of all the documents taken from its offices during the investigation on the ground that their seizure fell outside the scope *ratione personae* of the investigation decision. That request was fruitless. The applicant goes on to mention the extensive discussions which that letter engendered within the Commission and asks the Court to direct the Commission to produce its internal notes of 21, 23, 24, and 25 August 1994, which will support its action. Minoan then mentions the Commission's letter of reply to ETA of 30 August 1994, which states that the investigation had been lawful. ETA had then sent a second letter on 29 January 1995 refuting the Commission's arguments regarding the lawfulness of the investigation. The applicant also considers, judging from the synoptic table which lists the documents in the file, that it is likely that a second, detailed, internal memorandum was drafted on 3 February 1995 to which it has been denied access and it requests the Court to direct the Commission to produce that document also, so that the Court may examine it and Minoan may have access to it and thus better protect its interests.

21 Minoan then goes on to state the reasons why it regards itself and ETA as separate and independent companies, from both a legal and an economic point of view.

22 As far as the lawfulness of the investigation is concerned, Minoan submits that both the investigation decision and the investigation itself, along with the conduct of the Commission officials who constrained ETA staff to acquiesce to the search of the company's premises, constitute clear infringements of Article 189 of the EC Treaty (now Article 249 EC) and Article 18 of Regulation No 4056/86.

23 Minoan observes in this connection, first of all, that whilst the fourth paragraph of Article 189 of the Treaty provides that '[a] decision shall be binding in its entirety upon those to whom it is addressed', in the present case the investigation decision of 4 July 1994 was addressed not to ETA but to Minoan. The Commission officials were therefore carrying out an investigation at the premises of one company, ETA, on the basis of an investigation decision and authorisation relating to another company, the applicant itself.

24 Secondly, Minoan submits that it is clear from the combined provisions of Article 18(1), (2) and (3) of Regulation No 4056/86 and also from Article 19(1)(c) of the same regulation that the investigating powers referred to in Article 18(1), which include examining the books and other business records, taking copies, asking for oral explanations and entering 'any premises, land and vehicles of undertakings', solely concern undertakings to which a decision of the kind referred to in Article 18(3) of the regulation is addressed. The same approach should be adopted to the threat of imposing fines under Article 19(1)(c) of Regulation No 4056/86 where undertakings refuse to submit to an investigation or where books or other business records requested are produced in incomplete form and also to the request for assistance made of the competent Greek authorities pursuant to Article 18(5) of the regulation.

25 Minoan also disputes the points which the Commission made in paragraph 139 of the Decision in support of its conclusion that the investigation was lawful.

26 As regards, first of all, the circumstance that ETA, as representative of Minoan, described itself as 'Minoan Athens' and that it used Minoan's logo and trademark in its premises in Athens, the applicant observes that in modern commercial practice it is very common for one undertaking to use the logo and commercial badges of another where the two are connected by a long-term contractual relationship, as is the case with commercial agents, members of a distribution network or franchise holders within a franchise network. In such cases, the need for consistency across the network calls for the use of a common distinguishing sign, that of the principal, the head of the distribution network or franchiser. That, according to the applicant, in no way affects the legal or economic independence of undertakings which are given permission to use and do in fact use the trademark of another company in conducting their commercial affairs. Accepting the view expressed in the Decision would result in permitting the Commission to rely on a decision addressed to the head of a distribution network to carry out investigations at the premises of all the members of that network, despite their being legally and economically independent entities. That would clearly conflict with fundamental principles and fundamental provisions of both Community and national law.

27 According to the applicant, this argument is not undermined by the fact that, before the investigation began, ETA's legal representative, Mr Sfinias, replied to a Commission request for information, signing, in the name of Minoan, a document at the top of which ETA's address appeared beneath the logo and trademark of Minoan. The applicant admits that the reply was indeed signed by Mr Sfinias, but emphasises that Mr Sfinias was acting on its express instructions.

28 As regards the fact that ETA's address appeared beneath the logo and trademark of Minoan, the applicant points out that the corresponding information is shown at the foot of the page with the address of 'International Lines Head Office', 64 B Kifissias Avenue, and that of the 'Passengers Office', 2 avenue Vassileos Konstantinou. Those addresses were given so that clients and others could see that, for matters relating to the international routes, the issue of tickets and passenger departures from Athens, they must go to the offices of the company's general agent, he being the person with authority for the international routes and for questions concerning passengers.

29 Moreover, the applicant maintains that, even if all those factors had created confusion in the minds of the Commission officials, that confusion ought to have been cleared up, at the latest, by the time the officials entered ETA's premises, given the protests and explanations to which their visit gave rise and given the information which was furnished to them and which they had specifically asked for (ETA's lease and salary slips of company employees).

30 The applicant also disputes the Commission's conclusion (at paragraph 139 of the Decision) that, 'independently of ETA's occupation and use of the premises in question, Minoan permitted ETA to use these premises as "Minoan Athens" premises, too'. That is an arbitrary conclusion and is not implied by the contracts between Minoan and ETA. The applicant emphasises that the premises were occupied and used exclusively by ETA and that ETA conducted its business there with its own staff, its own capital and its own organisation, acting as Minoan's agent under contract.

31 The applicant also disputes the Commission's argument that, even if Minoan had not in fact conducted business (*in corpore*) in the premises in question, the fact that documents belonging to it were found there gave the Commission the right to look for them. The applicant submits that an argument such as that is clearly

inconsistent with the provisions of Regulation No 4056/86 and contrary to fundamental principles of law. Moreover, it regards the argument as a dangerous one because, by making it, the Commission is claiming the right, on the basis of an investigation decision addressed to one party, to enter the premises of a different party which it thinks might be holding documents belonging to the undertaking to which the investigation decision is actually addressed, and to carry out investigations there on the basis of that decision.

32 The applicant goes on to say that the Commission's argument stands in clear contradiction with the principle that the acts of the Community institutions must have a legal basis and with the principle of protection against arbitrary intervention by the public authorities in the sphere of private activity of any person, whether natural or legal (see Joined Cases 46/87 and 227/88 *Hoechst* v *Commission* [1989] ECR 2859, paragraph 19). Minoan also points out that the Court has repeatedly acknowledged that the general principle of protection of the rights of the defence in administrative procedures which may lead to the imposition of penalties also makes it necessary to prevent those rights from being irremediably impaired during preliminary inquiry procedures, including investigations (*Hoechst* v *Commission*, cited above, paragraph 15).

33 The applicant says that fundamental rights form an integral part of the general principles of law whose observance the Community judicature ensures and that, to that end, the Court of Justice and the Court of First Instance draw inspiration from the constitutional traditions common to the Member States. Furthermore, as provided in Article F(2) of the Treaty on European Union (now, after amendment, Article 6(2) EU), 'the Union shall respect fundamental rights, as guaranteed by the European Convention on Human Rights... and as they result from the constitutional traditions common to the Member States, as general principles of Community law'. It observes that Article 9 of the Greek Constitution, which deals with the inviolability of the home, has been uniformly interpreted as applying also to commercial premises, including those belonging to legal entities under private law, such as companies. The applicant concludes by saying that these principles apply *a fortiori* where an investigation is carried out at the premises of an undertaking which is not the addressee of the investigation decision.

34 The applicant complains that the Commission officials made abusive and unlawful use of the investigation decision and authorisation and threatened ETA with sanctions and forced entry into its premises. It submits that if the officials concerned had had reason to believe that a search of ETA's premises was necessary, they ought to have obtained a fresh Commission decision expressly addressed to ETA, setting out the specific reasons for which ETA was to be made the subject of an investigation.

35 According to the applicant, it follows that the Commission acted not only in breach of the investigation decision and authorisation but also, more generally, in breach of specific provisions and fundamental principles of Community law and, in particular, the principle that acts of the Community institutions must have a legal basis.

36 The Commission, for its part, denies that it carried out an illegal investigation at ETA's offices or that it made unlawful use of the documents which it gathered on that occasion. When it conducted its investigation it believed that ETA was an auxiliary body forming part of Minoan's business and that it acted exclusively on behalf of and in the name of Minoan, not as an independent broker, as indeed it stated in paragraph 137 of the Decision. It believed that ETA was Minoan's '*longa manus*'.

37 The Commission observes that ETA described itself as 'Minoan Lines' and clearly gave third parties the impression that the offices at 64 B Kifissias Avenue, Athens, were Minoan's offices. It adds that, before the investigation, Mr Sfinias had replied to a Commission request for information, signing, in Minoan's name, a document on headed notepaper bearing Minoan's logo and trademark and the address of ETA's offices, without making any reference to ETA.

38 The Commission maintains that all the business conducted in the offices which it inspected, or at least in some of it, was Minoan's business, irrespective of who was the tenant of those offices. What matters, according to the Commission, is not the formal lease, but the real situation, as it appears from the factors just mentioned. Even if the applicant had not actually (*in corpore*) conducted business there it is plain that documents belonging to it were found there and that, consequently, it was entitled, for that reason, to search for those documents.

39 That being so, there is no question, in the Commission's view, of unlawfully obtained evidence or of arbitrary use of investigation powers. The inspection which it conducted was carried out in offices in which business was being transacted that was, partially, if not entirely, the business of Minoan, the company to which the investigation decision of 4 July 1994 was addressed.

40 In any event, even if it had made a mistake as to the identity of the company which it investigated, the Commission says, first, that it made every possible effort to ascertain who was occupying the offices at 64 B Kifissias Avenue, where Minoan, the addressee of the investigation decision, carried on its Athens business. Secondly, the Commission regards it as simplistic of Minoan to say that the information which it was given ought to have removed any ambiguity concerning the manner and place in which it conducted its business. The Commission points out that, until the inspection began, there had never been any question of there being two distinct legal entities. On the contrary, ETA, which described itself as 'Minoan Lines', presented itself as an integral part of Minoan and in fact operated as such. Moreover, ETA's manager, Mr Sfinias, answered correspondence addressed to Minoan, signing his letters beneath the logo and trademark of Minoan and giving ETA's address, yet made no allusion whatsoever to ETA itself. In light of all those factors tending to indicate unity of conduct between Minoan and ETA and to blur the distinction between them, the Commission maintains that the 'information' given by the ETA employees was not sufficient either to throw light instantly on the issue of a distinction between

the two legal persons or to prevent the inspection from being carried out, and this all the more so as the distinction in fact called for an assessment of matters of substance which ignored the apparent circumstances.

Findings of the Court

41 By this plea the applicant essentially complains that the Commission unlawfully gathered the evidence on which it based the Decision in that it obtained that evidence in the course of an investigation carried out at the offices of a company that was not the addressee of the investigation decision. The applicant argues that, by so doing, the Commission exceeded its powers of investigation and infringed Article 189 of the Treaty, Article 18 of Regulation No 4056/86 and general principles of law.

42 In examining the merits of this plea reference should be made to the principles which determine the extent of the Commission's investigatory powers and the factual background to the case.

A — The Commission's powers of investigation

43 It is clear from the 16th recital in the preamble to Regulation No 4056/86 that the legislature saw fit that the regulation should make provision for the 'decision-making powers and penalties that are necessary to ensure compliance with the prohibitions laid down in Article 85(1) and Article 86 [of the Treaty], as well as the conditions governing the application of Article 85(3)'.

44 More specifically, the powers granted the Commission in on-the-spot investigations are set out in Article 18 of Regulation No 4056/86. That provision reads as follows:

'*Article 18*

Investigating powers of the Commission

1. In carrying out the duties assigned to it by this regulation, the Commission may undertake all necessary investigations into undertakings and associations of undertakings.

To this end the officials authorised by the Commission are empowered:

(a) to examine the books and other business records;

(b) to take copies of or extracts from the books and business records;

(c) to ask for oral explanations on the spot;

(d) to enter any premises, land and vehicles of undertakings.

2. The officials of the Commission authorised for the purpose of these investigations shall exercise their powers upon production of an authorisation in writing specifying the subject matter and purpose of the investigation and the penalties provided for in Article 19(1)(c) in cases where production of the required books or other business records is incomplete. In good time before the investigation, the Commission shall inform the competent authority of the Member State in whose territory the same is to be made of the investigation and of the identity of the authorised officials.

3. Undertakings and associations of undertakings shall submit to investigations ordered by decision of the Commission. The decision shall specify the subject matter and purpose of the investigation, appoint the date on which it is to begin and indicate the penalties provided for in Article 19(1)(c) and Article 20(1)(d) and the right to have the decision reviewed by the Court of Justice.

4. The Commission shall take decisions referred to in paragraph 3 after consultation with the competent authority of the Member State in whose territory the investigation is to be made.

5. Officials of the competent authority of the Member State in whose territory the investigation is to be made, may at the request of such authority or of the Commission, assist the officials of the Commission in carrying out their duties.

6. Where an undertaking opposes an investigation ordered pursuant to this article, the Member State concerned shall afford the necessary assistance to the officials authorised by the Commission to enable them to make their investigation. To this end, Member States shall take the necessary measures, after consulting the Commission, before 1 January 1989.'

45 The wording of Article 18 of Regulation No 4056/86 is the same as that of Article 14 of Council Regulation No 17: First Regulation implementing Articles 85 and 86 of the Treaty (OJ, English Special Edition, Series I (1959-1962), p. 87). Both regulations were adopted in implementation of Article 87 of the EC Treaty (now, after amendment, Article 83 EC) in order to clarify the precise rules for applying Article 85 of the Treaty and 86 of the EC Treaty (now Article 82 EC). The case-law relating to the scope of the Commission's investigatory powers under Article 14 of Regulation No 17 is therefore equally applicable to the present case.

46 According to Article 87(2)(a) and (b) of the Treaty, the purpose of Regulation No 17 is to ensure compliance with the prohibitions laid down in Article 85(1) and Article 86 of the EC Treaty and to lay down detailed rules for the application of Article 85(3). The regulation is thus intended to ensure that the aim stated in Article 3(f) of the Treaty is achieved. To that end it confers on the Commission wide powers of investigation and of obtaining information by providing, in the eighth recital in its preamble, that the Commission must be empowered, throughout the common market, to require such information to be supplied and to undertake such investigations 'as are necessary' to bring to light infringements of Articles 85 and 86 of the Treaty (Case 136/79 *National Panasonic* v *Commission* [1980] ECR 2033, paragraph 20, and Case 155/79 *AM & S* v *Commission* [1982] ECR 1575, paragraph 15). The 16th recital in the preamble to Regulation No 4056/86 is to the same effect.

47 Equally, the Community judicature has emphasised how important it is that fundamental rights are respected, particularly the rights of the defence in all procedures involving application of the competition rules laid down in the Treaty, and has specified how the rights of the defence are to be reconciled with the Commission's powers during administrative procedures and also at the preliminary stages of inquiry and information gathering.

48 The Court has ruled that the rights of the defence must be observed by the Commission during administrative procedures which may lead to the imposition

of penalties and also during preliminary inquiry procedures because it is necessary to prevent those rights from being irremediably impaired during preliminary inquiry procedures including, in particular, investigations which may be decisive in providing evidence of the unlawful nature of conduct engaged in by undertakings for which they may be liable (*Hoechst* v *Commission*, cited above, paragraph 15).

49 As regards, more specifically, the powers accorded the Commission by Article 14 of Regulation No 17 and the extent to which the rights of the defence may restrict them, the Court has acknowledged that the need for protection against arbitrary or disproportionate intervention by public authorities in the sphere of the private activities of any person, whether natural or legal, constitutes a general principle of Community law (*Hoechst* v *Commission*, cited above, paragraph 19, and Case C-94/00 *Roquette Frères* [2002] ECR I-9011, paragraph 27). The Court has held that, in all the legal systems of the Member States, any intervention by the public authorities in the sphere of private activities of any person, whether natural or legal, must have a legal basis and be justified on the grounds laid down by law, and, consequently, that those systems provide, albeit in different forms, protection against arbitrary or disproportionate intervention.

50 The Court has also held that the aim of the powers given to the Commission by Article 14 of Regulation No 17 is to enable it to carry out its duty under the EC Treaty of ensuring that the rules on competition are applied in the common market. The function of those rules is, as follows from the fourth recital in the preamble to the Treaty, Article 3(f) and Articles 85 and 86, to prevent competition from being distorted to the detriment of the public interest, individual undertakings and consumers. The exercise of these powers thus contributes to the maintenance of the system of competition intended by the Treaty with which undertakings are absolutely bound to comply (*Hoechst* v *Commission*, cited above, paragraph 25).

51 Similarly, the Court has held that both the purpose of Regulation No 17 and the list of powers conferred on the Commission's officials by Article 14 thereof show that the scope of investigations may be very wide. More specifically, the Court has expressly ruled that 'the right to enter any premises, land and means of transport of undertakings is of particular importance inasmuch as it is intended to permit the Commission to obtain evidence of infringements of the competition rules in the places in which such evidence is normally to be found, that is to say, on the business premises of undertakings' (*Hoechst* v *Commission*, cited above, paragraph 26).

52 The Court has also taken pains to emphasise how important it is to preserve the effectiveness of investigations as a necessary tool for the Commission in carrying out its role as guardian of the treaty in competition matters, ruling that 'that right of access would serve no useful purpose if the Commission's officials could do no more than ask for documents or files which they could identify precisely in advance. On the contrary, such a right implies the power to search for various items of information which are not already known or fully identified. Without such a power, it would be impossible for the Commission to obtain the information necessary to carry out the investigation if the undertakings concerned refused to cooperate or adopted an obstructive attitude' (*Hoechst* v *Commission*, cited above, paragraph 27).

53 Nevertheless, it should be noted that Community law provides undertakings with a range of guarantees against arbitrary or disproportionate intervention by public authorities in the sphere of their private activities (*Roquette Frères*, cited above, paragraph 43).

54 Article 14(3) of Regulation No 17 requires the Commission to state reasons for the decision ordering an investigation by specifying its subject-matter and purpose. As the Court has held, this is a fundamental requirement, designed not merely to show that the proposed entry onto the premises of the undertakings concerned is justified but also to enable the undertakings to assess the scope of

their duty to cooperate whilst at the same time safeguarding their rights of defence (*Hoechst* v *Commission*, paragraph 29, and *Roquette Frères*, cited above, paragraph 47).

55 The Commission is likewise obliged to state in that decision, as precisely as possible, what it is looking for and the matters to which the investigation must relate (*National Panasonic* v *Commission*, cited above, paragraphs 26 and 27). As the Court has held, that requirement is intended to protect the rights of defence of the undertakings concerned, which would be seriously compromised if the Commission could rely on evidence against undertakings which was obtained during an investigation but was not related to the subject-matter or purpose thereof (Case 85/87 *Dow Benelux* v *Commission* [1989] ECR 3137, paragraph 18, and *Roquette Frères*, paragraph 48).

56 Moreover, an undertaking against which the Commission has ordered an investigation may bring an action against that decision before the Community judicature under the fourth paragraph of Article 173 of the EC Treaty (now, after amendment, the fourth paragraph of Article 230 EC). If the decision in question is annulled by the Community judicature, the Commission will in that event be prevented from using, for the purposes of proceeding in respect of an infringement of the Community competition rules, any documents or evidence which it might have obtained in the course of that investigation, as otherwise the decision on the infringement might, in so far as it was based on such evidence, be annulled by the Community judicature (see the orders of the President of the Court of Justice in Case 46/87 R *Hoechst* v *Commission* [1987] ECR 1549, paragraph 34, and in Case 85/87 R *Dow Chemical Nederland* v *Commission* [1987] ECR 4367, paragraph 17, and *Roquette Frères*, paragraph 49).

57 Those are the considerations which must inform the Court's examination of the merits of the applicant's plea that the investigation was unlawful.

B — The merits of the plea

58 Before the merits of this plea can be examined it is necessary to set out the circumstances in which the investigation was carried out.

1. Relevant facts agreed between the parties

59 On 12 October 1992, acting pursuant to Regulation No 4056/86 on a complaint that ferry prices were very similar on routes between Greece and Italy, the Commission sent a request for information to Minoan at its registered office (Agiou Titou 38, Heraklion, Crete).

60 On 20 November 1992 the Commission received a letter in response to its request for information, signed by Mr Sfinias on Minoan headed paper which bore, in the top left-hand corner, the single commercial logo 'Minoan Lines' and, beneath that, the address '2 Vas. Konstantinou Ave., (Stadion); 11635, Athens'.

61 On 1 March 1993 the Commission sent a second request for information to Minoan, again at its registered office in Heraklion.

62 On 5 May 1993 an answer was given to the Commission's letter of 1 March 1993 in a letter again signed by Mr Sfinias on Minoan headed paper which again bore the commercial logo 'Minoan Lines' in the top left-hand corner, but this time

with no address beneath it. At the foot of the page were two addresses: 'INTERNATIONAL LINES HEAD OFFICES: 64 B Kifissias Ave., GR, 15125 Maroussi, Athens' and below that 'PASSENGER OFFICE: 2 Vassileos Konstantinou Ave., GR, 11635 Athens'.

63 On 5 July 1994, certain Commission officials went to premises situated at 64 B Kifissias Avenue, 15125 Maroussi, Athens, and gave to certain persons who, it transpired, are employees of ETA, the investigation decision and authorisations Nos D/06658 and D/06659 of 4 July 1994, signed by the Director-General of the Directorate-General for Competition, authorising the officials to carry out the investigation.

64 On the basis of those documents, the Commission officials asked the ETA employees to agree to the investigation being carried out. The employees however drew the Commission officials' attention to the fact that they were at the offices of ETA, that they were employees of ETA and that ETA was a separate legal entity that had no relationship with Minoan other than that of being its agent. The Commission officials, after telephoning their superiors in Brussels, insisted on carrying out the investigation and reminded the ETA employees that, should they refuse, sanctions under Article 19(1) and Article 20(1) of Regulation No 4056/86 could be adopted. (Those two provisions were cited in the investigation decision and the text of the provisions was set out in an annex thereto.) The Commission officials also asked the department for investigation of the market and for competition of the Greek Ministry of Commerce, as the competent national authority in competition matters, to send one of its officials to ETA's offices.

65 The Commission officials did not expressly advise the ETA employees of their right to legal assistance but gave them a two-page note which explained the nature and normal conduct of the investigation.

66 After telephoning their manager, who was not in Athens, the ETA employees finally decided to submit to the investigation, albeit signalling that they would record their disagreement in the minutes.

67 The Commission officials then began their investigation, which ended the following day, 6 July 1994.

68 Lastly, it should be mentioned, as the applicant itself has emphasised (see paragraph 26 of the present judgment), that, as the applicant's representative, ETA had full authority to act as, and to refer to itself in commercial matters, as 'Minoan Lines Athens' and to use Minoan's trademark and logo in the conduct of its business as agent.

69 In light of the foregoing, the Court regards it as clear from the facts that:

— first, in carrying out its work as agent and representative of Minoan, ETA had authority to present itself to the public at large and to the Commission as Minoan, its identity, when conducting the commercial matters in question being practically coterminous with that of Minoan;

— secondly, the fact that the Commission's letters to Minoan were passed on to Mr Sfinias so that he would reply directly to the Commission indicates that Minoan, ETA and Mr Sfinias were all aware from the beginning of the Commission's intervention that the institution was in the process of dealing with a complaint; they also learned of the nature of the complaint, the

subject-matter of the request for information and the fact that the Commission was acting pursuant to Regulation No 4056/86, which was cited in the letters in question; it follows that, by sending the letters to Mr Sfinias for an answer, Minoan gave him, and ETA, authority to present themselves to the Commission as the interlocutor duly appointed by Minoan for the purposes of the investigation;

— thirdly, it is clear both from the foregoing and from the fact that Minoan had delegated the conduct of its business to ETA that the offices at 64 B Kifissias Avenue housed in fact the real centre of 'Minoan's' commercial activities and were therefore the place where the books and business records relating to the activities in question were held.

70 It follows that those premises were the premises of Minoan as addressee of the investigation decision, within the meaning of Article 18(1)(d) of Regulation No 4056/86.

2. Compliance with the principles defining the extent of the Commission's powers of investigation

71 It is clear from the documents before the Court that both the investigation decision and the investigation authorisations which the Commission officials presented to the ETA employees satisfied the requirement to state the subject-matter and purpose of the investigation. The investigation decision in fact devotes a page and a half of its preamble to explaining the basis of the Commission's conclusion that the principal companies serving routes between Greece and Italy might have formed a cartel on ferry rates for passengers, vehicles and lorries contrary to Article 85(1) of the Treaty. It sets out the principal characteristics of the relevant market, names the principal companies operating in that market,

including Minoan, defines the market shares of the companies serving the three routes and describes in detail the type of conduct which it regards as possibly contravening Article 85(1) of the Treaty. The decision clearly states that the addressee company, Minoan, is one of the principal companies active in the market and states that Minoan is already aware of the investigation.

72 Next, Article 1 of the operative part of the investigation decision expressly states that the purpose of the investigation is to establish whether the mechanisms for setting the prices or rates charged by the companies operating roll-on roll-off ferries between Greece and Italy are contrary to Article 85(1) of the Treaty. Article 1 of the investigation decision also mentions the addressee's obligation to submit to the investigation and describes the powers of the Commission officials in the investigation. Article 2 states the date on which the investigation is to be carried out. Article 3 gives the name of the addressee of the decision. It states that the decision is addressed to Minoan. Three addresses are given as potential inspection sites: first, 28 Poseidon Key, Piraeus, secondly, 24 Poseidon Key, thirdly 64 B Kifissias Avenue, 15125 Maroussi, Athens, the place to which the Commission officials ultimately went. Lastly, Article 4 mentions the right to bring an action against the investigation decision before the Court of First Instance, explaining that any such action would not have suspensive effect unless the Court were to decide otherwise.

73 As far as concerns the investigation authorisations given to the Commission officials, these expressly stated that the officials were authorised to proceed in accordance with the objectives set out in the investigation decision, a copy of which was annexed thereto.

74 That being so, it was clear from the content of those documents that the Commission was seeking evidence of Minoan's involvement in a presumed cartel and believed it would find that evidence, amongst other places, at the premises at 64 B Kifissias Avenue, 15125 Maroussi, Athens, which it regarded as belonging to Minoan. It this connection, it should be borne in mind that that was the

address printed on the notepaper used by Minoan on 5 May 1993 to reply to the Commission's request for information of 1 March 1993, the words 'INTERNATIONAL LINES HEAD OFFICES: 64 B Kifissias Avenue GR, 15125 Maroussi, Athens' being printed at the foot of the page.

75 The Court finds that the investigation decision and authorisations contained all the necessary information to enable the ETA employees to judge whether, given the reasons underlying the decision and in light of their knowledge of the nature and extent of the relationship between ETA and Minoan, they were obliged to consent to the investigation which the Commission proposed to carry out at their premises.

76 It must therefore be concluded that, as far as the investigation decision and authorisations are concerned, the requirements laid down by case-law were fully satisfied in so far as concerns the occupier of the premises inspected, namely ETA, because, as the company managing Minoan's affairs in the market for roll-on roll-off passenger ferry services between Greece and Italy, it was in a position to comprehend the extent of its duty to cooperate with the Commission officials and because its rights of defence remained fully protected, given the detailed statement of reasons provided in those documents and the express mention of its right to bring an action against the investigation decision before the Court of First Instance. The fact that it subsequently chose not to bring an action does not undermine that conclusion; it tends to confirm it.

77 It should be borne in mind in this connection that, whilst ETA was legally a separate entity from Minoan, in its role as Minoan's representative and sole manager of those of Minoan's affairs which were the subject-matter of the investigation, its identity merged with that of its principal. Consequently, it fell under the same obligation to cooperate as that incumbent on its principal.

78 Furthermore, in the event that Minoan might be permitted to avail itself of the rights of defence of ETA, a distinct entity, it must be held that those rights have never been called into question. The investigation had no bearing either on any separate business ETA might have had or ETA's own books and business records.

79 The applicant complains that the Commission infringed the fourth paragraph of Article 189 of the Treaty, which provides that 'a decision shall be binding in its entirety upon those to whom it is addressed' because, in the present case, the Commission carried out an investigation at the premises of one company, ETA, on the basis of an investigation decision and authorisations relating to another company, namely Minoan.

80 That argument, however, is irrelevant. First of all, the reference to Article 189 of the Treaty adds nothing to the applicant's essential argument that the basic infringement consisted in the Commission's alleged breach of Article 18 of Regulation No 4056/86 and of general principles of law, and in the alleged abuse of its powers of investigation. Article 189 of the Treaty merely states what legislative measures and decisions are available to the institutions together with their respective legal effects. Secondly, even if Article 189 were pertinent in this case, it would merely underscore the mandatory effect of the investigation decision which was 'binding in its entirety' upon Minoan, as addressee of the decision, and upon ETA, as agent and representative authorised by Minoan for the purposes of the investigation.

81 The Commission cannot be criticised in this case for having assumed that Minoan had its own premises at the address in Athens to which the Commission officials went or for having stated that address in its investigation decision as being the place in which Minoan had one of its centres of activity.

82 Next, the Court addresses the question whether the Commission, in insisting on carrying out its investigation, satisfied all relevant legal requirements.

83 It is clear from the case-law mentioned earlier that the Commission must, in all its investigatory work, ensure compliance with the principle that the actions of the Community institutions must have a legal basis and with the principle of protection against arbitrary intervention by the public authorities in the sphere of private activities of any person, whether natural or legal (see *Hoechst* v *Commission*, cited above, paragraph 19). It would be excessive and contrary to the provisions of Regulation No 4056/86 and fundamental principles of law to allow the Commission a general right of access, based on an investigation decision addressed to one legal entity, to inspect premises belonging to another legal entity simply on the pretext that the latter is closely connected with the addressee of the investigation decision or that the Commission believes it will find there documents belonging to the addressee of the decision.

84 However, in the present case, the applicant cannot justly complain that the Commission attempted to broaden its investigatory powers, visiting premises belonging to a company other than the addressee of the decision. On the contrary, it is clear from the documents before the Court that the Commission acted diligently and amply fulfilled its duty to make as sure as possible, before the investigation began, that the premises which it proposed to inspect indeed belonged to the legal entity which it wished to investigate. It should not be forgotten in this connection that there had been an exchange of correspondence between the Commission and Minoan in which Minoan had answered two letters from the Commission with two letters signed by Mr Sfinias, who, it finally transpired, is the manager of ETA, without mentioning ETA's very existence or the fact that it was operating in the market through an exclusive agent.

85 It should also be observed, as the Commission pointed out in its defence, without being contradicted on the point by the applicant, that the list of members of the union of Greek ferry owners operating on coastal routes includes Mr Sfinias, the signatory of the two letters from Minoan, that the table of tariffs published by

Minoan mentions a general agency with an address at 64 B Kifissias Avenue, Athens and, lastly, that the Athens telephone directory contains an entry for Minoan Lines at the address to which the Commission officials went in order to carry out their investigation.

86 However, the question remains whether, after having discovered that ETA was a different company and that they were therefore not in possession of an investigation decision for that company, the Commission officials ought to have withdrawn and, if appropriate, returned with a decision addressed to ETA, properly setting out the reasons warranting the investigation in this particular case.

87 The Court must hold that, in view of these particular circumstances, it was reasonable of the Commission to regard the 'information' given by the ETA employees as insufficient either to throw light instantly on the issue of a distinction between the two undertakings or to warrant suspending the inspection, and this all the more so, as the Commission emphasises, because deciding whether or not the two were in fact the same undertaking called for an assessment of matters of substance and, in particular, interpretation of the scope of Article 18 of Regulation No 4056/86.

88 In the circumstances of the present case, it must be held that, even after ascertaining that the premises they were visiting belonged to ETA and not to Minoan, the Commission was entitled to take the view that they should be treated as premises used by Minoan for the conduct of its business and that, therefore, they could be treated as being the business premises of the undertaking to which the investigation decision was addressed. It should be borne in mind in this connection that the Court has held that the right to enter any premises, land and means of transport of undertakings is of particular importance inasmuch as it is intended to permit the Commission to obtain evidence of infringements of the competition rules in the places in which such evidence is normally to be found, that is to say, on the 'business premises of undertakings' (*Hoechst* v *Commission*,

cited above, paragraph 26). In the exercise of its investigatory powers, therefore, the Commission was entitled to take into account in its reasoning the fact that its chances of finding proof of the supposed infringement would be higher if it were to investigate the premises from which the target company in fact conducted its business as a matter of practice.

89 In any event, the Court would add that there was no definitive opposition to the Commission proceeding with its investigation.

90 It follows that, in the present case, the Commission did not exceed its powers of investigation under Article 18(1) of Regulation No 4056/86 when it insisted on carrying out an investigation.

3. The rights of the defence and the question whether there was excessive interference on the part of the public authorities in the sphere of ETA's activities

91 As the Court has pointed out, according to its case-law and that of the Court of Justice, whilst it is necessary to preserve the utility of Commission investigations, the Commission must, for its part, satisfy itself that the rights of defence of the undertaking under investigation are respected and must abstain from all arbitrary or disproportionate intervention in the sphere of their private activities (*Hoechst* v *Commission*, cited above, paragraph 19, *Dow Benelux* v *Commission*, cited above, paragraph 30, Joined Cases 97/87 to 99/87 *Dow Chemical Ibérica and Others* v *Commission* [1989] ECR 3165, paragraph 16, and 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 417).

92 As regards observance of the rights of the defence, the Court points out that neither the applicant nor the legal entity which occupied the premises inspected by the Commission, that is to say ETA, thought it appropriate to bring an action against the investigation decision on the basis of which the investigation was conducted, even though, as Article 18(3) of Regulation No 4056/86 expressly provides, that was within their power.

93 Furthermore, as for the applicant, suffice it to say that it now avails itself of its right to ask for judicial review of the intrinsic lawfulness of the investigation as part of its present action for annulment of the final decision which the Commission adopted under Article 85(1) of the Treaty.

94 It is also established that, in so far as the ETA employees made no definitive opposition to the Commission proceeding with its investigation, the Commission saw itself under no obligation to seek a warrant and/or the assistance of the police in order to carry out the investigation. It follows that an investigation of the sort that was carried out in the present case is one that is carried out with the cooperation of the undertaking concerned. The fact that the Greek competition authorities were contacted and that one of their agents came to the investigation site cannot undo that conclusion because that measure is provided for by Article 18(5) of Regulation No 4056/86 in cases where undertakings do not oppose investigation. That being so, there can be no question of undue interference by the public authority in the sphere of ETA's activity, there being no evidence that the Commission went beyond the cooperation offered by the ETA employees (*PVC II*, cited above, paragraph 422).

C — Conclusion

95 It is clear from the foregoing that in this case the Commission fully obeyed the law as regards both the investigation authorisations which it granted and the

manner in which it subsequently conducted the investigation and that, in doing so, it preserved the rights of defence of the undertakings concerned and fully complied with the general principle of Community law that guarantees protection against intervention by public authorities in the sphere of the private activities of any person, whether natural or legal, that is arbitrary or disproportionate.

96 The Court finds that it has sufficient information on the facts and on the relevant rights to consider this plea and consequently finds that there are no grounds for acceding to the applicant's request for the production of documents.

97 This plea must therefore be ruled unfounded.

The second plea: the Commission wrongly imputed to the applicant the actions and initiatives taken by ETA

Arguments of the parties

98 The applicant submits that it suffered an injustice in that the Commission imputed to it actions and initiatives by ETA, which, according to the Decision, infringed Article 85(1) of the Treaty.

99 First, the applicant argues that several of the activities complained of were ETA's own initiatives, not approved by Minoan and outside the scope of the ETA-Minoan contracts, and that Minoan should not be regarded as responsible

for them. The applicant maintains that, contrary to the Commission's submission, those contracts do not indicate that ETA was acting on its instructions and under its control. On the contrary, ETA is largely autonomous. It maintains its own network of associate offices throughout Greece (with the exception of Crete) and has power to nominate, under its own responsibility, agents in Greece and abroad. Nor do the contracts show that ETA was given authorisation to enter into unlawful cooperation with other companies. Indeed, no document shows that Minoan asked ETA to do so. The applicant maintains that agreeing by contract the commission that agents would be paid does not prove that ETA was not an independent company.

100 Next, the applicant disputes the Commission's assertion (at paragraph 137 of the Decision) that ETA should be described as its *longa manus*, operating as its representative and as an intermediary who acts exclusively on its behalf and does not undertake business on its own account. The fact that ETA is the applicant's agent does not necessarily mean that all of its initiatives should be imputed to the applicant, especially where they fall outside the ambit of their contractual relationship and where there is no instruction or *a posteriori* approval from the applicant.

101 The applicant adds that, contrary to the Commission's assertion, it is not only in his communications with Minoan's headquarters in Heraklion that Mr Sfinias mentions ETA. Quite the opposite, the telexes to which the Commission refers give, both in the heading (that is, before the name of the sender and addressee or addressees) and at the foot of the page, below Mr Sfinias's name, the name and facsimile number of ETA, so as to indicate who the real sender is. The applicant adds that the words 'Minoan Lines' and 'Minoan Lines Athens' are attributable to a need for concision and a desire to avoid the use of 'ETA Worldwide General Agents for Minoan Lines'.

102 Minoan maintains that it never called upon ETA's legal representative, Mr Sfinias, to enter into illegal agreements, but admits that, to the extent that it was informed of such matters, it did not forbid him either from entering into discussions with other companies. Since Minoan was convinced that any such discussions fell within the ambit of the policy of the Ministry of Merchant Shipping it did not regard them as 'particularly serious'.

103 In support of its assertion that it was unaware of the activities engaged in by ETA, the applicant maintains that it did not focus attention on the contacts and discussions entered into by Mr Sfinias, concentrating instead on his proposals in the matter of tariff policy so as to approve, reject or correct the prices proposed on the basis of various economic parameters and in accordance with its own criteria. Mr Sfinias's statements at the hearing on 13 and 14 May 1997 confirm that. In particular, Mr Sfinias said the following:

'Our company is instructed by contract to create the best possible operating conditions for Minoan's vessels based on actions and initiatives which Minoan regards as the best. We ourselves assess how far we must keep Minoan informed. Obviously, where we have great faith in our actions and believe that they will prove to be of benefit to our principal's interest, in the broad sense, then perhaps we will not inform Minoan at the beginning, or at all: it is the result that matters. Or we may inform it afterwards, in order to obtain approval, principally because we know that the board of directors of our principal — a company with many shareholders among the general public — which will either approve or reject our initiatives, is itself responsible to a large number of shareholders.'

104 Furthermore, the applicant disputes the Commission's assertion that the documents referred to at the end of paragraph 137 of the Decision prove that it was aware of the collusion. The applicant argues, on the contrary, that this was all information which it received after the event.

105 Lastly, the applicant takes issue with the arguments set out in paragraph 138 of the Decision which led the Commission to draw the conclusion that, for the purposes of the Decision, ETA and Minoan should be regarded as forming a single legal and economic unit. Minoan complains that the Commission imputed to it all of ETA's actions and initiatives, without exception.

106 The applicant says that imputing behaviour in that way cannot be justified by reference to the case-law relating to the imputation of the conduct of subsidiary companies to their parent companies (Case 48/69 *ICI* v *Commission* [1972] ECR 619, paragraphs 132 and 133, and Case 107/82 *AEG* v *Commission* [1983] ECR 3151, paragraph 49) because that case-law concerns subsidiaries and not independent undertakings that have entered into cooperation agreements. Furthermore, the judgments cited by the Commission stipulate that conduct may not be imputed unless 'the subsidiary, although having separate legal personality, does not decide independently upon its own conduct on the market, but carries out, in all material respects, the instructions given to it by the parent company'. Lastly, in order to impute conduct in this way it is not sufficient if there is merely the possibility of influencing conduct, it must be proved that use has actually been made of that possibility (see *AEG* V *Commission*, cited above, paragraph 50 et seq., and *ICI* v *Commission*, cited above, paragraphs 135, 137, 138 and 141).

107 The applicant says that none of those conditions has been satisfied in the present case because ETA is not a subsidiary of Minoan and Minoan therefore exerts no influence on ETA's managers and directors. The only connection between the two companies is one arising from the terms of the contracts, which clearly define the rights and obligations of both parties. Moreover, even if, under the contracts, it were possible for Minoan to exert a certain influence, Minoan has never made use of that possibility. Lastly, there is nothing in the documents before the Court that mentions Minoan having influenced, by positive action, ETA's conduct or that it gave ETA precise instructions, directions or mandates. On the contrary, the documents show that either Minoan was completely unaware of certain initiatives or that it was merely the passive recipient of incomplete information sent to it by ETA after the event.

108 The applicant concludes that, given those facts, the Commission's position that 'for the purposes of this Decision, ETA and Minoan are considered to form a single legal and economic unit', on the basis of which it justifies imputing all of ETA's actions and initiatives to Minoan, is arbitrary and vitiated by a clear want of reasoning and is unsupported by the documents before the Court or the case-law cited by the Commission.

109 The Commission, for its part, does not question the fact that ETA is a separate legal entity, but argues that, according to case-law, the fact that a company is a separate legal entity does not mean that its conduct cannot be imputed to another company. The Commission maintains that, in Community competition law, an economic approach must be adopted, not a purely legal one, and that, applying an economic approach to the present case, it found that ETA's actions and initiatives were not undertaken in its own name and on its own behalf but in the name of and on behalf of Minoan.

110 According to the Commission it is clear from the clauses of the various contracts governing relations between ETA and the applicant, and from what Mr Sfinias has said concerning that relationship, that ETA enjoyed very broad powers of representation and was authorised and instructed not only to organise the network of local agents and to promote the sale of tickets for foreign destinations but also, more generally, to manage the vessels on the international routes, to represent the applicant, to concern itself with all questions and actions relating to the vessels which it managed and to promote their use in the name of and on behalf of the applicant. The Commission emphasises that it is clear from the contracts that ETA was under a contractual obligation to operate under Minoan's instructions (Clause IV(g) of these management contracts) and, in regular collaboration with Minoan, to use its best endeavours to ensure Minoan's cooperation with other companies (if Minoan so requested) (Clause II(1) of the management contracts).

111 The Commission adds that it is necessary, when considering this point, to draw a distinction between the contractual obligation of the agent, which requires it to act on behalf of its principal in accordance with the latter's instructions and under its control, and the actual ability of the principal to exert the necessary control over its agent. Thus, even if it transpires that the applicant was inexpert in shipping and, consequently, not in a position to give ETA certain specialised technical or economic instructions, that in no way detracts from the fact that ETA was fulfilling its function as the applicant's representative in accordance with its obligations under contract and law, in the context of the instructions and authorities given it by the applicant.

112 The Commission refutes the applicant's allegation that ETA enjoyed a broad autonomy because it was under a contractual obligation not to represent any other shipping company operating on the same routes. The applicant's allegations do not indicate that ETA represented or acted as agent in the relevant market for any other shipping company at all.

113 Moreover, the Commission observes that the contracts do not indicate — and the applicant does not submit — that ETA took on any financial risk whatsoever in connection with the provision of roll-on roll-off ferry services (for the transport of passengers and vehicles) between Greece and Italy or in connection with the performance of contracts in relation to such services concluded with third parties. Thus, in the present case, ETA should not be regarded as an independent trader but as an auxiliary body forming part of the Minoan business. Indeed, the contracts concluded between the applicant and ETA make it plain that, as exclusive general agent for the applicant, ETA undertook to manage Minoan's ships and, more generally, to concern itself with all questions relating to them, taking, as remuneration for its services, a percentage of ticket sales.

114 Lastly, the Commission does not accept the applicant's assertion that ETA did indeed take action on its own initiative 'outside the scope of ETA-Minoan contracts', but not on Minoan's behalf. The purpose of the contract between ETA and the applicant was, according to the Commission, to manage the applicant's ships on international routes and in that context the activities listed in the clauses of the management contract is not exhaustive. On the contrary, it is clear from the contracts between them that ETA was more generally required to concern itself with all questions and actions relating to the ships which it managed. Thus, any activity which helped to achieve that objective and to perform the contracts successfully did indeed fall within the ambit of the contractual relationship.

Findings of the Court

A — Preliminary remarks

115 The question whether ETA's actions may be imputed to the applicant is addressed in paragraphs 136 to 138 of the Decision.

116 In paragraph 136 the Commission sets out a series of arguments refuting Minoan's allegation that several of the activities of ETA referred to in the Decision cannot be imputed to it because they were ETA's own initiatives, fell outside the scope of the contracts between the two companies and were not approved by the applicant.

117 In paragraph 138 of the Decision the Commission refutes the applicant's argument that ETA enjoyed such a degree of autonomy that its conduct cannot be imputed to its principal. It cites in a footnote the case-law of the Court of Justice

relating to the imputation of subsidiaries' conduct to their parent companies (*AEG* v *Commission*, cited above, paragraph 49, and *ICI* v *Commission*, cited above, paragraphs 132 and 133). The Commission goes on to conclude that '[f]or the purposes of this Decision, ETA and Minoan are considered to form a single legal and economic unit'.

118 In its application the applicant argues that the case-law on which the Commission relies is irrelevant because ETA is not a subsidiary of Minoan. In its pleadings the Commission merely indicates the rules which it regards as applicable to the case, citing, inter alia, the judgment in 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 1663 and the Commission's Notice on exclusive dealing contracts with commercial agents (OJ 1962 C139, p. 2921).

119 The Court observes at the outset that, in this case, the Commission regards ETA as the applicant's 'right hand man', inasmuch as it is the general manager of the applicant's affairs in the relevant markets. It maintains that the two companies belong not to the same legal entity but to the same economic entity. Whilst the terms used in paragraph 138 of the Decision are ambiguous and appear to confuse the two concepts, it is clear from a reading of paragraphs 136 to 139 as a whole and from the reference in the footnote to paragraph 138 to the case-law relating to the imputation of subsidiaries' conduct to their parent companies that the imputation of ETA's conduct to the applicant rests on the principles which govern the relationship between agent and principal and on the principal's liability for its agent's actions, interpreted with reference to the notion of a single economic entity, which is generally used where the conduct of undertakings is analysed from the point of view of competition law. The arguments which the Commission sets out in its pleadings confirm this.

120 It is in light of those remarks that the Court must consider whether the Commission was right to find, in the Decision, that ETA's actions could be imputed to the applicant for the purposes of applying Article 85 of the Treaty.

B — Imputation of responsibility between agent and principal

121 It is clear from settled case-law that, in competition law, the term 'undertaking' must be understood as designating an economic unit for the purpose of the subject-matter of the agreement in question even if in law that economic unit consists of several persons, natural or legal (Case 170/83 *Hydrotherm* [1984] ECR 2999, paragraph 11, and Case T-234/95 *DSG* v *Commission* [2000] ECR II-2603, paragraph 124).

122 It has also been held that a single economic unit is one that consists in a unitary organisation of personal, tangible and intangible elements which pursues a specific economic aim on a long-term basis and can contribute to the commission of an infringement of the kind referred to in Article 85(1) of the Treaty. Where a group of companies constitutes one and the same undertaking the Commission is entitled to impute liability for an infringement committed by the undertaking and to impose a fine on the company responsible for the actions of the group in the context of the infringement (Case T-11/89 *Shell* v *Commission* [1992] ECR II-757, paragraph 311).

123 The Court has also emphasised that, for the purposes of applying the competition rules, formal separation of two companies resulting from their having distinct legal identity, is not decisive. The test is whether or not there is unity in their conduct on the market (see, to that effect, *ICI* v *Commission*, cited above, paragraph 140).

124 Thus, it may be necessary to establish whether two companies that have distinct legal identities form, or fall within, one and the same undertaking or economic entity adopting the same course of conduct on the market.

125 The case-law shows that this sort of situation arises not only in cases where the relationship between the companies in question is that of parent and subsidiary. It may also occur, in certain circumstances, in relationships between a company and its commercial representative or between a principal and his agent. In so far as application of Articles 85 and 86 of the Treaty is concerned, the question whether a principal and his agent or 'commercial representative' form a single economic entity, the agent being an auxiliary body forming part of the principal's undertaking, is an important one for the purposes of establishing whether given conduct falls within the scope of one or other of those provisions. Thus, it has been held that 'if... an agent works for the benefit of his principal he may in principle be treated as an auxiliary organ forming an integral part of the latter's undertaking, who must carry out his principal's instructions and thus, like a commercial employee, forms an economic unit with this undertaking' (*Suiker Unie and Others* v *Commission*, cited above, paragraph 480).

126 In the case of companies having a vertical relationship, such as a principal and its agent or intermediary, two factors have been taken to be the main parameters for determining whether there is a single economic unit: first, whether the intermediary takes on any economic risk and, secondly, whether the services provided by the intermediary are exclusive.

127 In so far as concerns the assumption of economic risk, the Court of Justice held, in paragraph 482 of its judgment in *Suiker Unie and Others* v *Commission*, cited above, that an agent may not be regarded as an auxiliary body forming part of its principal's business where the agreement entered into with the principal confers upon the agent or allows it to perform duties which from an economic point of view are approximately the same as those carried out by an independent dealer, because they provide for the said agent accepting the financial risks of selling or of the performance of the contracts entered into with third parties.

128 In so far as concerns the question whether the services provided by the agent are exclusive, the Court has held that it tends not to suggest economic unity if, at the same time as it conducts business for the account of its principal, an agent undertakes, as an independent dealer, a very considerable amount of business for

its own account on the market for the product or service in question (*Suiker Unie and Others* v *Commission*, cited above, paragraph 544).

129 It is clear from the documents before the Court that the criteria used in earlier cases to establish whether or not an agent and its principal form a single economic unit are satisfied in the present case because ETA did business on the market only in the name of and for the account of Minoan, it took on no financial risk in connection with that business and, lastly, the two companies were perceived by third parties and on the market as forming one and the same economic entity, namely Minoan.

130 That conclusion is reached, in particular, after consideration of the management contracts between Minoan and ETA.

C — The management contracts

131 The ship management contract concluded between Minoan and ETA on 24 June 1991, which reproduces the terms of previous contracts, sets out, in Clause II, the obligations assumed by the manager, ETA. Clause II reads as follows:

'In order to attain the objective mentioned above, and in performance of the present contract, the manager accepts the following obligations:

(a) The manager shall maintain a broad network of associate offices throughout Greece (with the exception of Crete, where the agency work has been

organised by the owner, albeit with accounting done at the manager's computer centre). The manager shall be entitled to appoint, under its own responsibility, agents both in Greece and abroad for the purpose of providing port services for the owner's ship in ports of necessity or refuge and ports of call and for all the work of establishing and issuing tickets and bills of lading and for providing port and other services during the carriage of passengers and vehicles.

(b) The manager shall make available exclusively to the owner and to no other the sales network at its disposal and undertakes to represent no other owner on the Ancona-Corfu-Cephalonia-Piraeus-Paros-Heraklion route.

(c) The manager shall be responsible for promptly receiving and paying over to the owner freight income of all kinds and from all agents both in Greece and abroad. Freight shall be paid within one month of completion of the journey for which it is charged.

The net income from freight charges must be paid into the owner's bank account and in the owner's name. The owner alone shall be entitled to both freight income from abroad, in the relevant currency, and national freight income, in drachmas.

In both cases, deposits shall be made to a bank nominated by the owner.

(d) The manager shall organise a special monitoring service and a general accounting service so as to ensure the smooth running of operations from issue and delivery of tickets, bills of lading, etc. to settlement of charges and

shall fully protect the interests of the owner to which the manager shall each month send for the manager's review the totals for tickets and bills of lading.

(e) The manager shall operate a reservations service (CRO) both in Greece and in Ancona, Italy. The reservations service shall be available to the owner's customers, both passengers and vehicular traffic, whether trade or tourist-related, travelling to Greece and to destinations abroad. The manager shall also ensure the provision of all customs or port services and transit authorisations for Ancona-Corfu-Cephalonia-Piraeus-Paros-Heraklion.

(f) The manager shall organise office accommodation for the purposes of providing port agency services in the ports of Ancona, Corfu, Cephalonia, Piraeus and Paros in such a way as to be able to satisfy all current needs and to answer all functional requirements of the ship.

(g) The manager shall represent the owner in Greece and abroad vis-à-vis the port authorities and other State authorities with which the manager shall endeavour to maintain the best relations possible so that the ship's needs may consistently be met in normal fashion.

(h) The manager shall be responsible for making all necessary arrangements for the embarkation and disembarkation of passengers and vehicles and for the loading and unloading of goods, with payment of transport costs or for the use of the ship.

(i) The manager shall take in hand and shall respond effectively to all the ship's requirements in the ports of Ancona, Corfu, Cephalonia, Piraeus, and Paros.

(j) The manager shall also (on the same route or on a different route between Greece and Italy, at the owner's request) represent other ships belonging to the owner, on terms and conditions to be agreed in a separate contract.

(k) The manager shall, under its own responsibility, appoint agents (port agents and others) both in Greece and aborad. The manager shall be liable to the owner for ensuring that agents abroad and at home comply with their obligations in connection with the management of ship freight and shall bring to an end any action on the part of such agents where there are serious reasons therefor and where the owner so requests in writing.

(l) The manager shall, at the owner's request, make all necessary arrangements to obtain the collaboration of other companies, always acting in the owner's interests and protecting the owner's interests through regular collaboration with the owner. The manager shall, at the owner's expense, attend tourism and shipping conferences in the countries and at the ports of call and ports of necessity or refuge so as to keep up with general trends in transport and freight generation and shall periodically organise, abroad and in Greece, conferences and seminars for foreign general agents and other suitable parties under the supervision of the owner's management in order to bring up to date the general policy and operating plan so as to ensure the protection and promotion of Minoan Lines.

It should be noted that freight income from offices in Crete or on the ship shall be posted to the owner's debit, with compensation on the periodic settling of accounts.

(m) The manager shall foster the generation of all sorts of freight in domestic transport or transport to overseas destinations. The manager shall take in hand all questions and operations concerning the ship which it manages and

shall take charge of and liquidate payments and receipts concerning the ship both overseas and in Greece and shall check the accounts of agents in Greece and abroad and the movements on the ship's accounts for receipts in foreign currency.'

132 First of all, it is clear from the content of Clause II of the management contract that the Commission was right to take the view that the contractual relationship between ETA and the applicant satisfied the condition of exclusive representation. Nor is there any dispute that ETA did not, in practice, represent any other company, at least not on the shipping routes with which the Decision is concerned. The fact that ETA concluded an agreement with Strintzis to represent that company's ships, in accordance with a partnership agreement which Strintzis and Minoan decided to implement, cannot undo that conclusion. Moreover, the applicant has not disputed the Commission's assertion that that collaboration was not put into practice.

133 Secondly, Clause II of the management contract confirms the Commission's view that ETA acted for the account of the applicant without taking on any financial risk, its remuneration being fixed by reference to the number of tickets it sold. It is appropriate to point out in this connection that the applicant has not replied to the argument which the Commission makes in its defence that the contracts do not indicate that ETA took on any financial risk whatsoever in connection with the provision of roll-on roll-off ferry services between Greece and Italy or in connection with the performance of the contracts relating thereto which it concluded with third parties.

134 Moreover, as the Commission emphasised in paragraph 137 of the Decision, all the documentary evidence shows that Mr Sfinias, the legal representative and manager of ETA, represented the applicant, signing all telexes and facsimiles sent to other companies in the applicant's name. It also shows that it was only when Mr Sfinias wrote to the applicant in his capacity as agent that he mentioned ETA.

135 Similarly, when other companies replied to facsimile or telex messages sent by Mr Sfinias, they addressed their replies not to ETA but to 'Minoan' or 'Minoan Athens', even though the documents which they sent to Minoan were in fact sent to Mr Sfinias at ETA's telex number. Furthermore, it is clear from the content of the telexes and facsimile letters that shipping companies in competition with the applicant believed that any statements Mr Sfinias made properly reflected the opinion of their competitor Minoan, a fact which is hardly surprising given that Mr Sfinias himself fostered that view, giving Minoan as the sender in letters he sent from ETA's offices.

136 That being so, the fact that ETA's initials were always shown on the telexes in question (either at the beginning or at the end of the document) is, contrary to the applicant's assertion, irrelevant for the purpose of identifying the real sender or recipient of the communication. Indeed, ETA's initials were printed automatically on the telexes to which the applicant refers by the telex machine and they merely showed who owned the telephone line. The fact that the other undertakings participating in the infringement regarded ETA's telex number as being Minoan's contact number clearly shows that, as far as those undertakings were concerned, ETA was no more than an organ of Minoan. That underscores the fact that the other shipping companies were convinced that ETA acted for the account of the applicant and with the applicant's authority, again supporting the conclusion that ETA conducted itself on the market as an auxiliary body within the applicant's undertaking.

137 Lastly, that conclusion is confirmed by the fact that the applicant's reply of 20 November 1992 to the Commission's request for information was given on notepaper which bore, as Minoan's address, an address which subsequently transpired to be ETA's address and by the fact that the letter was signed by Mr Sfinias, beneath Minoan's logo, without any indication that he was not a director of Minoan, but its agent. By its actions the applicant confirmed that ETA was merely an auxiliary body; it instructed ETA to answer the requests for information that the Commission had sent it at the address which the Commission thought was Minoan's but which proved to be ETA's address. This is further confirmed by the fact that, in its letter of reply to the Commission, the

applicant made no mention of the fact that another company was answering the requests for information or of the reasons why a company which was not the addressee of the Commission's letter was replying to it. The Court cannot accept the applicant's argument that it instructed Mr Sfinias to reply because of the technical nature of the information requested because that circumstance was not such as to prevent the applicant itself from replying. In any event, if the applicant had had difficulty understanding the questions asked by the Commission or assembling the information needed to reply, it could itself have answered the request for information after asking ETA to supply the necessary information.

138 It follows from the foregoing that the Commission was entitled to take the view that ETA should be regarded as Minoan's 'right-hand man' and that the two companies formed a single economic entity for the purposes of applying competition law and imputing to the applicant the actions of ETA complained of in the Decision.

139 To rebut that finding, the applicant cannot simply allege that it was unaware of the actions undertaken by ETA or that it had not given ETA authorisation or approval to embark upon unlawful cooperation.

140 First of all, it is clear from the provisions of Clause II of the ship management contract that ETA's authority to represent the applicant was extensive. It was authorised to manage the applicant's ships on the international routes and was under an obligation to take in hand all questions concerning those ships, including most certainly the rates which the applicant should charge on the international routes. As the applicant itself emphasised at paragraph 40 of its application, as its general agent, ETA was responsible for all questions concerning the international routes and passengers. It follows that the subject-matter of the unlawful agreements to which the Decision refers, namely the fixing of international tariffs, falls cleanly within the scope of ETA's mandate and within the ambit of its contractual relationship with the applicant.

141 The applicant refers to a letter sent by ETA on 14 September 1993, attempting to demonstrate that certain of ETA's actions did not fall within the scope of the contractual obligations existing between the two companies and submitting that those actions cannot be imputed to it. In the letter, ETA makes a distinction between services provided in the context of the contractual relationship and other services which fell outside that context. However, the important point is that the services in question were nevertheless provided for the applicant and in its name. Among them, it is important to note that the author of the letter includes within what he calls 'services' provided to the applicant 'peace on tariffs', which it achieved with twenty or so companies and 'the tariff which it has always managed to fix to Minoan's best advantage'. It follows that the letter confirms that ETA acted in all cases on the applicant's behalf, even in matters concerning the illegal agreements on tariffs.

142 Moreover, it should be observed that the arguments by which the applicant alleges that it was unaware of and did not approve ETA's actions are belied by the evidence in the file. The argument that the applicant was not informed of the collusion is belied by the telex of 21 May 1992, mentioned in paragraph 30 of the Decision, and by the telexes of 25 February 1992 and 27 May 1992, which clearly show that the applicant was informed about the discussions on tariffs which ETA was holding with other companies. Even if, as the applicant argues, the telex of 25 February 1992 does not prove that it instructed ETA to begin tariff negotiations, it does make it clear that the applicant was aware of those negotiations.

143 As far as the telex of 21 May 1992 is concerned, it is sufficient to recall the terms in which its author, ETA, wrote to the applicant:

'We would inform you that today a conference of representatives of the Patras-Ancona route shipping companies is to be convened to discuss the drafting of the new tariff for 1993.

The principal points on the agenda are as follows:

— tariff for the Trieste line

— tariff for camping vehicles

— group discount

— revision of catering prices 1992/1993

— upgrading policy

— travel agents' and central agents' commissions.

We shall keep you informed of developments.'

144 Next, in the telex of 27 May 1992, ETA informed the applicant of how the meeting had gone, as follows:

'We inform you concerning the proposals that we put to the meeting of the four shipping companies and which, with minor differentiations for the Karageorgis

and Strintzis companies, were accepted. Anek is reserving its position and will reply in 10 days time.

— General increase of 3% of the 1992 tariff in German marks.

— The tariff in drachmas will be fixed on the basis of the current exchange rate for converting marks into drachmas; the tariffs in other European currencies will be fixed on the basis of the exchange rate of the drachma by comparison with those other currencies.

— Increase of 6% for the "deck" tariff.

— Increase of 30% for category 4 vehicles and 50% for category 5 vehicles (these increases being of special relevance to Minoan for the ship *Erotokritos*).

— Incorporation of port taxes, which are rising from DEM 15 to DEM 18 (to compensate payment of the commission), in the ticket price, so as to avoid the problems that arose in Igoumenitsa.

— Immediate adaptation of tariff for restaurants from 2 600 drachmas to 3 000 drachmas.

— Immediate increase of 5% in the tariff for goods vehicles on the Ancona route.

— Immediate increase of 20% in the tariff for goods vehicles on the Trieste route by comparison with the tariff applicable on the Ancona route (Karageorgis and Strintzis are restricting themselves to 15%).

— Immediate withdrawal of the 20% discount on the passenger tariff announced by Anek for its ship *Kydon II*.

— Setting the passenger and tourist vehicle tariffs on the Trieste route for 1993 at 20% higher than the tariff for the Ancona route (Minoan's proposal, Karageorgis and Strintzis propose 15%).

— Group discounts: same as in 1992.

— High season: Italy to Greece: 26 June to 14 August 1993
Greece to Italy: 29 July to 9 September 1993.

We would ask you kindly to examine the positions adopted on your behalf and give your approval.

We will keep you informed of all further developments as soon as we hear of them.'

145 Those two documents point up the fact that ETA maintained a policy of keeping the applicant informed and that the applicant was therefore regularly apprised of the actions on ETA's part with which the Decision is concerned and which were clearly in the applicant's own interests. That is further confirmed, for example, by the telex of 24 November 1993 by which ETA informed the applicant that agreement had been reached on the tariff for goods vehicles. The telex states: 'we are pleased to inform you that at today's meeting we achieved agreement'. The Commission was entitled to infer from the terms of that telex that the applicant was aware that the meeting was to take place, since no explanation is given concerning the meeting and since the applicant opposed neither the convening of the meeting nor the conclusion of an agreement. Lastly, and moreover, it should be borne in mind that the applicant has acknowledged (in paragraph 67 of its application) that it was aware of a certain number, at least, of these contacts, albeit that it emphasises that it did not oppose them because it believed that they were made in the context of the Greek regulations and thus it saw nothing 'particularly serious' in them.

146 As regards the applicant's argument that it did not approve ETA's actions, and that that precludes liability being imputed to it, suffice it to recall that, in the telex of 27 May 1992, the content of which is set out above, ETA asked the applicant to approve the actions taken on its behalf. The applicant cannot rely on the fact that the Decision does not state that it actually gave its approval because, in these circumstances, it is for the applicant to prove that it was opposed to the contacts or that it instructed ETA to withdraw from the agreement in issue. It has failed to do so. In fact, it is clear from the documents before the Court that it was only after the Commission had carried out its investigation that the applicant expressly warned ETA that any action that was not strictly legal and that might expose the applicant to the risk of sanctions should be avoided.

147 It is clear from the foregoing, first, that establishing the tariffs and conditions applicable on the applicant's ships on the international routes fell within the

sphere of activities of its agent, ETA, secondly, that the applicant was regularly informed of the actions undertaken by its agent, including the contacts which it maintained with the other companies, for which it sought prior or *a posteriori* authorisation and, lastly, that the applicant had both the power and the right to forbid its agent from undertaking certain actions, even if it exercised that right only after the Commission had conducted its investigation.

D — Conclusion

148 It is clear from an examination of the telexes exchanged between ETA and the applicant and between ETA and the other companies which participated in the infringement, from the applicant's replies to the Commission's requests for information, and from the other circumstances which the Court has considered, that ETA acted in the market vis-à-vis third parties, customers, sub-agents and competitors of the applicant as an organ of the applicant and that the two companies therefore formed one and the same economic unit or undertaking for the purposes of applying Article 85 of the Treaty. That being so, the Commission was entitled to impute to the applicant the conduct which was sanctioned in the Decision as contrary to Article 85 of the Treaty and in which ETA played an important part.

149 That conclusion is not affected by the fact, to which the applicant points, that the two companies had diverging interests, as is evidenced by the telex which ETA sent the applicant on 26 May 1994. In that telex ETA complained that, by continually granting credits to its office in Heraklion, Minoan was undermining ETA's endeavours to conclude an agreement on the route to Italy. The pursuit by the two companies of different, even opposing interests in the matter of the commissions which ETA received on ticket sales is a matter concerning the internal relationship between the companies but does not alter the fact that, as far as the agreements here in issue are concerned, in its dealing with third parties ETA always acted in the name of and on behalf of the applicant. As the

Commission has emphasised, differences regarding the amount of remuneration or various aspects of cooperation which arise within an economic entity do not call into question the existence of such an entity for the purpose of applying Article 85 of the Treaty.

150 It follows from the foregoing that the applicant's complaints relating to incorrect application of Article 85(1) of the Treaty in that ETA's actions and initiatives were wrongly imputed to it are unfounded.

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

The third plea, raised in the alternative: the facts of the case were wrongly construed as showing the existence of agreements prohibited by Article 85(1) of the Treaty

A — First limb: incorrect application of Article 85(1) of the Treaty in that the undertakings did not have the requisite degree of autonomy, their conduct being dictated by legislation and directions from the Greek authorities

Arguments of the parties

152 The applicant describes the very special legal and geopolitical circumstances in which the facts of the case occurred, which it regards as essential to an understanding of the conduct of the undertakings involved.

153 First of all, the applicant emphasises the vital importance that Greece attaches to the shipping route between its own shores and Italy, that being the only direct link with the other countries of the European Union. It maintains that, for that reason, the transport services provided on the routes between Greece and Italy are, in the eyes of the Greek authorities, services of general public interest. Indeed, guaranteeing the permanent, regular operation of these lines was and still is a priority of the Greek Government, as is plain from the letter sent on 17 March 1995 to the Commission by the Deputy Permanent Representative of the Hellenic Republic to the European Communities.

154 Secondly, the applicant explains the essential characteristics of Greek legislation relating to merchant shipping in Greece and of the policy pursued by the Greek Ministry of Merchant Shipping.

155 The applicant observes that shipping in Greece is governed by the public law shipping code, the private law shipping code and by other specific regulations that contain provisions on unfair competition in the maritime transport sector, including in particular Law No 4195/29. Because of those laws, maritime transport companies are governed by a legislative and regulatory framework that is very strict and includes a prohibition on all unfair competition. Lastly, the applicant points out that Law No 4195/29 on unfair competition concerns not only the conduct of shipping companies on domestic routes, but also their conduct on long-distance routes to foreign destinations.

156 Next, the applicant describes the principal characteristics of the policy pursued by the Ministry of Merchant Shipping which it regards as pertinent to an understanding of the conduct of the undertakings involved in this case. It maintains that the ministry adopts all necessary measures on the basis of the legislation just mentioned, availing itself fully of the powers conferred on it by that legislation. Such measures include (a) the grant of 'operating licences' for domestic routes, including licences for the domestic segments of international

journeys; (b) ratification of uniform mandatory tariffs for domestic connections or for the domestic segments of international connections, such as the Patras-Igoumenitsa-Corfu leg, a measure which has strong repercussions on the tariffs applicable to the international segments of journeys; (c) annual approval of connections by ministerial decision: the decision falls within the discretion of the competent minister and, once granted, places shipping companies under an obligation to comply with the approved connections, which amounts to a periodic market-sharing exercise on the part of the State; (d) monitoring of the periods for which ships lie in dock so as to ensure that mandatory connections are facilitated; this may include prohibiting ships from lying in dock and if an authorised period of lying in dock is exceeded, fines may be imposed; (e) the imposition of mandatory negotiations between shipping companies so as to programme and coordinate connections before routing plans are approved by the Ministry of Merchant Shipping for the coming year, in the context of new negotiations between the ministry and the companies.

157 As regards more specifically the routes between Greece and Italy, the vital importance to Greece of these transport links and the need to promote tourism in Greece have led all Greek governments to seek to ensure their smooth operation, on a regular and permanent basis, with services of as high a quality as possible and costs as low as possible.

158 The applicant maintains that the legislative framework and the policy adopted by the Ministry of Merchant Shipping engendered a climate which not only favoured but essentially demanded contact, consultation and negotiation between shipping companies in relation to the fundamental parameters of commercial policy. The applicant describes how tariffs for domestic lines were in practice fixed by the Ministry of Merchant Shipping.

159 The applicant maintains that, taking that practice into account, the companies were obliged to agree not only on connections but also on the tariffs to be applied

on domestic routes, so that a proposal could be put to the minister with a view to obtaining his approval of the tariffs. That, according to the applicant, explains the contacts, consultations, exchanges of information and 'agreements' on tariffs and on any adjustments to those tariffs occasioned by inflation and by the constant fluctuations in the rate of exchange between drachmas and foreign currencies. Against that background, it is natural, almost unavoidable, that companies should exchange information, including information on the tariffs charged for entire journeys, which, in the case of the Patras-Igoumenitsa-Corfu-Italy line, include both the domestic leg (Patras-Igoumenitsa-Corfu) and the international leg of the journey, since the other parameters for setting domestic tariffs are also calculated on the basis not only of the domestic segment of the journey but of the entire journey, as is dictated by normal economic logic.

160 The truth of these assertions is confirmed by the letter sent on 17 March 1995 by Mr Vassilakis, the Deputy Permanent Representative of the Hellenic Republic to the European Communities. That letter shows that the administrative fixing of tariffs for the domestic segments of routes is a factor which has an impact on the tariffs for the international segments of routes between Greece and Italy inasmuch as they act as indicative prices. According to the letter, a second factor is the instructions which the Ministry of Merchant Shipping gives to shipping companies to keep the tariffs applied to the international legs of routes low and to keep annual increases within the level of inflation. The third factor mentioned in the letter is the Greek legislation on unfair competition and, in particular, Law No 4195/29, which prohibits the application on international routes of fares which would be derisory or disproportionate by comparison with passengers' requirements in terms of safety and comfort and any reduction in prices by comparison with the tariffs generally applied in the port, albeit at the same time allowing the Ministry of Merchant Shipping to intervene by imposing upper and lower levels of fares. Lastly, the applicant states that the Ministry of Merchant Shipping may at any time call upon shipping companies to prevent any possible price war so that it is not obliged to intervene and make use of its powers under Law No 4195/29.

161 More specifically, the applicant refers to the way in which the Decision describes (at paragraphs 98 to 108) the role played by the Greek public authorities. It criticises the Commission for merely setting out the arguments made by the companies on this point without examining their merits. The Decision contains a serious error in its assessment of the factual circumstances in that the Commission ought to have attributed special importance to the simultaneous concourse of all the relevant parameters, namely the fact that the transport services on the routes between Greece and Italy are provided in the public interest, the establishment of mandatory, uniform tariffs for domestic routes and the domestic part of international lines, the restriction of tariff increases on the international routes, the prohibition on unfair price competition laid down in Law No 4195/29, the fixed costs attributable to reducing the time for which ships may lie in dock to two months, except in cases of *force majeure*, the obligation to employ crews made up exclusively of Greek (or Community) nationals who are protected by the very strict Greek legislation on seafarers, and the obligation to reserve a minimum of space for goods vehicles transporting delicate produce such as fresh fruit and vegetables, which, especially in high season, results in the loss of the revenue that could be obtained if the space were given over to tourist vehicles, which bring more passengers and thus additional revenue (see paragraph 18(d) of the confidential memorandum of 6 October 1994 which Minoan sent to the European Commission). Had the Commission properly understood the letter from the Permanent Representation, it would have concluded that the concourse of those parameters, which were expressly set out in the letter, has a decisive effect on the autonomy of the Greek shipping companies when planning and forming their pricing policy.

162 The applicant argues that, taking account of that background, Article 85(1) of the Treaty is not applicable to the present case because the 'cumulative effect' just described was the consequence of legislative and regulatory measures which, taken as a whole, very firmly limit the autonomy of the shipping companies, especially as regards the fixing of tariffs for the international parts of the routes between Greece and Italy. In this connection the applicant makes particular reference to the judgment in *Suiker Unie and Others* v *Commission*, cited above, and to the judgment of the Court of Justice in Case 311/85 *Vlaamse Reisbureaus* [1987] ECR 3801, in which the Court acknowledged that certain State regulations, and in particular provisions concerning unfair competition, may in fact restrict the business freedom of the undertaking subject to them.

163 The applicant adds that another important consequence of the cumulative effect of the measures just mentioned is distortion of competition, because only certain companies operating lines between Greece and Italy are subject to the regulatory framework, namely those whose ships fly the Greek flag. They alone must hold the necessary operating licence which, as in Minoan's case, is granted subject to a series of very onerous obligations. The other shipping companies operating lines between Greece and Italy, on the other hand, are not subject to that regulatory framework and are therefore quite free to plan their business solely according to the profit principle.

164 In the event that the Court should find that the applicant participated directly in the contacts and negotiations in issue, Minoan argues that the sole aim of its conduct was to comply with, or give the impression of complying with the existing regulatory framework in Greece, which is characterised by the imposition upon undertakings of positive obligations (such as the obligation to negotiate itineraries and domestic tariffs) and prohibitions (such as that on unfair price competition). The applicant observes that failure to comply with the legislatory and regulatory framework may be sanctioned by a series of State intervention measures, such as the imposition by the Ministry of Merchant Shipping of minimum and maximum prices, where there is unfair competition, and heavy penalties, whereas failure to comply with the 'agreements' with which the Decision is concerned could not lead to any sanction because the undertakings concerned did not agree on any mechanism of compulsion.

165 Lastly, the applicant disputes that its attitude of complying with rules and regulations on unfair competition can be regarded as restrictive of competition within the meaning of Article 85(1) of the Treaty.

166 In the circumstances, the applicant concludes that its conduct in this case does not fall within the scope of Article 85 of the Treaty and that, in any event, should certain ancillary aspects of its conduct be found to fall within the scope of that

provision, any infringement of which it is guilty is not a grave one, given its legal and economic context and the cumulative effect of the various parameters which had a decisive influence on its conduct.

167 The Commission, for its part, takes issue with the applicant's argument that the legislative and regulatory framework resulting from the policy of the Ministry of Merchant Shipping had the cumulative effect of restricting the autonomy of the undertakings referred to in the Decision.

168 As regards, first of all, the legislative and regulatory framework governing the functioning of merchant shipping in Greece, the Commission disputes certain of the applicant's assertions regarding its extent and influence on international traffic and considers it necessary to make some important remarks.

169 First, the Commission observes that the grant of an operating licence, the setting of mandatory tariffs, the annual approval of routes and the ministry's monitoring of periods for which ships lie in dock all relate to domestic lines, not international lines.

170 Next, the Commission argues that neither the conclusion, between undertakings charged with anti-competitive conduct, of agreements to set tariffs on domestic lines nor their mutual consultation and exchange of confidential information on domestic lines are contemplated by any legal provision and that, in any event, even if the Greek Ministry of Merchant Shipping actually favoured that practice, it still related only to domestic lines.

171 The Commission also raises the matter of the nature of the transport services offered on the lines between Greece and Italy, which are described as 'services of public interest'. It doubts that the letter of 17 March 1995 from the Deputy Permanent Representative of the Hellenic Republic to the European Communities can be viewed as proving that these services must be taken to be 'services of public interest'. In so far as, by making that assertion, the applicant claims that it should be treated as an undertaking 'entrusted with the operation of services of general economic interest' and, consequently, that it is subject to the rules on competition only to the extent that application of those rules does not obstruct the performance, in law or in fact, of the tasks entrusted to it, the Commission argues that, in the circumstances of the case, the conditions for applying this concept of 'undertakings entrusted with the operation of services of general economic interest' are not satisfied. The Commission says that the notion must be interpreted narrowly, given that it affects a provision which, in certain circumstances, permits derogation from the rules of the Treaty.

172 The Commission also takes issue with the argument that the concourse of the parameters mentioned, which the applicant says influenced the tariffs applicable to the international part of routes between Greece and Italy, restricted the autonomy of the undertakings when planning and deciding their pricing policy. The Commission adds that, even if it were proved that the parameters had influenced the level at which the tariffs in question were fixed, any such influence would, in any event, have been merely indirect and partial and not such as to indicate that the undertakings were in this case deprived of a certain margin of autonomy in defining their tariff policy. The Commission refers, in this connection, to the case-law which states that Articles 85 and 86 may apply if it appears that the national legislation does not preclude undertakings from voluntarily engaging in conduct which prevents, restricts or distorts competition (Joined Cases C-359/95 P and C-379/95 P *Commission and France* v *Ladbroke Racing* [1997] ECR I-6265, paragraph 34)

173 According to the Commission, it follows that, in accordance with the case-law, in order for conduct to escape application of Article 85(1) of the Treaty, the following conditions must be satisfied: (a) there must be a legal provision of a coercive nature, capable of affecting the free play of competition within the

common market and in trade between the Member States, (b) the legal provision in question must have no connection with any conduct on the part of undertakings which falls within the scope of Article 85(1) of the Treaty and (c) the undertakings concerned must simply comply with the legal provision in question.

174 However, the Commission takes the view that those conditions have not in fact been satisfied.

175 The Commission submits that it is established that the undertakings with which the Decision is concerned, including the applicant, acted autonomously when deciding upon the options of their commercial policy and as a matter of practice entered into prohibited agreements with each other the purpose of which was to set the tariffs applicable on international lines, irrespective of whether or not they took account of the law and of the instructions of the Greek Ministry of Merchant Shipping.

Findings of the Court

176 It is clear from the case-law that Articles 85 and 86 of the EC Treaty apply only to anti-competitive conduct engaged in by undertakings on their own initiative (see, to that effect, Case 41/83 *Italy* v *Commission* [1985] ECR 873, paragraphs 18 to 20, Case C-202/88 *France* v *Commission* [1991] ECR I-1223, paragraph 55, Case C-18/88 *GB-INNO-BM* [1991] ECR I-5941, paragraph 20, and *Commission and France* v *Ladbroke Racing*, cited above, paragraph 33). If anti-competitive conduct is required of undertakings by national legislation or if the latter creates a legal framework which itself eliminates any possibility of competitive activity on their part, Articles 85 and 86 do not apply. In such a situation, the restriction on competition is not attributable, as those provisions implicitly require, to the

autonomous conduct of the undertakings (*Commission and France* v *Ladbroke Racing*, cited above, paragraph 33, Case T-228/97 *Irish Sugar* v *Commission* [1999] ECR II-2969, paragraph 130, and Case T-513/93 *Consiglio Nazionale degli Spedizionieri Doganali* v *Commission* [2000] ECR II-1807, paragraph 58).

177 Articles 85 and 86 may apply, however, if it is found that the national legislation does not preclude undertakings from engaging in autonomous conduct which prevents, restricts or distorts competition (Joined Cases 209/78 to 215/78 and 218/78 *Van Landewyck and Others* v *Commission* [1980] ECR 3125, paragraph 126, *Commission and France* v *Ladbroke Racing*, cited above, paragraph 34, *Irish Sugar* v *Commission*, cited above, paragraph 130, and *Consiglio Nazionale degli Spedizionieri Doganali* v *Commission*, cited above, paragraph 59).

178 Moreover, it should be recalled that the possibility of excluding specific anti-competitive conduct from the scope of Article 85(1), on the ground that it was required of the undertakings in question by existing national legislation or that any possibility of competitive activity on their part has been eliminated, has been applied restrictively by the Community judicature (*Van Landewyck and Others* v *Commission*, cited above, paragraphs 130 and 133, *Italy* v *Commission*, cited above, paragraph 19, Joined Cases 240/82 to 242/82, 261/82, 262/82, 268/82 and 269/82 *Stichting Sigarettenindustrie and Others* v *Commission* [1985] ECR 3831, paragraphs 27 to 29, Case T-387/94 *Asia Motor France and Others* v *Commission* [1996] ECR II-961, paragraphs 60 and 65, and *Consiglio Nazionale degli Spedizionieri Doganali* v *Commission*, cited above, paragraph 60).

179 Thus, in the absence of any binding regulatory provision imposing anti-competitive conduct, the Commission is entitled to conclude that the operators in question enjoyed no autonomy only if it appears on the basis of objective,

relevant and consistent evidence that that conduct was unilaterally imposed upon them by the national authorities through the exercise of irresistible pressures, such as, for example, the threat to adopt State measures likely to cause them to sustain substantial losses (*Asia Motor France and Others* v *Commission*, cited above, paragraph 65).

180 In the present case, the applicant's argument consists in maintaining that the existing legislative and regulatory framework in Greece and the policy pursued by the Greek Ministry of Merchant Shipping decisively restricted the autonomy of the shipping companies, in particular in so far as concerns the fixing of tariffs applicable both on the domestic routes and on the international segments of routes between Greece and Italy. It follows, says the applicant, that the shipping companies found themselves obliged to contact each other, to consult and to negotiate in relation to the fundamental parameters of their commercial policy, such as their prices.

181 The Court must therefore establish whether the conduct complained of in this case has its origin in the national legislation or in the practices of the Greek authorities or, on the other hand, to some extent at least, in the will of the applicant and of the other undertakings which participated in the agreements. The Court must therefore determine whether the legislative and regulatory framework and the policy of the Greek Ministry of Merchant Shipping had the cumulative effect of robbing the undertakings of their autonomy in adopting a tariff policy for the routes between Greece and Italy and thus of removing any possibility of competition between them.

182 Merchant shipping in Greece is governed by the public law shipping code, the private law shipping code and by other specific regulations that contain provisions on unfair competition in the maritime transport sector, including in particular Law No 4195/29 on unfair competition and Law No 703/77 on free competition, which entered into force on 1 January 1979 with a view to the Hellenic Republic's accession to the European Communities.

183 In the exercise of its powers under the legislation just mentioned, the Ministry of Merchant Shipping adopts the following measures, inter alia: (a) the grant of 'operating licences' for domestic routes, including licences for the domestic segments of international journeys; (b) ratification of uniform mandatory tariffs for domestic routes or for the domestic segments of international routes, such as the Patras-Igoumenitsa-Corfu leg; (c) annual approval of connections; (d) monitoring of the periods for which ships lie in dock so as to ensure that mandatory connections are facilitated, and (e) the imposition of mandatory negotiations between shipping companies so as to programme and coordinate connections before routing plans are approved by the Ministry of Merchant Shipping for the coming year, in the context of new negotiations between the ministry and the shipping companies.

184 The parties are agreed that the grant of operating licences, the setting of mandatory tariffs, the annual approval of routes and the Greek Ministry of Merchant Shipping's monitoring of periods for which ships lie in dock all relate to domestic, not international lines. Moreover, the Commission stated in its pleadings, without being contradicted on the point by the applicant, that the obligation to operate regular services, which attaches to the operating licence, solely affects ships flying the Greek flag which serve domestic routes only or which serve international routes, but in the case of the latter the obligation attaches only in respect of the domestic part of the journey. Similarly, the Commission has pointed up, again without being contradicted on the point, that the undertakings were free to choose to serve international lines with or without a domestic leg, or even purely domestic lines. Therefore, if an undertaking chose to serve international lines with no national segment there was no need for it to obtain an operating licence or to comply with the obligations attaching thereto.

185 Similarly, for the purpose of fixing tariffs for domestic routes, the Ministry of Merchant Shipping asked shipping companies to submit overall proposals for each route, justifying the figures proposed by reference to operating costs, inflation, the profitability of lines, the frequency of journeys, and so on. Next, on the basis of the tariffs proposed, the justification for them and other more general criteria relating to overall government policy, the ministry would approve or amend the proposals after taking the opinion of the prices and revenue

commission of the Greek finance ministry, such approval or amendment having in fact the effect of fixing the tariffs in question. The administrative fixing of tariffs for the domestic segments of corresponding connections would therefore have an impact on the tariffs for the international segments of routes between Greece and Italy inasmuch as they would serve as indicative prices.

186 Greek legislation relating to unfair competition and, in particular, Article 2 of Law No 4195/29, prohibits 'in the case of routes to destinations abroad, any reduction in the tariffs for transporting passengers or goods which, charged for anti-competitive purposes, brings prices to levels that are derisory or disproportionate in comparison with what would be a reasonable and just charge for the services provided and with passenger's requirements in terms of security and comfort or to levels lower than those that are generally applied in the port in question'. Article 4 of Law No 4195/29 provides that:

'where freedom to fix tariffs for routes to destinations abroad leads to unfair competition, in addition to applying the foregoing provisions, the Ministry of Shipping (Department of Merchant Shipping) may, after taking the opinion of the council for merchant shipping, fix upper and lower limits for tariffs for transporting passengers and goods on Greek passenger vessels travelling between Greek ports and ports abroad. Compliance with those limits is mandatory and offenders will be subject to the penalties laid down in Article 3.'

187 Moreover, it has been alleged that the Ministry of Merchant Shipping encouraged shipping companies to fix low rates for the international legs of routes, to keep annual increases within the level of inflation and to prevent any kind of price war between themselves, so that it not be obliged to intervene and make use of its powers under Law No 4195/29.

188 In its letter of 23 December 1994, mentioned in paragraph 101 of the Decision, which was sent in reply to the Commission's letter of 28 October 1994, the Ministry of Merchant Shipping stated:

'...

As far as the memorandum submitted by Strintzis Lines is concerned, I have no particular comments apart from clarifying that there is no involvement of the Ministry in the rate fixing policy which is followed by the companies on the international routes. Our involvement is strictly confined in the fixing of prices in domestic routes only.

As I have already explained in more detail to you in our September meeting, Greece considers the sea corridor between the west Greek ports and the Italian east ports of paramount national as well as Community importance since it is the only main direct link to connect Greece with the rest of the European Union.

It is therefore to our national and Community interests that the vessels engaged between Greece and Italy operate all year round, to facilitate our import-export trade as well as the passenger traffic. Furthermore, as you may well understand, it is to our national interest that the tariff rates applied must be competitive, but at the same time at a level where the transportation cost will be kept low, so as our import-export trade be kept competitive in the European markets.

Now I come to the specific question you have put to me and I must say that I haven't seen anything in the Strintzis memorandum that could possibly guide me to that conclusion.

I am sure that there is a misunderstanding. It is unthinkable and it is out of any question that the Ministry threatens to withdraw operating licences for domestic routes if companies fail to agree prices on international routes.

As you will see from the relevant legislation I have attached herewith, when the Ministry accords an operating licence for the domestic trades, there are certain obligations (all year round services, frequency of sailings, etc.) which must be respected, otherwise the Ministry has the right to withdraw the licence. Furthermore, the tariffs are determined by a Ministerial Decision which is being issued periodically. This specific legislation affects the vessels of the respective companies with operating licences for the domestic part of the voyage between Greece and Italy (Patras-Igoumenitsa-Corfu)...'

189 Similarly, by letter of 17 March 1995 (referred to in paragraph 103 of the Decision), sent in reply to the Commission's letter of 13 January 1995, the Deputy Permanent Representative of the Hellenic Republic to the European Union, wrote:

'1. The Greek Government attaches great importance to the smooth promotion of the sea route linking the ports between western Greece (principally Patras, Igoumenitsa and Corfu) and the Italian ports of Ancona, Bari, Brindisi and Trieste.

...

Regular, uninterrupted sailings, throughout the year, between Greek and Italian ports, are a factor of decisive importance in enabling and ensuring the

development of Greek import and export trade and thus, in a wider sense, Community trade as a whole.

The policy of the Greek Government and, more specifically, of the Ministry of Merchant Shipping, which is responsible for defining national policy for maritime transport, is thus directed toward preserving the smooth operation of the route between Greece and Italy.

The services offered on this route are regarded by us as services of public interest for our country. Given that, you will understand that it is a fundamental concern to the Greek Government to ensure the viability of this route and the prevention by all possible means of a price war which could hinder the smooth progression of import and export trade or the transport of vehicles and passengers. I would reiterate that our principal concern is to ensure operation of the route throughout the year and to avoid interruptions due to a price war.

2. Given those facts and the positions adopted in consequence, the competent departments of the Greek Ministry of Merchant Shipping adopted decisions aimed at regulating in the most appropriate manner the normal transportation of vehicles during any given period of the year. Measures were therefore adopted to ensure that a certain number of places always be reserved for goods vehicles on passenger and vehicle ships and that the ships' vehicle deck never be entirely filled with tourist vehicles, especially during the summer months when there are more passengers. This has made it possible to maintain the movement of goods and to keep markets supplied.

Care is also taken to keep very strictly to shipping route plans, so as to avoid delays, but also so that issues can be dealt with such as the presence of appropriate receiving facilities at ports of destination, which are needed to ensure

the safety of and improve the service provided to the passengers and vehicles carried.

3. As regards freight charges applied by the shipping companies, I would observe that the involvement of the Ministry of Merchant Shipping, as the authority responsible for regulating shipping, in cabotage freight, is limited to fixing prices solely for national cabotage operations. I would point out that, on international lines, even where the journey includes calls at Greek ports (for example Patras-Corfu-Ancona), whilst the part of the journey between the Greek ports is subject to an agreed price schedule, the prices on the journey between Greece and Italy are fixed freely by the companies operating that line. It is true, in such a case, that the total price of the ticket for a journey to Italy is influenced — indirectly and partially, of course — by the tariff fixed by the State for the transport within Greece.

Moreover, as regards the tariffs for journeys abroad — which are freely fixed, as I said — the Ministry of Merchant Shipping encourages the shipping companies to keep them low and competitive and in any event to keep annual increases within the level of inflation. Our national interests in fact demand that our export trade is kept competitive and that our imports remain as cheap as possible. Other than that, the companies are free to fix their tariff rates according to their own commercial and economic criteria.

That freedom is restricted by Greek legislation if it leads to unfair competition. More specifically, Law No 4195/29 (a copy of which is attached) seeks to prevent unfair competition between shipping lines operating on routes between Greece and destinations abroad, inter alia, by prohibiting derisory tariff rates, the simultaneous departure from the same port of two or more ships serving the same line and failure to operate the published service (except in certain cases of *force majeure* — Article 3). Where there is unfair competition, the Ministry of Merchant Shipping may set upper and lower levels of fares (Article 4). Where it

does so, it will informally encourage the companies to keep their tariff rates low and to prevent annual increases from exceeding the rate of inflation.

4. Those observations seemed to me to be necessary in order to demonstrate that the line between Patras and Italy, which was created by private enterprise without any State aid, must continue to operate without interruption so that the ships which serve that line can continue to provide services of public interest, as we regard them to be for our country, for that sea link is the only direct link between our country and the other countries of the European Union.

5. Lastly, I would point out that the legal framework governing the grant and withdrawal of operating licences which, I would stress, apply only to domestic routes within Greece, provides that, where a company fails to comply with the obligations set out in the operating licence granted it (regarding, for example, faultless operation of published lines, the annual period of lying in dock, maintaining the proper frequency of sailings), the Ministry of Merchant Shipping may withdraw the licence.'

190 Whilst those two letters from the Greek authorities emphasise that the proper functioning and regularity of the maritime lines connecting Greece with Italy is a question of national importance, they confirm that neither the legislation applicable in Greece nor the policy implemented by the Greek authorities demands that agreements be concluded to fix the tariff rates applicable on international lines.

191 Admittedly, the information given to the Commission by the Greek authorities makes it clear that one of the authorities' main concerns was to ensure regular service throughout the year on maritime lines to Italy and that they were also anxious about the adverse effects that might be caused by unfair competition, such as a price war. It is also clear that, in order to prevent unfair competition, the law grants the Ministry of Merchant Shipping power to set upper and lower

limits for tariffs. However, the fact remains that no concertation on prices would be legitimate, even in a case such as this, because each undertaking would still remain free to decide its prices, autonomously, within the upper and lower limits set. Moreover, the information offered in the letters just considered confirms that prices on maritime routes between Greece and Italy are set freely by the companies operating those lines. Furthermore, it is also indisputably clear from what is said in those letters that, in order to ensure that Greek exports remain competitive and that the price of imports to Greece remains reasonable, the Ministry of Merchant Shipping encouraged shipping companies not to increase their prices in concert but merely to keep their prices low and competitive, so as to avoid, in any event, annual increases greater than the rate of inflation.

192 It follows that each of the shipping companies serving those lines enjoyed acknowledged autonomy in setting its pricing policy and was thus at all times subject to the rules on competition. The letters point up the fact that, as far as the Greek authorities are concerned, full application of the competition rules and thus also of the prohibition of price agreements under Article 85(1) of the Treaty did not prevent the shipping companies, either in fact or in law, from fulfilling the task given them by the Greek Government. Therefore, the fact that, in its letter of 17 March 1995, the Permanent Representation of the Hellenic Republic describes the operation of lines between Greece and Italy as being 'services of public interest' is irrelevant for the purposes of applying Article 85 of the Treaty. For precisely the same reasons it is unnecessary to consider whether the Commission was right to dispute the argument that the undertakings with which the Decision is concerned must be viewed under Community law as 'undertakings entrusted with the operation of services of general economic interest', within the meaning of Article 90(2) of the EC Treaty (now Article 86(2) EC).

193 The information contained in the letters mentioned confirms that the applicant cannot succeed in its allegation that the cumulative effect of the parameters influenced the tariff rates applicable to the international part of lines between Greece and Italy and had the effect of restricting the autonomy of the undertakings in planning and deciding their pricing policy. It confirms that the

Greek Ministry of Merchant Shipping intervened in the tariff-fixing policy applied by the shipping companies on international lines only to the extent of encouraging them to keep their tariffs low and to keep annual increases within the level of inflation. Given that attitude on the part of the Greek authorities, there remained the clear possibility of competition on the market that could be prevented, restricted or distorted by the autonomous conduct of undertakings.

194 It must be added that Law No 4195/29 contains no prohibition on reducing the tariffs applicable on international lines. Whilst that law, whose purpose is to preclude any unfair competition between shipping companies operating lines between Greek and foreign ports, specifically prohibits the reduction of tariffs to derisory levels, the simultaneous departure from the same port of two or more ships serving the same line and failure to operate the published service, except in certain cases of *force majeure* (Article 2), it does not rob the undertakings impugned by the Commission of all 'margin of autonomy'. On the contrary, it confirms that each undertaking is, in principle, free to determine its tariff policy as it sees fit, provided that it does not enter into unfair competition. The prohibition on unfair competition can in no way be interpreted as requiring the undertakings in question to conclude agreements to fix the tariffs applicable on international lines. In the absence of any binding regulatory provision imposing anti-competitive conduct, the applicant can rely on a lack of autonomy only if it can produce objective, relevant and consistent evidence that that conduct was unilaterally imposed upon it by the Greek authorities through the exercise of irresistible pressure, such as, for example, the threat to adopt State measures likely to cause it to sustain substantial losses.

195 Now, the letters from the Greek authorities show that those authorities neither adopted measures nor employed any practice that could be deemed 'irresistible pressure' on the shipping companies compelling them to conclude tariff agreements. The applicant cannot therefore claim that the undertakings in question were deprived of any margin of autonomy in defining their tariff policy

or that the anti-competitive conduct of which the Commission complains was imposed on them by existing Greek legislation or by the policy implemented by the Greek authorities.

196 As regards the Ministry of Merchant Shipping's encouraging shipping companies to fix low rates on international routes and not to exceed the rate of inflation when applying annual increases, whilst the ministry's letter refers to informal 'encouragement', there is no suggestion in it of 'unilaterally imposing' such action on the companies. It was therefore open to the companies to resist the informal encouragement without thereby exposing themselves to any threat that State measures might be adopted. Furthermore, the Greek ministry categorically denied that it could threaten to withdraw operating licences for domestic routes should the companies fail to reach agreement on the tariffs applicable on international routes, and that is clear from the letter of 23 December 1994.

197 In so far as concerns the power conferred on the Greek Ministry of Merchant Shipping by Law No 4195/29 to set upper and lower price limits in the event of unfair competition, so as to prevent any price war, it must be observed that the law in question does not deprive the impugned undertakings of 'all margin of autonomy'. It gives them a certain liberty to determine their tariff policy provided that they do not engage in unfair competition. Indeed, according to Article 4 of Law No 4195/29, the Ministry of Merchant Shipping has no right to set upper or lower limits for the tariffs in question except where the freedom of the undertakings autonomously to fix the tariffs for routes to destinations abroad results in acts of unfair competition.

198 In light of all the foregoing the first limb of this plea must be rejected as unfounded.

B — Second limb: the contacts between the undertakings impugned by the Commission were wrongly construed as agreements prohibited by Article 85(1) of the Treaty

Arguments of the parties

199 The applicant disputes the Commission's legal characterisation of the contacts which the undertakings in question maintained. It argues that, whilst the authors of the documents to which the Commission alludes frequently use the expressions 'agreement', 'agreed' and 'we are agreed', there were no 'agreements' in the strict sense of the word or within the meaning of Article 85(1) of the Treaty, for in no case were mandatory obligations or enforcement mechanisms created. These supposed 'agreements' were instead intended to confirm the existence of a general code of conduct which, according to the applicant, was in any case imposed on the undertakings by the shipping regulations and by the policy of the Ministry of Merchant Shipping. It was for each shipping company to decide whether or not to adhere to that code of conduct, in accordance with the choices it made and its general view of the consequences of any departure from it. Any sanction for such departure could only emanate from the competent State authorities and so, according to the applicant, the danger was that the other companies would inform the competent authorities of any departure from the code of conduct or that they too would depart from it, which would probably have brought about a price war, with prices falling in a vicious circle, and the intervention of the surveillance authority, namely the Ministry of Merchant Shipping, which is traditionally opposed to such practices.

200 The applicant points to the purpose and scope of the 'agreements' just mentioned, emphasising that they related only to the published tariffs for international lines. In particular, they were not concerned with organisation of the commercial network, the commissions payable to agents and travel agencies, the credit policy of the companies with regard to their customers, advertising policy, the price of services and goods offered on ships (food, drink, duty free shopping, etc.),

upgrade policy, ad hoc discounts on published tariffs (which it is difficult for other companies and the Ministry of Merchant Shipping to learn of) and discounts on tariffs for goods vehicles (which are not published). Lastly, the applicant maintains that these essential factors undermined still further the 'agreements' on tariffs, the scope of which was in any case limited.

201 The applicant adds that the 'agreements' with which the Decision is concerned were not implemented in practice. It maintains that, as far as possible, it endeavoured to make use of the little freedom which it still had in fixing rates and, to that end, applied, especially on lines between Greece and Italy, significant discounts on published rates where economic circumstances permitted and pursuant to specific agreements concluded with its customers, either directly or indirectly via its agents, albeit avoiding any advertising so as not to run the risk of complaints from its competitors or direct or indirect pressure from the surveillance authority, the Ministry of Merchant Shipping.

202 The applicant refers, more specifically, to the various 'infringements' recorded in the Decision, year by year, and puts forward a series of points to show that the Commission's assessment of the facts was wrong inasmuch as it took the view that they fell within the scope of Article 85(1) of the Treaty.

203 The Commission submits that the evidence which it set out in detail in paragraphs 8 to 42 of the Decision shows that the conduct of the undertakings which it impugned, including the applicant, does indeed constitute an 'agreement between undertakings' within the meaning of Article 85(1) of the Treaty (see paragraphs 97 to 174 of the Decision).

Findings of the Court

1. General remarks

204 First of all, as the Court held after considering the previous plea, the applicant cannot, in the circumstances of this case, rely on the legislative and regulatory framework governing Greek merchant shipping as a means of avoiding application of Article 85(1) of the Treaty to the conduct with which the Decision is concerned.

205 It is therefore necessary to consider whether the Commission was right to classify the conduct referred to in the Decision as constituting an agreement prohibited by Article 85(1).

206 The evidence of the existence and scope of agreements between the undertakings impugned relating to international tariffs is set out in detail in paragraphs 8 to 42 of the Decision. It is appropriate to observe, first of all, that it is clear from paragraph 169 of the Decision that the applicant acknowledged the contacts, discussions and meetings listed in paragraphs 8 to 42. Like the other undertakings impugned, it did not dispute the factual basis of the Commission's statement of objections during the administrative procedure, a consideration which justified a substantial reduction in the fine imposed.

207 Next, the Court holds that the classification of these actions as agreements within the meaning of Article 85(1) of the Treaty cannot be called into question by the allegation that the agreements created no mandatory obligations or enforcement mechanisms for the purposes of their application. In order for there to be an agreement within the meaning of Article 85(1) of the Treaty it is sufficient that the undertakings in question should have expressed their joint intention to

conduct themselves on the market in a specific way (Case T-347/94 *Mayr-Melnhof* v *Commission* [1998] ECR II-1751, paragraph 65 and the case-law cited). As the Commission points out, even a gentlemen's agreement constitutes an agreement within the meaning of Article 85(1) of the Treaty (Case T-141/89 *Tréfileurope* v *Commission* [1995] ECR II-791, paragraphs 95 and 96 and the case-law cited).

208 The same applies to the applicant's argument that the agreements were not implemented in practice. The fact that an agreement to restrict competition is not implemented or followed is, according to consistent case-law, not sufficient to place it outside the scope of the prohibition laid down in Article 85(1) of the Treaty. It is participation in negotiations aimed at restricting competition that constitutes an infringement, even if the agreement is not performed (see, to that effect, *Mayr-Melnhof* v *Commission*, cited above, paragraph 135). Moreover, in deciding the amount of the fine, the Commission acknowledged that the infringement had little real impact on the market and accepted the submission of the undertakings concerned that they did not apply in full all the specific price agreements (paragraph 148 of the Decision). Thus, the argument which the applicant puts forward in an attempt to show that the agreements did not fall within the scope of Article 85(1) of the Treaty, namely that they were not in fact implemented, must be rejected, without it being necessary to consider whether, as the Commission maintains, they were in fact largely implemented by the applicant.

209 Lastly, the fact that the shipping companies in question competed to a certain extent in matters such as discounts, credit policy, the services provided on-board ships and so on, is irrelevant to the question whether Article 85(1) of the Treaty is applicable to the facts of the case because it is plain that any such competition was influenced by, and thus limited by, the agreement on published tariffs or on the basis on which reductions and discounts might be granted. That being so, the fact that the companies impugned by the Commission competed in matters other than tariffs is relevant only to deciding the amount of the fine. Now, as the Commission has emphasised, it is clear from paragraph 148 and 162 of the Decision that it took that circumstance into account when evaluating the gravity of the infringement and assessing the mitigating circumstances and reducing the fine.

210 Having regard to the foregoing, this limb of the plea must also be rejected.

211 The Court's conclusion is not undermined by the numerous factors to which the applicant alludes in an attempt to explain or alter the way in which, according to it, the conduct referred to in the Decision should be understood and interpreted. Whilst, in raising these factors, the applicant does not expressly dispute the fact that the conduct occurred, it is nevertheless appropriate to consider them in so far as they are intended to cast doubt upon the characterisation of the facts as an unlawful agreement and, thus, also upon the evidence against the applicant gathered by the Commission.

212 Examining these factors calls for a thorough analysis of the evidence set out in the Decision (in paragraphs 8 to 42).

2. The evidence of the agreement

213 In the operative part of the Decision the Commission sanctioned two infringements: first, the applicant, Anek, Karageorgis, Marlines and Strintzis were found to have infringed Article 85(1) of the Treaty by agreeing prices to be applied to roll-on roll-off ferry services between Patras and Ancona; secondly, the applicant, Anek, Karageorgis, Adriatica, Ventouris and Strintzis were found to have 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.

214 In this case it is clear from the wording of the passages of the documents placed before the Court and set out in the Decision that, from at least July 1987 onwards, there existed between the shipping companies serving the Patras to Ancona line a concurrence of wills regarding implementation of a common pricing policy for the various services provided.

215 The documents show that the companies undertook direct, regular negotiations in order to fix passenger and freight rates. These negotiations took place each year with a view to setting the tariff levels for the following year and periodically for the purpose of responding to problems arising during the course of the year.

216 A concurrence of wills of this kind constitutes an agreement within the meaning of Article 85(1) of the Treaty, as interpreted by the Community Courts, since, in order for there to be an agreement within the meaning of that provision, it is sufficient for the undertakings in question to have expressed their joint intention to conduct themselves in the market in a particular way (Case 41/69 *Chemiefarma* v *Commission* [1970] ECR 661, paragraph 112, *Van Landewyck and Others* v *Commission*, cited above, paragraph 86, Case C-49/92 P *Commission* v *Anic Partecipazioni* [1999] ECR I-4125, paragraph 130, *Tréfileurope* v *Commission*, cited above, paragraph 95, and 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 958).

217 It is appropriate in this connection to consider the literal meaning of the following passages of some of the documents contained in the file.

218 In a telex which it sent on 15 March 1989 to Anek, the applicant wrote:

'We regret that your refusal fully to accept the proposals we put forward in our earlier [message] at least for the time being prevents the conclusion of a broader agreement which would be extremely advantageous to our companies... We refer of course to your refusal of our proposals concerning the definition of a joint pricing policy for the Patras-Ancona route; and we ask you to understand the positions we set out below, which are intended as a response to your view that

you cannot accept the 1989 tariff in force for goods vehicles and that the pricing policy for the forthcoming year 1990 cannot be defined immediately.

...

In the last three months on the particular route two readjustments of the fares for goods vehicles have been agreed jointly by all the shipowners on the Patras-Ancona route, amounting to a total of 40%, and have certainly caused no agitation or difficulties with our driver colleagues.

...

The pricing policy for 1988, as mutually established with the other interested parties, was decided on 18 July 1987. This has in fact been the usual practice.'

219 In a telex which it sent to Anek on 22 October 1991, the applicant wrote:

'From the wording of the price list annexed to the circular to which you refer we note that you want to apply to the Patras-Trieste route the same fare that we have all agreed for the Patras-Ancona route.

You will realise that the obscurity in the wording causes us great concern, because it raises the prospect of a collapse of the equilibrium in tariffs which we have succeeded, with considerable difficulty, in establishing for all the Italian ports.

Let us remind you that by a joint effort — to which you yourselves contributed — we reorganised the tariffs as best we could and established differentials on the basis of the distances in nautical miles to the ports of Brindisi, Bari and Ancona.

We would add that, even at the time of the Bulgarian vessels *Trapezitsa* and *Tsarevits* (which were represented by your agent Mr Kallitsis) similar price regulation was introduced by common accord, including for the port of Trieste.

We would accordingly entreat you to defend — as you ought to do — the agreement between the 11 companies and the 36 vessels on the Greece-Italy crossing because given the intense differences which are smouldering away under the surface the existing agreement could well collapse.

We would suggest to you that the tariff for the Patras-Trieste trip should be put at 20% above that for the Patras-Ancona route (as indeed was the case in the past), so as to harmonise fully with the differentials between Ancona and the more southerly ports.

Our companies are obliged to notify you that if you insist on applying the same price from Trieste and Ancona for Greece, our agreement for a common price policy concerning the Ancona route will cease and each company will determine its own price policy.'

220 Lastly, in a telex sent on 5 September 1990 to Anek, Karageorgis and Minoan, Strintzis stated that one of the conditions for applying the proposed increase was 'a proportional increase in fares for the Bari and Brindisi routes'. It went on to say 'nevertheless, it is necessary to reach an agreement in principle between our four companies'.

221 Those documents, which are corroborated by all the other documents mentioned in the Decision, clearly show the existence of an agreement on prices for the route between Patras and Ancona.

222 Equally, the Commission was also in possession of documents proving the existence of similar conduct, also prohibited by Article 85(1) of the Treaty, in relation to the prices applicable on the routes between Patras and Bari and between Patras and Brindisi. These include a telex dated 8 December 1989 which contains a list of prices to be applied on the various routes from 10 December 1989 onwards and a telex of 24 November 1993 which refers to a meeting held that day and attended by the companies operating the various routes. The Commission's finding is also confirmed by other documents which refer to events occurring between those dates: a facsimile letter of 30 October 1990, a telex of 22 October 1991, a document dated 25 February 1992 and sent by ETA to Minoan, and a telex of 7 January 1993.

223 It follows that the Commission was entitled to conclude that it had sufficient evidence to prove the two infringements which it sanctioned: the agreements on the prices of the services applicable to roll-on roll-off ferries between Patras and Ancona and an agreement on the prices to be applied on the routes from Patras to Bari and Brindisi for the transport of goods vehicles.

224 Not only do these documents have probative force, but also their existence and authenticity have not been disputed by the undertakings impugned. In fact, Anek and Strintzis, at least, seem to have expressly admitted the substantive truth of the facts. The other companies do not appear to call them into question. (See paragraph 169 of the Decision).

225 It is appropriate to consider the evidence of the applicant's involvement in these infringements.

3. The Commission's evidence against the applicant

a) The evidence relating to 1987, 1988 and 1989 (paragraphs 9 to 12 of the Decision)

226 According to the applicant, the position which the companies adopted vis-à-vis Anek must be viewed in light of the fact that, under the existing regime, any direct and openly avowed practice of applying both published prices and significantly lower actual prices for goods vehicles would have been contrary to both Greek legislation (in particular, Article 2 of Law No 4195/29) and the stated policy of the Ministry of Merchant Shipping, which was clearly opposed to any price war between the shipping companies. The applicant observes that Anek's conduct may be explained by the fact that this was the first time that it had operated ships on international lines and it was not sufficiently aware of the incidence of the applicable Greek legislation or of the impact of the policy of the Ministry of Merchant Shipping on the conduct of the Greek companies operating on the international segments of routes between Greece and Italy.

227 As regards the readjustments of the fares referred to in paragraph 11 of the Decision, which took place in the space of three months on the Patras-Ancona line and totalled 40%, the applicant maintains that the statement in question was intended solely to impress Anek and in no way corresponded to reality. It adds that the readjustments were, in any event, not prompted by any profit motive, but by other factors, such as inflation and the increase in fuel prices attributable largely to a rise in the United States dollar and a fall in the drachma by comparison with other currencies, and in particular the Italian lira.

228 The Court considers it clear from the description of the facts given in paragraphs 9 to 12 of the Decision, which the applicant does not dispute, and especially from the evidence referred to in those paragraphs, that the applicant attempted to persuade Anek, by a telex sent on 15 March 1989, to take part in the agreement concluded on 18 July 1987 and that, faced with Anek's hesitation, the other companies (namely the applicant, Karageorgis, Marlines and Strintzis) decided to charge collectively, from 26 June 1989 onwards, the same goods vehicle tariffs as those applied by Anek. The telex of 22 June 1989 shows that the applicant informed Anek of this decision.

229 The Commission was therefore entitled to take the content of those telexes as proof not only the existence of an agreement but also that the applicant had played a leading role in that agreement. The applicant cannot, therefore, claim that it had wanted to inform Anek of the incidence of the applicable Greek legislation and of the impact of the policy of the Ministry of Merchant Shipping on the conduct of the Greek companies operating on the international segments of routes between Greece and Italy. Nor can it claim that such an agreement was necessary in order to prevent the companies from entering into unfair competition or applying prices that are derisory or disproportionate and contrary to the policy of the Ministry of Merchant Shipping, which was opposed to any price war between the companies. Proof that there was no question of a price war is to be found in the applicant's telex of 15 March 1989 to Anek which stated that, over the course of the previous three months, the other companies operating the route between Patras and Ancona had agreed on two readjustments totalling 40%, without that having created any problems with road hauliers.

b) The evidence relating to 1990 (paragraphs 13 to 20 of the Decision)

230 The applicant maintains that the negotiations and 'agreements' to which paragraphs 13 to 20 of the Decision refer are also attributable to the tactic adopted by each company of appearing to comply with the national rules so as to avoid provoking the intervention of the Ministry of Merchant Shipping. The applicant also observes that the tariffs for passengers and tourist vehicles are in any event published and adds that the reference tariffs for goods vehicles, which each company uses for the purpose of applying discounts and which are not published, could easily be ascertained by competitors thanks to transparency in the market.

231 As regards paragraph 16 of the Decision, the applicant asserts that Strintzis's facsimile of 8 December 1989 was sent after the mandatory negotiations between the companies had taken place towards the end of the calendar year. The applicant emphasises that the tariffs set out in the tables were purely for the domestic part of the journeys and that the Ministry of Merchant Shipping fixed these prices administratively at a level of up to 90% of the total price, as in the case of journeys to Bari and Brindisi. As far as the applicant is concerned, the signatures of the representatives of the companies in question must be not be taken as constituting a formal written 'agreement'. They may be explained by the fact that the documents in question, which state the variances which the companies regarded as reasonable between the rates for the line to Ancona and those for lines to Bari and Brindisi, were brought to the attention of Ventouris, which operated on the southern routes. The signatures merely mean that the companies accepted the principle that there should be a reasonable relationship between the distance of the journeys in nautical miles and the tariffs applied. The mention of an 'ideal' price for each category of goods vehicle, both for the line to Ancona and for those to Bari and Brindisi, was regarded as being of use in providing 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, so as to avoid any unfair competition which, as has been stated, was prohibited by current legislation and was contrary to the policy of the Ministry of Merchant Shipping. In other words, setting 'ideal' prices for the

various categories of goods vehicles was an attempt to set up a model for calculating the different tariffs to be applied according to the distance of the journey in nautical miles, not to apply a definitive price for each line and for each category of goods vehicle. That explains why Mr Sfinias, ETA's legal representative, signed the two tariffs, despite the fact that the applicant did not operate ships on routes to Bari or Brindisi and why the two tariffs were countersigned by Ventouris, which operated exclusively on those routes.

232 The applicant regards it as mistaken to say that the telex of 11 April 1990 sent by Anek to Karageorgis, Minoan and Strintzis 'shows again the common price policy in force in 1990' (see paragraph 17 of the Decision). The telex merely refers to an 'agreement' on certain precise parameters of the pricing policy which could in any event be easily ascertained by competitors, namely 'the passenger, passenger cars and truck vehicles fares', and does not concern either agents' commissions or group discounts. The wording of the telex does not imply that any common tariff policy was 'in force', as the Decision states.

233 As regards paragraphs 18 to 21 of the Decision, which concern the negotiations for a common increase in the tariffs for goods vehicles, the applicant observes that, as Strintzis's telex of 5 September 1990 and Karageorgis's telex of 10 October 1990 show, there was at that time a steep increase in fuel prices which led the Minister of Merchant Shipping to adjust the tariffs for the domestic part of the line, that is to say the Patras-Igoumenitsa-Corfu leg. According to the applicant, the four companies mentioned in the telex were probably canvassed on the need to adjust the tariffs for the remainder of the journey, that is to say the segment between Corfu and Ancona, so as to mitigate the consequences of the increase in transport costs and so that the companies might continue to use their ships on the route during the winter months when tourist traffic is non-existent. The applicant points out in this connection that the grant of 'operating licences' by the Ministry of Merchant Shipping is subject to the acceptance of a duty to provide a regular service throughout the year and that the licence may be withdrawn for non-compliance with its conditions and that other administrative and penal sanctions may be imposed under current legislation.

234 Lastly, the applicant submits that the telexes and documents relating to 1990 which are referred to in the Decision show that, in so far as they were in fact announced by a certain number of the companies, the price increases in question were not an attempt to increase profits but were dictated by the application of simple economic logic to the very significant increase in the cost of providing transportation.

235 This Court found, on considering the first limb of the present plea, that it must reject the argument that the shipping companies in question had no autonomy in determining their commercial policy. It also held that the agreements had not been imposed on the companies by current national legislation and that the Ministry of Merchant Shipping had in no way taken part in collusion on the tariffs applicable on international routes. That being so, the applicant cannot maintain that the negotiations referred to in the paragraphs of the Decision just mentioned are attributable to the tactic adopted by each company of appearing to comply with the national rules so as to avoid provoking the intervention of the Ministry of Merchant Shipping. Nor can it allege that mandatory negotiations concerning international tariffs were imposed on it by the Greek authorities. Lastly, in so far as the applicant does not dispute that it took part in the negotiations and contacts mentioned in the documents cited in paragraphs 13 to 20 of the Decision, there is no need for the Court to consider the other arguments alleging that transparency in the market in any event enabled competitors to ascertain what tariffs were applied to passengers and tourist vehicles.

236 As regards the facsimile which Strintzis sent on 8 December 1989 (paragraph 16 of the Decision) to the applicant, Anek, Karageorgis and Hellenic Mediterranean Lines, to which was attached the table of tariffs for goods vehicles to be applied from 10 December 1989 onwards on the routes between Patras and Ancona and between Patras and Bari and Brindisi, the applicant cannot claim that this is not proof of an agreement on prices. The alternative explanation that it was necessary to avoid unfair competition clearly cannot be accepted. The Court cannot accept the applicant's argument that setting 'ideal' prices for the various categories of goods vehicle was an attempt to set up a model for calculating the different tariffs to be applied according to the distance of the journey in nautical miles, not to

apply a definitive price for each line and for each category of goods vehicle. That argument fails to explain why the undertakings thought it necessary to append their signatures to a document the alleged object of which was merely to provide a point of reference.

c) Evidence relating to 1991

237 The applicant observes that the 10% increase in tariffs mentioned in paragraph 21 of the Decision was rendered necessary by the very high rate of inflation in Greece at that time. (It reached 25% in 1990.) The applicant emphasises that, in any event, the increase in prices remained below the rate of inflation.

238 Next, the applicant refers to the telex of 22 October 1991 and submits that Anek's proposal to set tariffs for the route between Patras and Trieste at the same level as for the route between Patras and Ancona amounted to unfair competition within the meaning of Article 2(a) of Law No 4195/29. According to the applicant, it follows that the 'agreements' to which the Commission refers amounted to nothing more than an acknowledgement in principle of the rule that tariffs should be proportional to the distance of the journey in nautical miles and a restatement of the need to avoid any unfair competition.

239 The applicant then refers to Anek's telex of 18 November 1991 (paragraph 23 of the Decision) and emphasises that Anek's main reason for not setting the tariffs for the route between Patras and Trieste higher than for the route between Patras and Ancona is that '[in the previous] year one of the four companies operated a ship on the Ancona-Piraeus-Heraklion route and not only was Anek not consulted, it was not even informed about the new tariffs, despite the fact that the routes began in Ancona and were consequently particularly subject to competition'. The applicant complains that the Commission passed over that passage in

silence in the Decision. It claims that the excerpt shows that Anek's attitude was a sort of 'reprisal' for the operation of the ship just mentioned, directed against the four companies, including the applicant. Moreover, Anek's response confirms that the declaration of an open price war would have had particularly grave consequences for all the undertakings because, being contrary to the frequently stated policy of the Ministry of Merchant Shipping, it would inevitably have brought about the ministry's intervention and the administrative fixing of upper and lower levels of tariffs pursuant to Article 4 of Law No 4195/29.

240 Notwithstanding, the Court finds that the evidence relating to 1991 mentioned in paragraphs 21 to 23 of the Decision is also conclusive. The fact that there was agreement on a common list of tariffs for the route between Patras and Ancona is particularly clear from the statements contained in the letter of 10 August 1990 which Karageorgis sent to the applicant, Anek and Strintzis. The letter says 'Following the agreement by the four companies that there should be a 5% increase on top of the first 5%, please find attached the new price schedules with the final 10%' (paragraph 21 of the Decision).

241 Similarly, a telex which the applicant, Karageorgis and Strintzis sent to Anek on 22 October 1991 states (paragraph 22 of the Decision):

'Let us remind you that by a joint effort — to which you yourselves contributed — we reorganised the tariffs as best we could and established differentials on the basis of the distances in nautical miles to the ports of Brindisi, Bari and Ancona... We would accordingly entreat you to defend — as you ought to do — the agreement between the 11 companies and the 36 vessels on the Greece-Italy crossing because given the intense differences which are smouldering

away under the surface the existing agreement could well collapse... our companies are obliged to notify you that if you insist on applying the same price from Trieste and Ancona for Greece, our agreement for a common price policy concerning the Ancona route will cease and each company will determine its own price policy'.

242 In the face of such direct and clear evidence, and taking into account its observations on the first limb of the third plea, the Court must reject the applicant's arguments.

d) Evidence relating to 1992 (paragraphs 24 to 29 of the Decision)

243 The applicant observes that uniformity in the tariffs for passengers and tourist vehicles may be explained by the fact that they are in any event published in the companies' brochures. Furthermore, the oligopolistic nature of the market combined with the stated policy of the Ministry of Merchant Shipping of permitting tariff increases only within the level of inflation and of avoiding all unfair price competition led, with mathematical precision, to the convergence of published prices. Consequently, it was in no company's interest to publish different tariffs for fear of immediately losing the ability to attract clients (should its prices be higher) or immediately being followed by the other companies (should they be lower). As regards the case of the company Calberson, mentioned in paragraph 27 of the Decision, the telex sent by ETA may be explained by the fact that Calberson had chosen to approach each company, falsely stating that the other companies had offered it a discount, which, being contrary to all economic sense, would clearly have amounted to unfair price competition prohibited by the legislation. That being so, according to the applicant, the companies reacted by endeavouring to find out if their competitors had indeed offered these unlikely discounts.

244 The document dated 25 February 1992 (paragraph 28 of the Decision), which relates to the Ortona route (not the Otrante route, as the Decision states) does not, according to the applicant, constitute evidence of an 'agreement' in the strict sense on tariff differentials for the various lines concluded by the companies operating those lines. The applicant maintains that, inasmuch as the table of tariffs at the end of the document states actual fares, it is no more than a simplified presentation of the fares for the various ports, supplied by its agent ETA for 'easier understanding', that is to say, to give the applicant an approximate means of comparison. The table does not prove that the fares in question were applied in practice by the various companies. As regards the adjustment of the tariffs for vehicles on the routes between Greece and Italy, the applicant observes that the excerpt from the telex of 7 January 1993 that is set out in paragraph 29 of the Decision gives a false impression of the real content of the telex because, as is clear when the telex is read as a whole, the 'last adjustment', to which the telex refers was one concerning the exchange rate between the drachma and the Italian lira, not any increase in prices expressed in those two currencies. Consequently, the reference — which solely concerns exchange rates, which, for the drachma, deteriorated by 15% — does not imply that there was any agreement in 1992 between the companies to apply the same prices.

245 Lastly, the applicant observes that paragraphs 24 to 29 do not provide a basis for the assertion that it concluded any agreement whatsoever with any company whatsoever for the routes to Bari and Brindisi for 1992.

246 As the Commission points out, the argument that actual competition took place not on published tariffs, but rather on discounts, cannot succeed. Given that the existence of agreements on prices has been proved, the alleged fact that the societies impugned by the Commission competed on aspects other than tariffs does not mean that Article 85(1) of the Treaty is inapplicable. The document extracts set out in paragraphs 24 and 25 of the Decision show that meetings were held between the applicant and Strintzis, Karageorgis and Anek in July and

October 1991 at which agreements were concluded concerning the tariff policy that those companies would apply in 1992. As is pointed out in paragraph 28 of the Decision, the document dated 25 February 1992 in which ETA reported to Minoan's head office on 'the latest development concerning the Italy route' is a clear indication that the agreement to maintain differentials between the tariffs applied on the various routes between Greece and Italy continued during 1992. Lastly, the evidence referred to in paragraphs 27 to 29 of the Decision, and in particular the telexes of 7 January 1992 and 7 January 1993, confirm that the applicant played a leading role in the collusion in issue.

247 Finally, it is appropriate to bear in mind the wording of the telex of 7 January 1993 sent by Minoan to Anek, Karageorgis and Strintzis, which shows that the two agreements imputed to the applicant (concerning the routes between Patras and Ancona and between Patras and Bari and Brindisi) continued in 1992:

'We point out that two years have passed since the vehicle tariff was last adjusted.

That means that there must be a new adjustment of the tariffs in drachmas or a reduction in the tariffs in lire.

As you can see, there is now a 15% variance between the two tariffs.

For that reason we propose a 15% adjustment of the tariff in drachmas (see the table below) from 1 February 1993 onwards.

Our decision to proceed to an agreement with you on the readjustment without first consulting with the companies on the other Italian routes is motivated by a desire to avoid the interminable discussions that would ensue if we were to embark on that consultation.

We believe that this joint agreement will be looked upon positively by those companies. If it is not, we believe that the loss of traffic on the more economic ports will not exceed the 15% tariff readjustment.

We would suggest that the tariffs for category 5, that is, vehicles between 12 and 15 metres long, will henceforth apply to vehicles between 12 and 16.5 metres in length (because it is a fact that most refrigerated vehicles are, and eventually all vehicles will be 16.5 metres long) and that the increase be 5% in lire (that is, from 910 000 to 950 000 Italian lire) for 15% to 23% in drachmas...'

248 In the face of such direct and clear evidence of the applicant's participation in the agreements the Court must reject the applicant's arguments.

e) Evidence relating to 1993

249 The applicant maintains that the proposals which ETA made at the conference of 21 May 1992, to which the telex of 27 May 1992 refers, were in fact no more than points of discussion. (Distinctions are made by Karageorgis and Strintzis and a reservation is expressed by Anek.) They were not binding on the applicant, as is clear from the fact that, in the telex, ETA asked it to consider the proposals and

give its approval. According to the applicant, the meeting held on 4 August 1992 (mentioned in paragraph 31 of the Decision), which addressed the question of 'no-shows' (where an agent sends a ticket on credit to a customer he knows and the customer fails to make the departure and refuses to pay for the wasted ticket even though a cabin might have been reserved), did not lead to a decision because the other companies were not inclined to agree to the suggested approach for dealing with the problem. The applicant argues that the mere information given it by ETA in this connection cannot amount to an infringement of Article 85 of the Treaty.

250 The telex of 6 November 1992 which ETA sent to the other companies operating on the Ancona line was, the applicant insists, sent on ETA's sole initiative and without the applicant's knowledge or approval.

251 As regards the tariffs for goods vehicles mentioned in paragraphs 36 and 37 of the Decision, the applicant states that, contrary to the Commission's submission, the readjustment was ascribable solely to the rate of exchange between the drachma and the lira, not to any simultaneous increase in the tariffs expressed in those two currencies, the readjustment of 15% envisaged fully corresponding to the depreciation of the drachma by comparison with the lira. As regards the meeting of 24 November 1993 and, in particular, the words 'the collapse of the previous agreement', the applicant says that there is no indication of what the agreement provided, when it was concluded, how long it remained in force or the matters it covered. In fact, 'the previous agreement' was nothing more than a non-binding declaration made by the various companies of their intention to comply with the principle of proportionality between distances of journeys in nautical miles and tariffs and to combat any unfair price competition. The applicant emphasises that, in the telex of 7 January 1993, mentioned in paragraph 36 of the Decision, the allusion to the wish to avoid 'interminable discussions' with the companies operating on the other routes to Italy shows that there was no common ground, not even on matters such as reasonable adaptation to developing exchange rates.

252 The Court takes the view that the documents referred to in paragraphs 30 to 37 of the Decision, just described, provide objective and consistent evidence of the continuance during 1993 of the agreement between the shipowners operating the lines between Patras and Ancona and between Patras and Bari and Brindisi. Furthermore, several of the documents contain evidence of the intention of the applicant and of the other companies operating the line between Patras and Ancona to call upon the companies serving the other lines to adhere to the price readjustment decided on for the line between Patras and Ancona.

253 For example, in the 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, the applicant 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.

254 Further confirmation of the continuance of the agreement may be found in the telex of 24 November 1993 in which the author states: '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.' This statement reveals that negotiations took place during 1993 in the course of which differences arose between undertakings certain of which were also party to the previous agreement (Ventouris, Adriatica, et al.). The words 'bit by bit' show that there was a whole series of negotiations between the companies (including the applicant) during the year, which amounts to proof that the applicant's participation continued from January to November 1993.

255 In the face of such direct and clear evidence of the continuation of the agreements and of the applicant's participation in them in 1993, the Court must reject the applicant's arguments.

f) Evidence relating to 1994

256 The applicant maintains that the agreement to which ETA refers in its telex of 24 November 1993 was nothing more than a non-binding statement acknowledging the need for reasonable proportionality between journey distances in nautical miles and tariffs and the need to prevent any unfair competition by means of derisory prices such as those charged by the companies on the so-called southerly routes. As regards the 'agreement on a readjustment of the vehicle tariff by approximately 15%' mentioned in the telex, the applicant doubts that any such agreement was in fact reached, still less that it was observed in practice. The wording of the telex may be ascribed to the wish of the applicant's agent, ETA, to vaunt the achievement of a significant success through the personal efforts of its legal representative, Mr Sfinias. The applicant adds that the purpose of the telex was probably to convince it to approve the 15% increase, which would also have increased ETA's income from commissions. It also adds that ETA's proposal to establish a new tariff offering a 30% discount for payment in cash, in order to encourage cash payment, was not followed and indeed had no consequences because the situation reverted to normality in July 1994 when all interested parties decided that the expected depreciation in the drachma would not in fact occur thanks, inter alia, to governmental measures taken to support the currency. The applicant regards it as wrong, in any event, to impute that initiative to it, to treat it as an infringement and, more generally, to conclude that an agreement was concluded to establish common tariffs for goods vehicles in 1994. Lastly, the applicant says that, even in 1994, it continued to grant substantial discounts to its clients pursuant to individual agreements.

257 It is in paragraphs 38 to 42 of the Decision that the Commission sets out the evidence which led it to conclude that the cartel continued in 1994 until at least the date of its investigation.

258 In paragraph 38 of the Decision the Commission relies on ETA's telex of 24 November 1993 to the applicant to show that the cartel continued in 1994, in

that the agreement was to come into effect on 16 December 1993. The telex also indicates that 14 companies were present at the meeting that day. The Decision then mentions a telex which the applicant sent on 13 May 1994 to Anek and Strintzis, which stated that a new type of trailer was becoming common on the Ancona route and suggested a new category of fare and a common implementation date. This telex was followed by further telexes of 25 May 1994 and 3 June 1994 on the same subject, also requesting agreement. Next, the Decision mentions a telex which ETA sent to Minoan's head office on 26 May 1994 and then the fact that the Commission's inspection at the premises of the undertakings took place in July 1994. Lastly, in paragraph 42 of the Decision, the Commission submits that there is no evidence that the companies continued their collusion after that date.

259 The telex of 24 November 1993 which ETA sent to Minoan's head office shows that, on that day, a meeting was attended by 14 shipping companies. According to paragraph 37 of the Decision the purpose of the meeting was the 1994 price readjustment for the routes between Patras and Ancona and between Patras and Brindisi and Bari. The author of the telex wrote:

'We are pleased to inform you that at today's meeting we achieved agreement on a readjustment of the vehicle tariff by approximately 15%. That agreement is 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.

...'

260 That document shows that the applicant participated in an agreement with certain companies to govern the manner in which they would conduct themselves in the market from 16 December 1993 onwards and, therefore, in 1994.

261 Similarly, the telexes of 13 May 1994, 25 May 1994 and 3 June 1994 provide objective and consistent evidence of the continuance during 1994 of the collusion between shipowners operating the line between Patras and Ancona and of the participation of the applicant through the intermediary of its sole agent.

262 In the face of such clear and direct evidence of the continuation of the applicant's participation in the collusion in 1994, up to the time of the Commission's investigation in July, the Court must reject the applicant's arguments.

263 In light of all the foregoing the Court must reject the second limb of this plea and rule that the third plea is unfounded in its entirety.

II — *The plea for annulment of the fine or a reduction in the amount of the fine*

264 In support of its claim for annulment of the fine imposed on it or a reduction in its amount the applicant puts forward a plea alleging infringement of Article 19(2) of Regulation No 4056/86 and of the guidelines for calculating fines.

A — *First limb: incorrect assessment of the gravity of the infringement*

Arguments of the parties

265 The applicant submits, first of all, that, by classifying the alleged infringement as serious (in paragraph 150 of the Decision), the Commission acted contrary to 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, hereinafter 'the Guidelines'), which are also applicable to fines imposed pursuant to Article 19(2) of Regulation No 4056/86. The applicant submits that the conditions which would permit the Commission to classify the infringement as serious have not been satisfied in this case, because the trade restrictions complained of were not applied strictly and were incapable of affecting a large part of the common market, a fact which is acknowledged in the Decision itself (in paragraphs 148 and 149). Consequently, for the purpose of calculating the basic amount of the fine, the infringement alleged against the impugned undertakings ought, at worst, to have been classified as a minor infringement, that category including trade restrictions with a limited market impact and affecting only a substantial but relatively limited part of the Community market. According to the applicant, the basic amount of the fine ought to have been no more than the figure given for minor infringements, namely EUR 1 million.

266 Secondly, the applicant submits that the distinction which the Commission drew, when calculating the fines, between the various types of transport company, that is, between large carriers, medium-sized carriers and small carriers (paragraphs 151 and 152 of the Decision), is arbitrary and places the applicant in an unfavourable position by comparison with its competitors. The applicant also submits that, in a pan-European context, it cannot be regarded as a large carrier, nor is it a point of reference for all its competitors. Lastly, the applicant argues

that the most reasonable criterion to use when determining the amount of the fine would be the market share of each undertaking on all lines between Greece and Italy (services market) because that criterion would also take account of the real ability of each undertaking to 'cause significant damage' in the market as a whole, as mentioned in paragraph 151 of the Decision.

267 The Commission argues that cartels falling within the categories described in Article 85(1) of the Treaty, which include agreements between undertakings to fix prices, are to be regarded as particularly serious, as is evidenced by the fact that the provision mentions them explicitly as an example of the sort of action that constitutes an infringement. Moreover, the Commission points out that, according to settled case-law, an agreement to fix prices by its nature restricts competition (see, to that effect, *Chemiefarma* v *Commission*, cited above, paragraph 133). Lastly, an infringement committed by a cartel which includes most of the active producers in the market in question, as in the present case, is a serious infringement.

268 The Commission also observes that, in principle, the Guidelines too classify cartels as very serious infringements. Nevertheless, in the present case, it took account (in paragraphs 146 to 150 of the Decision) of the factors raised by the applicant (see, in particular, paragraph 148), and also of the fact that the agreements had a limited impact on the market and produced their effects only in a limited area of the market. Its conclusion was that the infringement in the present case was a serious one, rather than a very serious one.

269 Lastly, the Commission argues that, when fixing the amount of a fine, account must be taken, as the Guidelines provide, of all the factors capable of influencing its conclusion as to the gravity of the infringement, one of those being the size of the undertakings participating in the prohibited practice. Given that there are considerable differences in the size of the undertakings in question in this case, this provides an adequate basis for assessing the weight and importance of each of them on the market and thus the real impact of their conduct on competition.

Findings of the Court

1. General remarks

270 In this case it is common ground that the Commission determined the fine imposed on the applicant in accordance with the general method for setting fines described in the Guidelines, which apply equally to fines imposed pursuant to Article 19(2) of Regulation No 4056/86. It is also appropriate to observe that the applicant does not dispute that the Guidelines apply.

271 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'.

272 The first paragraph of Section 1 of the Guidelines provides that, when calculating a fine, the basic amount will be determined according to the gravity and duration of the infringement, which are the only criteria referred to in Article 19(2) of Regulation No 4056/86.

273 According to the Guidelines, when calculating a fine, the Commission takes as the starting point a given amount determined by reference to the gravity of the infringement. The appraisal of the gravity of the infringement must take account of the actual nature of the infringement, its specific impact on the market, where

it can be measured, and the size of the relevant geographic market (Section 1 A, first paragraph). In that context, infringements are divided into three categories, namely 'minor infringements', for which the likely fines are between EUR 1 000 and EUR 1 million, 'serious infringements', for which the likely fines are between EUR 1 million and EUR 20 million, and 'very serious infringements' for which the fines are likely to exceed EUR 20 million (Section 1 A, first to third indents).

274 Next, mindful of the differential treatment which it is appropriate to apply to undertakings, the Guidelines state that, within each of those categories of infringement, and in particular the categories described as serious and very serious, the scale of fines allows differential treatment to be applied to undertakings according to the nature of the infringements committed (Section 1 A, third paragraph). It is also necessary to take account of the effective economic capacity of the offenders to cause significant damage to other operators, in particular consumers, and to set the amount of the fine at a level which ensures that it has a sufficiently deterrent effect (Section 1 A, fourth paragraph). Furthermore, account may be taken of the fact that large undertakings have in most cases infrastructures capable of providing them with legal and economic information on the basis of which they can better appreciate the unlawful nature of the conduct and the consequences stemming from it under competition law (Section 1 A, fifth paragraph).

275 Within each of the three categories just defined, it may be appropriate in cases involving several undertakings, such as cartels, to apply weightings to the amounts decided on so as to take account of the specific weight and therefore the real impact on competition of the unlawful conduct of each undertaking, especially where there is considerable disparity in the sizes of the undertakings that have committed an infringement of the same nature and to make consequential adjustments to the basic amount depending on the specific characteristics of each undertaking (Section 1 A, sixth paragraph).

276 As regards the factor relating to the duration of the infringement, the Guidelines draw a distinction between infringements of short duration (in general, less than one year), for which the starting amount, determined for gravity, should not be increased, infringements of medium duration (in general, one to five years), for which the amount determined for gravity may be increased by up to 50%, and infringements of long duration (in general, more than five years), for which the amount determined for gravity may be increased by 10% per year (first to third indents of the first paragraph of Section 1 B).

277 Next, the Guidelines set out, by way of example, a list of aggravating and mitigating circumstances which may be taken into consideration in order to increase or reduce the basic amount and refer to the Commission notice of 18 July 1996 on the non-imposition or reduction of fines in cartel cases (OJ 1996 C 207, p. 4) ('the Leniency Notice').

278 By way of a general remark, the Guidelines state that the final amount calculated according to this method (basic amount increased or reduced on a percentage basis) may not in any case exceed 10% of the worldwide turnover of the undertakings, as laid down by Article 19(2) of Regulation No 4056/86 (Section 5(a)). The Guidelines further provide that, depending on the circumstances, account should be taken, once the above calculations have been made, of certain objective factors such as a specific economic context, any economic or financial benefit derived by the offenders, the specific characteristics of the undertakings in question and their real ability to pay in a specific social context, and that the fines should be adjusted accordingly (Section 5(b)).

279 It follows that, under the method laid down in the Guidelines, fines continue to be calculated according to the two criteria referred to in Article 19(2) of Regulation No 4056/86, namely the gravity of the infringement and its duration, and the maximum percentage of turnover of each undertaking as laid down in that provision is observed. Consequently, the Guidelines do not go beyond the

legal framework of the fines set out in that provision (Case T-23/99 *LR AF 1998* v *Commission* [2002] ECR II-1705, paragraphs 231 and 232).

2. The merits of the first limb of the fourth plea

280 As has just been recalled, in the Guidelines, cartels are in principle classed as very serious infringements. That classification accords perfectly with the case-law of the Court of Justice and of the Court of First Instance, which holds this type of infringement to be one of the most serious restrictions of competition, especially where the cartel is concerned with price fixing.

281 Now, as far as the present case and the applicant's situation are concerned, it is clear from paragraphs 147 to 150 of the Decision that, although the Commission stated (in paragraph 147 of the Decision) that '[a]n agreement by which the price of transporting passengers and freight by roll-on roll-off ferries was agreed by some of the most important ferry operators in the relevant market constitutes, by its nature, a very serious breach of Community law', it in fact classed the infringement as being only a serious one (paragraph 150 of the Decision). It came to reduce the gravity of the infringement after observing that 'the infringement had a limited actual impact on the market' and that, 'during the period of the infringement, the Greek Government encouraged the undertakings to keep fare increases within the inflation rates' and that consequently 'fares were kept at one of the lowest levels within the common market for maritime transport from one Member State to the other' (paragraph 148 of the Decision). Furthermore, the Commission took account of the fact that the infringement 'produced its effect within a limited part of the common market, namely three of the Adriatic sea routes', a market that is small compared to other markets within the Community (paragraph 149 of the Decision).

282 It follows that the Commission was right to classify the infringement in the Decision as a serious one.

283 As regards the applicant's argument concerning the relative sizes of the undertakings, it is clear from paragraphs 151 and 152 of the Decision that the Commission considered it appropriate to take account of the effective capacity of offenders to cause significant damage and that it wished to set the fine at a level which would ensure that it had a sufficiently deterrent effect. The Commission considered it appropriate that larger fines be imposed on the larger undertakings than on the smaller ones because of the considerable disparity in their sizes. Table 1 (set out in paragraph 151 of the Decision) indicates the relative size of each of the undertakings concerned by the Decision. It shows that the applicant is the largest operator in the market, followed by the only other large operator in the market, Anek, and that it is more than twice as large as the operators classified as medium carriers and 10 times larger than the small carriers. The comparison is based on turnover achieved in 1993 from roll-on roll-off services on the Adriatic routes, that being a reference year from which the Commission could assess the specific weight and importance of the undertakings in the relevant market and, thus, evaluate the real impact of the offending conduct of each undertaking on competition. Paragraph 152 of the Decision explains that, on that basis, the amount of the medium-sized carriers' fines reflecting the gravity of the infringement were set at 65% of the fines of the large carriers, which include the applicant.

284 It is clear from case-law that the Commission may impose a heavier fine on an undertaking which occupies a decisive position within the market and where the impact of its actions on the market is more significant than that of the actions of other undertakings committing the same infringement, without violating the principle of equal treatment by so doing. Calculating the amount of the fine in such a way also satisfies the requirement that it be sufficiently dissuasive (see, to that effect, Joined Cases T-24/93 to T-26/93 and T-28/93 *Compagnie maritime belge transports and Others* v *Commission* [1996] ECR II-1201, paragraph 235).

285 Moreover, the size of the undertakings which took part in the prohibited practice is one of the points of reference stipulated in the Guidelines for the calculation of fines. It follows that, contrary to the applicant's claim, the distinction between large, medium-sized and small operators drawn in paragraphs 151 and 152 of the Decision for the purpose of determining their fines is wholly consistent with the wording and objectives of the Guidelines. Furthermore, the applicant does not dispute the percentages which the Commission used in the comparative analysis set out in paragraph 151 of the Decision or the fact that there are significant differences in size between the undertakings impugned in this action. Therefore, the argument that the Commission made an error by distinguishing between various types of transporters cannot be upheld and the applicant has no just complaint that the Commission took relative size to be an adequate basis for assessing the specific weight and importance of each undertaking on the market and the real impact of its conduct on competition.

286 This limb of the fourth plea must therefore be rejected.

B — *The second limb: incorrect assessment of the duration of the infringement*

Arguments of the parties

287 The applicant argues that what the Decision describes as an 'agreement' was in fact a practice of negotiation between the companies operating on routes between Greece and Italy of several decades' standing, which simply continued after 1 July 1987, the date on which Regulation No 4056/86 came into force. It criticises the Commission for not treating the fact that the practice had gone on for decades as a mitigating circumstance and instead considering the continuance and appli-

cation of this 'habitual practice' to be a particularly serious aggravating circumstance. First, the Commission found that this 'habitual practice' was one of 'long duration' (paragraph 155 of the Decision). Secondly, it took an extremely severe approach and increased the applicant's fine by the maximum permissible uplift of 10% for each year of the infringement, even though the Guidelines provide that, in the case of infringements of long duration (over five years), an uplift may be made of up to 10% (see Section 1 B, first paragraph, third indent, of the Guidelines). In this way the fine imposed on the applicant was increased by a very substantial 70% (paragraph 156 of the Decision) of an already considerable basic amount (2 million ecus), unfairly bringing the basic amount of the fine to 3.4 million ecus (paragraph 158 of the Decision).

288 The Commission notes that the applicant does not take issue with the start and end dates of the agreement (1 July 1987 and July 1994) and points out that, as the Guidelines provide, infringements lasting for more than five years are regarded as being of long duration. The Commission also argues that it can impose a maximum uplift of 10% for each year of the infringement and submits that, in this case, it kept within the limits laid down.

Findings of the Court

289 It is clear from the Guidelines that an amount reflecting the duration of the infringement in the case of each undertaking may be calculated and added to the general basic amount (calculated by reference to the gravity of the infringement) and that, to that end, the Commission must distinguish between three types of infringement: those of short duration (generally less than one year), those of medium-term duration (generally between one and five years) and those of long duration (generally over five years).

290 Whilst no additional amount may be added in the case of infringements of short duration, the Commission may, in the case of infringements of medium-term duration, increase by up to 50% the general basic amount (calculated by reference to the gravity of the infringement). As regards infringements of long duration, the figure chosen to reflect the gravity of the infringement may be increased by 10% per annum. The Guidelines state that the Commission wished, in this way, to strengthen considerably, by comparison with previous practice, the increase in the fine for long-term infringements with a view to imposing effective sanctions on restrictions which have had a harmful impact on consumers over a long period.

291 Paragraph 153 of the Decision explains that the Commission found that, in the case of Strintzis and the applicant, the infringement began on 18 July 1987 at the latest and went on until July 1994 (when the Commission carried out its investigation). It classified the infringement as one of long duration in the case of the applicant, Strintzis and Karageorgis (paragraph 155 of the Decision) and found that that justified increasing the fines by 10% for every year of the infringement for the applicant and Strintzis, giving a total increase of 70% (paragraph 156 of the Decision). Table 2 sets out the percentage increments applied in the case of each company.

292 It is appropriate to observe that the applicant has not taken issue with the finding that the infringement began on 1 July 1987 (indeed, it emphasises that the agreements existed even before that date), ended on July 1994 and thus went on for seven years. Therefore, and given that the Guidelines provide that infringements lasting for more than five years are to be regarded as being of long duration and that such infringements warrant an uplift of up to 10% per annum of the amount decided on to reflect the gravity of the infringement, the applicant cannot say that the criteria laid down in the Guidelines have been ignored.

293 The Court cannot accept the applicant's claim that the Commission should be censured for finding that the infringement was one of long duration instead of acknowledging as a mitigating circumstance the fact that the practice of negotiating had been going on for decades. It is within the Commission's sole discretion to state in the Decision the date on which it believes the infringement began on the basis of the evidence it has of the existence and scope of the infringement. Therefore, contrary to the applicant's submission, the fact that the conduct punished in the Decision in fact began considerably earlier than the date specified in the Decision can in no way constitute a mitigating circumstance.

294 Lastly, it must be borne in mind that whilst the Court cannot uphold the applicant's submission that it was a matter of tradition for the companies operating shipping lines in Greece to contact each other, that this was at the behest of the Greek Government and that therefore any such contact fell outside the scope of the prohibition on agreements that restrict competition which is laid down in Article 85(1) of the Treaty, the Commission nevertheless treated those factors as a mitigating circumstance. Indeed, in paragraph 163 of the Decision, the Commission acknowledged that '[t]he usual practice — not directly imposed by the legal or regulatory framework — of fixing domestic fares in Greece through a consultation of all domestic operators (whereby they were expected to submit a common proposal) and the ex post decision of the Ministry of [Merchant Shipping] may have created some doubt among the Greek companies operating also on domestic routes as to whether price fixing consultation for the international route did indeed constitute an infringement'. In view of these considerations the Commission reduced the fines by 15% for all the undertakings (paragraph 163 of the Decision).

295 The second limb of the fourth plea must therefore be rejected.

C — *The third limb: incorrect assessment of the aggravating circumstances*

Arguments of the parties

296 The applicant submits that the aggravating circumstances which the Decision ascribes to it (in paragraph 159 to 161) are groundless, imprecise, biased and incomplete. The Decision violates the fundamental principle of proportionality, the prohibition on discrimination and the principle of sound administration.

297 First of all, the applicant disputes that it acted as the instigator of the cartel, reminding the Court that this was a 'usual practice' which had gone on for several decades, as the Decision acknowledges. In this connection it adds that, from 1981 until mid-1987, it operated lines between Greece and Italy with just one ship, those lines being dominated by other companies like Karageorgis, Strintzis, HML, Adriatica and Ventouris, which operated a larger number of vessels.

298 Second, the applicant submits that the telex of 15 March 1989 is insufficient to support the view that it was the 'instigator' of a 'cartel', given the prior existence of the 'usual practice'.

299 Third, it was wrong of the Commission to say in the Decision that the applicant had 'organised... meetings with the companies involved in the infringement'. Indeed, the telexes which ETA sent on 21 May 1992 and 24 November 1993, on which the Commission's accusation rests (see paragraphs 30, 37 and 38 of the Decision) merely inform Minoan, after the event, about a meeting that had already been decided upon (the telex of 21 May 1992) and another meeting that

had already taken place (the telex of 24 November 1993). There can therefore be no question that the applicant 'organised' (to use the word used in the Decision) these two meetings. It was simply informed about them afterwards. Lastly, since ETA cannot be held responsible for having organised the meetings, nor, *a fortiori*, can the applicant.

300 Fourth, the applicant disputes that it 'monitored the cartel's operations'. The biased, incomplete and, in any event, *a posteriori* information which it received from ETA did not enable it to monitor the cartel's operations. The applicant regards as particularly illuminating the telex of 24 November 1993 which ETA sent it and which it regards as deliberately exaggerated because of Mr Sfinias's desire to claim for himself a significant success.

301 Fifth, the applicant denies that it 'tried to extend the scope of the companies' collaboration' and takes issue with the Commission's interpretation of the telexes to which it refers in its assessment of this aggravating circumstance.

302 Sixth, the applicant denies that it attempted to 'obstruct the Commission in carrying out its investigation'. The Decision is wrong where it states that 'Minoan proposed that each company should differentiate its prices by 1% for four cabin categories'. That suggestion came from ETA, not the applicant. Minoan gave no directives or directions, nor was it informed of the measure, nor did it approve it.

303 The applicant concludes that the Decision erred, and was unreasonably severe, in increasing the basic amount of the fine by 10% because of its alleged role as instigator of the cartel.

304 Next, the applicant pleads that the Commission breached the principle of equal treatment in its assessment of the aggravating circumstances.

305 The applicant maintains that other impugned companies launched projects and initiatives similar to those of ETA which the Commission imputes to it. That being so, and given the Commission's description of the applicant as 'instigator of the cartel', the Decision breaches the principle of equal treatment because it places the applicant in a less favourable position than that of its competitors.

306 The applicant begins by comparing its situation with that of Strintzis, arguing that it is clear from a reading of paragraphs 13, 14, 16, 18, 19, 24, 25 and 35 of the Decision that Strintzis played a part in the unfolding of events comparable to, if not more important than that alleged against ETA and imputed to Minoan. Yet its initiatives were not treated as aggravating circumstances, by contrast with the decision in the applicant's case. The Commission therefore clearly breached the principle of equal treatment. Next, the applicant criticises the Commission for having omitted from the Decision the fact that Strintzis also operated a ship on the route to Brindisi in 1989, 1990 and 1991. It also complains that it is described in the Decision as the 'instigator' of the extension of the collaboration to the companies operating on the southerly routes, despite the fact that it never had a presence on those routes, unlike Strintzis, which has not been charged with that aggravating circumstance. The applicant also mentions the treatment accorded to Karageorgis, against which similar initiatives are alleged in paragraphs 18, 21 and 33 of the Decision, without the Commission taking them to be aggravating circumstances.

307 The Commission, for its part, disputes the applicant's allegation that the Decision errs in treating it as the protagonist in the creation of the cartel and its further allegation that it breached the principles of equal treatment and proportionality in its findings concerning aggravating circumstances. The Commission refers to

paragraphs 159 to 161 of the Decision in which it set out various pieces of evidence that indicate that the applicant had played a leading part in the creation of the cartel and in the monitoring of developments within the cartel and reveal the efforts which the applicant made to obstruct the Commission's inquiry.

308 In addition, the Commission maintains that, in assessing the fines, it took account of the overall conduct of the impugned undertakings and of the role played by each of them, as is required by case-law. It maintains that the evidence shows that the applicant was clearly more active in the cartel than the other impugned companies, not only making proposals but also organising meetings and informing the other companies of the reply it gave to the Commission's request for information as well as attempting to obstruct the Commission's investigation.

Findings of the Court

309 It is clear from Section 2 of the Guidelines that the Commission may increase the basic amount of a fine in order to reflect aggravating circumstances. The Guidelines set out a list of potential aggravating circumstances. These include, by way of example, repetition of the same type of infringement by the same company, refusal to cooperate with or attempts to obstruct the Commission in carrying out its investigations, adopting the role of leader in, or instigator of an infringement and the deployment of retaliatory measures against other undertakings with a view to enforcing practices which constitute an infringement. The Guidelines also mention that it may be necessary for the Commission to increase the basic amount of a fine in order to exceed the amount of gains improperly made as a result of the infringement when it is objectively possible to estimate that amount.

310 The Commission set out in paragraphs 159 to 161 of the Decision the factors which it regarded as aggravating circumstances in the case of each of the undertakings to which the Decision is addressed.

1. The role of instigator of the cartel

311 As far as the applicant is concerned, the Commission found (at paragraph 159 of the Decision) that it was appropriate to increase its fine by 25% in view of its having acted as instigator of the cartel.

312 The Commission reached that conclusion after considering a series of circumstances.

313 First, it found that the applicant had tried to persuade Anek to join the cartel. On this point it is enough to read Minoan's telex of 15 March 1989 to find that that was indeed the case.

314 Secondly, the Commission found that the applicant had discussed with Ventouris the latter's tariff policy in the Ortona route (see ETA's document of 25 February 1992) and organised and directed meetings with the companies involved in the infringement (ETA's telexes of 21 May 1992 and 24 November 1993).

315 It must be emphasised that the Commission was right to find in the Decision that the applicant had organised and directed meetings with the companies involved in the infringement (see ETA's telexes of 21 May 1992 and 24 November 1993).

316 As far as the meeting of 21 May 1992 is concerned, it is indeed clear from ETA's telex of that date to the applicant that the latter had been informed of the fact that a 'conference of representatives of the Patras-Ancona route shipping companies [was] to be convened to discuss the drafting of the new tariff for 1993' and was aware of the agenda for that meeting. Similarly, it is clear from a telex dated 27 May 1992 that ETA informed the applicant of the proposals which it had made to the meeting of shipping companies held on 21 May 1992, which had been generally accepted.

317 As far as the meeting of 24 November 1993 is concerned, a telex which ETA sent that day to the applicant's head office 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%. That agreement is 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.

...'

318 The telex shows that on 24 November 1993 a meeting was attended by 14 shipping companies the purpose of which was the 1994 price readjustment for the routes between Patras and Ancona, Brindisi and Bari. It clearly shows that the applicant's agent played an important part in furthering negotiations.

319 Thirdly, the Commission took into account the fact that the applicant not only monitored the cartel's operations but also tried to extend the scope of the companies' collaboration (see the telexes dated 15 March 1989, 7 January 1992, 25 February 1992, 7 January 1993, 24 September 1993 and 26 May 1994).

320 The Court has already considered the telexes of 15 March 1989, 25 February 1992 and 24 September 1993 and has found that the matter which the Commission alleges as aggravating circumstances in regard to the applicant have been established.

321 The telex of 7 January 1992 from the applicant to Anek, Strintzis and Karageorgis, mentioned in paragraph 27 of the Decision, without demur on the applicant's part, warns its addressees that several importers of motor vehicles are 'endeavouring to lure our companies into tariff competition... we propose to you that we should stick to a common policy which will keep us off the slippery slope'. The applicant proposed a price to be quoted by all the companies and requested their agreement 'in order to reply to the Calberson company which, as you know, has been in contact with all of the companies'.

322 The telex dated 7 January 1993 from the applicant to Strintzis, Anek and Karageorgis suggested an adjustment to the tariffs for vehicles on the routes between Greece and Italy. It says:

'our decision to proceed to an agreement with you on the readjustment without first consulting with the companies on the other Italian routes is motivated by a desire to avoid the interminable discussions that would ensue if we were to embark on that consultation. We believe that this joint agreement will be looked upon positively by those companies. If it is not, we believe that the loss of traffic on the more economic ports will not exceed the 15% tariff readjustment... We await your agreement.'

323 It is clear from that telex that the applicant decided to negotiate directly with its main competitors on the route between Patras and Ancona, namely Strintzis, Anek and Karageorgis, and to suspend negotiations with the companies operating other lines. That demonstrates the importance of the applicant's role in the functioning and evolution of the agreements. Lastly, the mention in the telex of the need to make the adjustment 'without first consulting with the companies on the other Italian routes' must be taken as a reflection of the applicant's wish to demonstrate the real possibilities of achieving a price readjustment and, therefore, its wish to encourage the other companies operating on the route between Patras and Ancona to agree to that readjustment. Thus, contrary to the applicant's claim, the statement does indeed constitute evidence of its attempt to 'extend the scope of the companies' collaboration'.

324 The telex which ETA sent to the applicant's head office on 26 May 1994 states:

'As a result of developing market conditions caused by high interest rates on repurchase facilities, short-term borrowing and financings, no one is paying in cash, everyone is paying with post-dated cheques.

To deal with this phenomenon, we have instructed our Piraeus office to restrict credit.

As you know, our customers reacted by complaining about us to you and seeking a solution through the issue of tickets by the Heraklion intermediary, where you are still granting credit.

We have embarked on an initiative to get a new tariff implemented on the Italy routes with differing rates for cash payment and two-month cheques.

The problem is that we have to get the agreement of 16 companies. Nevertheless, we are optimistic.'

325 That document speaks of a particular problem arising from the fact that the companies' customers were more and more frequently paying with post-dated cheques, rather than cash. It also mentions an initiative to get a new price schedule implemented on the routes to Italian destinations with differing rates for cash payment and 60-day cheques. The words 'we have embarked on an initiative' demonstrate that the applicant's agent acted as ringleader in the initiatives, even though the document does not precisely state which other companies were the target of ETA's initiative.

326 It follows that the Commission has established to the requisite legal standard that the applicant played an important role in the course of the events sanctioned by the Commission, which it rightly regarded as constituting a cartel.

327 Lastly, given the probative value of the direct documentary evidence, the arguments which the applicant puts forward cannot be upheld. First of all, the fact that, until 1987, operation of the routes between Greece and Italy was dominated by other companies, such as Karageorgis, Strintzis, HML, Adriatica and Ventouris is irrelevant because the infringement of which the Commission complains began only in 1987. Secondly, the fact that there was in Greece a usual practice of fixing domestic fares through a consultation of all domestic operators has no bearing on the role actually played by the applicant. The point is more likely to be taken in the opposite sense from that intended by the applicant if it were to prove true that the applicant was one of the largest undertakings serving domestic Greek lines.

328 The arguments centring on the wrongful attribution to the applicant of ETA's conduct cannot be upheld, as the Court explained in its analysis of the second plea.

329 That being so, the applicant has no grounds for criticising the Commission for treating it as the instigator of the cartel and for finding that the role which it played was very clear-cut in comparison with that of the other undertakings, such as Strintzis and Karageorgis.

330 Lastly, the applicant cannot say that the Commission breached the principle of equal treatment in fixing the amount of the fines.

331 First of all, it is not true that the Commission completely ignored the fact that other undertakings, namely Strintzis and Karageorgis, also launched various initiatives under the price-fixing agreement, as the applicant claims. It is sufficient to note that these two undertakings are not among those benefiting from the 15% reduction in the fines accorded in paragraph 164 of the Decision on the ground that they had played an exclusively 'follow-my-leader' role in the infringement.

332 Next, given that it is established that the applicant played the leading role in the infringement, the Court must reject its complaint that the Decision charges it with having attempted to extend the collaboration to other companies operating on the southerly routes despite the fact that, unlike Strintzis, it never had a presence on those routes, and even though Strintzis also operated a ship on the route to Brindisi in 1989, 1990 and 1991. It should be observed in this connection that the Commission did not criticise the applicant alone for having sought to collaborate with the companies serving the southerly routes. It took more general account of the fact that several documents show that the applicant attempted on a number of occasions, in different contexts, on different routes and at different times to extend the collaboration of the undertakings.

333 Equally, the applicant cannot claim that it has suffered discrimination by comparison with Karageorgis in the Commission's assessment of aggravating circumstances. Whilst paragraphs 18, 21 and 33 of the Decision, to which the applicant refers, point up the fact that Karageorgis participated in the cartel and was actively involved inasmuch as it replied to the applicant's telexes, confirming its agreement on the new tariffs, they do not show that it acted as instigator or that it promoted initiatives, as did the applicant.

334 Lastly, it is appropriate to point out that, as the Commission submits, even if Strintzis and Karageorgis had also played a leading role in the agreements and the Commission was therefore wrong not to increase their fines to the same degree, 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, paragraphs 334 and 335).

2. The applicant's attempts to obstruct the Commission's investigation

335 It is clear from paragraphs 160 and 161 of the Decision that the Commission increased the applicant's fine by 10% because it attempted to obstruct its investigation. After the parties had received requests for information from the Commission the applicant proposed, in November 1992, that each company should differentiate its prices by 1% for four cabin categories. That, according to the Commission, amounts to an attempt to obstruct its investigation.

336 The Commission states, in paragraph 34 of the Decision, that in November 1992, having received a request for information from the Commission concerning prices

on routes between Greece and Italy, the applicant sent a telex to Anek, Karageorgis and Strintzis stating: 'Because of the sensitive situation brought about by the Commission's question concerning our price schedules on the Greece-Italy route and after the verbal exchange of views, we propose the following: of the 17 categories in our schedule, "deck" should be disregarded, since this is where none of us wants anyone to be cheaper; as for the remaining 16, each company should take four categories (to be chosen by Mr Sakellis) [of Strintzis] and reduce its schedule by 1%.' The telex also states that the applicant sent Anek a copy of its reply to the request for information.

337 Paragraph 34 of the Decision refers to a telex signed by Mr Sfinias and sent on 6 November 1992 by Minoan to Anek, Karageorgis and Strintzis. A copy of the telex is set out in annex 31 to the defence. The applicant disputes neither its existence nor its truth. However, it maintains that the author of the initiative was not itself but ETA, that it gave no directions or instructions and that the initiative was taken without its knowledge or approval. The content of the telex however clearly shows that the Commission was right to take the view that the applicant attempted to obstruct the Commission's investigation.

338 Similarly, the applicant does not dispute that it informed the other companies of the reply which it gave to the Commission's request for information. In the context of this case and, in particular, in light of the telex of 6 November 1992, that may be interpreted as an attempt to obstruct the Commission's investigation.

339 In light of all the foregoing the Court must reject the third limb of this plea in its entirety.

D — *The fourth limb: incorrect assessment of the mitigating circumstances*

Arguments of the parties

340 The applicant complains that the Commission allowed it only the mitigating circumstances mentioned in paragraphs 162, 163 and 169 of the Decision, even though it submits that it might legitimately claim the benefit of all the mitigating circumstances set out in the Guidelines.

341 More specifically, it maintains that it played a passive role, because none of ETA's initiatives should be imputed to it, and that it did not actually apply the agreements, as is acknowledged in the Decision. The applicant also argues that, immediately after the investigations of 5 and 6 July 1994, it sent ETA instructions and a very strict warning concerning the latter's actions. The applicant had, it says, been convinced that its conduct was not unlawful. On the contrary, it was an attempt to comply with the legislative and regulatory framework and with the policy of the Ministry of Merchant Shipping. That shows that there was more than a reasonable doubt as to whether the restrictive practice in question was illegal. The applicant maintains that any infringement of which it might be guilty is attributable not to negligence but quite simply to its absolute unawareness than its conduct was unlawful. Lastly, the applicant claims that it cooperated effectively with the Commission from the beginning and that it provided all the necessary information on all aspects of the present matter.

342 Lastly, the Commission's failure to acknowledge these mitigating circumstances constitutes, according to the applicant, a breach of the principle of proportionality and discrimination by comparison with the other companies, which were given the benefit of a greater number of mitigating circumstances. In particular, the applicant maintains that Anek's conduct shed no light on the

matter because, well before Anek sent its memoranda to the Commission, the applicant (and other companies too) had provided the Commission with information, had explained all the negotiations between the companies and had put itself at the Commission's disposal for any further information.

343 The applicant concludes that, in the circumstances, the reduction in its fine of 35% is particularly small in comparison with that applied to the fines of Marlines, Adriatica and Ventouris (45%) and Anek (70%) especially when account is taken of the fact that the reduction is in fact cancelled out by the increase of 35% already applied on account of alleged aggravating circumstances.

344 The Commission takes issue with the applicant's arguments that there are other mitigating circumstances in its favour and reminds the Court that the mitigating circumstances which it did take into account are detailed in paragraphs 162 to 169 of the Decision.

Findings of the Court

345 It is clear from Section 3 of the Guidelines that the Commission may reduce the basic amount of a fine to take account, *inter alia*, of the following mitigating circumstances: the fact that an undertaking has adopted an exclusively passive or 'follow-my-leader' role in the infringement, non-implementation in practice of the offending agreements or practices, termination of the infringement as soon as the Commission intervenes (in particular when it carries out checks), the existence of reasonable doubt on the part of the undertaking as to whether the restrictive conduct does indeed constitute an infringement, infringements committed as a result of negligence or unintentionally and effective cooperation by the undertaking in the proceedings, outside the scope of the Leniency Notice.

346 Paragraphs 162 to 164 of the Decision explain that the Commission took into account a number of mitigating circumstances in favour of the undertakings to which its Decision was addressed.

347 First, the Commission found (in paragraph 163) that the usual practice of fixing domestic fares in Greece through a consultation of all domestic operators and the ex post decision of the Ministry of Merchant Shipping might have created some doubt among the Greek companies operating also on domestic routes as to whether price fixing consultation for the international segments of routes did indeed constitute an infringement. Those considerations justified a 15% reduction in the fines imposed on all the undertakings.

348 Secondly, the Commission took into account (in paragraph 164) the fact that Marlines, Adriatica, Anek and Ventouris had played an exclusively 'follow-my-leader' role in the infringement and found that that justified a 15% reduction in the fines imposed on those four undertakings.

349 Lastly, it must be remembered that in paragraph 169 of the Decision the Commission pointed out that a 20% reduction in the fines was granted for all companies, including the applicant, in view of the fact that they had not contested the factual basis of the Commission's statement of objections. In Anek's case that reduction was in fact 5% because it also produced documents before the Commission issued its statement of objections and these confirmed, to a significant extent, the existence of the infringement in question.

350 The applicant cannot reproach the Commission for not having found in its favour all the mitigating circumstances mentioned in the Guidelines.

351 First of all, as has been observed, the applicant's claim that it played a passive role is groundless, it being quite right to impute ETA's conduct to it.

352 Secondly, in so far as concerns non-implementation of the agreements, suffice it to recall that the Commission took that factor into account when assessing the gravity of the infringement, that is to say when determining the basic amount, as is expressly stated in paragraph 162 of the Decision.

353 Nor can the applicant reproach the Commission for failing to make a further reduction on account of the applicant's alleged ignorance of the fact that its conduct was unlawful because the confusion created by the legislative and political framework imposed by the Greek authorities concerning domestic traffic was in fact taken into account and the undertakings were allowed a 15% reduction (in paragraph 163 of the Decision).

354 As regards the applicant's alleged collaboration with the Commission from the beginning and the fact that it provided the Commission with all necessary information on all aspects of the present affair, the Commission cannot be criticised for failing expressly to highlight that cooperation because it granted a 20% reduction on account of the fact that the applicant did not dispute the substantive truth of the facts.

355 Lastly, the applicant cannot claim that it suffered discrimination by comparison with Anek and that it deserved the same reduction as that allowed to that undertaking. It is solely for the Commission to determine the extent to which the cooperation afforded by the undertakings was of use to it in carrying out its duties. The applicant does not dispute the fact that Anek produced specific

documents proving its express admission of the facts. Such a degree of cooperation cannot be compared with the applicant's merely not disputing the facts set out in the statement of objections. Moreover, it should be remembered that the applicant was allowed a 20% reduction in its fine for not disputing those facts.

356 In light of all the foregoing the fourth limb of this plea must be rejected as unfounded.

III — *The application for an increase in the fine imposed on the applicant*

357 The Commission points out that, during the course of the present action, the applicant has on a number of occasions called into question the facts on which the Decision rests. It has asked the Court to exercise its unlimited discretion under Article 229 EC and increase the applicant's fine by 20% (or, in other words, to withdraw the 20% reduction allowed on grounds of its cooperation).

358 The Court cannot, however, uphold that request. In paragraph 85 of its judgment in Case T-354/94 *Stora Kopparbergs Bergslags* v *Commission* [2002] ECR II-843, the Court of First Instance, ruling on a referral back from the Court of Justice on an appeal, held 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.'

359 It follows that the simple fact that an undertaking which has cooperated with the Commission by not disputing the substantial truth of the facts and has benefited from a reduction in the amount of its fine for that reason subsequently brings an action before the Court of First Instance cannot justify a fresh review of the size of the reduction granted to it.

360 It follows that the action must be dismissed in its entirety.

Costs

361 Under Article 87(2) of the Rules of Procedure of the Court of First Instance, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the applicant has been unsuccessful and the Commission has applied for costs, the applicant must be ordered to pay the costs.

On those grounds,

THE COURT OF FIRST INSTANCE (Fifth Chamber)

hereby:

1. **Dismisses the application;**

2. **Orders the applicant to bear its own costs and to pay those incurred by the Commission.**

Cooke García-Valdecasas Lindh

Delivered in open court in Luxembourg on 11 December 2003.

H. Jung P. Lindh

Registrar President

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