JUDGMENT OF THE COURT OF FIRST INSTANCE (Fifth Chamber)

11 December 2003 *

In Case T-59/99,

Ventouris Group Enterprises SA, established in Panama (Panama), represented by M. Proestou, M. Velmachou and E. Kinini, lawyers, with an address for service in Luxembourg,

applicant,

v

Commission of the European Communities, represented by R. Lyal and D. Triantafyllou, acting as Agents, and 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 2 July 2002,

gives the following

Judgment

Facts

1 The applicant, Ventouris Group Enterprises SA, is a ferry operator which provides passenger and vehicle transport services between Greece and Italy, principally on the route between Patras and Bari.

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 requests 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 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, 151 25 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 used as evidence against 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 the applicant and to other ferry companies asking them to provide further information concerning the documents found during the inspection.

5 By decision of 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 '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 (hereinafter 'the applicant' or '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 1 March 1999 the applicant brought the present action for annulment of the Decision.

10 By separate document lodged at the Registry on the same day, the applicant also applied for suspension of the operation of the Decision and for dispensation from its obligation to provide a bank guarantee. By order of 20 July 1999, the President of the Court of First Instance rejected those applications and reserved costs.

11 On hearing the report of the Judge-Rapporteur, the Court of First Instance decided to open 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.

12 The parties presented oral argument and answered the questions put to them by the Court at the hearing on 2 July 2002.

13 The applicant claims that the Court should:

— annul the Decision in whole or in part,

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

— order the Commission to pay the costs.

14 The Commission contends that the Court should:

— dismiss the action in its entirety,

— order the applicant to pay the costs.

Law

15 The applicant puts forward four pleas in law in support of its application for annulment of the Decision. By the first, it alleges an error of assessment of the facts in that the Decision treated as established the applicant's participation in an agreement to fix prices on the route between Patras and Bari. By the second it

alleges that the inspection carried out at ETA's offices, during which the Commission obtained most of its evidence, was unlawful. It raises the third plea in the alternative and alleges incorrect application of Article 85(1) of the EC Treaty (now Article 81(1) EC) to the facts of the case in that the agreements in question were of minor importance. By its fourth plea the applicant alleges that the statement of reasons for the Decision is inadequate.

16 In the further alternative, in support of its application for annulment of its fine or a reduction in its amount, the applicant puts forward a fifth plea in law alleging that the Commission infringed the principle of proportionality when determining the fine because of its assessment of the duration and severity of the infringement and of the applicant's share of responsibility for it.

I — *The plea for annulment of the Decision*

The first plea: error of assessment of the facts in that the Commission treated as established the applicant's participation in an agreement to fix prices on the route between Patras and Bari

A — Preliminary remarks

Arguments of the parties

17 The applicant begins by observing that it was the first company to provide ferry services on the line between Patras, Igoumenitsa, Corfu and Bari in 1984. Using its own funds it assisted, in collaboration with the Italian authorities in the locality, in creation of the proper infrastructure in the port of Bari in order to

enable the mooring of vessels adapted to the transportation of goods vehicles and thus satisfy market requirements and provide a better service to consumers, passengers and hauliers. The applicant submits that it attracted a faithful, stable client base comprised of international transport companies with which it has collaborated for a number of years pursuant to specific contracts agreed with each of them individually. Each shipping line now has its own unique geopolitical and economic characteristics and attracts a different sector of the public and because of that the shipping companies operating each line have no interest, from an economic, technical or commercial point of view, in operating other lines.

18 The applicant argues that, thanks to its special, preeminent position on the route between Patras and Bari, and the stability and faithfulness of its customer base, it had no reason to conclude agreements with other companies operating on different routes (between Patras and Ancona and between Patras and Brindisi) to fix prices for goods vehicles, as the Commission alleges. On the contrary, it was able to determine independently its own commercial and price policy on the basis of market conditions, competition in the market, inflation, fluctuations in the drachma exchange rates and ship operating costs. Its business policy was always in conformity with the recommendations and directions of the Greek Ministry of Merchant Shipping and was directed towards avoiding unfair competition and avoiding setting prices at 'particularly undervalued' levels.

19 The applicant submits that the Commission erred in its assessment of the evidence and thus wrongly reached the conclusion that it had participated in an agreement to fix goods vehicle tariffs on the route between Patras and Bari between 8 December 1989 and July 1994. It criticises the Commission for having reached that conclusion on the basis of evidence consisting in an exchange of correspondence between other companies concerning, essentially, a different maritime route, that is to say, the route between Patras and Ancona, and for having decided that it had participated in the agreement on the basis of statements which the applicant made which certain of the companies had found it beneficial to quote in the correspondence in question. The applicant points out in this connection that, when the Commission carried out, unannounced, its

investigation at Minoan's offices, it found no documents or other evidence to show that it had participated or collaborated in an agreement or agreements to fix goods vehicle tariffs.

20 In addition, the applicant complains that the Commission failed to treat as disculpatory evidence a series of documents which came to its attention during the investigation, namely correspondence exchanged by the companies operating essentially on the route between Patras and Ancona, which proves that the applicant did not enter into any price fixing agreement with those companies.

21 Next, the applicant sets out the reasons for which it maintains that the various pieces of evidence relied on by the Commission to support the charges it makes against the applicant cannot be regarded as probative.

22 The Commission, for its part, observes at the outset that, in paragraph 5 of the Decision, it indicated that the three maritime routes in question are not operated in isolation as distinct and separate markets; there is a degree of substitutability between them. Moreover, the Commission submits that the applicant has indirectly admitted that the three routes make up a single market in that it has stated that it was led to adapt the increases in its fares for 1993 and 1994 to the rates sought by the companies on the other lines, so as to avoid any price war.

23 As regards the applicant's preeminent position on the route between Patras and Bari, the Commission emphasises that Article 85 of the Treaty relates to agreements having the purpose or effect of restricting not only actual competition, but also potential competition in the market in question. Now, the applicant has not established that it was impossible (from an economic, technical and commercial point of view) for the companies operating on other routes in the market to operate on the route between Patras and Bari. The

Commission considers the applicant's arguments to be arbitrary and contradictory. Indeed, at the same time as recognising that the three routes in question link Greece with Italy and that each of the lines could, to a certain extent, substitute for the others, it claims that each route has its own geopolitical and economic characteristics and serves a different sector of the public and that, as a result, each line operates, in the end, autonomously.

24 Consequently, the Commission's assertion that the relevant market is that for the provision of roll-on roll-off ferry transport services between Greece and Italy and that the various lines existing within that market are not operated separately as distinct markets, but instead present a certain degree of substitutability (paragraphs 3 to 5 of the Decision) is not fundamentally contradicted.

25 Next, the Commission submits that the applicant's point that there was no reason for it to conclude agreements is irrelevant because its involvement in agreements to fix international tariffs for goods vehicles has been demonstrated.

Findings of the Court

26 The arguments which the applicant puts forward are intended to distinguish between the various shipping routes linking Greece and Italy and to show that the Commission was wrong arbitrarily to fail to take account of the fundamental differences between those lines. The Commission takes issue with the applicant's approach and maintains that there was a single infringement. Thus the question arises as to the precise nature of the infringement sanctioned by the Decision, a question that must be considered before the Court can proceed to review the Commission's endeavours to obtain evidence against the applicant.

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

28 In so far as concerns the first infringement, which allegedly went on from July 1987 to July 1994, only the companies operating on the route between Patras and Ancona are implicated. They are Minoan, Anek, Karageorgis, Marlines and Strintzis. In the case of the second infringement, which went on from December 1989 to July 1994 and concerns the routes between Patras and Bari and Patras and Brindisi, three undertakings operating on those routes (Adriatica, Ventouris and Strintzis) and three undertakings not operating on those routes (Minoan, Anek and Karageorgis) are said to have been involved. The Court observes in this connection that the Commission has not taken the view that the companies operating on the southerly routes (from Patras to Bari and from Patras to Brindisi) took part in a cartel with the undertakings operating on the northerly route (from Patras to Ancona) in relation to prices on the northerly route.

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

'on the basis of the above, the Commission considers that Minoan, Anek, Karageorgis, Marlines and Strintzis participated in an agreement contrary to Article 85 by agreeing prices which would be applied to roll-on roll-off ferry services between Patras and Ancona. The Commission also considers that Minoan, Anek, Karageorgis, Strintzis, Ventouris and Adriatica agreed on the levels of fares for trucks to be applied on the Patras to Bari and Brindisi routes. These agreements formed part of a broader scheme of collusion in the setting of

fares for the ferry services between Italy and Greece. These should therefore not be regarded as separate infringements but as aspects of a single continuous infringement.'

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

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

32 In the present case, the wording of the operative part of the Decision presents no ambiguity. On the contrary, it is clear and precise, stating plainly that the Commission regards as established a cartel between the companies operating on the northern route (between Patras and Ancona) on the prices applicable to that route and a cartel between all the undertakings concerned by the Decision (with the exception of Marlines) on prices for the transportation of goods vehicles on the southerly routes (between Patras and Bari and Patras and Brindisi). Moreover, not only does the operative part make no mention of the fact of there being only one infringement, but it is particularly precise in its description of the infringements sanctioned. Article 1 is subdivided into two paragraphs concerning two distinct groups of companies. As far as concerns the group referred to in paragraph 2 of Article 1, the operative part states that the

infringement of Article 85(1) of the Treaty resides in the fact that they agreed on the level of prices to be applied for goods vehicles solely on the routes between Patras and Bari and between Patras and Brindisi. It follows that the two paragraphs of Article 1 of the Decision relate to infringements which are distinct for two reasons: they concern different undertakings and they have different scope or intensity.

33 Given that the operative part of the Decision is not ambiguous, in its examination of the various pleas put forward in this case, this Court must begin from the position that the Commission has established and sanctioned not one single infringement relating to all routes but two distinct infringements, one relating to the northerly route (paragraph 1 of Article 1) and the other relating to the southerly routes (paragraph 2 of Article 1). In so far as concerns the applicant, it is clear from the Decision that it is not charged with any liability other than that arising from the infringement described in paragraph 2 of Article 1 of the Decision.

B — The merits of the plea

34 In light of the foregoing, the Court must, in examining the first plea, consider whether the applicant is right to allege that the Commission made an error of assessment by treating the documents referred to in the Decision as documentary evidence of the applicant's involvement in the cartel described in paragraph 2 of Article 1 of the Decision, that being the cartel to fix prices for the transportation of goods vehicles on the routes between Patras and Bari and Patras and Brindisi between 8 December 1989 and July 1994. An assessment of the merits of this plea calls for a detailed analysis of the various pieces of documentary evidence on which the Commission based its conclusions as to the applicant's involvement in this cartel.

1. The facsimile of 8 December 1989

— Arguments of the parties

35 The applicant refers, first of all, to a facsimile which Strintzis sent on 8 December 1989 to Anek, Minoan, Karageorgis and Hellenic Mediterranean Lines, to which was attached an alleged '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 argues that the Commission's conclusion, in paragraphs 128 and 129 of the Decision, drawn on the basis of this facsimile, that the applicant participated in an agreement to fix 1990 goods vehicle tariffs (to take effect on 8 December 1989), is wrong. It maintains that it had decided upon its goods vehicle tariffs for 1990 well before Strintzis sent the facsimile. In support of that assertion, the applicant makes particular reference to a telex which it sent on 4 December 1989 to Pan Travel, its principal agent in Italy, in which it informed the agent of its new rates for goods vehicles.

36 The applicant submits that the 'table of tariffs' which was attached to the facsimile of 8 December 1989 does not constitute an 'agreement' between it and the other companies to which the Decision is addressed to fix the tariffs applicable to goods vehicles. The table merely reflects what prices it regarded as reasonable to charge on the various lines between Greece and Italy and which it had already decided to apply on the route between Patras and Bari. The applicant signed this document to mark its recognition of the fact that it showed prices which it regarded as reasonable and which, in so far as they related to the route between Patras and Bari, it had already decided upon and published through the intermediary of its network of agents. The applicant points out that, before publishing its prices on 4 December 1989, the staff of its relevant departments had spent a great deal of time analysing the results of their market research and reviewing forecasts of likely shifts in the exchange rates between the drachma and

other European currencies and likely fluctuations in the petrol sector so as to be able to formulate a proposal on prices for submission to the company's board of directors and subsequent amendment or adoption. The Commission cannot, therefore, maintain that, since the 'tariffs' annexed to the facsimile of 8 December 1989 bear no date, the applicant might have countersigned them a few days earlier.

37 The applicant adds that, in any event, a document which sets out certain indicative prices and on which are affixed merely a few signatures does not constitute an agreement because it lacks the characteristics needed to give it binding effect, such as the stipulation of penalties in the event of breach, a method for applying penalty clauses, provision for the payment of damages and interest, and so on and so forth.

38 The Commission, for its part, emphasises first of all that the applicant has acknowledged signing the table of tariffs annexed to the facsimile of 8 December 1989. Next, it states that it is not necessary for an 'agreement' within the meaning of Article 85(1) of the Treaty to be binding in nature. 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-1/89 *Rhône-Poulenc* v *Commission* [1991] ECR II-867, paragraph 120, Case T-347/94 *Mayr-Melnhof* v *Commission* [1998] ECR II-1751, paragraph 65).

39 In view of that, it is irrelevant whether the table of tariffs in question stated the level of tariffs which the applicant regarded as reasonable and which were the subject of an agreement concluded with the other undertakings called into question, or whether it expressed a proposal made by the other undertakings, which the applicant subsequently accepted.

— Findings of the Court

40 The facsimile sent on 8 December 1989 by Strintzis to Minoan, Anek, Karageorgis and Hellenic Mediterranean Lines sets out information relating to the rates for transporting goods vehicles to be applied from 10 December 1989 onwards on the routes from Patras to Ancona, from Patras to Bari and from Patras to Brindisi. The author of the facsimile wrote: 'please find attached a photocopy of the list of tariffs for goods vehicles on the routes between Greece and Italy, signed also by Ventouris Ferries'. The list of tariffs is signed by Strintzis, by the other companies to which the facsimile is addressed and by the applicant.

41 It must be observed, first of all, that, in its application, the applicant acknowledged having signed the list of tariffs attached to the facsimile.

42 The facsimile is therefore clear evidence of the existence of an agreement between the companies in question — including the applicant — to fix prices applicable to goods vehicles. The fact that the applicant is not given as an addressee of the facsimile does not stand in opposition to that view, nor does it suggest that it was not a party to the agreement, given that the author expressly stated that the applicant was in agreement with the tariffs proposed.

43 The applicant says that on 4 December 1989 it informed its network of agents of the new goods vehicle tariffs which it would apply in 1990 and maintains that that fact shows that the table of tariffs attached to Strintzis's facsimile of 8 December 1989 was not an agreement but merely a statement of the tariffs which it regarded as reasonable to apply on the routes between Greece and Italy and which it had already decided to apply on the route between Patras and Bari.

44 That argument cannot be accepted.

45 First of all, as the Commission emphasises, given that the table of tariffs attached to the facsimile bears no date, it remains to be established on what date or dates the agreement was concluded and signed. It could have been on the day the facsimile was sent; it could have been several days earlier, and there are several indications that agreement on the new tariffs was reached before the day on which the facsimile was sent.

46 First of all, the fact that the author of the facsimile stated that the tariff applicable to goods vehicles had already been signed by Ventouris seems to suggest that the applicant had already expressed its agreement some time before the facsimile was sent. As the Commission suggests, the list which Strintzis sent on 8 December 1989 to Anek, Minoan, Karageorgis and Hellenic Mediterranean Lines, and which bore the signature of those five undertakings and also that of the applicant, might have been signed even before 4 December, the day on which the applicant informed its agents of the new 1990 tariffs. If that were so, that is to say, if, after signing the list, the applicant had then sent it to the company's agents, the telex of 4 December 1989 would merely be a reflection of the application in practice of agreements which it had concluded earlier. The applicant maintains that the other companies copied its tariffs. However, that argument cannot be accepted because the facsimile expressly stated that the applicant was party to the agreement and, furthermore, even if, as the applicant maintains, it had already decided to apply autonomously its new tariffs, the undisputed fact that it countersigned the list can be interpreted only as constituting its adherence to an agreement as to future prices.

47 Secondly, it must be observed that the two tables of tariffs applicable to goods vehicles in 1990, namely that of 4 December 1989 which the applicant claims to

have drawn up independently and that of 8 December 1989 which was signed by all the companies, not only show identical tariffs but also stipulate 10 December 1989 as the date of entry into force.

48 That being so, the Commission was entitled to take the view that the most plausible explanation is that a common table of tariffs was decided upon before 4 December 1989 and that, for reasons which are unclear, it was not sent to the other companies until 8 December 1989. Indeed, the signature of such a list by the six companies in question could only have happened at a meeting or by advance circulation of the necessary pages. Thus, it seems likely that the addressees of Strintzis's facsimile of 8 December 1989 had signed the document, each in turn, at Strintzis's invitation and that the applicant, being the last to do so, kept a copy of it signed by all of the companies concerned and returned it to Strintzis, which then, acting as secretary, would have indicated to the four other companies that all parties concerned had signed, sending them a copy of the table of tariffs bearing the six signatures.

49 In any event, even if the tariffs set out in the table are the same as those decided upon earlier by the applicant, the simple undisputed fact that it sent those tariffs to Strintzis is enough to indicate its adherence to a price-fixing agreement as recorded in the facsimile of 8 December 1989. Two circumstances confirm that interpretation of the facts: first, the table of tariffs was signed by all six companies, including the applicants, secondly, Strintzis expressly emphasised that the applicant was in agreement with the tariffs proposed, there being no other plausible explanation for the applicant deciding to inform its competitors of its tariffs for 1990.

50 In fact, given the importance of the applicant company and its traditional presence on the line between Patras and Bari, which it alone served until 1990, as it itself emphasised in the opening remarks of its application, the fact that it was

the company that studied in detail and in advance what tariffs to apply in 1990 on that line and communicated to the other companies its view on the tariffs to be applied merely confirms the importance of its role in implementing this aspect of the cartel. That being so, as the Commission emphasises, this fact hardly relieves the applicant of liability.

51 The applicant cannot claim that these were merely indicative tariffs because if that were the case there would have been no need for it to compromise itself vis-à-vis the other companies which countersigned the table. It follows that this was an agreement between the companies concerned to fix prices and not simply an exchange of information between them.

52 In so far as concerns the lack, to which the applicant refers, of any obligation upon the undertakings which signed the table of tariffs to adhere to the tariffs, suffice it to recall that, in order for an agreement between undertakings to be an agreement prohibited by Article 85(1) of the Treaty, it is not necessary for it to be binding in nature. It is sufficient that the undertakings in question should have expressed their joint intention to conduct themselves on the market in a specific way (*Mayr-Melnhof* v *Commission*, cited above, paragraph 65, and *Rhône-Poulenc* v *Commission*, cited above, paragraph 120).

53 Furthermore, it is clear from case-law that for the purpose of applying Article 85(1) of the Treaty there is no need to take account of the actual effects of an agreement once it appears that its aim is to prevent, restrict or distort competition within the common market (Joined Cases 56/64 and 58/64 *Consten and Grundig* [1966] ECR 429 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, paragraphs 1120 and 1170).

54 Therefore, the fact that the six companies signed a table of tariffs applicable to various categories of services and stipulating a single implementation date is sufficient to demonstrate the existence of an agreement. In the circumstances of the present case, the applicant cannot rely on its ignorance of the consequences of its signing the table. It should have anticipated that the communication of the tariffs which it had decided to apply, followed by the signature, by all its competitors, of a single table of tariffs showing the same rates applicable from a specified date onwards could only amount to an agreement on prices prohibited by the Treaty. Indeed, it is clear from case-law that it is not necessary for an undertaking to have been aware that it was infringing Article 85 of the Treaty for an infringement to be regarded as having been committed intentionally; it is sufficient that it could not have been unaware that the contested conduct had as its object or effect the restriction of competition (Case 246/86 *Belasco and Others* v *Commission* [1989] ECR 2117, paragraph 41).

2. The facsimile of 30 October 1990

— Arguments of the parties

55 The applicant denies that it received a facsimile sent by Strintzis on 30 October 1990 to eight companies operating ferries between Greece and Italy, to which was attached a table of tariffs (in drachma and in lire) applicable to goods vehicles on the routes between Patras and Ancona, Patras and Bari and Patras and Brindisi from 5 November 1990 onwards.

56 The applicant also disputes the probative value accorded to this document by the Commission, which found, in paragraph 130 of the Decision, that the applicant had participated, along with the other companies to which the Decision was addressed, in an agreement to fix the 1991 tariffs for goods vehicles, which would

come into effect on 5 November 1990. According to the applicant, that conclusion ignores the fact that, as early as the beginning of October 1990, before the facsimile was sent, the applicant had already determined and published its 1991 tariffs for goods vehicles, as is clear from the documents which it sent to the Commission (confidential letters sent by the applicant on 11 October 1990 to its associates and to transport companies).

57 In this connection the applicant argues that the inclusion of the tariffs which it had decided to apply in 1991 in a column headed 'Bari' shown in the table attached to Strintzis's facsimile may be explained as follows: almost a month had elapsed since it had informed its associates of the tariffs in question and relative transparency reigned in the market in so far as concerns the tariffs published by each company; the companies operating on other routes had therefore most likely been informed, by an agent or by a transport company, of the applicant's tariffs for goods vehicles and had set them out in the table. That, however, is merely an explanation, a logical interpretation of an act carried out by a third party, Strintzis, and the applicant was not and is not in a position to say exactly why its own tariffs were set out in the table attached to Strintzis's facsimile. It reiterates that the absence of any date for the table of tariffs proves nothing, least of all that there had been any prior 'agreement' concerning them.

58 Furthermore, the applicant submits that the facsimile shows, on the contrary, that there was no agreement to which it could subscribe. The fact that, in its facsimile of 30 October 1990, Strintzis called on the applicant to confirm its agreement to the content of the facsimile shows that there was no final agreement between the applicant and the other companies. Otherwise it would not have been necessary for Strintzis to ask the applicant to confirm its agreement.

59 The Commission, for its part, maintains that, since the table of tariffs attached to the facsimile bears no date, the agreement could well have been concluded at any time before the facsimile was sent, *a fortiori,* because the facsimile and the telex which the applicant sent to its agent contain the same table of tariffs and very similar dates for their coming into effect.

— Findings of the Court

60 The facsimile in question was sent by Strintzis on 30 October 1990 to eight companies operating ferries between Greece and Italy (Adriatica, Anek, Hellenic Mediterranean Lines, Karageorgis, Minoan, Mediterranean Lines, Strintzis and the applicant). The author of the facsimile wrote in the following terms: 'We communicate the final agreement for truck fares. Please acknowledge your agreement as to the contents; we suggest announcing the prices on 1 November and putting them into effect, as has been agreed, from 5 November 1990.' Attached to the facsimile was a table with tariffs expressed in drachmas and Italian lire for various categories of goods vehicle for the routes between Patras and Ancona, Patras and Bari and Patras and Brindisi.

61 It is appropriate to add that, according to paragraph 20 of the Decision, on 2 November 1990 Minoan then sent a document to its agents informing them of the new prices, valid from 5 November 1990, clearly stating that these prices had been agreed by the companies on all the routes between Greece and Italy.

62 The applicant, which was one of the addressees of the facsimile of 30 October 1990 and which must be regarded, logically, as one of the companies operating on routes between Greece and Italy, cannot dispute the value of this document as probative evidence of its participation in the cartel.

63 The applicant claims that it did not receive the document which Minoan sent on 2 November 1990. Nevertheless, it is clear from the wording of the document itself, whose existence and authenticity the applicant has not called into question, that the applicant had given its agreement on the tariffs to be applied for goods vehicles and on the date on which the new tariffs would come into effect.

64 Therefore, given the circumstances of this case, in which similar agreements had been concluded in previous years, the applicant cannot rely on the fact that the Commission is in possession of no documentary evidence that it responded to Strintzis's request for confirmation of its agreement to the content of the facsimile. Case-law plainly states that 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 C-49/92 P *Commission* v *Anic Partecipazioni* [1999] ECR I-4125, paragraph 130, Case C-235/92 P *Montecatini* v *Commission* [1999] ECR I-4539, paragraph 162, Case T-141/89 *Tréfileurope* v *Commission* [1995] ECR II-791, paragraph 95, *Cimenteries CBR and Others* v *Commission*, cited above, paragraph 958, and Case T-41/96 *Bayer* v *Commission* [2000] ECR II-3383, paragraph 67).

65 The applicant's allegation that it had already fixed and published its new tariffs must be rejected for the reasons which the Court gave on considering the probative value of the facsimile of 8 December 1989. The fact that the table of tariffs sent bears no date may be interpreted as an indication that the agreement was concluded earlier. Similarly, the two tables of tariffs for goods vehicles for 1991, that is to say, the one allegedly drawn up independently by the applicant (see the confidential letters which it sent to its associates and to transport companies on 11 October 1990) and the one set out in the facsimile which Strintzis sent to all the undertakings on 30 October 1990, state not only identical tariffs but also very similar dates for their entry into force (the end of October/ beginning of November in one case, 5 November in the other). This amounts to evidence of the agreement's existence.

3. The facsimile of 25 February 1992

— Arguments of the parties

66 The applicant disputes the Commission's interpretation (in paragraph 131 of the Decision) of the facsimile which ETA sent to Minoan on 25 February 1992 as proving its participation in an agreement to fix 1992 fares for goods vehicles on the route between Patras and Bari. The applicant argues that this was merely an internal document issued by third parties and was neither addressed to it nor sent to it in any way whatsoever. In it, ETA was expressing its misgivings with regard to the applicant's proposal to extend its business to a new line, namely that between Patras and Ortona. Moreover, the document does not concern the applicant. It concerns instead other companies which were following the fares set and announced by the applicant, possibly for the purpose of adapting their own fares. The applicant in fact maintains that, on the contrary, the content of the facsimile reveals the truth of its assertion that it had an autonomous pricing policy on the line which it operated and had no reason to enter into agreements or to cooperate with companies operating other lines. Lastly, the applicant observes, in the alternative, that, even were it to be found that it had participated in a price-fixing 'agreement', it is clear from this facsimile that any such participation ceased once and for all in 1992.

67 The applicant adds that if the sentence is given a purposive interpretation, as well as a literal one, and is read together with the rest of the facsimile, it becomes clear that ETA was expressing to Minoan its commercial concerns concerning the viability of the Ortona line and its preoccupations regarding the applicant's policy on that line, so that Minoan could orient its own policy and decide whether or not to operate a ship on the line and, if it were to do so, fix the tariffs which it would apply. The applicant also points out that, whilst ETA stated: 'we have already commenced discussions on the matter', it did not say with whom it had commenced such discussions, nor what purpose they served.

68 In conclusion, the applicant maintains that what ETA was sending Minoan was the list of tariffs applicable on routes to Bari, Ortona and Ancona, that is to say, the tariffs that were actually in force and were being applied on the relevant lines, to which it attached its proposals for the tariffs to be applied on the line to Ortona. It would therefore be arbitrary and a distortion of the real meaning of the expression 'in force', which means 'which is valid' or 'as applied', to interpret, as the Commission does, the words 'the table of fares in force' as meaning 'the tariffs I agreed upon'.

69 The Commission, for its part, maintains that, given that there was already agreement on the table of tariffs for the route between Patras and Bari, this facsimile shows that discussions had been broached with the applicant concerning the tariff policy to be applied on the Ortona line. The Commission states that it is clear from the document that there was no question regarding the tariff policy to be applied on the route between Patras and Bari, a table of tariffs having already been made the subject of an agreement already in force, and that efforts were being concentrated on a new matter, namely the applicant's initiative on the Ortona line, about which discussions had already begun.

— Findings of the Court

70 The document in question is a facsimile dated 25 February 1992 in which Minoan's exclusive agent, ETA, informed Minoan's head office as follows:

'we are pleased to inform you of the latest development concerning the Italy routes.

Ventouris has launched a new ship, *Polaris*, on the new route between Patras and Ortona. Its capacity is 150 goods vehicles.

Karageorgis Lines has launched a charter ship, *Nordboard*, with a capacity of 100 goods vehicles, on the route between Patras and Ancona.

Clearly, the line is already served by a formidable tonnage and we will certainly be going through a difficult transitional period.

We hope progressively to launch *Marilia* and *Noromorg* and that is why we are concentrating our efforts on the tariff policy to be implemented by the Ventouris company on the Ortona route.

We have already commenced discussions on the matter.

To make things clearer we give you present fares for Bari, Ortona and Ancona and our own proposed Ortona fares.

...

We will keep you informed of any further developments.'

71 The applicant argues that this document, taken alone, does not prove its involvement in a cartel relating to the route between Patras and Bari or the fact that a cartel relating to the routes between Patras and Bari and Patras and Brindisi remained in effect.

72 However, it is appropriate to point out that, as is clear from paragraph 28 of the Decision, the Commission mentioned this document not as evidence of the applicant's participation in the cartel, but as evidence that 'the agreement to maintain differentials between the tariffs applied on the various Greece-Italy routes continued during 1992'. The document is thus used as evidence not of the applicant's involvement in the cartel but of the continuation of the cartel. That being so, in the Court's assessment of the merits of the present plea, there is no need to consider whether or not the document furnishes proof of the applicant's involvement.

73 As regards the probative value of this document in proving the continuation of the cartel relating to the route between Patras and Bari, to which indirect reference is made in paragraph 28 of the Decision, it should be observed that, in the document, the author, ETA, informs the addressee, Minoan, of the 'present fares for Bari, Ortona and Ancona'. The tariffs for routes to Bari and Ancona are the same as those which the companies concerned — which include the applicant — had charged in 1990, as can be seen from the facsimile of 30 October 1990 which the Court has already considered. Given that, the Commission was entitled to conclude that if the question of the tariffs to be applied on the route between Patras and Bari is not addressed in the facsimile of 25 February 1992, it is because the cartel continued in force.

74 It follows that the document may be taken as evidence of the continuation in 1992 of the cartel in relation to the route between Patras and Bari, as the Commission took it to be in paragraph 28 of the Decision.

4. The telex of 24 November 1993 and the meeting of that date

— Arguments of the parties

75 The applicant refers to a telex which ETA sent to Minoan on 24 November 1993. First of all it states that it was not a recipient of the telex. Next, it submits that the Decision errs where, on the basis of this document, it states that the applicant participated in an agreement to fix the prices applicable to goods vehicles in 1993 and up to July 1994. It maintains that, from 1992 onwards, it followed an autonomous pricing policy which, for 1993, was inspired by the notion that, by increasing its tariffs by between 5% and 10%, it could cope with inflation. Nevertheless, given the price transparency prevailing in the market and taking the view that it would provoke strong reaction on the part of the other operators in the market if it were to increase its tariffs by the percentages just mentioned, particularly as it was a small company, it decided autonomously and independently — hoping to steal a march on the other companies which were veering towards even greater increases — to increase its tariffs by 15%.

76 The applicant does not dispute that it attended the meeting on 24 November 1993 to which the telex just mentioned refers. However, it states that it informed the other companies present that it had already decided on its pricing policy, explained to them what increases it would apply to tariffs for goods vehicles on the route between Patras and Bari and then left the meeting before the other participants reached agreement, making clear to them that it was opposed to any agreement or negotiations of this type.

77 Next, the applicant disputes the conclusion which the Commission draws from the telex regarding the date on which the alleged agreement entered into force. As far as the applicant is concerned, since the meeting at which the agreement was supposed to have been concluded took place on 24 November 1993, even if its

participation in the agreement were proved, the Commission could not in any event take the view, expressed in paragraphs 128 and 154 of the Decision, that it participated in an 'agreement' to fix tariffs applicable to goods vehicles for the whole of 1993. The applicant refers in this connection to a postscriptum added by the author of the telex which states 'fourteen companies reached a satisfactory solution which they are adhering to without there being any need for a contract'. According to the applicant, that statement is so vague as to be incapable of evidencing its involvement in the 'satisfactory solution' mentioned or in any 'agreement'. Lastly, the applicant emphasises that the telex gives neither the identities of the parties which had concluded the 'previous agreement' nor the period for which it remained in force, nor the date on which it terminated.

78 The Commission, for its part, submits that the document clearly shows that, during the meeting on 24 November 1993, which the applicant expressly admits attending, discussions took place concerning the 15% increase in tariffs and an agreement was finally reached.

— Findings of the Court

79 The telex of 24 November 1993 was sent by ETA to Minoan to inform it of the outcome of a meeting which several shipping companies attended that day and of which the object was the tariff adjustment to be applied for 1994 on the routes between Patras and Ancona, Brindisi and Bari. ETA wrote in the following terms:

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

We would confirm that we do not anticipate this increase having any negative impact on the flow of goods or passengers.

In addition we balanced out the various conflicts which, as you know, exist concerning the discrepancies from one port to another.

Truly, we are very pleased, given that on 1993 throughput figures this will provide our company with an immediate yield of new net receipts in the order of GRD 600 000 000 annually.

...

PS. We hope that the above agreement will assist in reaching a similar agreement (in terms of tariff protection) at the meeting next week between representatives of the Cretan companies (we would point out that the two representatives of the companies were present today) and that we will be able to duplicate the success achieved by 14 companies (which have nothing else in common) which will abide by this agreement without there being any need for a contract. We do not wish to appear controlling, but that is in fact the case because a great deal of money is lost due to the frenetic competition in Crete and it would be regrettable if what is achieved overseas is given away to compensate these losses to a corresponding percentage.

...'

80 This telex shows that, on 24 November 1993, certain shipping companies operating on routes between Greece and Italy (and, most likely, 14 of them) met to agree on an adjustment to the tariffs to be charged in 1994. The document shows that efforts were made to reach a concurrence of wills among certain companies regarding the manner in which they would conduct themselves on the market.

81 It is appropriate to observe that the applicant acknowledges having attended the meeting. Nevertheless it claims that it did no more than tell the other companies present that it had already informed them of its pricing policy and that, after explaining to them that it would apply increases to the tariffs for goods vehicles on the route between Patras and Bari in the order of 15%, it left the meeting before the other participants reached agreement, making clear to them that it was opposed to any agreement.

82 Notwithstanding, the applicant has furnished no evidence in support of those assertions. There is absolutely nothing to indicate that the applicant did leave the meeting before an agreement was reached or that it made clear to the other companies present its opposition to this type of agreement or collusion. Moreover, it should be noted that the meeting followed on from other meetings and exchanges of correspondence all having the same purpose, to which, according to the document in issue, the applicant was party.

83 That being so, the applicant's participation in an agreement to adjust tariffs for goods vehicles for 1994, contrary to Article 85(1) of the Treaty, cannot be disputed.

84 The applicant's allegation that it merely informed the other companies of the decision which it had already taken independently and that it then withdrew from the negotiations in question is belied by the content of the document. The telex

alludes to the 'problem of the collapse of the previous agreement on account of the opposition of the companies of Kosma-Giannatou and Ventouris'. The author then goes on to say 'we repaired the situation bit by bit, overcoming the 5% to 10% (positions of Strintzis, Ventouris G and Adriatica)'. Those passages show that discussions and negotiations took place, that they were marred by a degree of internal opposition and disagreement which it was possible to overcome, and that an agreement was reached. Lastly, the applicant has not taken issue with the fact that it is specifically mentioned as one of the companies which initially expressed a different point of view and which, during the course of the discussions, agreed the percentage by which the table of tariffs was to be increased, which was ultimately approved by all the companies.

85 Similarly, the Court rejects the applicant's submission that it acted autonomously and had decided in advance and unilaterally to increase its tariffs by 15%. The terms of the telex are sufficiently clear to show that discussions had taken place and that the applicant had played an active part in them.

86 It is appropriate to add that it is clear from the telex that, before the meeting in November 1993, an earlier agreement was still in force. The postscriptum of the telex alludes to the agreement to which the 14 companies were adhering without there being any need for a contract. That being so, the Commission was entitled to conclude that the applicant, which figures among the companies already having expressed their position at the meeting, was one of the 14 companies which had adhered to the agreement in the past, that is to say, during 1993. The applicant cannot rely on any vagueness in the telex concerning the identities of the companies which had entered into the 'earlier agreement', how many they were and how long the agreement it was in force.

87 In the circumstances, even if the applicant took no account, when determining its pricing policy, of the parameters negotiated at the meeting, the Commission was entitled to conclude that it had infringed Article 85(1) of the Treaty.

88 The arguments put forward by the applicant cannot undo that conclusion.

89 It does not assist the applicant that the author of the telex mentions that the previous agreement had not had the success anticipated. It is clear from case-law that for the purpose of applying Article 85(1) of the Treaty there is no need to take account of the actual effects of an agreement once it appears that its aim is to prevent, restrict or distort competition within the common market (*Consten and Grundig* v *Commission*, cited above, and *Cimenteries CBR and Others* v *Commission*, cited above, paragraphs 1120 and 1170).

90 Furthermore, participation in concertations to restrict competition amounts to an infringement irrespective of whether the party concerned took part in the conference in question willingly or, as the applicant claims, against its will (*Mayr-Melnhof* v *Commission*, cited above, paragraph 135, and *Tréfileurope* v *Commission*, cited above, paragraphs 58 and 71).

91 The fact that the applicant was not an addressee of the telex and that its name was not mentioned in it does not contradict those conclusions. Documents found during an inspection of offices belonging to undertakings that have been charged may be used as evidence against a different party (see, to that effect, Case T-3/89 *Atochem* v *Commission* [1991] ECR II-1177, paragraphs 31 to 38). Similarly, the absence of any mention of a given company from a document relating to a cartel does not mean that it did not participate in the cartel where that has already been proved by means of other documents and where the lack of any mention does not throw a different light on the documentary evidence used by the Commission to establish that party's involvement in the cartel (*Cimenteries CBR and Others* v *Commission*, cited above, paragraphs 1390 and 1391).

92 Lastly, in so far as concerns the applicant's point that it was unaware that merely attending a meeting could be treated as an infringement of Article 85(1) of the Treaty, it must be remembered that it is not necessary for an undertaking to have been aware that it was infringing Article 85 of the Treaty for an infringement of the Community competition rules to be regarded as having been committed intentionally; it is sufficient that the undertaking could not have been unaware that the contested conduct had as its object or effect the restriction of competition in the common market (Case T-61/89 *Dansk Pelsdyravlerforening* v *Commission* [1992] ECR II-1931, paragraph 157, and Case T-310/94 *Gruber + Weber* v *Commission* [1998] ECR II-1043, cited above, paragraphs 249 and 259).

93 It follows from the foregoing that the Commission was entitled to conclude that the documents which the Court has considered demonstrate the applicant's participation in the cartel relating to the route between Patras and Bari.

94 The other arguments raised by the applicant, which the Court will now consider, cannot undo that conclusion.

5. The arguments relating to the telex of 7 January 1993

95 The applicant was wrong to reproach the Commission for failing to take account of documents which provide exculpatory evidence. In this connection, the applicant refers to the telex which Minoan sent on 7 January 1993 to the other companies serving the line between Patras and Ancona (Anek, Karageorgis and Strintzis). It makes particular reference to the mention of 'interminable discussions' with the companies on other lines. That, says the applicant, demonstrates that it did not wish to, nor had any reason to participate in discussions aimed at achieving an agreement on tariffs. The telex is one of a number of documents that show that the 'agreement' in question was one that solely concerned the companies serving the line between Patras and Ancona, not the companies serving other lines further to the south.

96 The telex of 7 January 1993, in which Minoan informed Strintzis, Anek and Karageorgis of a proposed adjustment to the tariffs for vehicles on the lines between Greece and Italy, states: '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.' A table of the proposed tariffs was annexed to the telex.

97 It is clear from the content of this telex that Minoan wished to negotiate directly with its main competitors on the route between Patras and Ancona, namely Strintzis, Anek and Karageorgis, and to exclude from the negotiations the companies operating other lines, such as the applicant. The telex alone cannot therefore prove the applicant's participation or that of the other companies on the lines between Patras and Bari and Patras and Brindisi in the efforts mentioned therein to adjust tariffs.

98 However, there is no indication whatsoever in the telex that the companies concerned (the author and the recipients) preferred the other companies, that is to say, those operating other lines to Italy, not to join in the initiative to adjust tariffs. On the contrary, the telex shows that Minoan was confident that 'this joint agreement [would] be looked upon positively by those companies'. Again, contrary to the applicant's submission, the fact that Minoan stressed in the telex its desire to avoid 'interminable discussions' with the companies operating the other Italian lines does not tend to prove that it was not a member of the cartel or that it did not wish to, and had no reason to participate in discussions. Admittedly, whilst the document cannot be interpreted as proving that the companies on the lines between Patras and Bari and Patras and Brindisi were party to the agreement to adjust tariffs, the reference to interminable discussions shows that negotiations with an anti-competitive purpose had taken place in the

past, in 1992. Moreover, the document is also evidence of the intention of Minoan 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.

6. The argument drawn from the legislative framework and the policy of the Greek authorities

99 The argument which the applicant draws from the Greek legislative framework and from an alleged need for shipping companies to exchange information on prices so as to be sure to charge prices that are reasonable, a requirement of the Greek Government, cannot be accepted, there being no legal obligation upon them in this regard.

100 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 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)...'

101 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 of 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 4195/1929 (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 internal 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.'

102 Whilst the 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 also 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.

103 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 services throughout the year on maritime lines to Italy and that they were 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 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 the 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, and to avoid, in any event, annual increases greater than the rate of inflation.

104 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).

105 The information contained in the letters 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 for 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.

106 In light of all the foregoing, the first plea must be dismissed in its entirety.

The second plea in law: the unlawfulness of the inspection which the Commission carried out at ETA's offices

Arguments of the parties

107 The applicant argues that the documents upon which the Commission based its findings were obtained unlawfully in that they were discovered during an

inspection carried out by its officials in July 1994 at the offices of one company, ETA, on the basis of an inspection authorisation issued for the inspection of the offices of another company, Minoan. Because ETA is not the same legal entity as Minoan, being merely its general representative, and the Commission officials were in possession of no authorisation for the inspection of ETA's offices, the investigation was carried out improperly and the documents and information discovered in those offices were obtained by the Commission unlawfully. In consequence, they should not have been used as incriminatory evidence.

108 The Commission observes, first of all, that the applicant's allegation that the documents which it took into consideration in this case were the fruit of an inspection carried out at ETA's offices is imprecise and incorrect. Only two of the four documents to which the applicant refers in its application were obtained from ETA's offices, the other two having been annexed to the memoranda which Anek sent to the Commission. Similarly, the telex of 22 October 1991, mentioned in paragraph 131 of the Decision, was annexed to Strintzis's reply to the Commission's request for information (see the statement of objections, paragraph 23, note 19).

109 In any event, the Commission submits that the applicant's argument should be rejected: the fact that ETA was a distinct, separate legal entity does not mean that its conduct may not be imputed to a different company because, in Community competition law, an economic approach must be adopted, not a purely legal one.

110 The Commission maintains that what is important in this case is that ETA acted in the name of and on behalf of Minoan, of which it was the exclusive general agent (paragraph 136 of the Decision). Under the terms of the contracts between the two, ETA represented Minoan before all national and international authorities and also within the association of Greek shipowners.

Findings of the Court

111 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 18 of Regulation No 4056/86 and general principles of law.

112 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

113 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)'.

114 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.'

115 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 Articles 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.

116 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 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.

117 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.

118 The Court has in fact 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 (Case 46/87 *Hoechst* v *Commission* [1989] ECR 2859, paragraph 15).

119 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.

120 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).

121 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*, paragraph 26).

122 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).

123 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).

124 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).

125 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).

126 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).

127 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

128 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

129 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).

130 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); 116 35, ATHENS'.

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

132 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, 151 25 Maroussi, Athens' and below that 'PASSENGER OFFICE: 2 Vassileos Konstantinou Ave., GR, 116 35 Athens'.

133 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.

134 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.

135 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.

136 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.

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

138 Lastly, it should be mentioned that, as Minoan'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.

139 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.

140 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

141 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.

142 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, 151 25 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.

143 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.

144 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, 151 25 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, 151 25 Maroussi, Athens' being printed at the foot of the page.

145 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.

146 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 neither ETA nor Minoan subsequently chose to bring an action does not undermine that conclusion; it tends to confirm it.

147 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.

148 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.

149 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.

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

151 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.

152 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.

153 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 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, 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.

154 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.

155 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.

156 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.

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

158 It follows that, in the present case such as the one at hand, 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

159 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).

160 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.

161 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.

162 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

163 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.

164 This plea must therefore be ruled unfounded.

The third plea, put forward in the alternative: the Commission wrongly applied Article 85(1) of the Treaty to the facts of the case, because the agreement in question was one of minor importance

Arguments of the parties

165 The applicant submits that the alleged agreement falls outside the scope of Article 85(1) of the Treaty on the ground that it, as a company, comes within the category of small and medium-sized enterprises (SMEs) and that the Commission acknowledges that its participation in the agreement did not affect competitive conditions in the market. The agreement was therefore one of minor importance. The passages in the Decision which address this point, paragraphs 148 and 151, are contradictory.

166 The Commission regards this submission as groundless. The agreement sensibly restricted competition in a significant segment of the market in question, as is stated in paragraph 151 of the Decision. It cannot therefore be treated as an agreement of minor importance. That position is not contradicted by paragraph 148 of the Decision, which states that 'the infringement had a limited actual impact on the market' because that passage relates to the mitigating circumstances taken into account in setting the level of the fine.

Findings of the Court

167 It is clear from paragraphs 148 and 149 of the Decision that, in assessing the severity of the infringement and the mitigating circumstances that should be taken into account when determining the amount of the fine, the Commission concluded that the infringement 'had a limited actual impact on the market' and 'produced its effects within a limited part of the common market, namely three of the Adriatic Sea routes'.

168 Nevertheless, contrary to the applicant's allegation, a finding such as that, which meant that the infringement committed by the undertakings sanctioned was classified as 'serious' rather than 'very serious', is not at odds with the Commission's refusal, in paragraph 151 of the Decision, to treat them as agreements of minor importance, even if the applicant can be classified as an SME.

169 The Commission's Notice on agreements of minor importance which do not fall within the meaning of Article 85(1) of the Treaty (OJ 1997 C 372, p. 13) states that agreements between SMEs are not, as a general rule, caught by the prohibition in Article 85(1) of the Treaty. Thus, only agreements to which all the parties are SMEs are capable of falling outside the scope of the prohibition. However, as the Commission rightly pointed out in a footnote to paragraph 151 of the Decision, in the present case, only Marlines and the applicant could be regarded as SMEs. Finally, the applicant cannot dispute the fact that the cartel sanctioned in the present case impeded competition to a significant extent in a substantial part of the market in question. Paragraph 20 of the Notice provides that the 'Commission... reserves the right to intervene in [agreements between SMEs] where they significantly impede competition in a substantial part of the relevant market'.

170 It follows that there is no contradiction between paragraph 148 and paragraph 149 or paragraph 151 of the Decision. The present plea must therefore be rejected.

The fourth plea: inadequacy of the statement of reasons

Arguments of the parties

171 The applicant argues that the Commission gave insufficient reasons to support its accusation that it participated in the agreement or agreements in question from 4 December 1989 to July 1994 without interruption. Nor is there sufficient evidence to support the accusation.

172 The Commission submits that that allegation is groundless. In accordance with consistent case-law, the reasons for a decision are sufficient where they set out clearly and logically the findings of fact and legal conclusions in such a way as to enable the party to which the decision is addressed, and the Court, to ascertain the various stages of the Commission's reasoning. The Commission says that its decisions are not necessarily required to state all the points of fact and law that every interested party has advanced during the administrative procedure. Moreover, the Commission points out that its handling of a complaint is governed by the principle that it is free to assess the evidence and that the Court may review only its overall assessment of the probative force of a document and the basic rules of logic in so far as concerns that evidence.

Findings of the Court

173 By its fourth plea the applicant raises together, in somewhat confused fashion, two separate complaints: first, it appears to reproach the Commission for having given an insufficient statement of reasons for the Decision; secondly, it submits that the Commission's accusations have no basis or that they are founded on insufficient evidence. The latter issue having been considered in the context of the first plea, it solely remains for the Court to consider the complaint that the Decision is insufficiently reasoned.

174 Article 190 of the EC Treaty (now Article 253 EC) requires the Commission to state the elements of fact and law which constitute the legal basis of a decision and the considerations which led it to adopt that decision, but it is not required to discuss all the issues of fact and law which have been raised by every party during the administrative proceedings (*PVC II*, cited above, paragraph 388).

175 In the present case, the Decision sets out all the evidence upon which the Commission relied in paragraphs 16, 19, 22, 28, 37 and 38). It also states in detail all the findings of fact and points of law relating thereto in paragraphs 111, 112, 117 and 128 to 131. The Court finds that those paragraphs of the Decision clearly state the facts which the Commission regarded as pertinent to its finding of an infringement and clearly explain its legal analysis. The level of detail and the breadth of the explanations given in the Decision are ample to enable the applicant to ascertain the Commission's reasoning and the Court to exercise its review.

176 The fourth plea must therefore be rejected.

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

177 The applicant argues, in the alternative and in the context of a plea for annulment of the fine or a reduction in its amount that, in assessing the fine which it imposed, the Commission breached the principle of proportionality by making errors in its assessment of the duration of the infringement, its severity and the applicant's part in it.

A — *The first limb: error of assessment of the duration of the infringement*

Arguments of the parties

178 The applicant maintains that the Commission's assessment of the period of time for which it is supposed to have participated in the infringement was arbitrary. In particular, the assertion that it participated in the agreement from 4 December 1989 to July 1994 without interruption is insufficiently supported by the evidence. According to the applicant, the Commission cannot in any event charge it with having participated in the agreement in question during the period between 1992 and 1994 in the absence of any evidence to that effect. Therefore, the applicant ought not, it says, to have been fined in respect of the period between 1992 and 1994.

179 The Commission refers to the case-law concerning its freedom to assess the evidence and its duty to state reasons for its decisions. It asserts that it set out the evidence concerning the applicant in paragraphs 128 to 131 of the Decision and, more specifically, it is clear from the documents dated 25 February 1992,

24 November 1993 and 7 January 1993 that the agreement continued in effect as between the companies accused — including the applicant — in 1992, 1993 and 1994, whereas there is no evidence that the applicant withdrew from the cartel in 1991.

Findings of the Court

180 As the Court held on considering the first plea, it is clear from Paragraph 2 of Article 1 of the Decision that the Commission's allegation against the applicant in this case is that it participated in a cartel relating to the tariffs for goods vehicles on the lines between Patras and Bari and between Patras and Brindisi from 8 December 1989 to July 1994.

181 It is clear from the case-law that it is incumbent on the Commission to prove not only the existence of the agreement but also its duration (Case T-43/92 *Dunlop Slazenger* v *Commission* [1994] ECR II-441, paragraph 79, and *Cimenteries CBR and Others* v *Commission*, cited above, paragraph 2802).

182 In so far as concerns evidence of the continuance of an infringement, the Community judicature has held that the system of competition rules established by Article 85 et seq. of the Treaty is concerned with the economic effects of agreements or of any comparable form of concerted practice or coordination rather than with their legal form. Consequently, with regard to cartels which are no longer in force, it is sufficient, for Article 85 to be applicable, that they continue to produce their effects after they have formally ceased to be in force (see, for example, Case 243/83 *Binon* v *AMP* [1985] ECR 2015, paragraph 17, and Case T-327/94 *SCA Holding* v *Commission* [1998] ECR II-1373, paragraph 95).

183 As the Court held when considering the first plea, the telexes of 8 December 1989 and 30 October 1990 prove the existence of an agreement, as described in Paragraph 2 of Article 1 of the Decision, and the applicant's participation in that agreement in 1990 and 1991.

184 The applicant takes issue with the evidence of its participation in the cartel from 1992 until the date which the Commission took to mark the end of the infringement, that is to say, July 1994. It is appropriate to examine the evidence on which the Commission relied.

185 As the Court held on considering the first plea, the telex of 30 October 1990 shows that the applicant participated in a cartel between the companies serving the lines between Patras and Bari and between Patras and Brindisi in relation to the tariffs for the transportation of goods vehicles from 5 November 1990 onwards.

186 The telex of 22 October 1991, which Minoan sent to Anek, clearly evidences the continuation of the agreements and negotiations concerning the lines between Patras and Ancona, Patras and Bari and Patras and Brindisi. It is sufficient to recall a few passages from the telex:

'... you want to apply to the Patras-Trieste route the same fare that we have all agreed for the Patras-Ancona route... 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 accordingly entreat you to defend — as you ought to do — the agreement between the 11 companies... We would suggest to you that the tariff for the... trip... 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.'

187 The telex of 7 January 1993, sent by Minoan to Strintzis, Anek and Karageorgis, shows that the negotiations which took place between the companies, including the applicant, in 1990 continued in 1992. The document clearly reveals the purpose of the agreement, described as 'tariff for goods vehicles on the Greece-Italy-Greece line' (see the second paragraph of the telex). It also shows that there was an earlier agreement with the same purpose in that it states:

'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... 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...'

188 The Court finds that the words 'We believe that this joint agreement will be looked upon positively by those companies' show that the companies which had been parties to the agreement of October 1990 (including the applicant) had been in contact and would again be in contact with each other. Similarly, the passage which reads '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' must be interpreted as referring to the last price agreement relating to the transportation of goods vehicles. It is clear from an analysis of the various pieces of documentary evidence relating to preceding years that it was precisely during the month of October 1990 that the tariffs in question were last adjusted (see the facsimile of 30 October 1990 which Strintzis sent to Adriatica, Anek, Hellenic Mediterranean Lines, Karageorgis, Med Lines, Minoan, and Ventouris). The applicant's participation in that adjustment has been proven by the Commission, as the Court held on considering the first plea.

189 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 passage 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.

190 It follows from the foregoing that it is clear, from a reading of the facsimile of 30 October 1990 and the telexes of 22 October 1991, 7 January 1993 and 24 November 1993 together, that the agreement continued in effect in 1992 and 1993.

191 In so far as concerns the cartel's continuation until July 1994, when, according to the Decision, the infringement came to an end, it is appropriate to observe that the telex of 24 November 1993 concerned tariffs for the transportation of goods vehicles on the three lines linking Greece with Italy applicable from 16 December 1993 onwards, that is to say, throughout 1994. It is also appropriate to mention a telex from ETA to the head office of Minoan dated 26 May 1994 in which the author writes '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.' That document shows that in May 1994 Minoan continued its endeavours to reach agreement with the other companies to adjust prevailing tariffs.

192 Lastly, the Court regards as irrelevant the applicant's mention, in page 13 of its application, of a contradiction between the period of the infringement recorded in the Decision, which includes all of 1993, and paragraph 62 of the statement of objections, in which it is accused of having participated in an agreement contrary to Article 85(1) of the Treaty during only part of 1993. It is sufficient in this regard to observe that the applicant draws no particular conclusion from this alleged contradiction. Moreover, and in any event, even were it to plead infringement of its rights of defence, this particular claim could not succeed because, as the applicant itself states in page 13 of its application, it was able at the hearing to put to the Commission its position as regards the continuation in 1993 of the infringement imputed to it in the statement of objections.

193 Taking account of the foregoing, and in the absence of any evidence or suggestion that might be interpreted as revealing a desire on the applicant's part to distance itself from the purpose of the agreement concluded in November 1993, the Court finds that the Commission was entitled to conclude that it was in possession of evidence of that agreement's continuation until July 1994, when, according to the Commission, the first inspections were carried out and the infringement ended. It follows that this limb of the plea must be dismissed.

B — *The second limb: the assessment of the gravity of the infringement and the applicant's part in it*

Arguments of the parties

194 The applicant maintains, first of all, that the Commission was wrong to classify the cartel as serious. By so doing, it disregarded the fact that it had a limited effect

on the market for maritime transport between Greece and Italy, the fact that published tariffs were not charged in practice and the fact that, because of the prevailing legislative and regulatory framework in Greece, it was not evident that the agreement was unlawful.

195 Next, the applicant claims that its share of responsibility for the supposed infringement is small. In any event, its role in the infringement could only be described as passive. It therefore argues that its conduct was not a matter of free choice but rather the result of the confusion that reigned amongst shipping companies in Greece because of the prevailing legislative and regulatory framework and the orders and recommendations of the Ministry of Merchant Shipping. Moreover, it took no active part in the supposed infringement because, as an SME, in order to survive, it was constrained to follow a defensive commercial policy vis-à-vis the other companies which were large operators on the market for maritime transport between Greece and Italy. The applicant also argues that it at all times acted in observance of the prevailing legislative and regulatory framework, in accordance with the dictates of competition in the market in question.

196 Lastly, the Commission's assessment of the applicant's share of responsibility for the infringement sanctioned was also wrong in that it ignored the fact that the applicant was found to have participated only in a cartel relating to the lines between Patras and Bari and between Patras and Brindisi. Furthermore, the fine imposed on the applicant is disproportionate in that the infringement solely concerned the tariffs applicable to goods vehicles, unlike the cartel relating to the line between Patras and Ancona, which also concerned the tariffs applicable to passengers and passenger vehicles.

197 That being so, the applicant submits that, should the Court decide that it has infringed Article 85 of the Treaty, the foregoing considerations will warrant reducing the amount of its fine to the lowest possible level.

198 The Commission, for its part, points out that, whilst 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') in principle classify price-fixing cartels as very serious infringements, it took account, in the present case, of the mitigating circumstances put forward by the applicant (in particular, those mentioned in paragraphs 148, 149 and 162 of the Decision). Those circumstances led it to conclude, justifiedly, that this was a serious infringement rather than a very serious one. Similarly, the Commission submits that it took due account both of the confusion arising from the legislative framework and of the follow-my-leader role played by the applicant, as is clear from paragraphs 163 and 164 of the Decision.

Findings of the Court

199 It is clear from case-law that, for the purpose of fixing the amount of the fine, the gravity of the infringement is to be appraised by taking into account in particular the nature of the restrictions on competition, the number and size of the undertakings concerned, the respective proportions of the market controlled by them within the Community and the situation of the market when the infringement was committed (Case 41/69 *Chemiefarma* v *Commission* [1970] ECR 661, paragraph 176).

200 Similarly, where an infringement has been committed by several undertakings, the Commission must take account of the role played by each of the undertakings in the infringement (Cases 100/80 to 103/80 *Musique diffusion française* v *Commission* [1983] ECR 1825, paragraphs 120 and 129) and must, therefore, examine the relative gravity of the participation of each of them (Case T-7/89 *Hercules Chemicals* v *Commission* [1991] ECR II-1711, paragraph 110, *Montecatini* v *Commission*, cited above, paragraph 207, *Commission* v *Anic Partecipazioni*, cited above, paragraph 150, and *Cimenteries CBR and Others* v *Commission*, cited above, paragraphs 4949 and 4994). In particular, the fact that

an undertaking has not taken part in all aspects of an anti-competitive scheme or that it has played only a minor role in the aspects in which it did participate must be taken into consideration when the gravity of the infringement is assessed and if and when it comes to determining the fine (*Commission* v *Anic Partecipazioni*, cited above, paragraph 90).

201 Before the Court considers the applicant's submissions in this limb of the plea it is necessary first to recall the wording of Article 1 of the Decision and then to analyse the manner in which the Commission meant to apply the Guidelines in this case.

202 As it held on considering the first plea, given that the operative part of the Decision is not ambiguous, the Court must begin from the position that the Commission has established and sanctioned not one single infringement relating to all routes but two distinct infringements, one relating to the northerly route (paragraph 1 of Article 1) and the other relating to the southerly routes (paragraph 2 of Article 1).

203 The Court is of the opinion that, in order to consider the second limb of this fifth plea, it must first address the applicant's complaints regarding the classification of the infringement as a serious one. Then it must address those concerning the Commission's failure to take certain mitigating circumstances into account. Lastly, it must address the complaint that the fine imposed was disproportionate to the applicant's involvement in the infringement.

1. The Commission's assessment of the gravity of the infringement

204 It is clear from paragraphs 147 to 150 of the Decision that, although the Commission is of the view (see paragraph 147 of the Decision) that, in principal, an agreement, such as the one in point in this case, 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 only a serious one (paragraph 150 of the Decision).

205 An agreement to fix prices by its nature restricts competition (*Chemiefarma* v *Commission*, cited above, paragraph 133). Furthermore, horizontal restrictions, such as price cartels, like the one in the present case, are, in principal, very serious infringements according to the Guidelines.

206 In this case, it is clear from the Decision that the Commission concluded that the infringement was a serious breach of Community competition rules (in paragraph 150 of the Decision) after recognising (in paragraph 148 of the Decision) that the infringement had a limited actual impact on the market and thus after accepting the undertakings' argument that they had not applied in full all the specific price agreements and that they had engaged, during the period of the infringement, in price competition through discounting. The Commission also expressly acknowledged that the Greek Government, during the period of the infringement, had encouraged the undertakings to keep fare increases within the inflation rates and that fares had consequently been kept at one of the lowest levels within the common market for maritime transport from one Member State to the other. The Commission also agreed (in paragraph 149) that the infringement had produced effects within a limited part of the common market, namely three of the Adriatic Sea routes, at the same time emphasising that, even if all Greece-Italy routes were taken into account, the market was still small compared to other markets within the European Union. Lastly, the Commission took account (in paragraph 149 of the Decision) of the figures for the number of passengers, cars and trailers transported during 1996 in this market by comparison with the other shipping routes of the European Union.

207 It follows that, when assessing the gravity of the infringement and, thus, the basic amount of the fine which it imposed on the applicant, the Commission took account of the mitigating circumstances on which the applicant relies, namely the limited effect which the agreements had on the market in question, the fact that

the prices agreed upon were not charged in practice, the fact that the Greek Government encouraged undertakings to keep tariff increases within the rate of inflation and the fact that the infringement produced effects only in a limited part of the common market.

208 Those mitigating circumstances were taken into account by the Commission and provided it with justification for reducing the very high degree of gravity that is normally attributed to price cartels. The applicant cannot therefore rely on those same circumstances to seek a further reduction in the degree of gravity of the infringement. This part of the second limb of the plea must therefore be dismissed.

2. The failure to take other mitigating circumstances into account

209 The applicant also maintains that the Commission failed to take account of all the mitigating circumstances present in this case.

210 In paragraphs 163 and 164 of the Decision, the Commission sets out the mitigating circumstances which it took into account in setting the final amount of the fine to be imposed on each addressee of the Decision, once the basic amount has been worked out.

211 In paragraph 163 of the Decision, the Commission acknowledged a certain degree of confusion among Greek shipping companies operating domestic routes as to whether consultations on the tariffs applicable to the international segments of routes constitute an infringement. It expressed itself in the following terms: 'The 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 for the Merchant Navy 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 that consideration, the Commission took the view that it was appropriate to reduce the fines by 15% for all the undertakings (paragraph 163, *in fine*).

212 In paragraph 164 of the Decision, the Commission stated:

'Marlines, Adriatica, Anek and Ventouris [had] played an exclusively "follow-my-leader" role in the infringement. These considerations [justified] a reduction of the fines by 15% for those undertakings.'

213 The necessary conclusion is that the Commission took account of all the mitigating circumstances put forward by the applicant and that it was thus persuaded to reduce by 30% the fine which it would otherwise have imposed.

3. The proportionality of the fine by comparison with the applicant's involvement in the infringement

214 Lastly, the applicant complains that the Commission erred in fixing the amount of the fine in that its calculation failed to take account of the scope of the infringement alleged against it, which solely related to the routes between Patras and Bari and between Patras and Brindisi and to the tariffs applicable to goods vehicles, unlike the cartel relating to the line between Patras and Ancona, which

also included tariffs for passengers and passenger vehicles. In so doing, the Commission ignored the fact that the applicant was charged only with participating in a cartel relating to the routes between Patras and Bari and between Patras and Brindisi and that resulted in the imposition of a fine disproportionate to the significance of the infringement committed.

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

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

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

218 It is appropriate to recall that this Court has held that the operative part of the Decision clearly shows that the Commission sanctioned two distinct infringements and that the applicant is charged only with having participated in the cartel sanctioned in Paragraph 2 of Article 1, namely that concerning the tariffs to be applied for goods vehicles on the routes between Patras and Bari and between

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

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

220 It follows that, in that the applicant has been held liable for its participation in the cartel sanctioned in Paragraph 2 of Article 1 of the Decision, the fine imposed on it is disproportionate to the significance of the infringement committed. Consequently, the fine imposed on the applicant must be reduced.

221 In light of the reasoning contained in the Decision and of the fact that the Commission chose to apply in this case a method which takes account of the specific weight of the undertakings and of the actual effect on competition of the infringements committed, the fine imposed on the applicant must take account of the relative volume of traffic on the routes mentioned in Paragraph 2 of Article 1 of the Decision (between Patras and Bari and between Patras and Brindisi) by comparison with the volume of traffic on the route mentioned in Paragraph 1 of Article 1 of the Decision (between Patras and Ancona). It is clear from the Commission's answer to a question put to it by the Court, in the context of measures of organisation of procedure, that the total turnover of the undertakings sanctioned by the Decision amounts to EUR 114.3 million. It is clear from the documents before the Court that the turnover from the provision of transport services subject to the cartel sanctioned in Paragraph 2 of Article 1 of the Decision (on the routes from Patras to Bari and from Patras to Brindisi) amounts to approximately one quarter of the total turnover taken into account.

222 In view of the foregoing, the Court considers, in the exercise of its unlimited jurisdiction, that the fine imposed on the applicant, EUR 1 010 000, must be reduced to EUR 252 500.

223 The remainder of the application must be dismissed.

III — *The application for measures of organisation of procedure*

224 In its reply, the applicant suggested to the Court that it call certain witnesses to support any pleas put forward in its application that might be found unsubstantiated on the basis of the written documents and for the further purpose of supplementing and giving further particulars of its assertions and arguments. The Court takes the view there is no controversy as to the facts of the present case and that it is able to give judgment without calling the suggested witnesses.

Costs

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

On those grounds,

THE COURT OF FIRST INSTANCE (Fifth Chamber)

hereby:

1. **Sets the amount of the fine imposed on Ventouris Group Enterprises SA at EUR 252 500;**

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

3. **Orders Ventouris Group Enterprises SA to bear its own costs and to pay three quarters of the Commission's costs, including its costs of the interlocutory proceedings, and orders the Commission to bear one quarter of its own costs.**

Lindh García-Valdecasas Cooke

Delivered in open court in Luxembourg on 11 December 2003.

H. Jung P. Lindh

Registrar President

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