II

(Acts whose publication is not obligatory)

COMMISSION

COMMISSION DECISION

of 17 March 1999

on State aid given by Greece to Heracles General Cement Company

(notified under document number C(1999) 716)

(Only the Greek text is authentic)

(Text with EEA relevance)

(2000/199/EC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community, and in particular the first subparagraph of Article 93(2) thereof,

Having given notice to the Parties concerned to submit their comments in accordance with the same provisions [1] and having regard to those comments,

Whereas:

I

The Heracles Decision and its annulment

(1) On 6 July 1995, the Court of First Instance of the European Communities annulled [2] a Commission Decision, notified to the Greek authorities by letter of 1 August 1991 [3], to authorise aid granted by the Greek Government to Heracles General Cement Company (hereinafter 'Heracles'), a Greek cement manufacturer.

II

Background to the dispute

(2) In 1983, the Greek authorities adopted a number of structural measures designed to remedy serious disturbances in the country's economy, including Law 1386/83 for the organisation for the financial reconstitution of undertakings (hereinafter 'Law 1386/83'), adopted on 5 August 1983. That law created an organisation known as the Business Reconstruction Organisation (*Organismos oikonomikis Anasygrotiseos Epicheiriseon* or OAE — the 'BRO'). The purpose of the BRO was to 'contribute to the social and economic development of the country through the financial rejuvenation of undertakings, the import and application of foreign technology, the development of Greek-based technology and the establishment and operation of socialised or mixed economy undertakings'. The BRO was empowered in particular to administer and manage undertakings, participate in the capital of undertakings and grant loans. Law 1386/83 also authorised the capitalisation of the debts of the undertakings concerned by the issue of new shares.

(3) By Ministerial Decree of 7 August 1986, the Greek Government applied Law 1386/83 to Heracles, the balance sheet of which had shown a substantial deficit since 1983, by bringing it under public control and converting into capital its debts to Greek public institutions amounting to GRD 27 755 million (approximately EUR 84 million).

(1) OJ C 84, 21.3.1996, p. 3.
(2) Joined Cases T-447/93, T-448/93 and T-449/93, *AITEC and Others* v. *Commission* [1995] ECR II-1971.
(3) OJ C 1, 4.1.1992, p. 4.

(4) Law 1386/83 was not notified to the Commission by the Greek authorities prior to its adoption. Nor does the Commission appear to have received advance notification from the Greek Government that Law 1386/83 was going to be applied to Heracles in August 1986. However, following the granting of the aid, the matter was brought to the Commission's attention by competitors of Heracles. The Commission therefore requested the Greek Government, by telex of 18 September 1986, to provide clarification on the point within seven days and to notify it of any application of Law 1386/83 in that instance. In response to that request, the Greek Government provided detailed information by letter of 10 October 1986, pointing out in particular that, in its view, the conversion of Heracles' debts into shares did not constitute aid within the meaning of Article 92 of the Treaty.

(5) On 29 October 1986, the Commission initiated administrative proceedings in respect of Law 1386/83; these culminated in the adoption on 7 October 1987 of Commission Decision 88/167/EEC [4], which authorised 'the implementation of the law' under Article 92(3)(b) of the Treaty, on the ground that it was intended to remedy a serious disturbance in the economy of a Member State.

(6) The implementation of Law 1386/83 was made subject, however, to a number of conditions, including the requirement that the Greek Government notify individual cases exceeding certain thresholds.

(7) In the recitals to the Decision, the Commission found that Law 1386/83 and the operations of the BRO fulfilled the conditions for the application of the second part of Article 92(3)(b), particularly in view of Protocol 7 to the Act of Accession of Greece, on the economic and industrial development of Greece. Protocol 7 provides that 'in the application of Articles 82 and 93 of the EEC Treaty, it will be necessary to take into account the objectives of economic expansion and the raising of the standard of living of the population'.

(8) The Greek Government was informed of Decision 88/167/EEC by letter from the Commission dated 17 November 1987. Thereafter, by letter dated 3 December 1987, the Greek authorities provided detailed additional information concerning Heracles, while repeating their view that the intervention in question did not constitute State aid.

(9) On 8 December 1987, Titan Cement Company ('Titan'), a Greek competitor of Heracles, lodged a complaint with the Commission opposing the granting of the aid to Heracles.

(10) By letter dated 15 February 1988, the Commission informed the Greek Government that it had decided to initiate administrative proceedings under Article 93(2) of the Treaty against the aid granted to Heracles. Noting that there had been an increase in Greek cement exports, particularly those of Heracles, to other Member States, the Commission found that the aid could distort competition and affect trade between Member States within the meaning of Article 92(1) of the Treaty, since Heracles had been making losses since 1983 whilst engaging in intra-Community trade. It pointed out that the only derogation applicable to the aid was that provided for by Article 92(3)(b) of the Treaty but that the application of that provision was subject to certain conditions which were not, in its view, met in the case of Heracles.

(11) On 9 March 1988, Titan sent to the Commission further comments on the aid granted to Heracles.

(12) Following its decision to open proceedings under Article 93(2) of the Treaty, the Commission published a notice [5] inviting parties concerned other than the Member States to submit their comments on the aid to Heracles within one month.

(13) In response to that notice, several of Heracles' competitors claimed that serious disturbance had been caused to the Community cement market as a result of the intervention by the Greek authorities, which had very greatly strengthened Heracles' competitive position. Thereafter, several meetings and exchanges of correspondence took place between, on the one hand, the Commission and the applicants and, on the other, the Commission and the Greek Government.

(14) The procedure was terminated by the Commission with the adoption of a Decision to approve the aid [6]. In that Decision the Commission concluded that the aid awarded to Heracles in 1986, by transforming parts of its debt into capital, could be considered to be in conformity with Decision 88/167/EEC.

(15) In parallel with the procedure relating to Heracles, the Commission on 3 April 1989 initiated proceedings pursuant to Article 93(2) of the Treaty against aid granted on the basis of Law 1386/83 to Halkis, the third largest Greek cement producer. Those proceedings led to Commission Decision 91/144/EEC [7] ('the Halkis Decision'), in which the Commission found that the aid to Halkis had been granted in breach of the rules set out in Article 93(3) of the Treaty and was incompatible

[4] OJ L 76, 22.3.1988, p. 18.

[5] OJ C 124, 11.5.1988, p. 4.

[6] See footnote 3.

[7] OJ L 73, 20.3.1991, p. 27.

with the common market, since it did not qualify for exemption under Article 92(2) and (3) of the Treaty, having regard in particular to the increase in Halkis' exports to Italy. The Commission concluded that the aid was contrary to 'the common interest'.

III

The Parties challenging the aid before the Court

(16) By application lodged at the Court of Justice of the European Communities on 27 March 1992, the Associazione Italiana Tecnico Economica del Cemento ('AITEC'), an Italian cement producers' association, brought an action for the annulment of the Commission Decision approving the aid granted to Heracles, which had been notified on 1 August 1991 ([8]).

(17) Similarly, by applications lodged at the Court of Justice on 30 March 1992, Titan and the British Cement Association ('BCA'), together with three of the BCA's member companies, Blue Circle Industries plc, Castle Cement Ltd and Rugby Group plc, which are the principal cement manufacturers in the United Kingdom, brought actions for the annulment of the same Decision ('the contested decision').

(18) The three cases before the Court of Justice, which were numbered C-97/92, C-105/92 and C-106/92, were joined for purposes of the proceedings.

(19) By orders of the President of the Court of Justice of 12 October 1992 and 24 March 1993 respectively, the Hellenic Republic and, subsequently, Heracles were given leave to intervene in support of the form of order sought by the defendant in the three cases, pursuant to applications lodged by them at the Registry of the Court of Justice on 14 August and 10 August 1992 respectively. They lodged their statements in intervention, which were common to the three Joined Cases, on 7 December 1992 and 3 July 1993 respectively.

(20) On 27 September 1993, the Court of Justice referred the proceedings to the Court of First Instance.

([8]) See footnote 3.

IV

The main findings of the Court of First Instance

(21) As to the substance of the case, the Court of First Instance ('the Court') found that all of the applicants maintained, in essence, that, when assessing the compatibility of the aid at issue with the Treaty, the Commission could not simply examine whether it fulfilled the conditions laid down by Decision 88/167/EEC, which declared that the aid scheme established by Law 1386/83, on the basis of which the contested aid was granted, was compatible with the Treaty. According to the applicants, the Commission should have carried out a specific examination of the compatibility of the aid at issue with the common market. It was appropriate, therefore, for the Court to determine first of all the scope of Decision 88/167/EEC and then to verify whether or not the contested decision disregarded Decision 88/167/EEC and Article 92 of the Treaty.

(22) As regards the scope of Decision 88/167/EEC, the Court of First Instance found that the Commission had approved the implementation of Law 1386/83 on the ground that it fulfilled the conditions of the second part of Article 92(3)(b) of the Treaty, read in conjunction with Protocol 7, since it was intended to remedy a serious disturbance in the Greek economy. However, the Commission authorised the implementation of the law subject to the condition that the Greek Government shall notify the individual cases of intervention in firms made subject to the law employing 300 or more persons in the case of non-sensitive branches and 100 or more persons in the case of sensitive branches.

(23) In the Court's view it followed that the Commission considered that interventions by the BRO on a certain scale should be subjected to a specific examination, first, of whether the aid fulfilled the 'conditions' imposed by Decision 88/167/EEC and, second, of whether or not it resulted in the undertakings concerned 'being left in a stronger competitive position vis-à-vis industries in other Member States than would otherwise occur had those difficulties not arisen in the first place'. The Court concluded that the need for such an examination was in line with Article 92 of the Treaty, whose purpose was to prevent aid granted by Member States from distorting competition or affecting intra-Community trade.

(24) As to the contested decision, the Court of First Instance noted that the Commission pointed out therein that the obligation to notify individual significant cases had been imposed 'so that these could be considered from the point of view of their impact on intra-Community trade

and competition'. However, in the contested decision, the Commission merely considered the consequences of the aid in Greece, and concluded that the aid fulfilled the conditions of Decision 88/167/EEC, particularly as regards the absence of any increase in production capacity and the viability of the undertaking. Whilst it was indeed necessary for those factors to be taken into consideration for the purposes of examining the compatibility of the aid with the common market, they were not enough for any conclusion to be reached in that regard, since Decision 88/167/EEC also required the Commission to examine the extent to which competition might be distorted or intra-Community trade might be affected. The Commission had undertaken no such examination in any way.

(25) The Commission had therefore disregarded the scope of its obligation under Decision 88/167/EEC and Article 92 of the Treaty to examine whether the aid in question distorted competition and affected intra-Community trade.

V

The enlargement of the Article 93(2) proceedings

(26) In its judgment the Court of First Instance annulled the Commission's decision to close the Article 93(2) proceedings initiated in 1988; this means that those proceedings are still open, and a new final decision is called for.

(27) In order to comply with the judgment, therefore, the Commission decided on 14 November 1995 to enlarge the Article 93(2) proceedings. The Commission observed that it had originally initiated proceedings only on the ground that the aid to Heracles might be incompatible with Decision 88/167/EEC; the proceedings needed to be broadened, so that the Commission could carry out a full investigation of the compatibility of the aid with Article 92, as the Court had required, without infringing the rights of defence of the Greek Government. The recapitalisation of Heracles constituted aid caught by Article 92(1) of the EC Treaty. There was at least serious doubt whether the aid could be considered compatible with the common market. The Commission also raised the question whether or not the aid was restricted to the minimum necessary to enable Heracles to regain its profitability. The Commission had now compared Heracles with its slightly smaller but profitable competitor Titan, and concluded that Heracles appeared to have been overcapitalised by some GRD 5 000 million (approximately EUR 15,5 million).

(28) The Commission informed the Greek authorities of its decision to enlarge the Article 93(2) proceedings by letter dated 29 November 1995. The Greek authorities replied by letter dated 13 February 1996; a summary of their arguments is given below.

(29) The Commission announced its decision to enlarge the proceedings in a notice published in the *Official Journal of the European Communities* ([9]). The notice invited other Member States and other Parties concerned to submit comments. In response to that notice information was submitted by three national cement associations, by one of Heracles' competitors, and by some other interested parties. Those comments are summarised in Section VI.

(30) The observations received from interested parties were submitted to the Greek Government for its comments by letter dated 17 June 1996. In letters dated 23 July and 12 September 1996 the Greek authorities requested extensions of the deadline within which they were to comment, and ultimately submitted their comments by letter dated 8 November 1996. Heracles submitted additional information by letters dated 12 December and 23 December 1996. Further to those answers, the Commission, by letter dated 16 January 1997, asked the Greek Government to provide additional information. That information was submitted on 6 February 1997.

(31) A series of meetings between the Commission departments and interested parties took place in summer and autumn 1997: Commission staff met the Agrupación de Fabricantes de Cemento de España ('Oficemen') on 29 July; AITEC on 30 July; the old shareholders in Heracles on 31 July; Lafarge Coppée SA ('Lafarge') on 31 July; representatives of the British cement industry on 1 August; and Titan on 17 September. A joint meeting with Heracles and the Greek Government took place on 19 September.

(32) On 12 August 1997, the Commission asked the Greek authorities for further information. The Greek authorities replied by letter of 17 November. Heracles' competitor Titan submitted further information to the Commission by letter of 2 December. Heracles addressed a memorandum to the Commission by letter of 23 January 1998. The Greek authorities sent additional information by letter of 10 February. In addition to its memorandum of 23 January, Heracles submitted further information in a letter of 6 April.

([9]) See footnote 1.

(33) A meeting with the Greek authorities took place on 5 October 1998. Additional information was sent by Heracles on 24 November and 29 December. Another meeting with Heracles' representatives took place, at their request, on 12 January 1999. The Greek authorities sent final submissions to the Commission on 8 February 1999, summarising the discussion to date and the information already supplied.

VI

Observations received in the course of the Article 93(2) proceedings

VI.1. **Observations submitted by the Greek Government and Heracles**

(34) Following the Commission's initial decision to open proceedings, in 1988, the Greek Government submitted its first observations by letter dated 27 April 1988. A bilateral meeting with representatives of the Greek Government and of Heracles took place on 29 June. Further to this meeting, the Commission requested additional information by letter dated 18 July, the reply to which was received on 26 October. An additional meeting took place on 30 May 1989, further to which the Greek Government submitted supplementary information by letter dated 18 July 1989. Another meeting was held on 13 December 1989, followed by a letter from the Greek Government dated 6 March 1990. Further meetings took place on 19 October 1990, 16 November 1990 and on 11 January 1991. The Greek Government submitted written information on 3 March 1991.

(35) In 1988, the Greek Government rejected the point of view taken by the Commission in its entirety: it contended that the BRO's intervention had been limited to the absolute minimum necessary for the company to survive; it defended the necessity of maintaining fixed low domestic cement prices; it denied that Heracles' productive capacities had been or would be increased; it claimed that the additional regional aid had been awarded in 1985 but not yet paid, and that without this aid the conversion of debt into capital would have been GRD 3 billion higher; and it submitted information on Heracles' investments in order to show that a real restructuring had taken place.

(36) In 1989, the Greek Government announced that some of the Commission's objections would be met. The fixed domestic cement price had been abolished, and Heracles' investment programme for 1987 to 1990 would be boosted, thus accelerating its restructuring. Finally, the Greek Government had decided not to award the additional regional investment aid.

(37) In 1990 and 1991, the discussion focused on the remaining problem, namely the amount of aid, and on the Greek Government's newly announced intention to privatise Heracles.

(38) Throughout the proceedings, both before the judgment of the Court of First Instance and during the formal investigation initiated by the Commission in 1988 and subsequently enlarged in 1995, the Greek Government has maintained that the conversion in 1986 of a part of Heracles' debts into shares held by the BRO, that is to say by the Government, did not constitute State aid within the meaning of Article 92(1). The Greek authorities have criticised the Commission for failing to ascertain, when it approved that intervention by the Greek State in August 1991, whether the intervention could in fact be considered State aid under Article 92(1), rather than simply taking the view that anything done under Law 1386/83, which was the legal basis of the measure in question and which the Commission had approved under Article 92(3)(b) in October 1987, would necessarily constitute State aid.

(39) More specifically, the Greek Government contends that the private investor test is satisfied, as the GRD 20 775 million invested by the Greek Government in Heracles gave a return of GRD 120 790 million six years later when the company was privatised in 1992. The Greek Government further contends that the aid is not caught by Article 92(1), owing to the lack of trade between Member States. It points out that the comparison between Heracles and Titan also shows that the aid had no adverse effect on the position of Heracles' main competitor, and that the aid was the minimum required for Heracles to remain viable, since Titan's sales did not drop either at home or abroad, nor was there any adverse effect on its turnover. Titan's pre-tax profits increased after the debt-to-share conversion, outstripping Heracles' profits.

(40) Heracles itself stresses that it fully supports the observations put forward by the Greek Government. Heracles contends that the capitalisation of its debts does not constitute aid, but that even if it did it ought to be approved in its entirety. Heracles argues that the Commission approved the aid to the company in 1991 on the basis of specific information and considerations that still apply today. If the Commission were now to come to a different conclusion on the basis of the same facts, it would violate the principle of legal certainty and the principle of sound administration. Moreover, given the time that has elapsed, the Commission has failed to

take a decision within a reasonable time, and is clearly rendered responsible. Heracles also maintains that it cannot be possible, in view of the principle of sound administration which Community institutions must observe in the exercise of their authority, for their proven errors to have an adverse effect on a private individual acting in good faith and to damage or undermine his interests.

VI.2. **Observations submitted by interested parties**

(a) Reactions to the Commission notice published on 11 May 1988 ([10])

(41) Following its initial decision to initiate proceedings in 1988 in respect of aid to Heracles, the Commission received observations from the Governments of three other Member States, seven national associations, four competitors of Heracles, and the old shareholders in Heracles, all of them in support of the Commission's own position.

(42) The *Belgian*, *Dutch*, *French* and *German* associations of cement manufacturers emphasised that their members had undergone heavy restructuring programmes, which included cuts in production capacity and substantial investment, without receiving any special aid. The Belgian association added that its members were facing serious disruption of the market which was partly the result of cheap imports of Greek cement. The Dutch association feared that the overcapacity created and maintained in Greece by means of State aid would force the Greek cement industry, and notably Heracles, to sell large volumes of cement in other countries, even at very low prices. The German association added that Greek cement, and Heracles cement in particular, was being offered in several western European countries, including Germany, at prices below comparable production cost.

(43) The *Luxembourg* association of construction materials manufacturers and traders pointed out that cement produced by Heracles had found its way to Luxembourg via the Netherlands at prices one third lower than those charged by the cement industry in Luxembourg.

(44) The *Italian* association of cement manufacturers protested against the increasing imports of cheap Greek cement in Italy, more than half of which came from Heracles. Both the Italian association and an Irish producer stressed that the Greek cement industry had had the benefit of various general aid schemes, notably export aid. Any further operating aid, such as a conversion of debt into capital, would be incapable of satisfying the tests of Article 92(3).

(45) The *British* Government objected in particular to rescue aid not linked to a sound restructuring plan.

(46) Two *Greek* competitors of Heracles stressed that the best way to help the Greek cement industry as a whole would be the abolition of price control for cement in Greece.

(47) The Governments of *Denmark* and *Germany*, an association in the *United Kingdom* and a manufacturer in *Denmark* protested against the aid in more general terms.

(48) The Commission submitted these observations to the Greek Government by letter dated 18 September 1989; the Government commented by letter dated 6 March 1990.

(49) The old owners of Heracles submitted confidential information in November 1990. This information could not be submitted to the Greek Government, and must therefore be disregarded.

(b) Reactions to the Commission notice published on 21 March 1996 ([11])

(50) The reactions of interested parties to the Commission's notice announcing the enlargement of the proceedings against the aid granted to Heracles are summarised below. They include submissions from a competitor of Heracles, from three national cement associations and from the old shareholders in Heracles. Following the enlargement of the proceedings lawyers representing a French cement manufacturer several times submitted observations on the aid.

(51) In general these interested parties argue that the aid unlawfully granted to Heracles is incompatible with the common market and should be recovered with accrued interest. They submit that the aid to Heracles cannot be authorised under Article 92(3)(b), because it does not remedy a serious disturbance in the Greek economy. They contend that the Commission has not shown how the aid might have remedied such a disturbance, nor what the effect on the economy might have been if the aid had not been granted.

([10]) See footnote 5.

([11]) See footnote 1.

Titan

(52) Titan argues that the aid accorded to Heracles, its principal business rival in the common market, has caused it serious injury. Titan is of the view that the Commission should have calculated the minimum level of debt capitalisation which would have ensured Heracles' survival by estimating the level of aid that was sufficient to reduce the financial costs of Heracles' indebtedness to a level where they could have been met out of cash flow.

(53) Titan regards the approach taken by the Commission, which compared Heracles' financial position with that of Titan, as flawed in several respects. First, it did not take account of the viability test: Heracles would have been perfectly viable even if its financial position remained weaker than that of Titan, the industry leader. That Heracles should have had to carry higher financial costs was perfectly natural, since it had invested much more heavily and recently than Titan. Second, Titan questions the validity of the data used by the Commission in making such comparisons, particularly in respect of the year 1987.

The British cement industry

(54) The British cement industry [12] states that the aid enabled Heracles to export to the United Kingdom in volumes that would not have been possible otherwise: the volume of cement exported by Heracles to the United Kingdom increased from 12 500 tonnes in 1986 to 388 000 tonnes in 1988, and was over 400 000 tonnes a year in the period 1989 to 1995. The aid permitted Heracles to produce cement at low unit cost, without the burden of the financing costs associated with the setting-up of the plant, which had been built and modernised using the aid. The effect on Heracles' profitability enabled it to sustain a substantial flow of unprofitable exports to the United Kingdom.

(55) The British cement industry submits that had no aid been given, Heracles would not have ceased to trade altogether, but would merely have been forced to take appropriated restructuring measures more promptly; these would very likely have included a further rationalisation of its production capacity to match demand. In its notice, the Commission does not indicate how such a restructuring would necessarily have led to any serious disturbance in the Greek economy.

(56) The State-imposed price controls that operated on the domestic market prevented manufacturers from obtaining a commercial rate of return on cement sold at home, and contributed to the difficulties of the Greek cement industry in general. Had the Greek Government acted to remedy that situation in 1986, for example, rather than in 1989, it would certainly have relieved the problems of the Greek cement industry without requiring the award of State aid. And if Heracles had been liquidated sooner, rather than being allowed by the Greek Government to benefit as a result of unlawful aid, the industry would have been rationalised more rapidly.

(57) The British cement industry calls for the Commission to assess whether the aid granted to Heracles was necessary in order to remedy a serious disturbance in the Greek economy on the assumption that: (i) the Greek Government had not granted unlawful State aid to Halkis, permitting Halkis to be liquidated and thereby making possible the restructuring of the Greek cement industry, and (ii) the Greek Government had moved earlier to lift the domestic price controls.

(58) The British cement industry submits, however, that this comparison, based on 1987 figures, is unduly favourable to Heracles, and that a correct analysis shows that the excess capitalisation was even greater. The Parties also criticise the Commission on the ground that it contended itself with considering what capital injection was needed to maintain Heracles' business substantially in its existing form, and simply assumed that this was necessary in order to prevent a disruption of the Greek economy.

AITEC

(59) In its comments, AITEC refers to the distortions of competition caused by increasing levels of exports by Heracles to Italy from 1988 onwards: the volume of cement exported by Heracles to Italy grew from 34 000 tonnes in 1987 to 885 000 tonnes in 1991, an increase from 1% to 32%. AITEC claims that Heracles has attained its market penetration in Italy by charging abnormally low prices and pursuing an aggressive pricing policy. It quotes figures which indicate that prices for Greek cement are on average 22,5% lower than those in Italy, and up to 30% lower than prices on the Greek market.

(60) AITEC argues that the aid granted to Heracles gave it an advantageous position vis-à-vis its competitors in Italy and enabled it to secure a substantial share of the Italian market. The fact that there was no restructuring linked to the conversion of the debts of Heracles in 1986 meant that the company's production capacity, as it stood in 1985, remained unaltered. But its annual

[12] The observations summarised here are those submitted by the BCA and by three of its members, Blue Circle Industries plc, Castle Cement Ltd and Rugby Group plc. These Parties are referred to collectively as 'the British cement industry'.

output increased, despite the fact that the number of its employees diminished considerably over the period from 1988 to 1994, from 3 600 to 3 000. It should also be noted that during that same period, 1988 to 1994, the ratio of investment to the company's turnover increased from 2% to about 4%. This AITEC considers to have been made possible by the aid that Heracles received. Heracles' exports to Italy have led, the association claims, to the loss of a total of 350 to 400 jobs in Italy.

Oficemen

(61) Oficemen notes in its letter that it is characteristic of the Greek cement industry that most of its output is exported. Out of the total volume of Greek cement exported in the years 1989 to 1995, the share of exports to Spain increased from 1% to 12%, or in absolute terms from 62 000 tonnes to 929 000. The volume of exports by Heracles to Spain increased from 29 000 tonnes in 1989 to 370 000 tonnes in 1994; the latter figure amounts to approximately 50% of Greek exports to Spain in that year. Oficemen maintains that so great an increase in Heracles' share of exports within five years was due to the aid it received from the Greek State, which allowed it to sell below production costs. Spanish cement manufacturers found themselves in a disadvantageous position vis-à-vis Heracles.

Old shareholders in Heracles

(62) The old shareholders in Heracles regard themselves as interested parties because the enforced increase in the company's had the effect of diluting the control of the original shareholders. They also observe that it is not surprising that Heracles became overcapitalised, since the capital increase was a disguised manœuvre aimed at taking control of the company, and was not motivated by purely financial considerations. The old shareholders argue that the aid was granted by an unlawful mechanism: it was not notified in advance, and it infringed Council Directive 77/91/EEC ([13]), as last amended by the Act of accession of Austria, Finland and Sweden ('the Second Company Law Directive'). An aid measure cannot be found compatible under Article 92(3) when the mechanism by which the aid is granted itself infringes a provision of Community law other than those laid down in Articles 92, 93 and 94 of the Treaty, in this case the Second Company Law Directive. Even if it were to be found compatible, the aid should not be authorised, since it was granted by unlawful means. In accordance with the case-law of the Court of Justice, the old shareholders should recover their original position of control.

([13]) OJ L 26, 30.1.1977, p. 1.

Lafarge

(63) Lafarge, a French cement manufacturer, criticises the Commission decision to enlarge the proceedings for failing to take account of the fact that the aid might enable Heracles to take over a loss-making cement producer, Halkis, and subsequently to increase its capacity even further. Heracles is controlled by Concretum SA, through Cal-Nat SA, and Lafarge here refers indirectly to the fact that Heracles has purchased from its parent Concretum at least 50% of Concretum's holding in Halkis. Concretum is the controlling shareholder in Halkis, and owns 70% of Halkis' shares. Lafarge contends that even if this does not formally constitute a takeover of Halkis by Heracles, the result in economic terms is the same, namely a reinforcement of the production capacity of two manufacturers who have taken advantage of state aid. Lafarge argues that the proceedings have not been broadened sufficiently, and do not cover the question of the economic unification of Heracles and Halkis.

VII

Application of Article 92 of the EC Treaty

VII.1. **Application of Article 92(1) of the Treaty**

(64) For the reasons set out below, the Commission considers that the aid granted to Heracles in 1986 is caught by Article 92(1) of the Treaty, and more specifically that is was granted through State resources to a specific undertaking and threatened to distort competition and to affect trade between Member States.

(65) Decision 88/167/EEC concerning Law 1386/83 determined that the interventions of the BRO constituted State aid. Heracles had been loss-making since 1983, and by the end of 1985 had accumulated losses of GRD 7 249 million, which was equal to approximately three times its share capital at the time; by Ministerial Decree of 7 August 1986 it was made subject to Law 1386/83, and its debts were converted into capital. Heracles owed GRD 27 755 million to public institutions, and capitalising this gave it a share capital 10 times greater than before, 93% of it owned by the Government.

(66) As the Commission observed when it decided on 15 November 1995 to enlarge the Article 93(2) proceedings, the aid granted to Heracles distorts competition and affects trade between Member States within the meaning of Article 92(1).

VII.2. **Distortion of competition and effect on trade between Member States**

(a) The European cement market [14]

(67) Cement is a tradable goods, although its low price-to-weight ratio makes it competitive only at short distances from its production site when transported overland. Consequently, practically all international trade in cement is either cross-border over a small radius, or seaborne in large vessels at much larger distances.

(68) The rate of activity in the cement industry is related to the rate of activity in the construction industry, which is directly dependent on the economic situation. Cement is an important basic material in construction and civil engineering, which account for substantial public and private investment.

(69) Cement production consists of two essential phases:

— the manufacture of a semi-finished product, known as 'clinker', which is obtained from the calcination in a high-temperature kiln of raw materials — clay, limestone, etc. — previously prepared in paste or powder form depending on the production process used (wet or dry),

— the manufacture of cement as a finished product, obtained by the homogeneous mixture of ground clinker and calcium sulphate with or without one or more additional components — slag, fly ash, pozzolana, filler, etc. — depending on the type of cement.

(70) Cement production requires large quantities of energy. Significant advances have been made in recent decades in reducing the energy required to produce a tonne of cement.

(71) There are no generally accepted criteria for ranking cement companies or groups, as both turnover and capacity can be defined in different ways. Published turnover in consolidated accounts may include non-cement activities, and the existence of trading affiliates can lead to different quantities of cement being produced and distributed by the same company. Capacity in part-owned companies can be calculated differently. Subject to these reservations, the largest companies in the world having cement interests in the Community are considered to be, in alphabetical order: Blue Circle, United Kingdom; Cemex, Mexico; Dyckerhoff, Heidelberger, Germany; Holderbank, Switzerland; Italcementi, Italy; Lafarge, France and Scancem AB, Sweden.

(72) As a result of the decline in building in Europe as a whole during the period from 1979 to 1985, total Community consumption fell from 164 million tonnes in 1979 to 134 million in 1985. But during the second half of the 1980s there was an increase in demand for cement across the Member States as a result of the spreading use of concrete in road construction and of reinforced concrete in railway networks, the renovation of ageing infrastructures, etc. Imports accounted for a relatively small proportion of consumption in the Community as a whole: 3,9% in 1979, and 4,6% in 1986. Total Community imports were stable between 1979 and 1986, at 6,4 million tonnes. Total output in Europe decreased from 185 million tonnes in 1979 to 153 million tonnes in 1986, reflecting a slowdown in consumption and building. The proportion of Community output which was exported was 13% in 1986, equivalent to 19,1 million tonnes.

(73) Consumption of cement decreased over the period from 1979 to 1986, in Greece and in the Community as a whole. But the negative trend was much steeper in the case of the whole Community than it was in the case of Greece. The proportion of the total Community market accounted for by Greek output rose from 6,5% in 1979 to 8,6% in 1986. This was due to the combined effect of an increase in Greek output and a decrease in Community output.

(74) In the second half of the 1970s and at the beginning of the 1980s, Greek cement producers increased their production capacities by some seven million tonnes, to meet strong demand from markets in the middle East, which at that time were in full expansion owing to higher prices being paid for oil products. Greece had traditionally exported cement to countries in the Middle East and North Africa, and until 1986 it exported hardly anything to other Member States. In the mid-1980s, however, falling oil prices led to the collapse of the middle eastern markets; this, combined with the expansion of local cement firms, created huge overcapacity in the Greek cement industry, and prompted a search for new markets for domestic output, which considerably outstripped domestic consumption. Since then Greek exporters have been diverting an increasing portion of their production to other Member States. Whereas in 1987 Greece exported six million tonnes of cement to third countries and only 0,5 million to other Member States, exports to other Member States had grown to 2,6 million tonnes in 1990 and 2,8 million tonnes in 1992.

(75) At the end of 1985 and the beginning of 1986, Greek producers looked towards western Europe, especially to those markets it regarded as more easily accessible: first the United Kingdom, because it had the highest cement prices in Europe, and second Italy, where small associations formed by consumers and import/export

[14] Institute of Economic and Industrial Research, *The Competitiveness of the Greek Industry*, Part D, *The Cement Industry*, Athens, June 1987 (report prepared on behalf of the Commission's DG III).

companies had taken the step of importing Greek cement.

(b) The structure of the cement industry in Greece ([15])

(76) The manufacture of cement is one of Greek industry's most traditional sectors. The two largest companies, Heracles and Titan, account between them for 80% of the Greek cement market (approximately 40% each). The third-largest company, Halkis, has a market share of 13 to 14%, and the fourth, Halyps, has 6 to 7%. The market shares of the four cement manufacturers differ considerably from region to region in Greece. Each company has a larger market share in the areas closest to its own plants and distribution centres.

(77) The domestic cement market is an oligopolistic market. Of the four manufacturers, only one, Titan, is a purely Greek company. The other three are controlled by foreign multinationals, two of them, Heracles and Halkis, by the same Italian company. In reality, therefore, two companies, Heracles/Halkis and Titan, account for 93% of the domestic market. The market is thus a highly concentrated one. At present there is no external competition in the domestic market, because imports are negligible and it is difficult for foreign companies to establish themselves in Greece because of the restrictions on access (strict environmental regulations, permits for operation as in all European countries, high transport costs, the strong position and comparative advantages of the Greek companies, etc.).

(78) The following table shows the market shares in Greece of the four Greek cement manufacturers Titan, Heracles, Halkis and Halyps from the mid-1980s onwards.

Domestic market shares of Greek cement manufacturers, 1985 to 1994

(%)

Firm	1985	1986	1987	1988	1989	1990	1991	1992	1993	1994
Titan	44,6	43,6	43,2	43	43,3	42,4	41,8	42	41,5	39,6
Heracles	43,3	42,9	43,6	43,1	42,6	42,1	41	40,1	40,5	38,7
Halkis	8,8	9,1	8,4	9	9,4	10	11,3	11,6	11,4	13
Halyps	3,4	4,4	4,9	4,9	4,7	5,5	5,9	6,3	6,6	8,6

Source: Hellenic Cement Association/Cembureau

(79) As regards the profitability and financial indicators of the Greek cement industry during the mid-1980s, it may be noted that gross operating profits per tonne of output increased overall during the period from 1979 to 1985, as a result of gains in operating cost efficiency in the industry, although export prices decreased and prices in the domestic market were at comparatively low levels. An analysis of profits before and after financial charges indicates the adverse effect of financial charges on the industry's profitability. High financial charges were incurred in order to finance the modernisation of the industry. The charges grew further because most of the long-term debt incurred in connection with modernisation was in foreign currencies, so that at each devaluation of the drachma there was a corresponding relative increase in interest payments and in the outstanding debt, directly affecting the financial structure of the companies; the drachma was devalued by a factor of 3,2 against the US dollar between 1979 and 1985.

Consolidated profits of the Greek cement industry

(GRD billion)

	1979	1980	1981	1982	1983	1984	1985
Profits before financial charges	2,3	2,7	3,7	3,2	2,6	4,0	4,5
Financial charges	1,2	1,6	2,2	2,8	5,5	9,4	13,3
Net profits before tax	1,1	1,1	1,5	0,4	− 2,9	− 5	− 8,8

Source: Companies' balance sheets

([15]) The information on the Greek cement industry in this section is based mainly on two studies: (i) Institute of Economic and Industrial Research, *The Competitiveness of the Greek Industry*, Part D, *The Cement Industry*, Athens, June 1987 (report prepared on behalf of the Commission's DG III); (ii) Institute of Economic and Industrial Research, *Cement Industry*, Athens 1997.

(80) Turning to financial indicators, it is worth noting that the heavy impact of accumulated losses on the financial structure of the two companies in 1985 completely eroded the book value of their net worth, which meant that the net worth of the whole industry was negative. The table below shows that:

— the gearing of the industry deteriorated from 1982 onwards, and by 1985 long and short-term liabilities exceeded total assets, which meant that the total assets of the industry as a whole were financed by long and short-term debt,

— liquidity, which was satisfactory until 1982, also deteriorated thereafter, reflecting acute problems of cash flow for the industry as a whole,

— profitability, in terms of netprofit, deteriorated throughout the period.

Financial indicators for the Greek cement industry

	1979	1982	1985
Long and short-term liabilities/Total assets	0,75	0,81	1,07
Current assets/Short-term liabilities	0,85	0,75	0,43
Net profit or loss before tax/Total assets	0,06	0,01	(0,10)

Source: Companies' balance sheets, current prices.

The respective profile of each Greek producer in the year 1985 is shown in the table below:

(GRD million)

	Heracles	Titan	Halkis	Halyps	Total industry
Number of workers	1 937	2 076	1 288	270	5 571
Total assets	43,6	20,7	16,7	6,3	87,4
Net worth	– 2,2	3,7	– 8,3	0,2	– 6,6
Current liabilities	31,8	10,2	19,2	4,4	65,6
Long-term liabilities	14,0	6,8	5,8	1,7	28,3
Net income (before tax)	– 4,2	0,4	– 5,0	—	– 8,8

Source: Companies' balance sheets.

(81) One factor that was crucial to the development of the cement industry in Greece around that time was that selling prices on the domestic market were low in comparison to prices in other domestic markets in the Community. This was in part due to the fact that cement prices in Greece were set by the State. Greek export prices declined sharply after 1983, a development which adversely affected similar companies elsewhere in the Community too. As recalled above, a high proportion of long-term loans, which had been used to finance investments in the early 1980s, were in foreign currencies. This caused difficulties for the industry because of the weakness of the drachma in comparison to foreign currencies. Manufacturers had to face high financial charges, the impact of which led to heavy losses for the industry as a whole in 1983 to 1985.

(82) Lastly, energy prices were an important factor, in view of the cost structure of the cement industry. Energy prices, and specifically the prices of coal, oil and electricity, had a particular significance for the Greek cement industry: they accounted for 53% of total costs, whereas the European average in 1984 was some 39%. But coal, the main fuel for the industry in both Greece and the Community as a whole, was considerably less costly in Greece from 1984 onwards.

(c) Development of Heracles' export pattern

(83) The Greek cement industry has traditionally been a considerable exporter. Greek exports grew strongly during the period from 1979 to 1986, from 4,9 million tonnes in 1979 to 7,6 million tonnes in 1985. The proportion of Greek cement output which was exported was 55,9% in 1985, 43,6% in 1990 and

51,7% in 1995. The Greek cement industry has several advantages over its competitors which enable it to export effectively. First of all, given the characteristics of Greece's geography, production can be located closer to where the raw materials are mined and at the same time to places where the final product is loaded for transport by sea; the most economical method of transporting cement is by sea, especially over long distances. Most of the Greek companies have modern plants, and their production costs are lower too because their production units are larger. Finally, the largest Greek companies have cargo vessels of their own for the transport of cement.

(84) Heracles is the largest Greek exporter. Between 1983 and 1984, Heracles' exports fell by 6%. In 1985, they grew by 3%, an increase similar to that of all Greek cement companies. In 1986 and 1987 exports were maintained at the 1985 level. They fell by 18% in 1988, when total Greek exports decreased by 11,3%.

	Heracles' exports (million tonnes)	Greek exports (million tonnes)	Heracles' share
1985	3,4	7,6	45%
1986	3,4	7,1	48%
1987	3,4	7,1	48%
1988	2,8	6,3	44%
1989	2,4	5,1	47%
1990	2,8	5,9	47%

(85) During the period from 1985 to 1987, Heracles managed to increase its share of exports to the other Member States from 14,8% to 18,8%.

(86) From the information presented above it can be concluded that the State aid granted to Heracles in 1986 resulted in the survival of the company and enabled it to export an increasing proportion of its output to other Member States. For these reasons Heracles' recapitalisation constitutes aid caught by Article 92(1) of the Treaty, since it distorted competition and affected trade between Member States.

(87) Thus the Commission does not accept the Greek Government's contention that the aid to Heracles was outside the scope of Article 92(1). Nor can the Commission accept the argument that there was no trade between Member States, so that not all the requirements of Article 92(1) were met: it was already foreseeable at the time that Greek exports would be directed towards other Member States, as the Court of First Instance found in its judgment.

(88) At the time, the Greek Government accepted risks which would have been prohibitive to other investors. The Greek Government has in any event failed to show that Heracles could have found the means necessary for its survival on the capital market. It has also failed to show that the State measure to assist Heracles did not constitute aid because on the basis of the structure and prospects of the company a reasonable return in the form of dividends or capital growth could be expected within a reasonable time.

(89) The Greek Government claims that the private investor principle was satisfied, but contradicts itself when it argues on the one hand that the financial problems faced by Heracles in 1986 were caused by short-term problems in the economy and on the other hand that Law 1386/83 and the operations of the BRO were a necessary response to the particular economic situation and developments in Greece.

(90) By failing to notify the aid prior to the recapitalisation, the Greek Government failed to comply with its obligations under Article 93(3) of the Treaty. Moreover, the Commission had in 1987 approved the implementation of Law 1386/83 subject to the condition that the Commission was to be notified of individual cases in which a firm was brought within the scope of the law if the firm employed 300 or more persons in the case of non-sensitive branches and 100 or more persons in the case of sensitive branches (see Decision 88/167/EEC). The aid was, therefore, granted unlawfully.

VIII

Assessment of the compatibility of the aid with the common market under Article 92

VIII.1. **The exemptions in Article 92(2) and (3) of the Treaty**

(91) The Commission is accordingly required to assess whether any of the clauses in Article 92(2) and (3) can be applied so as to exempt the aid from the general prohibition in Article 92(1).

(92) The exceptions laid down in Article 92(2) do not apply in this case, given the nature of the intervention, which did not pursue any of the objectives listed there.

(93) Greece may be regarded as meeting the definitions in Article 92(3)(a), which allows 'aid to promote the economic development of areas where the standard of living is abnormally low or where there is serious underemployment'; but the concept of regional development to which that exception is linked is based essentially on the provision of aid for new investment or major expansions or conversions of undertakings involving large-scale investments of a physical nature and the costs associated with these. The recapitalisation of Heracles cannot be considered to fall within the scope of that exemption.

(94) Article 92(3)(c) cannot apply to the aid granted to Heracles, which was not designed 'to facilitate the development of certain economic activities or of certain economic areas'. In other words, the aid had no regional objectives, nor was it linked to any restructuring of the company in question.

(95) Article 92(3)(d) cannot apply, because the aid was not intended 'to promote culture and heritage conservation'.

(96) The first part of Article 92(3)(b) makes provision for 'aid to promote the execution of an important project of common European interest'; this cannot apply to the aid granted to Heracles, which was not intended to promote the execution of such a project.

(97) It was under the second part of Article 92(3)(b) that the Commission authorised Law 1386/83, on the ground that it was intended to remedy a serious disturbance in the Greek economy, and that law provided the legal basis for the granting of aid to Heracles, so that an individual award of aid of this kind may be permitted solely under that exemption.

VIII.2. **Applicability of Article 92(3)(b)**

(98) As stated above, Law 1386/83 forms the legal basis under which the aid was granted to Heracles. The implementation of the law was made subject, however, to a number of conditions, including the requirement that the Greek Government was to notify individual cases exceeding certain thresholds. This specific notification requirement was imposed in order to enable the Commission to consider significant individual cases from the point of view of their impact on trade between Member States and competition.

(99) The Commission wishes to emphasise that the Heracles case was not a one-off case but clearly a part of the whole programme pursued by the BRO. The economic situation in Greece had been constantly deteriorating up to October 1985. Both internal and external imbalances had created a difficult situation which demanded firm policy measures. In particular, the Greek authorities were confronted with very serious external payments and pressures on the exchange rate in September 1985. Thus, in October 1985, they introduced an economic stabilisation and recovery programme. This programme included measures to devalue the drachma by 15%; the introduction of a non-interest-bearing import deposit scheme; the abolition of wage indexation; major changes to the tax system; and a tightening of credit and monetary policy. By the time the austerity programme was instituted many Greek companies had got into financial difficulties as a result of the previous policy on wages, limits on making workers redundant, price controls, interest rates and overvaluation of the drachma. When the Commission adopted Decision 88/167/EEC authorising the implementation of Law 1386/83, it observed that it had to be regarded as important that Greek companies maximise their economic performance if the objectives of the austerity programme were to be achieved. Given the major effort the Greek Government was undertaking to reverse past policies in the October 1985 stabilisation programme, the Commission concluded that Law 1386/83 and the operations of the BRO were an integral part of the programme and were compatible under Article 92(3)(b).

(100) On the question of the purpose of the aid, that is to say whether reorganising and recapitalising Heracles would help to remedy a serious disturbance within the Greek economy, it should be noted that Heracles was at the time, and still is, an enterprise important to the Greek economy. The Greek Government stressed this in its letter of 3 December 1987, pointing out that in the absence of an intervention on the part of the BRO, the existence of the largest cement group with a workforce of approximately 2 000 directly employed in the second largest exporting industry of Greece would have been threatened. This would have had grave social and regional consequences, and repercussions on the Greek balance of payments.

(101) The Commission would point out that under the Treaty the aid must be limited to the minimum necessary to achieve the goal for which it was granted, in order to avoid undue distortion of competition.

(102) The Commission accepts, then, that aid to Heracles was necessary in order to achieve the objectives of the measures taken by the Greek authorities to remedy the serious disturbance in the Greek economy; but the Commission is of the opinion that the aid granted was not limited to the minimum necessary, because it went

beyond the objective of remedying the serious disturbance in the Greek economy and thus distorted competition and affected trade between Member States to an extent contrary to the common market. The immediate result of the measures taken in respect of Heracles was a debt write-off, which brought substantial cost savings, since there was now no need to pay interest on the debts capitalised or default interest on liabilities overdue to the public institutions. The company's liquidity increased considerably, since its debts were capitalised and it no longer had to pay interest or capital to its creditors; this enabled it to improve the credit terms it offered to its customers on the domestic and export markets, and to export a greater proportion of its output to other Member States. The company was left in a stronger competitive position, by reason of an increase in its exports and a shift in the destination of its exports towards other Member States. Only that part of the aid which was necessary to restore Heracles' viability without affecting trade between Member States to an extent contrary to the common market, and which would not place the company in a more favourable position vis-à-vis its competitors, may be said to be compatible under Article 92(3)(b) of the Treaty. That part of the aid helped to remedy a serious disturbance in the Greek economy; it did affect trade, since the State intervention enabled the company to stay in business and to increase its exports to the other Member States, but not to an extent contrary to the common market. The increase in Heracles' exports to other Member States has to be seen in the light of a general shift of Greek exports towards other Member States which took place from 1986 onward. As has been pointed out above, the collapse of the middle eastern markets, which were the traditional export markets of Greece, caused the diversion to the Member States of an increasing proportion of the output of all Greek exporters, mainly because of the competitiveness of Greek exports as compared with European production, which was not sufficient during the period from 1986 to 1990 to meet the increase in internal consumption.

(103) In order to establish what part of the aid is not justifiable under Article 92(3)(b), because it went beyond the scope of remedying a serious disturbance in the Greek economy, and left the company in a financial situation which was better than necessary in order to ensure its long-term viability, the Commission has carried out an analysis of Heracles' economic development and financial situation and has examined the most appropriate methods for its calculation.

(a) Economic development and financial situation of Heracles

(104) Heracles had been loss-making since 1983. In 1985, it was in acute financial difficulty: in its annual report, it disclosed negative capital and reserves of GRD 2 163 million, net losses of GRD 4 216 million, and net losses on ordinary activities of GRD 4 623 million. By the end of 1985, its accumulated losses amounted to GRD 7 249 million.

(105) In 1985 and 1986, before State intervention, Heracles faced the following situation:

— it was equipped with modern production facilities, owing to a major investment programme carried out in the early 1980s (1983 was the last year in which capital expenditures were high),

— this investment programme had been financed very largely, if not exclusively, by additional foreign borrowing,

— the devaluation of the drachma had had a negative impact on the cost of this borrowing,

— sales revenue prospects were hit by domestic price controls,

— declining demand in the company's traditional export markets in the Middle East came hand-in-hand with the oil price shock of 1985/1986, which reduced the capacity of oil-exporting countries to finance major construction programmes.

(106) The economic and financial position of the company was thus characterised by sharply rising financial charges resulting from borrowing, which not only had a negative impact on its profitability but in fact threatened it with liquidation. On the other hand, it could look forward to a relatively substantial improvement in production efficiency, owing to the investment programme undergone in the early 1980s.

(107) By Ministerial Decree of 7 August 1986, the Greek Government converted into share capital GRD 27 755 million in commercial debt owed by Heracles to various public institutions, in order to save the company from insolvency. This relieved Heracles of part of its debt and financial burdens, because it did not have to pay interest on this borrowing or to pay dividends to its shareholders. Heracles was rescued, and continued to export a proportion of its output to other Member States.

(108) The table below shows Heracles' financial and economic situation in the period from 1985 to 1989 and thus the effects of the State aid measure on the company's accounts.

(GRD million)

	1985	1986	1987	1988	1989
Fixed assets	27 627	24 507	22 194	26 854	24 572
Current assets	14 301	14 987	17 078	20 438	25 132
Capital and reserves	– 2 163	23 054	23 751	32 402	35 866
Long-term liabilities	13 990	4 841	2 768	1 506	687
Short-term liabilities	30 933	12 679	12 155	12 305	11 249
Total assets	43 583	40 919	39 820	47 607	49 934
Turnover	29 928	29 840	30 480	34 923	39 549
Operating costs	28 020	27 356	26 840	29 777	31 940
Operating profit or loss	1 908	2 484	3 640	5 146	7 609
Financial charges	– 6 530	– 4 202	– 2 388	– 2 087	– 1 992
Profit or loss on ordinary activities	– 4 622	– 1 718	1 252	3 059	5 617
Extraordinary profit or loss	407	– 230	– 1 144	– 1 634	– 2 151
Net profit or loss	– 4 215	– 1 948	108	1 425	3 466

Source: Company's annual reports 1985 to 1989.

(109) The table below shows the trend in some major financial indicators for Heracles before and after the conversion of debt into capital.

	1985	1986	1987	1988	1989
Long- and short-term liabilities/Total assets	1,03	0,43	0,37	0,29	0,24
Current assets/Short-term liabilities	0,46	1,18	1,41	1,66	2,23
Net profit or loss before tax/Total assets	– 0,1	– 0,05	0	0,03	0,07

Source: Company's annual reports 1985 to 1989.

(110) As indicated by Heracles' annual reports, its financial situation before the debt-to-equity conversion was very precarious: the high financial outgoings due to high levels of outstanding debt had resulted in substantial losses which had eroded the company's capital. But during the most critical years for the company's activity, Heracles registered positive operating results, if financial costs are left out of consideration, and its poor financial results were closely linked to the extremely weak situation of the Greek economy as a whole.

(b) Alternative methods for calculating the part of the aid which was not restricted to the minimum necessary

(111) At the time it enlarged the Article 93(2) proceedings ([16]), and following the judgment of the Court of First Instance, the Commission seriously

([16]) See footnote 1.

doubted whether the aid to Heracles could be considered compatible with the common market, as has been recalled above. In particular, the Commission doubted whether the exemption in Article 92(3)(b) could apply in Heracles' case. The Commission was of the opinion that the aid might well have left Heracles in a stronger competitive position than would have been necessary in order to ensure its viability.

(112) The Commission examined the financial costs of Titan and Heracles in relation to their turnover and volume sold, and concluded that Heracles was overcapitalised by approximately GRD 5 billion, so that the aid had not been limited to the minimum necessary.

(113) Following the enlargement of the Article 93(2) proceedings, the Commission received comments from numerous interested parties, including some concerning the method for calculating the minimum level of debt conversion needed to ensure Heracles' viability.

(114) On behalf of its members, the *BCA* commissioned a study of the economic aspects of the aid from Prof. George Yarrow, of Hertford College. In his first report, Prof. Yarrow estimated the degree of Heracles' overcapitalisation by analysing its cash flow as indicated in its accounts. At the Commission's request, the British cement industry asked Prof. Yarrow to provide additional observations, since the conclusions drawn in the first report were more of an *ex post* nature and could be used only as factual evidence.

(115) In his subsequent *ex ante* evaluation and calculations based upon comparison of financial structures, Prof. Yarrow assumed that Heracles' investment (relative to Titan) was financed in the same way as Titan's activities as a whole, i.e. by a similar mix of debt and equity and with similar payments and charges in respect of debt and equity. On such assumptions, the depreciation and asset figures indicated that Heracles' debt capacity would, other things being equal, have been about twice that of Titan in the mid-1980s. On this basis, the BCA arrived at the conclusion that the conversion of Heracles' debts in 1986 was excessive by about GRD 15,5 billion.

(116) In its complaint, *Titan* claimed that the amount of capitalisation was excessive and that a conversion of that magnitude was not only unnecessary but also disproportionate in relation to the company's size and needs. In Titan's view, the minimum level of debt capitalisation that would have ensured Heracles' viability would have been one which allowed it to continue to service its debt and still remain in production. Titan accordingly proceeded to analyse Heracles' expected cash flows after 1986, given that cash flows are what is used to pay debts.

(117) According to Titan's calculations, based on financial data extracted from Heracles' annual reports, Heracles generated enough cash in the years 1987 and onwards to sustain at least GRD 15 billion more in debt, or even GRD 20 billion if the capital repayments were weighted towards the later years.

(118) *Heracles*, in order to demonstrate that the debt-to-equity conversion in 1986 had not overcapitalised it, submitted to the Commission a report drawn up by Prof. Joseph Hassid, of Piraeus University, and Prof. Emmanuel Sakellis, of the Panteion University of Athens. Their calculations were made by comparing various capital structure ratios for Heracles with corresponding ratios extracted from four large samples of international cement producers ([17]). The samples comprised not only viable companies but also some facing difficulties.

(119) The starting point of the report was to determine the amount by which the net worth of Heracles would have had to be increased on 31 December 1985 in order to ensure the company's viability. For a company to qualify as viable, its long-term capital had to exceed the value of its fixed assets. Otherwise it would have to finance part of its fixed assets through short-term borrowing, something which would leave it in an unhealthy condition, since its working capital, which included stocks that were not readily liquid, would not be sufficient to cover such short-term liabilities.

(120) To determine the amount that needed to be converted from short-term liability to equity, financial information was taken from the balance sheets of the four samples, in order to estimate individual and group average financial indicators, and to use the geometric average of the four sample averages as an appropriate critical value towards which Heracles' financial structure should aim to converge. For the samples the following ratios were calculated: (i) net worth plus long-term liabilities divided by fixed assets; (ii) fixed assets divided by net worth; and (iii) the Z-score, a ratio for the evaluation of the probability of bankruptcy.

([17]) First sample: *Troy Almanac of Business and Financial Ratios* (441 companies engaged in cement production during the period from July 1984 to June 1985). Second sample: Value Line databases (all cement industries in the USA in 1985). Third sample: Robert Morris & Associates, *Annual Statement Studies* (209 companies engaged in the production of cement and related products during the period from April 1985 to March 1986). Fourth sample: Robert Morris & Associates, *Annual Statement Studies* (136 ready-mix concrete companies during the period from April 1985 to March 1986).

(121) Applying the first ratio, the amount by which the long-term capital of Heracles should have increased was estimated at GRD 27,5 billion. That amount would have had to be converted from short-term liabilities into either long-term loans or equity in order to achieve the same ratio as the four samples. The amount of Heracles' short-term liabilities converted into equity in August 1986 was GRD 20,2 billion (the remaining GRD 7,5 billion represented a conversion of long-term loans to equity); this was less than what was called for by the ratio. The results with the other ratios were similar.

(122) The Commission takes the view that in order to examine to what extent the debt conversion was greater than what was needed to maintain the company's viability it is appropriate, because of the specificity of the cement market in Greece, to compare Heracles with its slightly smaller but consistently profitable Greek competitor Titan, as it did when it enlarged the Article 93(2) proceedings in November 1995. Both companies operated in the same difficult economic circumstances, and faced similar costs for such things as labour, energy and interest rates. At the time of the capitalisation the prevailing market conditions for Greek producers differed significantly from those of their European competitors, in particular as regards the macroeconomic environment, input prices and conditions, national corporate law obligations, the system of fixed prices, and dependence on export markets.

(123) Moreover, as regards the financial year chosen for the comparison, the Commission considers, as it did when it enlarged the Article 93(2) proceedings, that 1987 is the proper reference year, because it was Heracles' first normal operating year after receiving the aid. Comparing figures for 1987 will allow an examination to be made of the situation at the time the State intervention took place.

(124) The Commission believes that the comparison between Heracles' and Titan's financial structure should be carried out on the basis of three financial ratios, namely net financial charges divided by turnover, net financial charges per tonne sold, and net financial charges per tonne produced. When it decided to enlarge the Article 93(2) proceedings in November 1995, the Commission used the first two ratios; in the light of the information exchanged in the course of the proceedings it is now of the opinion that it is appropriate to add the third ratio, namely financial charges per tonne produced. This will enable the Commission to carry out a better comparison of the two companies, because it compensates for differences in supply strategies whereby one company stocks its output while the other supplies direct from production.

(125) On the basis of the information received from the Greek authorities on 8 February 1999, which enables the Commission better to document its final conclusion, the Commission is thus in a position to refine the financial method for calculating Heracles' overcapitalisation. The calculation is based on more detailed configurations of financial charges, for both Heracles and Titan, in that income from participating interests can be deducted from the total amount of both companies' financial charges.

(126) Applying this method, the Commission finds that Titan's net financial charges represented 10,1 % of its turnover, whereas the quotient for Heracles was just 8,1 %. In terms of net financial costs related to volume sold, the quotients are GRD 469,9 per tonne for Titan and GRD 392,7 per tonne for Heracles; in terms of net financial costs per tonne produced, the quotients are GRD 423,5 per tonne for Titan and GRD 471,2 per tonne for Heracles.

(127) The Commission has applied Titan's ratios to Heracles in order to calculate the average theoretical amount of net financial expenditures saved by Heracles, and concludes that Heracles' overcapitalisation amounts to GRD 2 488 million (approximately EUR 7 million).

(128) This method results in a smaller differential between the two companies' financial charges, and thus a smaller degree of overcapitalisation of Heracles as compared to Titan. The reasoning behind the method is that the financial charges used in the comparison between Heracles and Titan correspond, because they are both net amounts, which makes them comparable. In the financial world, net financial charges are preferred to gross financial charges for analyses of this kind, because they provide more accurate figures.

(129) The figure of GRD 2 488 million represents the amount of the debt-to-equity conversion which exceeded what was necessary to ensure Heracles' long-term viability. The overcapitalisation had distortive effects on the European cement market, in that it left Heracles in a stronger competitive position, as appears from the increase in its exports, and the shift in the destination of its exports towards other Member States. This part of the aid was not necessary to restore Heracles' viability, went beyond the scope of remedying a serious disturbance in the Greek economy, unduly placed the company in a more favourable position vis-à-vis its competitors, and is not compatible with the common market under Article 92(3)(b) of the Treaty. In order to restore the previous competitive position, the benefits which the company derived from it must be returned.

(130) The approach followed here enables the Commission to calculate Heracles' overcapitalisation on the basis of the information available at the time when the State intervention took place, without making use of *ex post* information based on events which happened after the debt conversion and which were not known at the time

of the State intervention. For these reasons the Commission disputes the approach taken by Titan in order to calculate Heracles' excess equity, which is based on the analysis of the company's cash flows after 1986 and its capacity to service its debt.

(131) Furthermore, the Commission's method for determining Heracles' overcapitalisation relates the financial charges of the two companies directly to their output, expressed both in monetary and in physical values. This makes it possible to reject certain artificial assumptions used by the BCA in determining Heracles' excess equity capital, such as the assumptions that Titan and Heracles had similar financial structures or that both financed their business using a similar mix of debt and equity, which do not correspond completely to the reality of that time.

(132) The Commission also disputes the approach taken by Heracles in order to demonstrate that it was not overcapitalised, which was based on a comparison of Heracles with a large number of international cement producers. As has been pointed out, the prevailing market conditions for Greek producers at the time of the capitalisation differed significantly from those of their world competitors, and an analysis based on a comparison of the financial ratios of companies operating in different environments and under different circumstances is not considered to be accurate.

(133) The analysis set out above takes account not only of the doubts that the Commission initially formulated regarding the compatibility of the aid in question, but also of the Commission's examination of the distortive effects of the aid in the Community. In this context the Commission has assessed whether the aid was granted in conformity with Decision 88/167/EEC, that is to say with Law 1386/83, and with Article 92 of the Treaty. This assessment has shown that the conversion of part of Heracles' debts into capital in 1986 can be considered to have been undertaken by the Greek Government in conformity with Decision 88/167/EEC.

(134) Turning to the question of compatibility with Article 92 of the Treaty, the examination demonstrates that one part of the total aid of GRD 27 755 million, amounting to GRD 25 267 million, can be considered compatible with the common market under Article 92(3)(b) of the Treaty on the ground that it helped to remedy a serious disturbance in the Greek economy without affecting trade to an extent contrary to the common market and without unduly placing the company in a more favourable position vis-à-vis its competitors. But the analysis also shows that Heracles was overcapitalised by GRD 2 488 million. In order to rectify the distortive effect of the aid in the market, the Commission should accordingly require the Greek Government to recover the sum of GRD 2 488 million from Heracles. The sum to be repaid should bear interest from the date on which it was made available to the recipient until the date on which it is repaid. Interest should be calculated on the basis of the reference rate which was used for calculating the grant equivalent of regional aid at the time the aid was granted.

(135) When the Court annulled the Commission's earlier positive decision on aid to Heracles it imposed a duty on the Commission to examine whether the aid distorted competition and affected trade between Member States, and in the analysis set out above the Commission has accordingly performed that duty.

IX

Conclusions

(136) The Commission has demonstrated here that the aid is unlawful and in part incompatible with the common market.

(137) Heracles argues that any reversal of the Commission's Decision on the compatibility of the aid would be in contradiction with the principles of legitimate expectations and of sound administration. Heracles contends that the facts on which the Commission based its decision remain the same; but it should be noted that in its judgment the Court of First Instance not only requires the Commission to assess the foreseeable effects of the aid but also — implicitly at least — places a duty on the Commission to consider the effects which were in fact observed in the years 1986 to 1991. Thus the facts the Commission has to consider are not confined to those relating to the time when the aid was granted, but include those which arose later.

(138) The Commission would point out, too, that the Court of Justice has consistently held [18] that, in view of the mandatory nature of the supervision of State aid by the Commission under Article 93 of the Treaty, undertakings to which an aid has been granted may not, in principle, entertain a legitimate expectation that the aid is lawful unless it has been granted in compliance with the procedure laid down in that Article. The fact that the Commission initially approved the aid to

[18] See the judgments of the Court of Justice in Case C-5/89 *Commission* v *Germany* [1990] ECR I-3437, paragraph 14, and Case C-169/95 *Spain* v *Commission* [1997] ECR I-135, paragraph 53.

Heracles cannot be regarded as capable of having caused the recipient undertaking, Heracles, to entertain any legitimate expectation, since that Decision was challenged in due time before the Court, which annulled it. The Commission's error cannot, therefore, erase the consequences of the unlawful conduct of Greece,

HAS ADOPTED THIS DECISION:

Article 1

The recapitalisation of Heracles General Cement Company to the amount of GRD 27 755 million constitutes aid within the meaning of Article 92(1) of the EC Treaty. Out of this aid a section amounting to GRD 25 267 million is hereby found to be compatible with the common market, on the ground that it satisfies the tests for exemption under Article 92(3)(b) of the Treaty. The remainder of the aid, amounting to GRD 2 488 million, is incompatible with the common market.

Article 2

1. Greece shall take the measures necessary to recover from the recipient the incompatible aid referred to in Article 1, which was granted to it unlawfully, and to secure the repayment of the sum of GRD 2 488 million in aid referred to in Article 1.

2. Recovery shall be effected in accordance with the procedures of national law. The sums to be recovered shall bear interest from the date on which they were made available to the recipient until their actual recovery. The interest shall be calculated on the basis of the reference rate used to determine the grant equivalent of regional aid at the time when the aid was granted.

Article 3

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

Article 4

This Decision is addressed to the Hellenic Republic.

Done at Brussels, 17 March 1999.

For the Commission

Karel VAN MIERT

Member of the Commission